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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge, First Judicial Circuit

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Case No. 2020-0006713

Denise Simmons,..... Appellant,

v.

South Carolina State University..... Respondent.

RESPONDENT'S INITIAL BRIEF

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II. STATEMENT OF THE CASE

This case arises out of a lawsuit filed by South Carolina State University ("University" or "SCSU") on May 11, 2015, in which the University has alleged that Appellant, Denise Simmons, failed to comply with the terms of a Memorandum of Agreement setting forth expectations while she engaged in a professional development sabbatical to complete her terminal degree, a Doctor of Philosophy in Civil Engineering. The terms of the agreement required a commitment from Dr. Simmons to remain employed at the University for at least the same number of years as her sabbatical, or she would be expected to repay the funds expended by the University for her studies. Dr. Simmons failed to return to teach as a professor at the University upon completion of her doctoral program at Clemson University, and instead became employed by Virginia Polytechnic Institute and State University. She has never repaid any funds to the University, despite her failure to return pursuant to the agreement. While furthering her education, from June 2008 through May 2012, the Appellant received $312,457.74 from the University in the form of wages, tuition, and stipends. Appellant was awarded her Doctor of Philosophy degree in Civil Engineering on May 11, 2012.

The University alleges breach of contract, fraud, and breach of contract accompanied by a fraudulent act. (Compl. ¶¶ 22-40, R. p. _____). Denise Simmons filed her Answer on September 21, 2015. The instant action was called to trial on July 31, 2017 before the Honorable Edgar Dickson. On the second day of trial, August 1, 2017, the University rested its case, and after the Defendant presented her case, the case was sent to the jury on that same day. The jury returned a verdict in favor of the University and awarded the University $414,260.00 in damages. (Verdict Form, R. p. ___). On August 10, 2017, Appellant, Denise Simmons, moved for a new trial or, in the alternative, new trial nisi remittitur, which was denied by the Honorable Edgar Dickson. (Order, R. p. __). The trial judge issued an Order on March 27, 2020 denying Simmons' motion for a new trial. (Order, R. p. ___). The present appeal was filed by Denise Simmons on April 23, 2020. (Notice of Appeal, R. p. ___).

III. STANDARD OF REVIEW

On appeal of a case tried by a jury in an action at law, the jurisdiction of the appellate court extends "merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *See Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006); *Odom v. Weathersbee*, 225 S.C. 253, 81 S.E. 2d 788 (1954); *see also Berberich v. Jack*, 392 S.C. 278 (2011); *Watson v. Ford Motor Co.*, 389 S.C. 434 (2010); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444 (2006). Because every litigant is entitled to one fair trial, not two, the decision of whether to grant or deny a motion for a new trial lies within the discretion of the district court. *Wallace v. Poulos*, 861 Supp. 2d 587, 599 (D. Md. 2012). A trial court's denial of a motion for new trial is reviewed for abuse of discretion, and will not be reversed save in the most

exceptional circumstances. *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339 (4th Cir. 2014).

Moreover, the Court of Appeals does not consider issues raised for the first time on appeal, absent exceptional circumstances. *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020). When a party in a civil case fails to raise an argument in the lower court and instead raises it for the first time before the Court of Appeals, the Court of Appeals may reverse only if the newly raised argument establishes fundamental error or a denial of fundamental justice; this rigorous standard is an even higher bar than the plain error standard and the burden is on the party who has failed to preserve an argument to show that the standard is met. *Id.* As a general rule, the parties' litigation conduct determines what issues are properly before a court, and a defense may be forfeited if the party asserting it waits too long to raise the point. *Id.* It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal. *State v. Bonner*, 400 S.C. 561, 565, 735 S.E.2d 525, 527 (Ct. App. 2012); *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003); *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct.App. 2005).

IV. STATEMENT OF FACTS

Appellant Denise Simmons is a former assistant professor at Plaintiff University in the Department of Civil Engineering Technology and the Interim Director of the Savannah River Environmental Sciences Field Station during summers. (Darby Tr. p. 21, lines 21-22, Dr. Luke Tr. p. 135, lines 4-6, R. p. __). Dr. Simmons was employed by the University beginning in 2004. (Dr. Luke Tr. p. 136, lines 5-6, R. p. ___). In 2008, Dr. Simmons submitted a Professional Development Plan (also referred to as professional improvement plan) proposal for sabbatical leave from Plaintiff University under the Faculty Development Program (FDP) funded through Title III of the United States Department of

Education to pursue her terminal degree, a Ph.D. in Engineering, from Clemson University. (Pyles Tr. p. 5, line 1-p. 6, line 24, R. p. ___). The purpose of the FDP is to assist Historically Black Colleges and Universities (HBCU) to build self-sufficiency and expand their capacity to serve low-income students by providing funds to improve and strengthen the academic quality, institutional management, and fiscal stability of the institution. (Dr. Okafor Tr. p. 67, lines 1-11, R. p. __). Dr. Simmons' purpose as stated in her plan for her leave was consistent with the overarching purpose of the FDP under Title III. (Pyles Tr. p. 5, R. p. ___).

In a letter to Dr. Stanley Ihekweazu, Dean of the College of Science, Mathematics, Engineering, and Technology, and then Chair of the Civil and Mechanical Engineering Technology Department at South Carolina State University, dated June 12, 2008, Dr. Simmons stated, in part, "I will stipulate to as many years of employment as you deem appropriate in exchange for your support of this proposal and my degree completion at Clemson University." (Pyles Tr. p. 9, lines 11-19, p.11, lines 3-6, Dr. Ihekweazu Tr. p. 100, lines 13-24, Exh. P1, R. p. ___). Dr. Simmons then signed an agreement on June 10, 2008, which provided in part the following:

> I will remain in the active service with South Carolina State University upon completing this agreement for a period the equivalent of the amount of time for which financial assistance was received. For the purpose of this agreement, a summer session as well as each conference workshop seminar, etc., for which assistance was provided (as outlined in the professional improvement plan) is considered to be the equivalent of a semester. Failure on my part to carry out the above agreement will result in the lump sum repayment of the entire amount expended by South Carolina State University in my behalf.

(Dr. Luke Tr. p. 124, lines 1-12, Exh. P1, R. p. ___). The University provided funds to Dr. Simmons by way of stipends, tuition, and payroll. (Pyles Tr. p 7, line 24-p.8, line 4, p. 13, lines 7-22, R. p. ____). During her time at Clemson, Dr. Simmons had several contacts with the University. She contacted the University several times for follow up regarding her professional development program. (Pyles Tr. p. 8, lines 1-4, R. p. __). Additionally, on April 9, 2012, Janice Guinyard, Administrative Specialist with the University, contacted Dr. Simmons by email to forward her teaching schedule for the Fall 2012 semester. (Okafor Tr. p. 63, lines 5-8, Exh. P5, R. p. ___). Guinyard's email reads, in part, "Looking forward to seeing you in August." (Exh. P5, R. p. __). In response, Dr. Simmons forwarded Guinyard's email to Dr. Kenneth Okafor, Chair of the Department of Civil and Mechanical Engineering Technology, on April 9, 2012, and inquired about changing her teaching schedule for the Fall 2012 semester, because she was concerned she had no background in one of the courses on her Fall 2012 schedule. (Okafor Tr. p.63, line 2-p. 65, line 11, R. p. ___). Dr. Okafor emailed Dr. Simmons on April 11, 2012, letting her know that he could not reach her by phone, that he could not change the schedule, but that she could make arrangements with two other professors to adjust the schedule. (Okafor Tr. p. 64, line 21-p. 65, line 4, R. p. ___). On August 13, 2012, University staff and Dr. Okafor sent Dr. Simmons and other instructors an email notification of a faculty meeting for Fall 2012 for which her attendance was expected on August 16, 2012, with a memorandum regarding the agenda and details attached. (Okafor Tr. p. 68, line 7-p. 69, line 11, R. p. ___). Dr. Simmons did not attend the faculty meeting. (Okafor Tr. p. 69, lines 10-11, R. p. ___).

On August 16, 2012, Dr. Simmons emailed Dr. Okafor indicating the following: "I have not received an employment contract to date and have not otherwise heard from you

or your office. I am a bit distressed, but have sought and secured employment." (Okafor Tr. p. 70, lines 13-18, Tr. Exh. P7, R. p. ___). Dr. Okafor responded by email on August 17, 2012, telling her in part that she should "not be discouraged," because a lot of people had not yet received "contracts.'" (Okafor Tr. p. 70, line 22- p. 71, line 4, R. pp. ____). On August 23, 2012, Dr. Simmons sent another email with her cell number and referred to the existence of time-sensitive matters and indicated that she wanted to discuss employment. (Okafor Tr. p. 73, lines 4-16, R. p. ____). Additionally, on August 23, 2012, she exchanged email and had discussions with Dr. Ihekweazu, in which he tells her she needed to report to the University, consistent with her obligation, while they address her concerns about a letter of employment. (Okafor Tr. p. 73, line 17-p. 74, line 5, Exh. P3, R. p. ___).

Dr. Simmons did not report to the University to teach her Fall 2012 class schedule. (Okafor Tr. p. 75, lines 13-21, Tr. Exh. P8, R. p. ____). At least as early as spring 2012, Dr. Simmons applied for a visiting professorship at another school; specifically, she was in communication with Virginia Polytechnic Institute and State University ("Virginia Tech") regarding a position at Virginia Tech. (Okafor Tr. p. 76, line 19-p. 77, line 1, R. p. ___). Dr. Simmons did not seek clarification from her University supervisors about an employment contract, and did not communicate that she had not received an employment letter for Fall 2012 until August. (*Id.*) Dr. Simmons accepted an offer from Virginia Tech on August 23, 2012. (Dr. Simmons Tr. p. 192, lines 5-7, R. p. ___). On that day, she was also communicating with the Plaintiff University administrators. (Okafor Tr. p. 73, lines 4-7, R. p. ____). Dr. Simmons did not return to the University to teach her classes in the Fall of 2012, and at the time the trial occurred, she remained employed with Virginia Tech. (Dr.

Simmons Tr. p. 202, R. p. ___).

V. ARGUMENTS

A. The Trial Court Did Not Err In Denying Appellant's Motion For A New Trial Or, In The Alternative, New Trial *Nisi Remittitur*.

The decision to grant a new trial *nisi remittitur* is within the sound discretion of the trial court. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020). The trial court's decision to deny a new trial *nisi remittitur* will not be disturbed on appeal unless the trial court's findings are "wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Id.*, quoting *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006).

As properly found by the trial court, the fundamental question raised by the requested remittitur is whether some evidence supports the jury's damages award. Here, the jury returned a general verdict awarding SCSU $414,260.00 in damages. SCSU's evidence clearly shows damages supporting the jury's general verdict award.

Under the Faculty Development Project/Plan agreement between Appellant and SCSU, SCSU not only paid Appellant as a stipend 80% of her current salary, or approximately $44,575/year for four years (totaling $178,300), but also paid her Ph.D. program tuition and expenses at Clemson University for four years. These tuition and expense payments cost SCSU $134,157 over four years. In addition to these damages, the evidence supports additional damages suffered by SCSU caused by Appellant's breach of contract and tortious conduct. In exchange for SCSU's financial support and administrative leave, Appellant agreed:

> My entire objective for pursuing the Ph.D. Degree has always been to bring my expertise back to South Carolina State with the goal of exposing South

> Carolina State students to my areas of specialty, offering scholarly works in my specialties, recruiting students to attend the University, and enhancing the academic and research capabilities of the University. I only need the time and financial support from SCSU in order to accomplish this objective…. I will stipulate to as many years of employment as you deem appropriate in exchange for your support of this proposal and my degree completion at Clemson University.

(Dr. Simmons Tr. p. 186, line 14 – p. 187, line 3; Exh. P1, R. p. ___). SCSU provided the Appellant "the time and financial support," but it never received the agreed upon benefits of the Appellant's: 1) expertise, 2) exposing SCSU's students to Appellant's areas of specialty, 3) recruitment of students to SCSU, 4) scholarly articles, or 5) enhancing the academic and research capabilities of SCSU.

Appellant's breach of her contract with SCSU in this regard and tortious conduct damaged SCSU beyond simply the financial support paid by SCSU to Appellant:

> It affected us [SCSU] negatively in fact we lost her services, we had nobody to help us. We had people to help us but we didn't have the high expertise with accreditation, doing research, or most importantly to teach students. As you can see from the letter she sent to us that she would bring these expertise back for our students, and her not coming back we lost those.

(Dr. Ihekweazu Tr. p. 102, line 25 – p. 103, line 8, R. p. _). Likewise, Dr. Okafor testified:

> Q: And did Denise Simmons not returning to teach at South Carolina State adversely affect the engineering department and its students?
>
> A: Of course it did.
>
> Q: And how is that?
>
> A: Because the students, especially the students in the classes assigned to her, did not have coverage. And we did something

> to make that – to cover those students, which meant that the faculty members that were assigned to those classes had extra work to do, which meant that we couldn't be sure about their efficiency in their assigned classes, let alone the additional classes assigned to them because of the situation.
>
> Q: Do you know if the University was able to replace that year Dr. Simmons with a Ph.D. level engineering faculty member.
>
> A: No.
>
> Q: Does it benefit the department to have Ph.D. faculty?
>
> A Of course. Every University boasts like how many percentages of their faculty that have Ph.D.'s, so its no different with SC State.

(Dr. Okafor Tr. p. 71, line 17 – p. 72, line 14; Exh. P1, R. p. ___). Additionally, Dr. Luke, the Provost and Vice President for Academic Affairs testified to the harm and loss that Appellant's actions caused SCSU:

> No. The University actually suffered a loss because Dr. Simmons did not return as she stated in that letter of June of 2008. You know, she intended to return to share expertise with those students. Our students lost the benefit of someone with this high level of education and expertise and exposure. The University lost from having the benefit of a faculty member with higher credentials, the prestige that comes with that. Dr. Simmons had served on the accreditation committee in her department and her engineering programs at the University accredited by (inaudible) and therefore the high level of expertise that come with her Ph.D., the contribution she would have made to our accreditation effort, we lost them. So the students in her department lost the whole mentoring that she would have provided them with this high level of education. So in many ways the University just got the rotten end of the stick with this agreement.

(Dr. Luke Tr. p. 132, line 15 – p. 133, line 6; Exh. P1, R. p. ___). The evidence shows that the value of these services, which SCSU had bargained for, but Appellant did not provide,

was (within six months of the Appellant's breach) valued by Virginia Tech at approximately $120,000 per year. (Dr. Simmons Tr., p. 203, line 5 – p. 205, line 24; Plaintiff's Exh. P12, R. p. ___). SCSU clearly established damages of the financial support paid to or on behalf of Appellant, totaling $312,000. The trial verdict award of $414,260, however, also encompasses the damages suffered by SCSU as a result of Appellant's wrongfully denying SCSU its benefit of the bargain under the Faculty Development Project/Plan agreement. The total verdict award is plainly supported by evidence and cannot be characterized as so excessive as to shock the conscience or clearly indicate the amount of the award was the result of some improper motive. *Howard v. Roberson,* 376 S.C. 143, 154, 654 S.E.2d 887, 883 (Ct. App. 2007).

Appellant's strained arguments to reduce the verdict award are not supported by the law or evidence. First, suggestions or theories counsel presented during closing arguments are obviously not binding on a jury, which is the finder of fact. *See, e.g., Hawkins v. Pathology Assoc. of Greenville, PA,* 330 S.C. 92, 111, 498 S.E.2d 395, 406 (Ct. App. 1998) (stating "[f]urthermore, even if the argument were properly preserved, we find no basis for reversal. The jury clearly rejected Hawkins' counsel's suggestion for damages," where jury awarded $2.4 million more in survival damages than suggested by counsel).

Moreover, Appellant's arguments ignore the two-issue rule. Under the two-issue rule, "where a jury returns a general verdict involving two or more issues and its verdict is supported by on at least one issue the verdict will not be reversed on appeal." *Sierra v. Skelton,* 307 S.C. 217, 225, 415 S.E.2d 169, 974 (Ct. App. 1991). Here, Appellant improperly assumes or imposes her theory of how the jury allocated damages and on which

claims. However, the Appellant must instead show the verdict award is wholly unsupported by any evidence. The jury's verdict is supported by evidence under either the contact or tort claim submitted to the jury. "Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages." *Amstrong v. Collins,* 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005).

> The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of the jury rather than that of the Court and this Court will not interfere with the verdict of a jury simply because it is greater than its own estimate.

Perry v. Green, 437 S.E.2d 150, 153 (Ct. App. 1993) (quoting *Brabham v. Southern Asphalt Haulers, Inc*., 76 S.E.2d 301, 306 (1953). The jury's verdict award is entitled to substantial deference and is supported by evidence. Thus, the trial court's denial of a remittitur should be affirmed.

B. The Trial Court Did Not Err In Denying Appellant's Requested Remittitur In Respect To Summer Payments To Appellant.

In attacking the trial court's denial of Appellant's motion for a new trial *nisi remittitur*, Appellant also contends, without evidence, that the jury included in its damages award money paid by SCSU to Appellant for work she performed over the summers from 2008-2012. Again, evidence supports the jury's verdict and, because the verdict was a general verdict, neither Appellant, nor this court, can now speculate as to how the jury allocated damages. *Amstrong*, 366 S.C. at 227, 621 S.E.2d at 379.

Moreover, Dr. Luke's testimony made clear that SCSU was not seeking as damages Dr. Simmons' salary for work during the summers and outside of the professional leave

stipend based on 80% of her nine month base-salary. (Dr. Luke Tr. p. 127, lines 15 – 23, R. p. __). Similarly, SCSU's counsel did not argue to the jury that these summer payments to Appellant should be considered as damages, but rather, the jury should consider the amounts based on 80% of Appellant's nine-month base-salary, or approximately $44,000 per year. (SCSU closing, p. 102, line 24-p. 103, line 3, R. pp. ___). Accordingly, under applicable law and fact, the trial court did not err in denying Appellant's motion for a new trial *nisi remittitur.*

C. The Trial Court Did Not Err Regarding A "Special Damages" Jury Instruction.

As an initial matter, Appellant's argument that the trial court erred by not providing a jury instruction for "special damages" was not addressed at the trial court level and may not be raised for the first time on appeal. *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020). As a general rule, the parties' litigation conduct determines what issues are properly before the court, and a defense may be forfeited if the party asserting it waits too long to raise the point. *Id.* The Court of Appeals does not consider issues raised for the first time on appeal, absent exceptional circumstances. *Id.* Moreover, Appellant's assignment of error based on the assertion that the trial court did not give a "special damages" jury instruction is groundless, improper and barred by the South Carolina Rules of Civil Procedure. Rule 51, SCRCP, states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.

Here, Appellant did not object to the trial court's jury instructions, and is now barred from assigning as error the failure to give an instruction. Rule 51, SCRCP; *Winters v. Fiddle*,

394 S.C. 629, 642, 716 S.E.2d 316, 323 (Ct. App. 2011); *Creech v. SCWMRD*, 328 S.C. 24, 36, 491 S.E.2d 571, 577 (1997).

Additionally, Appellant's assignment of error is factually groundless. Appellant contends that her Proposed Jury Instruction I would have been a proper instruction. (Def's Brief, pp. 19 – 20, R. pp. ___). This proposed jury instruction states:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered to arise naturally according to that usual course of things from the breach of contract itself, or such damages as may reasonably be supposed to have been within the contemplation of the parties at the time they made it as the probable result of the breach.

Proposed Jury Instruction I.

(Def's Brief, p. 20, R. p. ___). In fact, the trial court substantively instructed the jury as set forth in this proposed instruction. The trial court instructed as follows:

> Finally, the Plaintiff must prove by preponderance or greater weight of the evidence, that the Plaintiff suffered damages which were proximately caused by the Defendant's breach of contract…. Damages for breach of contract are those that may fairly and reasonably be considered to arise naturally from the breach of contract itself or those that may be reasonably suppose to have been in the minds of the parties at the time the contract was made.

(Jury instruction, p. 135, lines 8 – 24, R. p. __). Consequently, the trial court not only instructed the jury consistent with Appellant's requested instruction, but properly instructed the jury with respect to "special" or "consequential" damages. *See McNaughton v. Charleston Charter School for Math and Science, Inc.,* 411 S.C. 249, 261, 768 S.E.2d 389, 396 (2015) (special damages or consequential damages occasioned by breach of

contract may be recovered when such damages may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made).

D. The Trial Court Did Not Err In Not Dismissing SCSU's Claim For Breach Of Contract Accompanied By A Fraudulent Act.

Appellant contends essentially that the trial court erred in not granting a directed verdict for Appellant on SCSU's claim of breach of contract accompanied by a fraudulent act. In reviewing the trial court's ruling on a directed verdict motion, this Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Pye v. Estate of Fox*, 369 S.C. 555, 564 633 S.E.2d 505, 509 (2006). Further, such a motion must be denied where the evidence yields more than one inference or its inference is in doubt. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). And, "[t]he trial court can only be reversed by this Court when there is not evidence to support the ruling below." *Strange v. South Carolina Dep't of Hwys. & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

In this case, the evidence and the reasonable inferences therefrom support the trial court's denial of Appellant's motion for a directed verdict. Appellant contends SCSU did not properly plead or present evidence of fraudulent intent required to prove a claim of breach of contract accompanied by a fraudulent act. However, Appellant improperly conflates the elements of fraud and deceit with the relevant fraudulent intent under a breach of contract accompanied by a fraudulent act claim.

"The action for breach of contract accompanied by a fraudulent act is not based on the same elements as the action in tort for fraud and deceit." *Harper v. Ethridge*, 290 S.C.

112, 118, 348 S.E.2d 374, 378 (Ct. App. 1986). Rather, SCSU is not required to allege fraud and deceit; instead, "[t]he fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Id.*, at 119, 348 S.E.2d at 378; *see also, Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).

The evidence in this case shows Appellant, in connection with her breach of her contract with SCSU, acted dishonestly in fact. Appellant clearly understood SCSU expected her to return to SCSU in August 2012 to teach three courses and provide her expertise and other services to SCSU and its students. Nevertheless, commencing in at least March 2012, Appellant began seeking employment from Virginia Tech. (Dr. Simmons, p. 192, lines 2 – 7, R. p. ____). Appellant intentionally and willfully did not notify SCSU of her efforts and intent to secure employment from Virginia Tech and not return to SCSU, while at the same time pretextually and falsely asserting SCSU had failed to re-employ her. These dishonest acts and omissions not only deprived SCSU of the opportunity to minimize the disruption to SCSU and its students resulting from Appellant's breach of her contract, but constitute fabricated pretextual reasons and designs by Appellant to terminate her contract with SCSU knowing the reasons were false and did not justify termination. In other words, these facts clearly show and reasonably infer that Appellant developed an intention to terminate and breach her contract with SCSU by at least March 2012. While still receiving benefits from SCSU under the contract, Appellant intentionally, willfully and dishonestly did not disclose to SCSU her intention to breach the contract, knowing such concealment would cause increased harm to SCSU and its students, and instead, she fabricated pretextual reasons for her breach and failure to perform

knowing the reasons were false and would not justify her non-performance under the contract. This constitutes a fraudulent act accompanying the breach of contract.

Under these facts, breach of contract accompanied by a fraudulent act was properly submitted to the jury. *See Conner*, 348 S.C. at 466, 560 S.E.2d at 612 (evidence showing City fabricating pretextual reasons for termination of contract knowing the reasons were false and did not justify termination establishes a genuine issue of material fact); *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988) (intentionally concealing information, while claiming other party's failure to meet contract term as justification for cancellation of contract, would be a separate and distinct, but closely connected, dishonest act). Accordingly, the law, facts, and reasonable inferences therefrom, in this case fully support the trial court's denial of Appellant's motion for a directed verdict.

Furthermore, the allegations of the Complaint properly pleaded the fraudulent act characterized by dishonesty in fact or unfair dealing. For example, the Complaint alleges:

> 19. Defendant refused to engage in any meaningful discussions with Plaintiff to prepare for Defendant's return to work at SCSU and continued to refuse to return to SCSU to teach as she had agreed to pursuant to the MOA.
>
> 21. Instead of returning to educate predominately African-American students at the state's only HBCU, the Defendant willfully and callously turned her back on SCSU and its students and chose instead to use the education and degree she received that was funded for the express purpose of educating "low income students" at an HBCU in order to teach at Virginia Tech.
>
> 34. Defendant intended Plaintiff to act in reliance on her representation that she would return to SCSU, under the agreement, upon receiving her degree from Clemson University.
>
> 38. Moreover, in breaching the MOA, Defendant exhibited a fraudulent intent related to the breaches alleged in this Complaint.

(Complaint, R. p. ____). Accordingly, the Complaint plainly complied with any notice pleading requirements regarding the claim.

Finally, Appellant's objections to the trial court's denial of its directed verdict motion must fail in light of the two-issue rule, as discussed above. The jury returned a general verdict on the claims of breach of contract and breach of contract accompanied by a fraudulent act. As previously discussed the verdict is supported on the breach of contract claim alone, and accordingly, the verdict should not be reversed upon appeal. *Sierra*, 307 S.C. at 225-26, 414 S.E.2d at 174.

E. Sufficient Evidence Supports A Jury Finding That The Parties Entered Into A Contract.

Appellant asserts that the Faculty Development Project/Plan contract between Appellant and SCSU did not constitute an enforceable contract because it lacked the essential compensation term. In order for there to be a binding contract between parties there must be a mutual manifestation of assent to the essential terms of price, time and place. *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). The evidence presented in this case reasonably supports the jury finding that the Appellant and SCSU agreed as to a contract price or compensation term.

Along with evidence from SCSU's other witnesses, Dr. Luke clearly testified as to the compensation or price term of Appellant's Faculty Development Project/Plan agreement.

> A: The Plaintiff's [exhibit] 10 is a personnel actions request form which call a P4 form, and its dated in 2008, September. And what it does, it authorizes the - - it authorizes the salary to be paid to Denise Simmons while she was in study leave to tune of $44,575.
>
> Q: And that's what she was paid each year while she was on

leave?

A: That's correct, from her salary.

Q: For four years?

A: This is from her base salary. This does not include the funding from the Title III support for tuition and stipends, et cetera.

Q: And this indicates on it that it's a temporary salary adjustment?

A: Right. So because the salary is reduced by 20 percent it's just for that period of when it will be in effect.

Q: Okay. So once that period of leave is over her base salary would go back into full effect?

A: Right, definitely.

Q: And what is her base salary indicated on this form to be?

A: $55,719.

(Dr. Luke Tr. p. 126, line 20-p. 127, line 22, R. p. ____). The record in this case fully supports that, at a minimum, Appellant's compensation would be derived from her base salary, as well as her tuition and expenses paid by SCSU. There is in fact no reasonable dispute about Appellant's agreed upon compensation, which Appellant in part received under the Faculty Development Project/Plan agreement from 2008-2012 without her objection or concern to definiteness. *McPeters v. Yeargin Const. Co., Inc.,* 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986) (finding reasonable certainty in compensation term of contract where "[a]lthough no specific dollar amount was mentioned for the bonus, the amount was ascertainable based on the salaries of individual and salaried employees"); *see also, Sloan v. Greenville Cnty.,* 356 S.C. 531, 566, 590 S.E.2d 338, 357 (Ct. App. 2003) (contract is sufficiently definite to "define the responsibilities and rights of the parties.").

Consequently, there is evidence to reasonably support the jury's verdict, including a sufficiently definite agreement as to Appellant's compensation. Thus, the trial court's jury instruction, denial of a directed verdict, and denial of a new trial *nisi remittitur* should be affirmed.

VI. CONCLUSION

For the foregoing reasons, SCSU respectfully asks the Court to deny Appellant's appeal and affirm the jury's verdict in this case.

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October 22, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge, First Judicial Circuit

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C.A. No.: 2015-CP-38-553

Denise Simmons,..... Appellant,

v.

South Carolina State University..... Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the aforementioned Respondent's Initial Brief via U.S. mail on October 22, 2020, addressed to Martin S. High, PO Box 33190, Clemson, SC, 29733.

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