

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2018-001926

William Crenshaw,Respondent,

v.

Erskine College and David Norman, Petitioners.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Dr. William Crenshaw petitions this Court to rehear this matter because this Court overlooked or misapprehended to matters set forth in this petition.

I. INTRODUCTION.

In a shocking exercise of judicial activism, a majority of this Court rejected the jurors' verdict and held, "[T]he trial court properly granted Erskine's motion for judgment notwithstanding the verdict (JNOV) because—as a matter of law—Erskine did not breach its contract with Dr. Crenshaw." *Crenshaw v. Erskine Coll.*, No. 2018-001926, 2020 WL 5405399, at 1 (S.C. Sept. 9, 2020). The majority opinion is shocking because it fails to articulate—let alone apply—a standard for reviewing the jurors' verdict. It is shocking because it disregards a swath of South Carolina employment law. It is shocking because it declares the College Faculty Manual a contract as a matter of law despite prominent

disclaimers of an employment contract and the evidence considered by the jurors. It is shocking because it purports to resolve a disputed fact based on a three-word answer to a leading question—that's contrary to the party's position throughout the litigation— during a reply argument in the state's court of last resort.

Despite ruling for the employer in this case, the majority opinion is a shocking windfall for employees. Going forward, any employer that issues an employee manual that contains a promise must strictly comply with every term in that manual because its employees are no longer employment-at-will employees—as a matter of law—regardless of any disclaimers contained in the document.

For the reasons set forth below, this Court should grant this petition, rehear this matter, and enter an order reinstating the verdict of the jurors.

II. STANDARD FOR GRANTING (AND REVIEWING) A JUDGEMENT NOTWITHSTANDING THE VERDICT.

Remarkably, the majority of this Court did not identify the standard of review ordinarily applied to determine whether the trial court properly granted a JNOV. To understand the importance of the standard of review, it is important to recall how this case reached this Court. Dr. Crenshaw appealed the trial judge granting a JNOV, presenting this issue to the Court of Appeals:

The trial court judge erred by granting Erskine College a judgment notwithstanding the verdict, finding that Dr. William Crenshaw breached his contractual obligation to Erskine College, even though the jurors, by special verdict form, expressly found (1) Dr. Crenshaw did not breach his obligation under the agreement and (2) Erskine College did breach its obligation under the agreement.

Brief of Appellant, at 3.

In his brief to the Court of Appeals, Dr. Crenshaw identified the standard of review

applicable to his appeal:

When reviewing the circuit court's ruling on a directed verdict or JNOV motion, this court must apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The circuit court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, [a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. In deciding such motions, neither the [circuit] court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 328, 781 S.E.2d 737, 741 (Ct. App. 2015) (internal quotations and citations omitted). "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict." *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (citing *Hilton Head Island Realty, Inc. v. Skull Creek Club*, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)).

"A cause of action for breach of contract seeking money damages is an action at law." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). "It is improper in a law case to submit factual issues to a jury in the form of non-binding 'advisory interrogatories.' A jury's resolution of factual issues in a law case is binding on trial and appellate courts." *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)).

Id. at 18-19.

The Court of Appeals applied this standard of review. *Crenshaw v. Erskine College*, 424 S.C. 287, 295, 818 S.E.2d 218, 222-23 (Ct. App. 2018). The Court of Appeals reversed the grant of a JNOV, recognizing "the trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt" and "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Crenshaw*, 424 S.C. at 297-98, 818 S.E.2d at 224 (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439,

440 (1994) and *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

On appeal to this Court, Dr. Crenshaw once again identified this standard of review, which Erskine did not dispute. Brief of Respondent, at 15-16 (citing Brief of Petitioner at 22). Without reference to any standard of review, the majority of this court declared, “Erskine’s Faculty Manual is a contract with its tenured professors as a matter of law” even though “Erskine refused at trial to concede the Faculty Manual is a contract, and continued its refusal to concede the point until [this Court] forced it to do so at oral argument before this Court.” *Crenshaw*, at 6. Once this Court applies the correct standard of review, it is evident the jurors’ verdict is supported by evidence presented at trial.

III. TENURE.

The majority of this Court held, “Most participants in this case—including the dissent, but not including the trial court in its ruling granting JNOV—have overstated the significance of “tenure” to Crenshaw’s enforceable rights in this breach of contract case.” *Crenshaw*, at 4. The parties and this Court, however, have the same basic understanding of tenure. During the oral argument, at 38:53, the Chief Justice asked counsel for Erskine, “What is the purpose of tenure?” Erskine acknowledged, “The purpose of tenure is to have a just cause protection from termination of employment and to allow academic freedom.” The majority of this Court acknowledged, “In simple terms, when an academic institution grants tenure to one of its professors, the institution promises long-term job security to the professor that differs from the employment-at-will status of non-tenured faculty.” *Id.* at 4; *and see, e.g., id.* at 6 (“The status of ‘tenured’ is important to the rights of any professor. Without it, the professor is probably an employee at will.”).

The parties and this Court thus agree that, by granting tenure to Dr. Crenshaw,

Erskine granted him “just cause protection from termination of employment” that differs from employment-at-will. At a minimum, the contract between the parties guaranteed that Erskine would not terminate Dr. Crenshaw without just cause. Examination of the contract between the parties must begin with this common understanding of the significance of tenure.

IV. THE CONTRACT.

It is well settled that a court must construe a contract against the drafter, in this case Erskine. *Moody v. McClellan*, 295 S.C. 157, 160, 367 S.E.2d 449, 451 (Ct. App. 1987) (“Since the language of the instrument is the employer’s, the Court must construe it, if its meaning is ambiguous, against the drafter.”). The majority of this Court did not do that when it held, “Erskine’s Faculty Manual is a contract with its tenured professors as a matter of law” even though “Erskine refused at trial to concede the Faculty Manual is a contract, and continued its refusal to concede the point until [this Court] forced it to do so at oral argument before this Court.” *Crenshaw*, at 6. This purported concession did not occur until the reply argument, at 39:09, when Justice James asked Erskine’s counsel, “So you’re saying the manual is the contract?” and Erskine’s counsel responded, “Yes, it is.”

The dissent, however, observed, “[T]he trial court correctly found there were genuine issues of material fact as to whether the Faculty Manual constituted a contract for tenured faculty such as Crenshaw and whether Erskine breached this contract” when “it properly denied Erskine’s motions for summary judgment and directed verdict, which were based on the ground that the handbook did not create a contract.” *Crenshaw*, at 17 (Hearn, J., dissenting).

Erskine’s claim that the Faculty Manual was not part of the contract flows from the

disclaimers contained in the manual. The front of the Faculty Manual states:

This manual describes some of the normal policies and procedures of the Erskine College faculty (in and outside the classroom), which are presented as faculty guidelines. This manual replaces any and all prior versions of the *College Faculty Manual* distributed to faculty in their entirety. Should there be a discrepancy in language between the *College Faculty Manual* (applicable to College faculty) and the *Employee Resource Handbook* (applicable to all employees, College and Seminary), the overriding document will be the *Employee Resource Handbook*. The issuance of this manual, the *Employee Resource Handbook*, and/or the policies and language contained therein do not create a contract of employment, expressed or implied, between Erskine and any employee. In the event that any mandatory language appears in this manual, the terms of this disclaimer shall take precedence over any such apparently mandatory language, so that no contract is created.

A. 831. In addition to the disclaimer on the front of the Faculty Manual, the bottom of each and every page of the Faculty Manual states, "This is not a contract of employment." See, e.g., A. 832-36.

During the trial, Erskine questioned Dr. Crenshaw about the Faculty Manual, and the following exchange took place.

Q. Okay. And are you aware of whether or not the language on the front page of this faculty handbook says that it is not a contract of employment?

A. I have no reasons to doubt it says that. I'm sure I read that before.

Q. All right. Well, let me ask you this and since this starts, the issuance. Does it say, this issuance of this manual, the employee resource handbook and/or the policies and language contained therein do not create a contract of employment expressed or implied between Erskine and any employee. Did I read that correctly?

A. You did.

Q. All right. And then the next sentence says, in the event that any mandatory language appears in this manual the terms of this disclaimer shall take precedence over any apparently mandatory language so that no contract is created.

A. I see that. I'm not sure I understand it, but I do see that sentence.

A. 397-98. The parties then argued an objection outside the presence of the jurors where counsel for Erskine stated the jurors decide whether the Faculty Manual is a contract or not. A. 398-401. After the jurors returned to the courtroom, the following exchange occurred:

Q. And I believe where we left off, Dr. Crenshaw, is we were looking at the two sentences on the front page of the handbook and my question was whether you understood those sentences?

A. I understand the word, but that's clearly legal language and I don't understand the implication for some of the material in the handbook.

Q. All right. And if you would for me, please, flip through the handbook. Just flip through the pages quickly and what I'm asking you is whether or not there is a sentence at the bottom of the pages that says this is not a contract of employment?

A. I see that, yes.

Q. You see that?

A. Yes.

Q. What's your understanding of that sentence?

A. That the college faculty manual is not a contract of employment.

A. 401-03.

Against this backdrop, the trial judge submitted this case to the jurors with the following instruction:

Dr. Crenshaw claims a breach of contract which existed between Erskine College. In order for him to recover for the breach of contract he must prove this claim by a preponderance or the greater weight of the evidence. First, he must prove by a preponderance of the evidence the existence of a binding contract. Now, a contract by definition, is an agreement entered into by two or more parties in which each party agrees to perform or not to perform certain acts. It may be shown by words, written or oral, or by conduct. However, a contract is more than a mere exchange of promises. For the agreement to be considered a contract the parties must have intended to

enter into the contract and must have reached a mutual understanding of the terms of that contract. This is sometimes called a meeting of the minds. So the parties must intend to be mutually bound by the agreement.

After proving the contract the Plaintiff must then show by a preponderance of the evidence that the Defendant unjustifiably breached or broke one of its promises in the contract. The word, breach, means failure without legal excuse to perform any promise that forms the whole or part of the contract. This includes the refusal of a party to recognize the existence of the contract or by doing something inconsistent with the existence of the contract. A party breaches a contract when that party does not perform as agreed upon under the contract by failing to carry out a term, promise or condition of the contract.

A. 798-99.

The trial judge, accordingly, instructed the jurors they must determine whether a contract existed between the parties, the terms of that contract, and whether Erskine breached the contract. Based on the evidence presented at trial, the jurors could conclude a contract existed between Dr. Crenshaw and Erskine. The jurors could conclude the contract prohibited Erskine from terminating Dr. Crenshaw's employment without just cause. The jurors could conclude Erskine breached the contract by terminating Dr. Crenshaw's employment without just cause. Based on the evidence presented at trial, the jurors also could conclude that the Faculty Manual was not part of the contract. As seen, Erskine denied the Faculty Manual was a contract until their reply argument in this Court. Dr. Crenshaw acknowledged the plain meaning of the disclaimer contained on every page of the Faculty Manual. These conclusions not only do not require wild speculation, but these conclusions are also entirely consistent with the standard of review, to wit: "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the

jury's verdict." *Shupe, supra*; see also Section II, *supra*.¹

The majority of this Court states, "The notion that a jury—or a Justice—may speculate so wildly as to a basis for imposing liability on a written contract is inconsistent with standard principles of contract law." *Crenshaw*, at 10. But that is not what happened here. Wild speculation is not required to conclude, by granting tenure to Dr. Crenshaw, Erskine granted him "just cause protection from termination of employment" that differs from employment-at-will. Thus, wild speculation is not required to conclude a contract

¹ This analysis is no different than the analysis our state's appellate courts employ any time the standard of review is an "any evidence" standard. See, e.g. *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017) ("We defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them."); *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it."); *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is "any evidence" to support its findings."); *Elders v. Parker*, 286 S.C. 228, 230, 332 S.E.2d 563, 565 (Ct. App. 1985) ("On appeal from a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. Our review is limited to determining if there is any evidence which reasonably tends to support the verdict."); *McGaha v. Mosley*, 283 S.C. 268, 274, 322 S.E.2d 461, 464 (Ct. App. 1984) ("In reviewing a jury verdict, this Court is not free to weigh the evidence presented at trial.");

An "any evidence" standard is also the standard the Court of Appeals applied when it held:

The jury, as fact finders, could have found the language in the Manual and letter were confusing as to whether Crenshaw was required to specifically request or waive a hearing that had already been set. The jury could have also determined Crenshaw did not breach his obligations to Erskine because the offer for early retirement was still pending when Crenshaw received Norman's letter and remained pending until the day after the scheduled hearing. Finally, even assuming the contract required a reply from Crenshaw, the jury could have determined Crenshaw's breach was immaterial. Accordingly, we reverse the grant of JNOV.

Crenshaw., 424 S.C. at 297, 818 S.E.2d at 224. This analysis was not wild speculation, but rather application of the well-established standard of review.

existed between these parties. And, wild speculation is not required to conclude the Faculty Manual was not part of the contract when every page of the contract states, “This is not a contract of employment.”

The majority of this court, in fact, reviewed Dr. Crenshaw’s closing argument to the jurors that “Erskine did not have adequate cause to terminate him,” even acknowledging, “This argument [is] a good argument on the facts.” Crenshaw, at 8-9. This Court then concluded this argument “fails as a matter of law” because “[u]nder the clear terms of The College Faculty Manual—Crenshaw’s contract—the decision to fire a tenured professor for cause belongs only to the Board of Trustees.” *Id.* That this Court held the procedures contained in the Faculty Manual are mandatory is stunning in light of the evidence presented at trial and the disclaimer on the front of the Faculty Manual stating, in part, “In the event that any mandatory language appears in this manual, the terms of this disclaimer shall take precedence over any such apparently mandatory language, so that no contract is created.” A. 831.

Once this Court examines the contract between the parties based on the common understanding of the significance of tenure, recognizes the remaining terms of the contract presented questions of fact for the jurors to decide, and applies the correct standard of review, the need to affirm the opinion of the Court of Appeals and reinstate the verdict of the jurors becomes apparent.

V. VERDICT FORM.

The majority opinion “address[ed] two points regarding the court of appeals’ opinion.” *Crenshaw*, at 14. Regarding the first point, the majority opinion stated:

[T]he court of appeals considered whether Crenshaw breached the contract by failing to request a hearing before the Hearing Committee. The trial court

submitted this question on its special verdict form to the jury, which answered, “No.” The question is misplaced. Crenshaw had no contractual obligation to request a hearing such that his failure to do so is a breach of contract. The issues to be decided in Crenshaw’s lawsuit are only the extent of Erskine’s obligations under the contract, and whether Erskine breached the contract by failing to meet any of those obligations. The fact Crenshaw did not request a hearing before the Hearing Committee is not a breach of contract, but under the clear terms of the contract, it meant Erskine’s obligation to conduct such a hearing never arose, and Norman’s preliminary determination that adequate cause existed for termination became a final decision.

Id. (internal citation omitted). Perhaps this special interrogatory is misplaced as Dr. Crenshaw agrees the issue for the jurors to determine was whether Erskine breached its contract with him, a tenured professor. Everyone—including Erskine and every member of this Court—agrees Dr. Crenshaw was not an employment-at-will employee. The majority opinion, however, errs by solely focusing on the Faculty Hearing Committee and ignoring whether Erskine breached its obligation not to terminate Dr. Crenshaw’s employment without just cause.

The trial judge submitted this special verdict form to the jurors at the request of Erskine. A. 806. Regardless of whether this question is misplaced, it is a significant data point regarding how the jurors resolved the factual issues submitted for their consideration, including finding the terms of the contract. Remarkably, the majority opinion does not even discuss the other special verdict form the trial judge submitted to the jurors, to wit: “Did Erskine College breach its obligation under the agreement?” The jurors answered, “Yes.” Based on the evidence presented at trial, and following the trial judge’s instructions, the jurors determined a contract of employment existed between the parties, the terms of that contract, and that Erskine breached the contract. Under the ordinarily applied standard of review, evidence presented at trial supports the jurors’ answer to this special verdict form.

Regarding the second point, the majority opinion stated:

[T]he court of appeals stated, “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.” The court cited no authority for the statement. The statement is an incorrect statement of the law of this State.

Crenshaw, at 14 (internal citation omitted). Ironically, the majority opinion does not cite to an authority articulating the correct statement of law.

This second point is based on Erskine’s argument, “Any finding that the Parties can transform a question of law into a question of fact by agreement is reversible error.” Brief of Petitioner at 21. As a threshold matter, this argument was not presented in Erskine’s petition for writ of *certiorari* and, therefore, is not properly before this Court. Regardless of error preservation, this argument misstates the record. As discussed in Section II above, the trial judge recognized there were questions of facts for the jurors to determine regarding the terms of the contract. The trial judge properly instructed the jurors to determine those facts in order to answer the special verdict questions. Erskine, moreover, maintained at trial that whether the faculty manual was not part of the agreement and argued “the jury decides whether it is a contract or not.” The manual contained a disclaimer stating it did not create an employment contract, and Erskine questioned Dr. Crenshaw, an English Professor, about the plain meaning of language of the disclaimer. A. 397-403. Erskine cannot complain about the jurors determining the terms of the contract and applying those facts to the law instructed by the trial judge without objection.

The majority opinion erred by failing to consider, under the ordinarily applied standard of review, whether any evidence existed in the record to support the jurors’ finding of fact that Erskine breached its contract with Dr. Crenshaw.

VI. FUTURE IMPLICATIONS OF THIS DECISION.

The dissent raises two concerns about the future implications of majority opinion in this case. First, the dissent points out the majority opinion “effectively renders academic tenure meaningless in this state.” *Crenshaw*, at 16 (Hearn, J., dissenting). This concern is valid because the majority of this Court refused to consider whether Erskine breached its obligation to Dr. Crenshaw not to terminate his employment except for just cause. Second, the dissent identifies the swath of our state’s employment law ignored by the majority opinion. This dissent noted, “The issue of whether the Faculty Manual constituted a contract was the most contested issue in this case, and the trial court was required to submit it to the jury, especially where, as here, the handbook contained a disclaimer that it did not constitute a contract of employment.” *Id.*, at 18 (Hearn, J., dissenting). The majority of this court even acknowledged the departure from our state’s employment law by stating, “We have required that courts be reluctant to find an employee handbook or manual to be a contract as a matter of law when the purported contract document contains a disclaimer provision.” *Id.* at 7.

Without acknowledging it, the majority of this court altered our state’s employment law, even though neither party “moved to argue against precedent.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016). Despite ruling for the employer in this case, the majority opinion is a shocking windfall for employees. Going forward, any employer that issues an employee manual that contains a promise must strictly comply with every term in that manual because its employees are no longer employment-at-will employees—as a matter of law—regardless of any disclaimers contained in the document. Our judicial system favors consistency. No doubt, many employers in South Carolina still rely on

disclaimers contained in employee manuals or handbooks not knowing the majority of this Court implicitly overruled a swath of our state's employment law without explicitly saying so.

VII. DUE PROCESS.

The majority of this Court purports to resolve a disputed fact based on a three-word answer by Erskine's counsel to a leading question—that's contrary to Erskine's position throughout the litigation—during the reply argument in this Court. Undersigned counsel is not aware of any precedent allowing an appellate court to resolve a factual dispute in this manner after that very dispute had been submitted to jurors. In this case, Erskine expressly recognized the question of whether the Faculty Manual is part of the contract is a jury question. The majority opinion's determination of this fact, in this manner, is contrary to the ordinarily followed standard of review.

The majority opinion's determination of this fact, in this manner, also deprived Dr. Crenshaw of procedural and substantive due process. U. S. Const. amend. XIV; S.C. Const. art. I, § 3. It deprived Dr. Crenshaw of procedural due process because this Court did not provide him with notice and an opportunity to be heard regarding the abandonment of ordinarily applied standard of review and the adoption of an unprecedented procedure where a party to a lawsuit can change its position during its reply argument in the state's court of last resort. It deprived Dr. Crenshaw of substantive due process because it rendered meaningless the jury trial, the appeal to the Court of Appeals, and even the appeal to this Court based on the manner in which the issue presented and how this Court resolved it.

At a minimum, this Court should grant rehearing in order to provide Dr. Crenshaw with due process.

VIII. CONCLUSION.

For the foregoing reasons, this Court should grant this petition, rehear this matter, and enter an order reinstating the verdict of the jurors.

IT IS SO MOVED.

Respectfully Submitted,

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