

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Circuit Court Case No. 2012-CP-01-00158

Opinion No. 5571 (S.C. Ct. App. Filed June 27, 2018)
Appellate Case No. 2015-002090

Supreme Court Case No. 2018-001926

William Crenshaw,

v.

Respondent,

Erskine College and David Norman,

Petitioners.

REPLY BRIEF OF PETITIONERS

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INDEX

INTRODUCTION	1
POINTS IN REPLY.....	3
I. Crenshaw’s arguments that he properly preserved the issue of the implied covenant of good faith and fair dealing for appeal are unpersuasive.	3
A. Well-established law on issue preservation rejects Crenshaw’s argument that he did not have to raise the implied covenant of good faith and fair dealing at the JNOV stage in order to preserve it for appeal.	3
B. Crenshaw’s remaining preservation arguments suffer from mischaracterizations of Erskine’s arguments and the record.	4
II. Crenshaw’s arguments that JNOV was improper, which are disguised as arguments that the Court of Appeals properly held that Erskine agreed that the question of breach of contract was one of fact and not law by use of a special verdict form, are unavailing.....	6
A. Crenshaw does not oppose Erskine’s argument that the Court of Appeals’s holding that a question of law can be transformed into a question of fact by failure to object to a special verdict form was error since that issue was not raised by Crenshaw on appeal and therefore not before the Court of Appeals.	6
B. Crenshaw’s argument that the Court of Appeals properly held that a question of law can be transformed into a question of fact by failure to object to a special verdict form ignores Rule 50(b) and does not directly address Erskine’s arguments on the issue.	7
III. Crenshaw provides no compelling argument that would prevent this case from contradicting <i>Swinton Creek Nursery v. Edisto Farm Credit, ACA</i>, if he is allowed to recover under the contract.	10
IV. Erskine properly supports its good faith actions in its brief, which show that it followed the procedure for termination of a tenured faculty member to the letter.	10
V. Crenshaw’s argument that the Court of Appeals properly guessed at the jury’s fact findings to support its decision is unavailing.	11
CONCLUSION.....	11

INTRODUCTION

Although Erskine has comprehensively addressed all issues in its principal brief¹ it will succinctly address Crenshaw's arguments made in Crenshaw's brief in response after a brief Introduction. Crenshaw alleges that Erskine's Faculty Manual is a contract of employment. He did not plead or argue that there is any contract of employment other than the Faculty Manual and his Return cites no such argument. (A. at 29-32.) Crenshaw's case at trial was that Erskine breached the Faculty Manual's procedures for terminating a tenured faculty member.

The Faculty Manual provisions at issue create a multi-step process for terminating the employment of a tenured faculty member. Crenshaw's actions—specifically his failure to request a hearing in which his peers would determine whether the President's grounds for terminating him were sufficient—cut the process short and prevented him from receiving protections the process was designed to give a tenured faculty member. But for Crenshaw's own failure to meet his contractual obligations, he might never have lost his job.

Distilled to its simplest form, the process for terminating a tenured faculty member is that the President must start by trying to informally resolve issues justifying termination of employment with the tenured faculty member by mutual consent. If that does not work the President must provide the grounds for termination in writing to the tenured faculty member. The tenured faculty member has a right to a hearing before a committee of other faculty members in which he can present evidence, witnesses, and have an attorney defend him. The Faculty Manual clearly states that the tenured faculty member must request the hearing in writing to the President. At the hearing, the burden to prove that the tenured faculty member must be terminated is on the

¹ Petitioners Erskine College and David Norman will be referenced as "Erskine," Erskine's Brief of Petitioners will be referenced as its principal brief, Respondent William Crenshaw will be referenced as "Crenshaw," and Crenshaw's Brief of Respondent will be referenced as Crenshaw's brief.

President. The faculty committee then decides whether the tenured faculty member will be terminated. The tenured faculty member can appeal any adverse decision of the faculty committee to Erskine's Board of Trustees. The key to this case is that as long as the tenured faculty member requests a hearing, his employment cannot be terminated unless the hearing committee of his peers determines the President has sufficiently proven the grounds for termination.

In Crenshaw's brief, Crenshaw never substantively addresses his failure to request the hearing, or its effect on his breach of contract claim. Instead, Crenshaw focuses—just as he did in his appeal—on an argument that there was evidence to support the jury's verdict that Erskine breached the contract and that he did not breach the contract. Crenshaw repeats this argument as much as possible. He argues that since there is no evidence to support that he breached the contract, there is no evidence on which the JNOV granted to Erskine could have been based. However, the evidence on which the trial court granted the JNOV is the same evidence which Crenshaw refuses to address; Crenshaw's failure to request a hearing on the President's grounds for his termination. (A. at 1550.) Thus, Crenshaw ignores that the purpose of a JNOV is to correct a jury's error in light of undisputed facts contrary to its verdict. *See Watson v. Suggs*, 313 S.C. 291, 294, 437 S.E.2d 172, 173 (Ct.App.1993) (internal citations omitted) (“In a law case, a jury's verdict may be reversed on appeal when the only reasonable inference to be drawn from the evidence is contrary to the factual findings implicit in the jury's verdict.”). The Subject Decision found that Crenshaw did not request the hearing to protect his employment and Crenshaw has never and does not now dispute that fact. Crenshaw cannot adequately refute the JNOV for Erskine by ignoring this dispositive fact.

If the Subject Decision stands, then Crenshaw will be allowed to recover \$600,000 on a contract he himself breached, if not subverted, and in the process discard over 65 years of legal

precedent for the “elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it.” *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).

Erskine’s principal brief provides the most comprehensive and orderly statement of the issues and its arguments. Here, Erskine will reply only to Crenshaw’s arguments warranting correction, clarification, or further response. In doing so, Erskine does not waive or abandon any of its arguments not addressed herein.

POINTS IN REPLY

I. Crenshaw’s arguments that he properly preserved the issue of the implied covenant of good faith and fair dealing for appeal are unpersuasive.

A. Well-established law on issue preservation rejects Crenshaw’s argument that he did not have to raise the implied covenant of good faith and fair dealing at the JNOV stage in order to preserve it for appeal.

Crenshaw is wrong that he did not have to argue the implied duty of good faith at the JNOV stage to preserve it for appeal. Crenshaw argues that because Erskine’s JNOV argument centered on Crenshaw’s failure to meet his contractual obligation to request a hearing and not on the implied covenant of good faith and fair dealing that he “properly kept his Rule 59 motion to alter or amend to pointing out the trial court’s error in ruling that Erskine was entitled to JNOV based upon Dr. Crenshaw’s failure to fulfill his contractual obligations.” (Crenshaw Br. p. 22(A).) In Crenshaw’s view he “had no reason to argue whether Erskine had violated its obligation of good faith because Erskine’s silence on this issue conceded that evidence in the record supported the jury’s finding that Erskine had violated the parties’ contract.” (Crenshaw Br. p. 21.) Crenshaw appears to attempt to support this argument by citing the JNOV standard of review in the following section. (See Crenshaw Br. p. 23(B).) However, the JNOV standard of review does not preclude

Crenshaw's preservation obligations and he cites no authority to the contrary. Instead, Crenshaw's argument fails under the well-established requirement that he "must present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422; 526 S.E.2d 716, 724 (2000). Crenshaw further proves the issue is unpreserved by also conceding that the trial court's order granting Erskine JNOV "merely rested upon the trial court's finding that Dr. Crenshaw did not fulfill his contractual duties," i.e. that the trial court did not rule on the issue of the implied covenant of good faith and fair dealing. Even if Erskine had raised the issue of the implied duty of good faith (although as Crenshaw acknowledges it did not), the fact that Crenshaw did not himself raise the issue—as he admits he did not do—renders the issue unpreserved. *See McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381, 597 S.E. 2d 181, 186 (Ct. App. 2004) (finding that even where the respondent raised an issue to the trial court, appellant's failure to raise the issue left it unpreserved for appeal). Through his misconstrued argument of issue preservation Crenshaw has conceded his failure to preserve the issue of the implied covenant of good faith and fair dealing.

B. Crenshaw's remaining preservation arguments suffer from mischaracterizations of Erskine's arguments and the record.

Crenshaw mischaracterizes the Court of Appeals's finding on issue preservation. He argues that the "Court of Appeals found [that] Dr. Crenshaw argued throughout the trial that Erskine violated the implied duty of good faith in terminating Dr. Crenshaw." (Crenshaw Br. p. 21(I) (citing A. at 1261, n. 4.) However, as opposed to finding that Crenshaw cited the implied covenant of good faith throughout trial, the Court of Appeals merely acknowledged Crenshaw's argument that he cited the implied covenant of good faith throughout trial. "Crenshaw asserts he argued throughout the trial and during the post-trial proceedings that Erskine violated its duty of

good faith to Crenshaw.” (A. at 1261, n. 4.) The Court of Appeals’s finding of issue preservation specifically relies only on Crenshaw’s one mention of “good faith” in Erskine’s directed verdict motion at trial and therefore Erskine properly focused its argument that the one mention does not preserve the issue for appeal. “While [Crenshaw did not explicitly cite case law regarding the implied covenant of good faith and fair dealing, Crenshaw did assert at trial Erskine violated the duty of good faith by jumping between the stages of termination; ‘[I]t shows a lack of good faith, the fact that they are jumbling these stages and give him two days to respond or three, I guess, less than three days, weekend days.’” (A. at 1261, n. 4.) Although Crenshaw argues again (just as he did in his Return to Erskine’s Petition for Writ of Certiorari and his Reply to the Court of Appeals) that he “repeatedly argued prior to trial, throughout the trial, during the post-trial motions, and during the appeal that Erskine violated the contract mainly through its bad faith actions,” he still fails to provide even a single citation to the record to support his argument, and the Court of Appeals, although it reached the wrong conclusion, properly limited its finding on preservation to Crenshaw’s one mention of it in Erskine’s directed verdict motion at trial.

In an effort to get around his failure to preserve the implied covenant of good faith and to focus the case on Erskine’s alleged breach instead of his own, Crenshaw blames Erskine for artificially limiting the issue of whether Erskine breached the contract to whether it breached the implied covenant of good faith and fair dealing. (Crenshaw Br. p. 22(B).) But, it was Crenshaw who limited the issue of Erskine’s alleged breach of the implied covenant of good faith and fair dealing, when that was the only argument regarding Erskine’s breach he made in his appeal. (Crenshaw’s Br. of App. Pp. 21-24.) Therefore, Crenshaw cannot side-step the fact that his lone argument on Erskine’s breach is unpreserved, and certainly cannot do so under the guise that Erskine has artificially limited his argument by some failure or inability to understand it.

Crenshaw next discusses how the trial court properly instructed the jury on breach of contract. Crenshaw argues that “[w]hile acting in bad faith was the majority of this breach, the trial court did not limit the jury to only considering whether Erskine acted in bad faith in determining whether Erskine breached the contract,” and that as result of this proper instruction the jury was right that Erskine breached and Crenshaw did not. (Crenshaw Br. p. 22(B).) However, the trial court did not instruct the jury on the implied covenant of good faith and fair dealing, or on “bad faith.” To the extent Crenshaw argues that it did, and that such instruction weighs in his favor, his argument fails.

II. Crenshaw’s arguments that JNOV was improper, which are disguised as arguments that the Court of Appeals properly held that Erskine agreed that the question of breach of contract was one of fact and not law by use of a special verdict form, are unavailing.

A. Crenshaw does not oppose Erskine’s argument that the Court of Appeals’s holding that a question of law can be transformed into a question of fact by failure to object to a special verdict form was error since that issue was not raised by Crenshaw on appeal and therefore not before the Court of Appeals.

Erskine made two arguments regarding the Court of Appeals’s holding that “the trial court erred in granting Erskine’s JNOV motion. By submitting the special verdict form to the jury, without objection, the parties agreed it was a question of fact as to whether the contract was breached.” (A. at 1261.) Erskine’s first argument was that this issue was not raised by Crenshaw on appeal and therefore was not before the Court of Appeals to decide, i.e. a procedural argument. (Erskine’s Br. pp. 20-21.) Erskine’s second argument was that a party cannot dictate to a court what is a question of law and what is a question of fact, i.e. a substantive argument. (*Id.* at pp. 21-22.) Although Crenshaw’s brief contains a heading purporting to address Erskine’s procedural argument (Crenshaw’s Br. p. 23(II)), Crenshaw only addresses the substantive argument in that section (and continues to address the substantive argument over the following two sections).

(Crenshaw's Br. pp. 26(III) – 27(IV).) Therefore, Crenshaw does not oppose, and thereby concedes, that this holding was error because the issue was not before the Court of Appeals.

B. Crenshaw's argument that the Court of Appeals properly held that a question of law can be transformed into a question of fact by failure to object to a special verdict form ignores Rule 50(b) and does not directly address Erskine's arguments on the issue.

In sections II – IV of his brief, Crenshaw responds to Erskine's arguments that a question of law, such as breach of contract, cannot be transformed into a question of fact by the parties, and that the Court of Appeals's holding that Erskine and Crenshaw did just that by use of a special verdict form was error. However, instead of directly addressing this issue and Erskine's three separate arguments on the issue, Crenshaw repeats a single argument in all three sections summarized as:

“As discussed in Sections II and III above, the trial judge correctly concluded the evidence presented questions of fact about the terms of the contract for the jurors to determine and so instructed the jurors, without objection. Erskine cannot complain about the jurors' findings of fact and application of law to those facts.”

(Crenshaw Br. pp. 27-28.) In other words, Crenshaw insists, as he has throughout this appeal, that since the trial judge submitted the legal question of breach of contract to the jury and the jury found in Crenshaw's favor, then Erskine is stuck with the jury's decision without any recourse. As he has all along, Crenshaw completely ignores Rule 50(b), SCRCP, which of course says, with a cadre of support from the courts over many years, that “[w]henver a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.” Crenshaw does not address or even once cite Rule 50(b), SCRCP in his brief.

Oddly, Crenshaw cites with favor that this Court can correct errors of law, and fact findings of the jury when “a review of the record discloses that there is no evidence which reasonably

supports the jury's findings." (Crenshaw Br. p. 27(IV)) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).) However, like with Rule 50(b), SCRCPC, Crenshaw ignores the well-established ability of this Court to correct a jury's fact finding—notably in this case, the that Crenshaw did not breach his obligation under the contract—when there is no evidence in the record to support it. It is no wonder that Crenshaw chooses to ignore Rule 50(b), SCRCPC and the court's ability to correct a jury's findings, given that Crenshaw admitted that he was required by the contract to request a hearing on his termination in writing, and that he did not affirmatively request the hearing. (Crenshaw Br. p. 14.) This uncontroverted fact, and the trial court's clear ability to correct errors of law or fact via JNOV, dictate that the Court of Appeals must be reversed and the trial court's order granting JNOV must be reinstated.

In section II, Crenshaw rehashes his argument made to the Court of Appeals that Erskine's failure to object to the special verdict form precludes JNOV. Regardless of whether the Court of Appeals misconstrued his argument, as he alleges, when it "note[d] our court rules and case law do not provide that the use of a special verdict form precludes the grant of JNOV," Crenshaw does not clarify why he argues that this well-principled holding of the Court of Appeals—which Crenshaw did not appeal and which is not at issue here—does not apply to this case, as he summarily argues. (Crenshaw Br. p. 26.)

Although Crenshaw barely addresses Erskine's arguments that a question of law cannot be transformed into a question of fact, he does attempt to preclude this Court's consideration of it by contending that Erskine did not make the argument in its petition for writ of certiorari and therefore that it is not properly before this Court. While Erskine did create a new section for this argument in its principal brief after the Court issued its writ of certiorari (Erskine's Br. p. 21(III)), Crenshaw overlooks that Erskine covers this argument in question presented V, "[t]he Court of Appeals erred

by contradicting its own holding in the Subject Decision, and misapplying the law, when it found that the legal issue of breach of contract was transformed to a question of fact by use of a special verdict form.” (Erskine Br. p. 24(V).) This Court issued its writ of certiorari on all questions presented by Erskine. Thus, Erskine presented the substantive question as to whether a question of law can be transformed to a question of fact by a court in its petition for writ of certiorari, and although presented under a different heading in Erskine’s principal brief (section III), its section III argument is a crystallization of the arguments made on that question presented in Erskine’s petition for writ of certiorari, and thus properly before this court.

Crenshaw’s only argument that might be construed as directly addressing whether a question of law cannot be transformed into a question of fact is his statement that Erskine’s argument “misstates the record.” (Crenshaw Br. p. 27(III).) Crenshaw then discusses the trial procedure. (*Id.*) To be clear, Erskine’s argument is over the Court of Appeals’s holding that Erskine agreed that the legal question of breach of contract was a question of fact for the jury by not objecting to the special verdict form, particularly given that the Court of Appeals held two pages prior that use of a special verdict form does not preclude JNOV. (A. at 1259, 1261.) Erskine did not misstate the record in this regard and Crenshaw offers no citation or further explanation of the accused of misstatement.

Adverse parties in litigation cannot dictate to any court, whether by agreement, lack of objection, or any other act, whether an issue before the court is an issue of fact or an issue of law. The court makes that determination. To find that any issue of law can be transformed into an issue of fact, is to render the court unable to fulfill its duties under the South Carolina Constitution. The transformation of an issue of law to an issue of fact would permit a fact-finding jury to make decisions of law. The reason a standard exists for a court to issue a JNOV is so a court can correct

and error of the jury. Just as a court must have real controversies before it to issue decisions and refrain from issuing advisory opinions, a court must decide what issues are legal and which are factual. *See Hitter v. McLeod*, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980) (citing *West v. West*, 263 S.C. 146, 208 S.E. (2d) 530 (1974); *Power v. McNair*, 255 S.C. 150, 177 S.E. (2d) 551 (1970); *Park v. Safeco Insurance Company of America*, 251 S.C. 410, 162 S.E. (2d) 709 (1968)). Legal issues cannot be converted to factual issues.

III. Crenshaw provides no compelling argument that would prevent this case from contradicting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, if he is allowed to recover under the contract.

Again, Crenshaw takes the “look the other way” approach with regard to his biggest hurdle—the Court of Appeals’s and his own acknowledgement that he did not request a hearing on the ground for the termination of his employment. (A. at 1257, Crenshaw Br. p. 14.) He argues that this Court’s decision in *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (2004) is misplaced because Crenshaw did not breach the contract with Erskine. (Crenshaw Br. p. 28(V).) Crenshaw glosses over his failure to request a hearing—the only breach alleged by Erskine—and states that Crenshaw was ready to perform his obligation under the contract to teach, which has never been at issue. There is no question that Crenshaw failed to request a hearing, i.e. that he breached the contract, and if he is allowed to recover under the contract on which he did not perform, then that allowance will contradict this Court’s holding in *Swinton Creek*, whether Crenshaw wants to address it or not.

IV. Erskine properly supports its good faith actions in its brief, which show that it followed the procedure for termination of a tenured faculty member to the letter.

Erskine’s argument that it acted in good faith is not as bare-bones as Crenshaw suggests. Erskine’s detailed facts section in its principal brief lay out how Erskine reasonably came to the decision to terminate Crenshaw’s employment, how it followed to the letter the Faculty Manual’s

procedure for terminating Crenshaw's employment, and how it treated Crenshaw with civility and dignity even when he refused to reciprocate. (Erskine Br. pp. 7-13.) Erskine cited three cases regarding the implied duty of good faith and fair dealing in the immediately preceding section of its principal brief. (See Erskine's Br. p. 24.) And, Erskine addressed in detail the speculative examples provided by the Court of Appeals of how the jury might have justified finding that Crenshaw did not breach the contract, through which Erskine recounted Erskine's compliance with its obligations and Crenshaw's refusal to comply with his. (See Erskine Br. pp. 25-29.) Therefore, Erskine's statement of its good faith was neither unsupported by legal authority, nor conclusory, and thus does not result in an abandonment of the issue.

V. Crenshaw's argument that the Court of Appeals properly guessed at the jury's fact findings to support its decision is unavailing.

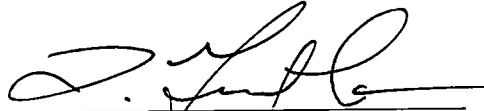
Crenshaw attempts to argue that by speculating about what the jury might have found to support Crenshaw's lack of breach of his obligation, the Court of Appeals was simply following the correct standard of review and viewing the evidence in the light most favorable to Crenshaw. However, Erskine's rebuttal to each of the Court of Appeals's speculations about what the jury might have found, clearly point out that the facts would not support such a finding by the jury. As cited by Crenshaw, "a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." (Crenshaw Br. p. 31) (citing *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).) Erskine's argument shows that no reasonable jury could have found what the Court of Appeals speculates this jury could have found—despite that it should not have so speculated—and Crenshaw does not dispute Erskine's explanation of why.

CONCLUSION

For the foregoing reasons, Erskine asks this Honorable Court to reverse the Subject Decision, and to affirm the circuit court's JNOV in Erskine's favor.

Respectfully submitted,

May 23, 2019



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I, L. Grant Close III, of FordHarrison, LLP, counsel for Erskine College and David A. Norman, hereby certify that the foregoing **REPLY BRIEF OF PETITIONERS**, was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 23, 2019, properly posted for delivery to the following addressees:

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