

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Dec 03 2020

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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

App. Case No. 2020-000671

South Carolina State University,

Respondent,

v.

Denise Simmons,

Appellant.

FINAL REPLY BRIEF OF APPELLANT¹

Respectfully submitted,

s/ Martin S. High

Martin S. High,

Martin S. High, P.C.

OK Bar #20725, SC Bar #102735,

TX Bar # 24108819

PO Box 33190

Clemson SC 29733-3190

Phone: 864.300.2444

Fax: 866.232.1096

Email: marty@martyhigh.com

ATTORNEY FOR APPELLANT,

Denise Simmons

¹ The Appellant filed a Motion for an Order to Settle Record and Stay Appellate Proceedings on Oct 27, 2020 describing inadequacies in the record as provided by the Orangeburg Ct. Clerk. Specifically, the record is missing numerous trial exhibits. As of the filing of this reply, Appellant's motion has not been adjudicated by this Court.

TABLE OF CONTENTS

Table of Contents..... 2

Table of Authorities..... 3

Arguments 4

 A. SCSU ignores the plain reading of the contract in arguing that the damages were not excessive.4

 B. SCSU’s citations to the record to support the proposition that it did not seek monies properly earned by Dr. Simmons are inapposite.6

 C. SCSU’s claim that a “Special Damages” instruction was provided is incorrect and without evidentiary support.....7

 D. SCSU’s cited case law supports a directed verdict and demonstrates the error in not dismissing the breach of contract accompanied by a fraudulent act.10

 E. SCSU failed to argue that the Trial Court’s jury instructions logically lead to a finding of no contract formation.11

CONCLUSIONS..... 13

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204 (Ct. App. 2005).....10

Brabham v. Southern Asphalt Haulers, Inc., 223 S.C. 421 (1953).....5

Edens v. Laurel Hill, Inc., 271 S.C. 360 (1978)11

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51 (Ct. App. 1985).....10

Rush v. Blanchard, 310 S.C. 375 (1993)5

Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81 (1976).....13

COURT RULES

Rule 51, SCRCP.....9, 10

ARGUMENTS

The Appellant, Dr. Denise Simmons, hereby submits here brief in reply to the Respondent's Initial Brief filed on Oct. 22, 2020. As the ten-day period for reply ended on a Sunday, that day is excluded from time computation pursuant Rule 263, SCACR. Therefore, this brief should be considered timely.

- A. SCSU ignores the plain reading of the contract in arguing that the damages were not excessive.

SCSU asserts that

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.

Resp. Br at 13. However, the purported contract precisely defined what damages were contemplated by the parties:

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. pp. 376 - 378.² The damages contemplated by the parties were reimbursement of tuition and fees, which is the \$134,157 amount asserted by SCSU. In fact, the contract only referenced these specific damages "if the course is not successfully

² The document identified as "Exhibit 1" in the record obtained from the Orangeburg Ct. clerk is the "Memorandum of Agreement Between South Carolina State University and Denise S. Grant." Exhibit 2 included documents titled 1) "Faculty Development Program Cover Sheet", numerous "Requests for Support," and "FACULTY DEVELOPMENT PROJECT/PLAN."

completed.” It is undisputed that Dr. Simmons completed her course of study. Most importantly, the damages asserted by SCSU and awarded by the jury are not commensurate with the language of the purported contract, a document drafted and agreed to by SCSU.

In her motion for a Memorandum in Support of Her Motion for a New Trial or, in the Alternative, New Trial Nisi Remittitur, R. pp. 50 – 56. (hereinafter “Mot. New Trial”), Dr. Simmons requested the Court consider the excessiveness of the judgement that was in excess of what was requested by the Plaintiff. Although a jury’s determination of damages is entitled to substantial deference, the Trial Court should have granted a new trial based on the excessiveness of the verdict that “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.” *Rush v. Blanchard*, 310 S.C.375, 379 (1993) (citing *Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421 (1953)). In this case, SCSU requested damages in the amount of \$368,176.00. SCSU Closing Argument at 103:12-17, R. p. 322, lines 12 – 17. The jury awarded \$414,260.00 – an excess of 12.5 % over what SCSU requested and far more than the damages (stipend, tuition, and fees) specified in the putative contract. The damages requested by SCSU are as follows:

SCSU's Title III expenditure	\$ 134,157.00	R. 320, lines 17-23.
SCSU State Funds	\$ 178,300.00	R. p. 320, line 24 - p. 321, line 6.
Special Damages	\$ 55,719.00	R. p. 321, line 16 - p. 322, line 17.
TOTAL	\$ 368,176.00	R. p. 321, line 16 - p. 322, line 17.

Only the \$134,157.00 was contemplated in the putative contract as damages.

Therefore, Dr. Simmons renews her argument that the Trial Court erred by not entering a remitter for damages above the only proven compensatory and consequential damages

requested by SCSU. She requests that this Court remand the case to the Trial Court for a new trial or a new trial *nisi remittitur*.

B. SCSU's citations to the record to support the proposition that it did not seek monies properly earned by Dr. Simmons are inapposite.

Dr. Simmons asked this Court to order a new trial or new trial *nisi remittitur* as the damages that SCSU requested included money that she properly earned during her employment with SCSU in the summer months. In contrast, SCSU asserts that "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." Resp. Br at 11-12. This is not correct. The portions of the transcript cited by SCSU are irrelevant to SCSU's proposition:

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

Q Okay. So once that period of leave is over her base salary would go back in to full affect?

A Right, definitely.

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

A \$55,719.

Q And there's some account listed below under the

Dr. Luke Test. at 127:15-23, R. p. 154, lines 15 – 23. This testimony is not even remotely related to the monies earned by Dr. Simmons during the summer months.

In addition, SCSU asserted that "SCSU's counsel did not argue to the jury that these summer payments to Appellant should be considered as damages" Resp. Br at 12 (citing SCSU closing, p. 102, line 24 – p. 103 line 3, R. p 321, line 24 – p. 322, line 3). What SCSU's counsel said in this cited section of the closing statement was

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. Apply common sense to the evidence that you've heard. Ask yourself what do, what do the facts add up to. They add up to Ms. Simmons knew she should of come back to South Carolina State and teach, knew she had a job, knew that she would at least not make less than what she made in 2008, knew what her course schedule was, what she would be doing when she came back, and knew

SCSU Closing Argument 102:24-103:25, R. p 321, line 24 – p. 322, line 25. It is not clear what proposition SCSU was attempting to support with this citation, but again it has nothing remotely connected to the idea that “SCSU was not seeking as damages Dr. Simmons’ salary for work during the summers” Resp. Br at 11-12. Therefore, Dr. Simmons asserts that SCSU’s assertion fails that it did not ask for or receive in damages Dr. Simmons’s earned salary for the summer.

Again, Dr. Simmons asserts that the Trial Court erred by not entering a remitter for payments that Dr. Simmons earned during her summer employment with SCSU. The evidence propounded by SCSU is inapposite. Dr. Simmons renews her request that this Court remand the case to the Trial Court for a new trial or a new trial *nisi remittitur*.

C. SCSU’s claim that a “Special Damages” instruction was provided is incorrect and without evidentiary support.

SCSU’s conclusory statement that “[c]onsequently, 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,” Resp. Br at 13, has no support in the evidence.

At no time did the Trial Court refer to “Special Damages.” This term was used repeatedly by SCSU in its closing statement which certainly confused the jury. SCSU’s citation to the relevant jury instruction does not define “Special Damages” but rather defines damages to be “that may be reasonably suppose [sic] to have been in the minds of the parties at the time the contract was made” *Id.* at 13 (*citing* Jury Instructions at 135:20 - 136:3, R. p 339, line 20 – p 340, line 3). The paragraph that follows the SCSU cited transcript defines actual damages, and which is followed by an unjust enrichment instruction. The Trial Court never instructed the jury about “Special Damages.” The Trial Court never instructed the jury about “Consequential Damages.” A search of the transcript proves this out. The closest jury instruction to consequential damages was the following instruction

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.

Jury Instructions at 135:8-11, R. p. 339, lines 8 – 11. Although, the term “proximately” was never defined. Also,

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 [sic] to have been in the minds of the parties at the time the contract was made.

Jury Instructions at 135:20-25, R. p. 339, lines 20 – 25.

Most importantly, the parties precisely defined damages as

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. The parties agreed that if the contract was breached, Dr. Simmons would pay for all or a portion of "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" was the extent to the damages. *Id.* No "Special Damages" were contemplated. Dr. Simmons's post-trial motion argued this point. *See generally* Mot. New Trial, R. pp 50 – 56.

SCSU's reliance on Rule 51, SCRCP is also misplaced. This rule states:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. 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. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 51, SCRCP (emphasis show portions omitted from SCSU's brief). The record as it currently exists indicates that the trial court did not "inform counsel of its proposed action upon the requests prior to their arguments to the jury."³ The trial transcript indicates that the trial court moved from closing arguments, shown ending at Jury Instructions at 121:18, R. p. 325, line 18, and directly began charging the jury. The Trial Court failed to "inform counsel of its proposed action" before arguments as required by Rule 51, SCRCP.

Contrary to SCSU's contention, the trial court never provided any instructions regarding "Special Damages" and assuming *arguendo* that such an instruction was given, it would have been improper. SCSU is not entitled to "Special Damages" given the plain reading

³ SCSU has not cited to jury instructions outside of the trial transcript or designated any matter regarding such written jury instructions in the record.

of the purported contract. The result was that the Jury went far above the damages set out in the contract as discussed *supra*.

Dr. Simmons renews her assertion that the Trial Court erred by not providing a jury instruction for “special damages” after Plaintiff’s counsel argued for “special damages” and by violating Rule 51, SCRPC. Dr. Simmons requests that this Court remand the case to the Trial Court for a new trial or a new trial *nisi remittitur*.

D. SCSU’s cited case law supports a directed verdict and demonstrates the error in not dismissing the breach of contract accompanied by a fraudulent act.

Without waiving her arguments in her brief not addressed by SCSU, she points out that SCSU failed to address the argument that SCSU attempted to manufacture a new, unique tort not recognized by this Court or the South Carolina Supreme Court. SCSU pleaded “[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). This Court defined the elements of breach of contract accompanied by a fraudulent act as “(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).” SCSU pleaded that a fraudulent act occurred at the time of the formation of the purported contract. Although Dr. Simmons vigorously disputes that she committed any fraudulent act, SCSU did not even plead that such an act occurred *accompanying* the breach. “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) (emphasis added). For this reason, the Trial Court erred by not dismissing the breach of contract accompanied by a fraudulent act claim when requested by Dr. Simmons at trial.

Trial Testimony of SCSU’s dismissal of fraud claim at 57:11-60:11, R. p. 283, line 11 – p 286, line 11.

Dr. Simmons reasserts that the Trial Court erred by not dismissing the improperly pleaded breach of contract accompanied by a fraudulent act claim. She requests that this Court order a new trial on just the contract claims.

E. SCSU failed to argue that the Trial Court’s jury instructions logically lead to a finding of no contract formation.

SCSU cites *Edens v. Laurel Hill, Inc.* for support that the jury’s verdict that a contract was formed. 271 S.C. 360, 364 (1978). However, the standard set out in *Edens* for “a mutual manifestation of assent to the essential terms of price, time and place” was not the instruction received by the jury. *Id.* Instead, the law presented to the jury was 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).

Looking at the “Memorandum of Agreement between South Carolina State University,” Pl’s Ex. 1, R. pp. 21–23,⁴ the document called for the following elements consideration:

⁴ It is not clear from the current unsettled record that the contract in question is Pl’s Ex. 1, but Dr. Simmons does not dispute that this document was signed by Dr. Simmons (Denise Grant), Stanley N. Ihakweazu, and Kenneth D. Lewis.

Consideration	Party Receiving Consideration
A.1 Official grade reports must be submitted for all courses taken prior to reimbursement.	SCSU
A.2 A written report detailing progress toward the accomplishments of the objectives outlined in the Professional Improvement Plan must be submitted after each period of enrollment.	SCSU
A.3 If activities other than courses are pursued, a written summary detailing benefits derived and the specific skills acquired from participation must be submitted prior to reimbursement. In addition, a comprehensive report providing similar information must be submitted upon the conclusion of the Professional Improvement Plan.	SCSU
B.1 For all courses pursued, a satisfactory grade must be obtained in order to receive reimbursement.	SCSU
B.2 Any changes or modifications In the Professional Improvement Plan must have the approval of all individuals who originally signed the Plan.	SCSU
B.3 Failure to complete the Plan as agreed to without justifiable cause may result in mandatory repayment of all funds received.	SCSU
B.4 Failure to comply with the reporting requirement outlines in "A" above or other requirement as may be instituted in the future, as deemed necessary, may result in termination of the agreement and/or mandatory repayment of all funds received.	SCSU
C. 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 of time equivalent to the amount of time for which financial assistance 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.	SCSU

Nowhere in this document that SCSU is attempting to enforce as a contract is there any consideration flowing to Dr. Simmons. SCSU will argue that other documents show consideration, but the only other document discussed above is the “Professional Improvement Plan.” In the record currently available, a document entitled “Faculty Development

Project/Plan” is provided that is presumably Plaintiff’s Trial Exhibit 2.⁵ It is not clear whether these are the same documents. In any case, this “Faculty Development Project/Plan” discusses Dr. Simmons’s rationale for pursuing an advance degree but does not include any consideration flowing to her.

The contract that the jury considered had no mention of compensation and was therefore unenforceable. 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. 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 Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85 (1976).

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 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 to

⁵ SCSU has not identified Pl’s. Ex. 2 in its designation of matter filed on Oct 22, 2020, and SCSU has not provided its exhibits identified in its DOM to Dr. Simmons as requested.

- A. Dismiss the case for lack of an enforceable contract;
- B. Vacate the jury verdict and remand this case for a new trial; or
- C. Vacate the jury verdict and remand the case for a new trial *nisi remittitur*.

Respectfully submitted, December
3, 2020

s/Martin S. High
Martin S. High,
Martin S. High, P.C.
OK Bar #20725, SC Bar #102735,
TX Bar # 24108819
PO Box 33190
Clemson SC 29733-3190
Phone: 864.300.2444
Fax: 866.232.1096
Email: marty@martyhigh.com
ATTORNEY FOR APPELLANT,
Denise Simmons

CERTIFICATE OF COUNSEL

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

RECEIVED
Dec 03 2020
SC Court of Appeals

s/ Martin S. High
Martin S. High