THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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. 2015-CP-38-553

South Carolina State University, Respondent,

v.

Denise Simmons, Appellant.

FINAL BRIEF OF APPELLANT

Respectfully submitted, December 3, 2020,

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by not entering a remitter for damages above the only proven compensatory and consequential damages requested by the Plaintiff?

2. Did the Trial Court err by not entering a remitter for payments made to Dr. Simmons that she earned during her summer employment with South Carolina State University?

3. Did the Trial Court err by not providing a jury instruction for "special damages" after Plaintiff's counsel argued for "special damages?"

4. Did the Trial Court erred by not dismissing the breach of contract accompanied by a fraudulent act claim after Plaintiff withdrew the fraud claim

5. Could the terms of the contract that contained no mention of compensation, a term the Trial Court deemed essential to contract formation in the jury instructions, reasonably support a jury finding that the parties entered into a contract?

STATEMENT OF THE CASE

On May 11, 2015, South Carolina State University ("SCSU") brought this action alleging 1) breach of contract, 2) fraud, and 3) breach of contract accompanied by fraudulent act, against Dr. Denise Simmons. *See* Complaint, R. pp 12-19. Dr. Simmons answered by denying that she breached any contract, denying that she committed fraud, and denied that she breached any contract by fraudulent act. *See* Answer and Counterclaim, R. pp. 26 - 31. In addition, Dr. Simmons counterclaimed that the SCSU claims were frivolous. *Id*. During the trial, the Plaintiff withdrew the claim regarding fraud. Dismissal of Fraud Claim 58:4-10, R. p 284, lines 4-10. The action was tried before a jury on July 31 and August 1, 2017, On August 1, 2017 the jury found for the Plaintiff in the amount of $414,260. Verdict Form, R. p. 11.

On August 10, 2017 Dr. Simmons submitted a motion for a new trial, or in the alternative, new trial *nisi remittitur*, under Rule 59, SCRCP, claiming the jury returned a verdict for damages that were grossly in excess of that which the evidence supported. SCSU submitted a memorandum on Nov. 20, 2017, in opposition to Defendant's motion for a new trial. Dr. Simmons submitted a memorandum of law supporting her motion on Nov. 29, 2017. On Mar. 27, 2020, over 2.6 years from the end of the trial, Judge Dickson entered an order denying Dr. Simmons's motion.

On Apr. 24, 2020, Dr. Simmons filed a Notice of Appeal to this Court and served the notice on SCSU. This brief is timely filed since the trial transcript was submitted to counsel for Dr. Simmons on July 23, 2020.

STANDARD OF REVIEW

In *Townes Associates, Ltd. v. City of Greenville*, the Supreme Court provided the general framework for determining an appellate courts' standard of review in civil cases. 266 S.C. 81 (1976). As this case does not involve any specialized scope of review rules, the *Townes* general framework is applicable.

On appeal from a case tried before a jury in an action at law, the appellate court only has the authority to correct errors of law. *Id*. The jury's factual findings can be disturbed only if "a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.* at 85; *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).

STATEMENT OF THE FACTS

Dr. Denise Rutledge Simmons is a native of Charleston, South Carolina. Simmons Test. at 144:5-6, R. p. 211, lines 5-6. She attended Clemson University ("Clemson"), working and taking loans to pay for her education. *Id*. at 144:6-13, R. p. 211, lines 6-13. She graduated with a Bachelor of Science degree in civil engineering. *Id*. at 144:17-20, R. p. 211, lines 17-20. She earned a master's degree in engineering and worked in private industry for many years prior to taking a position as an instructor at South Carolina State University (SCSU), the Plaintiff, in 2005. *Id*. at 144:23-145:1, R. p. 211, line 23 - p. 212, line 1. She earned her Professional Engineering License in Civil Engineering after sufficient professional practice and taking a licensure examination. *Id*. at 146:2-15, R. p. 213, lines 2-15.

In 2005 she applied for and was hired as a faculty member at SCSU. Simmons Test. at 146:18-147:3, R. p. 213, line 18 - p. 214, line 3. She began teaching and performed research in her engineering field. Dr. Simmons fell in love with teaching – a profession to which she always strived to enter. *Id*. She aimed for not to just teach, but to teach students like her that did not find it easy to earn a college degree especially in engineering. She also wished to teach and did teach at a historically black college. *Id*. at 153:23-154:14, R. p. 220, line 23 - p. 221, line 14.

Dr. Simmons also became director at the Savannah River Environmental Sciences Field Station ("SRESFS") at the Savannah River Site in Aiken, SC, a part-time academic year and full-time summer position through SCSU. *Id*. at 156:4-159:3, R. p. 223, line 4 - p. 226, line 3. The SRESFS is managed by SCSU and its goal was to recruit and retain women and minorities in environmental science and engineering and natural resources-related fields of

study. *Id*. She held that summer position through the Summer 2012 semester and performing her duties as the director. *Id*. at 165:22-166:1, R. p. 232, line 22 - p. 233, line 1.

Dr. Simmons described in detail the contracting procedures that were in place during her years at SCSU including the course of performance of always receiving a contract specifying key terms before the fall semester started. *Id*. at 148:2-151:18, R. p. 215, line 2 - p. 218, line 18. It was the course of past performance between the parties to have a contract executed with altered provision signified by initial at or before the beginning of every semester. *Id*.

Eventually, Dr. Simmons's desired to further her education, with the goal of returning to serve as a tenure-track faculty member at SCSU with a Ph.D. Simmons Test. 155:3-6, R. p. 222, lines 3-6. In 2008, through discussions with mentors and advisors at SCSU, she decided to seek a terminal degree and was offered a Federal Title III grant (funded through the U.S. Department of Education) grant to fund a PhD in engineering from Clemson. *Id*. at 152:20-153:22, R. p. 219, line 20 - p. 220, line 22. The grant required her to sign two documents, a memorandum of understanding and memorandum of agreement. *Id*. at 155:22-156:3, R. p. 222, line 22 - p. 223, line 3; Pl.'s Trial Ex. 1, R. pp. 347-382. The Memorandum of Understanding is the basis for the contract action brought by Plaintiff. *See* Complaint at ¶ 27, R. 17, para 27. The Memorandum of Agreement between South Carolina State University and Denise S. Grant (Dr. Simmons's surname at the time was Grant) states the following:

> I, Denise S. Grant, agree that I will remain in the active service with South Carolina State University upon completing this agreement for a period equivalent to 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.

Plaintiff's Trial Exhibit 1, R. p. 377. The Memorandum of Understanding that SCSU required Dr. Simmons to signed contained a specified damages term that conflicts with the above:

> I understand that the advance payment of a stipend in the amount of $5000 plus tuition and fees for each summer session and $9000 plus tuition and fees for each fall and spring semester is issued to enable me to defray the expenses of pursuing a PhD in Civil Engineering. I further understand that I may be required to reimburse the Program for all or a portion of this amount if the course is not successfully completed.

Plaintiff's Trial Exhibit 1, R. p 379.

After obtaining the Title III grant, Dr. Simmons and SCSU agreed that she would stay on in her position with SCSU as the Director of the SRESFS, a full-time position during the summer sessions and work part time during the academic year. She continued in this position throughout her academic studies at Clemson. Simmons Test. 156:3-19, R. p. 223, lines 3-19. It is not disputed that Defendant completed her academic work and continued working for Plaintiff during the Fall 2008 through Spring 2012 semesters and satisfied all elements of the Memorandum of Agreement and Memorandum of Understanding during this period.

Dr. Simmons maintained a workload also during the nine-month academic year of approximately 20%. She had a staff in place that she hired, paid through the grants that she secured, and who were in place throughout her time at Clemson. Dr. Simmons would meet with weekly with the SRESFS staff, to recruit students for the summer program and meet with funders. She also had a state vehicle allocated to her the entire time she was at Clemson for the purpose of SRESFS travel. She continued to write, submit and be awarded grants at SCSU. Simmons Test. at 158:3-159:3, R. p. 225, line 3 – p. 226, line 3.

Dr. Simmons earned her Ph.D. from Clemson in 2012 and was looking forward to returning the SCSU where she had worked for four years prior as a faculty member. She lived

in Columbia and was fully prepared to rejoin SCSU. Simmons Test. at 164:10-17, R. p. 231, lines 10-17. During the last semester at Clemson (April 2012) there is undisputed evidence that Dr. Simmons informed SCSU that she was graduating and ready to return to SCSU. During this time, Dr. Simmons was concerned about news reports of SCSU's financial and governance issues and she became concerned that the University may not be able to affect her return. *Id*. at 166:8-18, R. p. 223, lines 8-18.

By mid-August of 2012, Dr. Simmons was very concerned that SCSU was unable to contract with her. Simmons Test. 157:15-158:6, R. p. 224, line 15 – p. 225, line 6. The practice for SCSU and other Universities, prior to hiring or re-hiring a professor, includes an appointment letter to be sent well prior to the academic year and, more importantly, the offer and negotiation of a contract of employment with the faculty member. Therefore, she worked to try and find some interim position for the 2012/2013 academic year at that late date. *Id*. at 192:5-7, R. p. 259, lines 5-7. She was able to get a tentative offer for a postdoctoral scholar ("post doc") position with help from her faculty mentor at Clemson, Dr. Julie Martin.

On August 23rd, Deborah Darby, an Academic Affairs employee with SCSU who was responsible for contracts, informed Dr. Simmons that her Department head should have already negotiated a contract with her. Simmons Test. at 175:19-176:5, R. p. 242, line 19 – p. 243, line 5. August 23rd was after SCSU classes had started and on the final date to accept the post doc offer. Simmons Test. at 174:13-24, R. p. 241, lines 13 - 24. On that August 23, 2012, after classes had started and on the final day in which to accept the interim post doc position, Dr. Simmons received the call from Ms. Darby. The first call went to voice mail and then Darby e-mailed asking Dr. Simmons to call. Dr. Simmons returned the call to Darby. Simmons Test. at 175:19-176:5, R. p. 242, line 19 – p. 243, line 5. Darby informed Dr.

Simmons that Darby had been unable to reach Dr. Okafar. *Id*. Dr. Simmons then called, left a voice mail message, and e-mailed Dr. Okafor that day, the 23rd of August. Simmons Test. at 176:9-17, R. p. 243, lines 9 – 17. Dr. Simmons testified that when they finally spoke on the phone, Dr. Okafor was unaware that Dr. Simmons was returning to SCSU even though she had her Clemson academic documents sent to SCSU. Simmons Test. at 176:21-177:10, R. p. 243, line 21 – p. 244, line 10. Regardless, Dr. Simmons asked for a contract or terms and Dr. Okafor was unwilling to discuss a contract, including offering any material terms such as salary, tenure and term. *Id*. Dr. Simmons stated that if Dr. Okafor would send a contract to her she would sign it and return to SCSU. Simmons Test. at 177:17-18, R. p. 244, lines 17 – 18. However, Dr. Okafor would not make an offer, discuss, or send a contract. He would not discuss salary or any other terms. Simmons Test. at 177:19-25, R. p. 244, lines 19 – 25. As the 23rd was not only after classes had started at SCSU but was also the final day to sign for the yearlong post doc interim position, Dr. Simmons had to accept that position. Simmons Aff. at ¶ 20, R. p. 412, para. 20. Dr. Simmons states as follows:

> From the beginning, I had every intention of returning to SCSU. l initiated the process of returning in late 2011. I had transcripts forwarded. I did not seek other employment that summer as all other recent PhD graduates were doing. I continued working as the SCSU Field Station Director during the summer of 2012. I was simply never given any formal document or indication of reappointment as faculty by letter, oral agreement or written contract. I had no choice but to take an interim and non-permanent post doc position at the last minute.

That day, Dr. Simmons was required to take the only position offered to her, which was an interim position with another institution, return to SCSU without a firm employment offer, or become unemployed. Simmons Test. at -179:7-9, R. p. 246, lines 7 – 9.

It is not disputed in the record that Dr. Simmons fulfilled all the conditions of the Grant during her time at Clemson and performed her job for SCSU as Field Director of SRESFS.

Dr. Simmons advised SCSU that she would graduate with a Ph. D. in the Spring of 20l2 and initiated the process of having her transcripts sent to SCSU. Simmons Test. 162:18-163:12, R. p. 229, line 18 – p. 230, line 12. In early 2012, she saw the statewide news coverage of the issues occurring at SCSU at that time and spoke to an employee of SCSU she knew about this situation. Simmons Test. 166:8-18, R. p. 233, lines 8 – 18. This caused her to become concerned about the financial ability of Plaintiff to offer her a position for the Fall but did not dissuade her from her hopes to return and teach minority engineering students. *Id.* ln April of 2012 Dr. Simmons received an e-mail from SCSU discussing her course schedule for the following semester and she was on the list. Simmons Test. 198:7-199:19, R. p. 265, line 7 – p. 266, line 19. This gave her some indication that of SCSU's ability to contract with her. *Id.* However, no contract was forthcoming. She continued in her role as SRESFS Field Director during summer semester 2012. Simmons Test. at 163:22-24, R. p. 230, lines 22 – 24. She was working for SCSU at their Aiken facility during the period that SCSU failed to provide a contract for Fall 2012.

During her four-year prior employment with SCSU as a faculty member, she had always received a written employment contract well before the beginning of the academic year and then always signed it before the start of classes. Simmons Test. at 151:10-12, R. p. 218, lines 10 – 12. Deborah Darby testified that it would be required for someone to send a contract to a professor. Darby Test. at 27:12-13, R. p. 138, lines 12 – 13. Not surprisingly Ms. Darby testified that Dr. Simmons would need a contract if she was working as a faculty member. Darby Test. at 37:1-2, R. p. 140, lines 1 – 2. Dr. Simmons sent the finalized and formal Clemson transcripts to SCSU in July of 2012. Simmons Test. 162:18-163:12, R. p. 229, line 18 – p. 230, line 12. No contract from SCSU was ever sent or in any way

communicated to her. Simmons Test. 157:15-158:6, R. p. 224, line 15 – p. 225, line 6. Defendant was never called by her Department head or academic affairs regarding her employment in June, July or the first half of August 2012. Naturally, given the financial distress in the news, she became concerned SCSU could not contract with her. Simmons Test. 170:3-5. She spoke of this with her faculty advisor at Clemson, Dr. Julie Martin, in early August and Dr. Martin was able to find an interim grant position for a year with Virginia Tech. Simmons Test. 170:1-171:4, R. p. 237, line 1 – p. 238, line 4. Defendant e-mailed her Dr. Okafor that she had not been given a contract, she was distressed and had to take another position. Simmons Test. 172:4-5, R. p. 239, lines 4 – 5. The interim position with Tech required a formal acceptance on the Aug. 23 and Dr. Simmons waited to formally accept to see what SCSU could do - relaying this fact to Dr. Martin. *Id*.

It is not disputed by SCSU that no appointment letter or contract was ever sent, offered, negotiated nor were material employment terms offered or verbally communicated to Dr. Simmons at any time. Simmons Test. 157:15-158:6, R. p. 224, line 15 – p. 225, line 6.The Department Head, Dr. Okafor, had written in an e-mail to Dr. Simmons on Aug. 17 that, "by the way, a lot [sic] of people have not yet received their 'contracts' so that should not discourage you." Okafor Test. at 70:22-71:4, R. p. 174, line 22 – p. 175, line 4. However, it is not disputed that Dr. Okafor had no actual knowledge of this assertion and testified later in deposition that he had no knowledge of the truth of this assertion. Okafor Test. at 85:19-88:4, R. p. 189, line 19 – p. 192, line 4. Ms. Darby, however, indicated that Dr. Simmons would need a contract if she was working as a faculty member. Darby Test. at 37:1-3, R. p. 140, lines 1 – 3.

So, where did the dispute arise? SCSU *never* offered her the yearly contract to return. A contract that had been always offered during Dr. Simmons's prior service as a faculty member. It is not disputed in the record that SCSU never sent an appointment letter, never offered Dr. Simmons a contract (written or otherwise), and never negotiated contract terms or indicated to her the offered terms of her employment. Simmons Test. 157:15-158:6, R. p. 224, line 15 – p. 225, line 6. What is disputed is after Dr. Simmons complied with all the terms of the Memorandum of Agreement and indicated that she was returning to SCSU was the Memorandum of Agreement breached.

ARGUMENTS

A. The Trial Court erred by not entering a remitter for damages above the only proven compensatory and consequential damages requested by the Plaintiff.

In her motion for a new trial or alternatively new trial *nisi remittitur*, Dr. Simmons requested the Court consider the excessiveness of the judgement that was in excess of what was requested by the Plaintiff. In South Carolina, post-trial relief in the form of motions for judgement notwithstanding the verdict, new trial, or new trial nisi are available to defendants claiming a verdict is excessive. *Gamble v. Stevenson*, 305 S.C. 104 (1991). And, a Trial Court may grant a new trial on the ground that the verdict is excessive. *Rush v. Blanchard*, 310 S.C. 375, 379 (1993) (*citing Brabham v. Southern Asphalt Haulers*, Inc., 223 S.C. 421 (1953)). Although a jury's determination of damages is entitled to substantial deference, the Trial Court should grant a new trial based on the excessiveness of the verdict "is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Id*. at 379–80. In this case, SCSU requested damages in the amount of $368,176.00.

SCSU Closing Argument at 103:12-17; 104:6-9. The jury awarded $414,260.00 – an excess of 12.5 % over what SCSU requested.

On August 12. 2017 Dr. Simmons submitted a motion to Judge Dickson for a new trial absolute or alternatively a new trial *nisi remittitur* pursuant to Rule 59, SCRCP. The Trial Court "did not give a charge on punitive damages to the jury and, therefore, the verdict could not contain punitive damages." D. Mem. M. Supp. New Trial at 2. The Court ruled that "I find there is ample evidence to support the jury's award of $414,260.00 as actual damages." Mar 27, 2020 Order at 4, R. p. 8. Note that this order was entered over *2.6 years after* the Trial Court heard the testimony. Dr. Simmons asserts that this ruling is in error for the following reasons.

The Trial Court noted that "[b]oth documentary evidence and testimony established that under SCSU's contract with Defendant, SCSU paid to Defendant or on her behalf the amount of $312,457.00. As Dr. Simmons argues below, a portion of the $312,457.00 was paid and to her for her duties as Director at the "SRESFS" and SCSU received their benefit of the bargain for those services. However, the award of $414,260.00 is also flawed because the $312,457.00 figure includes all actual and compensatory damages. Therefore the 12.5% excess has no basis in the evidence.

At trial SCSU's counsel walked the jury through the damages they were requesting:

> The facts clearly show that the, the understanding and expectations of Denise Simmons and state what they were in 2008, and the whole next four years, while State was paying, and it went -- it was, in total, in excess of $300,000, and we'll add up the exact numbers in a little bit on Denise Simmons' behalf.

SCSU Closing Arg. at 75:16-22, R. p. 294, lines 16 – 22. SCSU's counsel did just that.

> Now, y'all have the opportunity to consider damages that South Carolina State should be awarded, and the principal amount of the damages that we've really talked about most today is that lump sum payment. Darby testified that that

> lump sum payment is -- her, her part of that lump sum from the Title III funds was $134,000 -- one hundred and -- $134,157.

SCSU Closing Arg. at 101: 17-23, R. p. 320, lines 17 – 23. Then

> Now, Doctor Luke testified there were also State funds that were committed really at the recommendation of Doctor Ihekweazu, and that was 44,000 per year, and Doctor Luke testified they paid it for four years, and double check my math, but, but I did it -- it was $178,300. But you get a clear visual of the level of investment and commitment that South Carolina State had invested in Denise Simmons' education.

SCSU Closing Arg. at 101:24-102:6, R. p. 320, line 24 – p. 321, line 6. Finally, "State gave her professional leave for four years and paid over $300,000. I mean this is seven -- $312,000." Next, and most importantly, SCSU's counsel outlined any special damages:

> Now, you'll also have an opportunity to consider, under contract law, special damages, which are unique damages that are unique to the breach of the contract. You know, someone breaches a contract should know the other side will suffer.
>
> Now, we don't need to look very far to see what Doctor Simmons should have known the district would suffer if she didn't come back. They bargained for, you know, her to come back and expose the students to specialty areas, to teach students. Doctor Ihekweazu, Doctor Okafor, and Doctor Okafor I believe testified they couldn't replace her with a PhD faculty person that year. I suggest a reasonable measure of those special damages, what was suffered by State and its employees in having to cover her classes with students, it was institutional harm to State. A figure to put on not getting the benefit of the bargain that they have paid so dearly for would be one year of Doctor Simmons salary. That's what we were, of course, willing to pay Doctor Simmons to perform those functions, and that, that amount was $55,719, and that's from her P4 and her 2008 contract. The five -- so, lump sum damages, special damages.
>
> South Carolina State would respectfully submit that it's entitled to holding Doctor Simmons to her word to payments in this amount, to damages in this amount, which -- I haven't said what it is. Please, you know, double check my -- it's *$368,176*. I told you this was bad math, all this.
>
> But, again, ask yourselves what do the facts add up to. That's what you're here for.

SCSU Closing Arg. at 102:16-103:17, R. p. 321, line 16 – p. 322, line 17. "That is what we are here for." *Id*. In fact, Dr. Okafor testified that the did not replace Dr. Simmons with another

faculty member. Okafor Test. 72:5-10, R. p. 176, lines 5 – 10. Further, there was no testimony whatsoever about what costs SCSU incurred because Dr. Simmons did not return. Therefore, the measure of damages in this case are limited to what the parties agreed upon in the Memorandum of Understanding.

The damages requested by SCSU are as follows:

Item	Cost	Citation (all cites to SCSU Closing Statement)
SCSU's Title III expenditure	$ 134,157.00	R. p. 320, lines 17 – 23
SCSU State Funds	$ 178,300.00	101:24-102:6, R. p. 320, line 23 – p. 331, line 6
Special Damages	$ 55,719.00	102:16-103:17, R. p. 321, line 16 – p. 322, line 17
TOTAL	**$ 368,176.00**	102:16-103:17, R. p. 321, line 16 – p. 322, line 17

No other damages were in evidence. Punitive damages were not part of the jury instructions. The award of $368,176 includes the special damages requested by SCSU. In fact, the Trial Court never instructed the jury as to meaning or measure of special damages. There are only three mentions of special damages in the entire case all of which came from Plaintiff's counsel in closing arguments. *See* SCSU Closing Arg. at 102:16-18, R. p. 321, lines 16 – 18; 103:1-4, R. p. 322, lines 1 – 4; 103:10-11, R. p. 322, lines 10 – 11. As the Trial Court noted in its post-trial order, "An award of special damages for breach of contract only must rest on evidence from which a reasonably accurate conclusion regarding the amount of loss can be logically and rationally drawn." Mar. 27, 2020 Order at 2, R. p. 6. Again, "special damages" were not defined for the jury.

Further, the court instructed the jury that "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 supposed to have been in the minds of the parties at the time the contract was made." Jury Instructions at 135:20-24, R. p. 339, lines 20 – 24. The court issued no instruction for special damages. The Trial Court premised its denial of a new trial *nisi remittitur* that "evidence presented to the jury supports the jury's verdict in an amount of $312,457.00, as direct damages determined by the express terms of the contract." *Id*. The $312,457.00 figure included direct damages and special damages as demonstrated above. Any damage award above that amount does not "rest on evidence from which a reasonably accurate conclusion regarding the amount of loss can be logically and rationally drawn." Further, the verdict "is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives" because such an award was not supported by any evidence and in excess of the direct and special damages presented by SCSU. *Rush* 310 S.C. at 379–80. Further, a verdict is capricious if it is excessive and against the overwhelming weight of the evidence. *Beasley v. Ford Motor Company*, 237 S.C. 506 (1961). In this matter, much of the verdict amount is absent any supporting evidence in the record.

In replying to the Defendant's motion for a new trial, even the Plaintiff was confused as to what the damages where that it sought. "There is both documentary evidence and testimony establishing that under SCSU's contract with Defendant, SCSU paid to Defendant or on her behalf the amount of $312,457." Pl.'s Mem. Law Opp'n Def.'s Mot. New Trial at 2, R. p. 59. As shown below, a portion of this $312,457 was earned by Dr. Simmons for her service as Director at the SRESFS at Aiken, SC. Plaintiff pointed out that "it took SCSU two years to find and employ a Ph.D.-degreed replacement …." Meaning, SCSU did not hire a Ph.D. replacement or bear that cost. Also, no evidence was introduced to support any cost

incurred by SCSU after Dr. Simmons did not return to SCSU. SCSU speculates, and it is merely speculation, that the jury conjured up a cost for a replacement based on salaries. But no such replacement was in evidence, and again, SCUS did not bear that cost. Any speculative cost should not be charged to Dr. Simmons if SCSU did not incur that cost. Plaintiff's argument exposes the speculative nature of the jury verdict, one which is not based on the evidence.

Lastly, per the plain terms of the contract, only direct damages could be awarded: "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." Plaintiff's Trial Exhibit 1 (*emphasis added*). The document that Plaintiff asserts is binding between the parties only permits damages to the amount "expended" by SCSU. Pl.'s Trial Ex. 1, R. p. 377.

Therefore, Dr. Simmons requests that this Court remand the case to the Trial Court for a new trial *nisi remittitur* as requested in Dr. Simmons's motion.

B. The Trial Court erred by not entering a remitter for payments made to Dr. Simmons that she earned during her summer employment with SCSU.

During the summer semesters of 2008 through 2012, Dr. Simmons worked as the director at the SRESFS at the Savannah River Site in Aiken, SC. Deborah Darby, Administrative coordinator for SCSU, testified that Simmons was working for SCSU at the SRESFS:

> Q: And she was working summers. She was the director in the field station, correct, in Akin?
>
> A That's true.

Darby Test. at 37:45-6, R. p 138, lines 45 – 46. In addition, Dr. Stanley Ihekweazu, who at the time of the trial was the Interim Dean of the College of Science, stated that Simmons was employed as the Director of the SRESFS:

> Q All right. Now, Dr. Simmons also continued as the Environmental Field Station Director at the South Carolina State University program, right?
>
> A Right. You have to understand how the field station was. The field station, while Denise was at Clemson, we had employed somebody else, two staff members who were doing everything that she used to do while she was on campus; sending letters to students who were coming to do their summer -- interviewing them. So we relieved her of most of her responsibilities while she was -- she was exchanging emails telling them what to do and they were doing all of those on campus.
>
> Q In the summer she went to Akin and she directed that field camp, correct? I'm sorry, I said field camp, field station.
>
> A Field station, yes.
>
> Q And during the academic year, although certainly not full-time, she wrote grants and recruited students and did that kind of thing, too, correct?
>
> A I don't know about recruiting students. But we have staff members who were also working with her, because I was working in close proximity with them.

Ihekweazu Test. at 114:19-115:15, R. p 145, line 19 – p. 146, line 15. During those periods that she worked at the time, Dr. Simmons was working at SRESFS, and she was providing professional, faculty services for SCSU. SCSU argued for damages for all monies provided to Dr. Simmons during the period in question. In doing so, SCSU included monies that were earned by Dr. Simmons during the summer periods and during her part-time efforts during the academic year. At least for her efforts as director of SRESFS, SCSU received its benefit of the bargain. Therefore, a portion of the damages designated by SCSU were rightfully earned by Dr. Simmons and should not have been included in damages.

Therefore, the Defendant respectfully requests that this Court order a new trial *nisi remittitur* so that the proper measure of damages may be determined.

C. The Trial Court erred by not providing a jury instruction for "special damages" after Plaintiff's counsel argued for "special damages."

The Trial Court charged the jury with the definition of actual damages:

> Actual damages are damages to compensate the Plaintiff and put them as closely as possible in the same position they were in before the breach of contract. In other words, actual damages are the actual losses and expenses which the Plaintiff has suffered because the Defendant breached the contract. Generally actual damages are the out-of-pocket costs actually paid by the Plaintiff as a result of the breach of the contract, and a gain above the costs that would of been realized if the contract had been performed;

Jury Instructions at 136:4-12, R. p 340, lines 4 – 12, and unjust enrichment:

> If you find there is a basis for unjust enrichment, the measure of recovery is that amount the Defendant has been unjustly enriched at the expense of the Plaintiff. Unjust enrichment is usually a requisite for the enforcement of a quasi contract. If there is no basis for finding an unjust enrichment, there is no basis for restitution. Unjust enrichment is a term used in the law to characterize the result or effect of failure to make restitution where the circumstances indicate an equitable obligation to account therefore. The general principle of the law is that a person should not be permitted to enrich himself unjustly at the expense of another, but should be required to make restitution of and for property of benefits received or retained where it is equitable and just that such restitution be made. Unjust enrichment is the unjust retention of a benefit to be loss of another or the retention of money or property or -- of another against the fundamental principles of justice or equity and good conscious.

Id. at 136:20-137:23, R. p 340, line 20 – p. 341, line 23.

The Trial Court never instructed the jury on consequential damages, or any other "special damages." There are only three mentions of "special damages" in the entire case before the jury. All these mentions came from Plaintiff's counsel in closing arguments. *See* SCSU Closing Arguments at 102:16-18, R. p 321, lines 16 – 18; 103:1-4, R. p 322, lines 1 – 4; 103:10-11, R. p 322, lines 10 – 11. This term was not defined for the jury by the Trial Court. Indeed, the Defendant proposed an instruction to the Trial Court that would have provided that information for the jury.

> 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 the 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 10, R. p 128.

Given that the actual damages are significantly lower than the verdict, the jury was certainly confused about "special damages" by the mention of such damages in closing and no instruction from the Trial Court.

The jury verdict did not indicate whether the defendant was found liable for breach of contract, a breach of contract accompanied by a fraudulent act, or both. Therefore, it is impossible to determine how the jury measured damages except that the jury returned a verdict significantly in excess of the damages proposed by Defendant's counsel in closing arguments. A jury instruction was not provided for consequential damages and the jury was at best uninformed about the measure of those damages. "The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required." *Moore v. Moore*, 360 S.C. 241, 255 (Ct. App. 2004). Here, the only thing that the jury could do is speculate as to what "special damages" could be. Further, "[w]here a plaintiff seeks special damages in addition to his general damages, he must plead and prove both the fact of damage and the amount of damage. *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 528 (Ct. App. 1988)(internal citations omitted). Assuming *arguendo* that the Plaintiff proved damages described in its closing remarks, any damages in excess of that figure were not proven or even requested.

Therefore, the Defendant respectfully requests that a new trial be ordered as the verdict was unclear as to which cause of action Dr. Simmons was found liable. In the alternative, Dr. Simmons respectfully requests a new trial new trial *nisi remittitur*.

D. The Trial Court erred by not dismissing the breach of contract accompanied by a fraudulent act claim after Plaintiff withdrew the fraud claim

Regarding the claim of breach of contract accompanied by a fraudulent act, the Plaintiff held the burden of proving the elements of that claim: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Armstrong v. Collins*, 366 S.C. 204, 223 (Ct. App. 2005).

The Trial Court erred in not dismissing this complaint because SCSU's argued that the fraud occurred at the formation of the contract, not at the time of an alleged breach. SCSU pled "[t]he Plaintiffs acts constitute dishonesty in fact, unfair dealing, and/or fraudulent conduct because Defendant *entered into the MOA* with *no intent* to fulfill the foregoing obligations." Complaint at ¶ 39 (emphasis added). SCSU failed to plead a cognizable tort, and SCSU's third cause of action should have been dismissed when requested by Dr. Simmons at trial.

Further, "[f]raudulent intent is normally proved by circumstances surrounding the breach." *Armstrong* 366 S.C. at 223. "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 54 (Ct. App. 1985). The Plaintiffs never proved fraudulent intent on the part of Dr. Simmons. If anything, SCSU's negligence in not providing a contract for the 2012-2013 academic year forced her to find employment at the last minute:

> Q All right. By August of 2012, did you begin to get concerned that you might not be hired by South Carolina State University?
> A By which day?
> Q August.
> A Yes.
> Q Why was that?
> A Because we're fitting what in my mind was the drop dead. The drop dead date is always August 15th or August 16th. Yeah. So I was beginning to think this may not occur.
> Q Did you take any action for a backup plan?

A I began speaking with my adviser about how I was concerned.
Q Who was your adviser?
A Julie Martin.

Dr. Julie Martin corroborated Dr. Simmons's concerns:

Q When did you first decide that maybe Dr. Simmons could fill that position?
A It had to have been late July or early August somewhere in there of 2012. My concern for her, and the reason that I suggested this, was because she didn't have a contract for the upcoming year. And in my experience at three universities, if you didn't have a contract by that time of year you wouldn't have a job for the next year.

In fact, Dr. Simmons was open to returning to SCSU even after it failed to provide a contract during August 2012:

Q Did anyone ever call you or discuss with you or email you or communicate in any way with South Carolina State University about the following academic year?

A No.

Q What was the next -- after -- did you discuss or have email exchanges with Dr. Okafor and some others in September in 2012? Do you recall that?

A I do recall that.

Q Did you intend to leave open the possibility of your returning at some point?

A It was always open in my mind.

Q In conversations, did you make that clear to – over the phone with Darby and Dr. Okafor?

A Yes. My email says, "We need to discuss employment contracts."
Q Would you have returned the year, I guess would be academic 13/14, had you been asked to and had you been given a contract to do so?

A Absolutely.

Simmons Test. at 180:16-181:9, R. p 247, line 16 – p. 248, line 9. There is no evidence in the record that indicates any fraudulent act or intent at or near the time of the breach. In fact, Dr.

Simmons indicated that she was willing to return to SCSU after August 23, 2012. In fact, Dr. Simmons testified repeatedly that she intended to return to SCSU once she was given a contract.

In *Zinn v. CFI Sales & Mktg., Ltd*, the South Carolina Court of Appeal indicated that "'Fraud,' in this sense, 'assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." 415 S.C. 93, 110–11 (Ct. App. 2015) (quoting *Sullivan v. Calhoun,* 117 S.C. 137, 139 (1921)). "Breach of contract accompanied by a fraudulent act ... requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. Such proof may or may not involve false representations." *Ball v. Canadian Am. Express Co.,* 314 S.C. 272, 276, (Ct. App. 1994)(citation omitted). "Fraudulent intent is normally proved by circumstances surrounding the breach."

The Trial Court erred by leaving so much information regarding the fraudulent intent cause of action to the imagination of the jury that they could not begin to understand this tort. The Trial Court did not even distinguish this tort from the contract cause of action. Indeed, it is not clear what this Court meant that the tort "assumes so many hues and forms." This Court has held that "[o]ur law has long recognized a plaintiff's right to recover punitive damages for breach of contract accompanied by a fraudulent act. *See Welborn v. Dixon*, 70 S.C. 108 (1904). However, mere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages." *Floyd* 287 S.C. at 53. This Court has recognized the damages for this tort as punitive, a penalty for particularly egregious breaches that included fraud. No such fraud occurred here, and SCSU did not request any punitive damages. The Trial Court did not instruct the jury properly about this or any tort action. Also, the Trial Court erred by not

dismissing this claim, and the jury was certainly confused about this tort cause of action combined with a contract claim.

For this reason, Dr. Simmons requests that this Court order a new trial on the contract claims.

E. No evidence supports a reasonably jury finding that the parties entered a contract given that the contract contained no mention of compensation, a term the Trial Court deemed essential for contract formation.

In the case, the contract that the jury considered had no mention of compensation and was therefore unenforceable. The jury's factual findings can be disturbed only if "a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Associates, Ltd.* 266 S.C. at 85.

In the jury instruction regarding validity of the contract indicated that

> in a contract for services, two essential terms are the scope of the work to be performed, and *the amount of compensation*. Regardless of intent, an agreement which leaves open material terms is unenforceable. Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement because of the difficulty of administering the agreement.

Jury Instructions at 134:2-8, R. p. 338, lines 2 – 8 (emphasis added). The contract that SCSU is attempting to enforce is the Memorandum of Agreement between South Carolina State University and Denise S. Grant. Complaint at Pl.'s Trial Ex. 1, R. pp. 376 - 378. This document does not contain any mention or even a hint of the amount of compensation. Further, "a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Associates, Ltd.* 266 S.C. at 85. Therefore, under the jury instruction provided by the Trial Court, this contract for services is void. Therefore, no evidence reasonably supports the jury's findings. No evidence reasonably supports the jury's finding that there was a contract formed. The jury's factual findings can be disturbed only if "a review

of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Associates, Ltd.* 266 S.C. at 85. This case warrants such a disturbance.

For this reason, Dr. Simmons requests that this Court enter an order voiding the contract or in the alternative remand for a new trial.

CONCLUSIONS

Dr. Simmons has shown above that the contract SCSU has attempted to enforce is void for lack of an essential term – compensation. Further, Dr. Simmons has shown that even if the contract is enforceable, the damages awarded by the jury far exceed the damages specifically bargained for in the contract. Lastly, she has shown that the damages awarded by the jury far exceed the damages requested by SCSU, which included direct and consequential damages. For these reasons, Dr. Simmons respectfully requests that this Court

A. Vacate the jury verdict or remand this case for a new trial; or alternatively,

B. Vacate the jury verdict and remand the case for a new trial *nisi remittitur.*

Respectfully submitted, December 3, 2020,

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

s/ Martin S. High
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SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 3rd day of December, 2020, a true and correct copy of the above and foregoing was _____ hand-delivered, __X__ mailed via USPS Priority mail with the proper postage to the following, and/or __X__ emailed pursuant to Amended Order (Case No. 2020-000447, SC Supreme Court) at (g)(3) to the following:

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