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

---

App. Case No. 2020-0006713

South Carolina State University, Respondent,

v.

Denise Simmons, Appellant.

RECORD ON APPEAL

Respectfully submitted, December 1, 2020

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Martin S. High, P.C.
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INDEX[1]

Page

Index ..... This Page

ORDERS

Order (denying new trial and new trial nisi remittitur) 4

JUDGMENTS

Verdict 10

PLEADINGS

Complaint 12

Answer and Counterclaim 25

SCSU's Answer to Counterclaim 32

Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment 35

Defendant's Memorandum in Support of Her Motion for a New Trial or, in the Alternative, New Trial Nisi Remittitur 49

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for New Trial 57

Plaintiff's Proposed Jury Charges 63

Defendant's Proposed Jury Charges 116

TRANSCRIPTS

Testimony of Ms. Deborah Darby 135

Direct Examination 136

Cross Examination 139

Testimony of Dr. Stanley Ihekweazu 141

Direct Examination 142

Cross Examination 144

[1] For the convenience of the Court, the record has been constructed with bookmarks accessible from a PDF reader. In addition, the page entries to the right of the Index are links to the first the relevant page in the document.

Testimony of Dr. Larry Luke.....147
Direct Examination.....148
Testimony of Dr. Kenneth Okafor.....164
Direct Examination.....165
Cross Examination.....181
Testimony of Ms. Gloria Pyles.....198
Direct Examination.....199
Testimony of Dr. Denise Simmons.....210
Direct Examination.....211
Cross Examination.....250
Redirect Examination.....278
SCSU's dismissal of fraud claim.....282
SCSU Closing Arguments.....287

JURY CHARGES

Jury Instructions.....323

EXHIBITS

Plaintiff's Trial Exhibit No. 1.....346
Plaintiff's Trial Exhibit No. 3.....383
Plaintiff's Trial Exhibit No. 5.....385
Plaintiff's Trial Exhibit No. 7.....389
Plaintiff's Trial Exhibit No. 8.....392
Plaintiff's Trial Exhibit No. 9.....394
Plaintiff's Trial Exhibit No. 10.....396
Plaintiff's Trial Exhibit No. 11.....398
Plaintiff's Trial Exhibit No. 12.....406
Affidavit of Denise Simmons.....409

Certificate by Counsel.....414

Order denying new trial and new trial nisi remittitur

ELECTRONICALLY FILED - 2020 Mar 27 10:39 AM - ORANGEBURG - COMMON PLEAS - CASE#2015CP3800553

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
South Carolina State University,	)	
	)	
Plaintiff,	)	C.A. No. 2015-CP-38-553
	)	
vs.	)	**ORDER**
	)	
Denise Simmons,	)	
	)	
Defendant.	)	
	)	

THIS MATTER IS BEFORE THE COURT on the August 10, 2017 motion of Defendant, Denise Simmons, 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 are grossly in excess of that which the evidence supported after a two-day trial on July 31, 2017, and August 1, 2017, in Orangeburg County Circuit Court. Plaintiff South Carolina State University ("SCSU") submitted a memorandum on November 20, 2017, in opposition to Defendant's motion for a new trial. Defendant Simmons submitted a memorandum of law supporting her motion on November 29, 2017. The Court has reviewed the submissions of both parties and the trial transcript. I find that the jury's verdict in favor of SCSU in the amount of $414,260.00 is well supported by the evidence admitted at trial and not a product of undue passion or speculation.

A. Standard of Review

The decision to grant or deny a motion for a new trial rests within the discretion of the trial judge, as the trial judge is in a unique position "…to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the Plaintiff in terms of damages." *Burke v. AnMed Health*, 710 S.E.2d 84, 88-89 (S.C. App. 2011). With respect to the specific issues of damages awarded by a jury the Court must do the following:

> 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

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> 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 (S.C. App. 1993) (quoting *Brabham v. Southern Asphalt Haulers, Inc*., 76 S.E.2d 301, 306 (S.C. 1953). 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. *The Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc*., 371 S.E.2d 532, 536 (S.C. 1988).

B. Ample Evidence Supports the Jury's Verdict

Both 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. The contract further expressly provided that, in the event of Defendant's breach of the contract by not remaining in SCSU's employ, the entire amount paid to her or on her behalf would be repaid by Defendant to SCSU. The 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.

Further, under contract law principles, allowable damages also include all amounts necessary "to place the nonbreaching party in the position he would have enjoyed if the contract had been performed." *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc*., 399 S.E.2d 8, 12 (S.C. App. 1990). The fact that Defendant's continued employment upon completion of her Ph.D. degree was within the contemplation of both SCSU and the Defendant is clearly established, again, by the express language of the parties' agreement:

> FACULTY DEVELOPMENT PROJECT/PLAN
> *Major goals or objectives*:
> My entire objective for pursuing the PhD degree has always been to bring my experience back to South Carolina State University (SCSU) with the goal of exposing SCSU students to my areas of specialty, authoring scholarly works on sustainable

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> development and engineering education, recruiting students to attend the University and enhancing the academic research capabilities of the University.

Likewise, that Defendant's continued employment at SCSU was part of SCSU's "benefit of the bargain," the denial of which would as a natural consequence cause SCSU to suffer a loss, is manifest in the contract. Defendant's own correspondence in connection with the parties' agreement states, "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."

Although there is no exact methodology for placing a dollar value on SCSU's loss in connection with Defendant's refusing to remain in SCSU's employ, the additional verdict amount of $101,803.00 ($414,260 - $312,457 = $101,803), as may have been determined by the jury, is reasonable and logical in light of the evidence, and not speculative. Indeed, the testimony indicated (and Defendant even argued to the jury) that it took SCSU two years to find and employ a Ph.D.-degreed replacement for the position abandoned by Defendant at SCSU. Additionally, the value of Defendant's services as a college professor with a Ph.D. is reasonably established by the annual base salaries offered to her by SCSU ($55,719/year) and Virginia Tech ($82,500/year). Accordingly, a jury determination of the loss to SCSU in the range of $55,719.00 at the low-end (for a one year loss of service at the lower salary amount) to $165,000.00 at the high-end (for two years loss of service at the higher salary amount), would be reasonable, logical, and wholly based on the evidence. *See, e.g., Perry v. Green*, 437 S.E.2d at 153. The jury verdict amount possibly attributable as special damages of $101,803.00 falls almost exactly within the middle of this range, reflects the jury's logical and dispassionate evaluation of the evidence and valuation of SCSU's loss as a natural consequence of Defendant's abandonment of her position in breach of her contractual obligation to SCSU.

SCSU's claim of breach of contract accompanied by a fraudulent act, a tort claim for which the jury may have properly awarded actual damages consistent with the principles of tort

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law, was also submitted to the jury. In tort, actual or compensatory damages may be awarded by the jury. Actual damages include compensation for all injuries which are naturally the proximate result of the Defendant's wrongful conduct. The measure of actual damages is the amount needed to compensate SCSU for the losses proximately caused by Defendant's wrong so that SCSU will be in the same position it would have been if there had been no wrongful injury. *Austin v. Specialty Transportation Services, Inc*., 594 S.E.2d 867, 874 (S.C. App. 2004).

The fundamental question before the Court with regard to actual damages is whether "there is any evidence to support the damages award…." *Id*. I find there is ample evidence to support the jury's award of $414,260.00 as actual damages. SCSU invested at least $312,457.00 in Defendant's education with the express expectation of, and in exchange for, Defendant agreeing to continue to work for SCSU and bring her expertise to SCSU and its students, faculty, and programs. Defendant abruptly and on the eve of a new school year wrongfully abandoned her commitment to SCSU, thereby proximately causing loss and injury to SCSU. A jury verdict of $414,260.00, as actual damages suffered by SCSU, is reasonable and supported by evidence presented at trial.

I. CONCLUSION

For the foregoing reasons, the jury's verdict is properly supported by the evidence, under either contract law or tort law. Defendant's motion for a new trial is denied, and the jury's verdict in this case is affirmed. Judgment in the amount of $414,260.00, is hereby entered in favor of SCSU against Defendant Simmons.

IT IS SO ORDERED.

_____
Edgar W. Dickson
Judge, First Judicial Circuit

_____, 2020

Orangeburg, SC

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Orangeburg Common Pleas

Case Caption: South Carolina State University VS Denise Simmons

Case Number: 2015CP3800553

Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153

Verdict

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG South Carolina State University, PLAINTIFF, v. Denise Simmons, DEFENDANT.	)	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT C/A No.: 2015-CP-38-00553 **VERDICT**

We the jury, by unanimous consent:

We find for the Plaintiff in the amount of $ 414,260 dollars.

--OR--

_____ find for the Defendant.

SIGNED: Chantell W. Pendarvis
JURY FOREPERSON

DATED: AUGUST 1, 2017 in ORANGEBURG, SC

PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED THE VERDICT FORM.

Complaint

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	
South Carolina State University,	)	Case No. 2015-CP-38-553
	)	
Plaintiff,	)	
	)	
vs.	)	**COMPLAINT**
	)	(Jury Trial Demanded)
	)	
Denise Simmons,	)	
	)	
Defendant.	)	
	)	

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FILED
WILLIAM A. SMITH
CLERK OF COURT
ORANGEBURG, SC

The Plaintiff, South Carolina State University (referred hereinafter as "Plaintiff" or "SCSU"), complaining of the Defendant, Denise Simmons, named herein would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Plaintiff, South Carolina State University, is a governmental entity and public institution of higher learning of the State of South Carolina and was, at all times referred to herein, the employer of the Defendant.

2. The Defendant, Denise Simmons, upon information and belief, is a resident of Blacksburg, Virginia; however, at all times relevant herein, including the execution of a Memorandum of Understanding ("MOA") entered into by the parties, which form the basis of this Complaint, she was a resident of the State of South Carolina and was an employee of the Plaintiff.

3. The MOA was entered into in the County of Orangeburg, State of South Carolina, while Defendant was employed by SCSU and resided in Orangeburg, South Carolina.

4. All claims arising under the MOA, including the claims contained in this Complaint, are governed by the laws of the State of South Carolina. Venue is proper in Orangeburg County,

South Carolina because South Carolina State University's principal place of business is located in Orangeburg County and/or because the most substantial part of the acts and omissions giving rise to the causes of action in this Complaint occurred here.

5. The parties and subject matter involved in this Complaint are within the jurisdiction of this Court.

STATEMENT OF FACTS

6. On or about August 12, 2004, Defendant was hired by South Carolina State University as an Assistant Professor in the Department of Civil Engineering Technology.

7. On June 10, 2008, the Plaintiff and Defendant executed a Memorandum of Agreement ("MOA") with SCSU under a program known as the Faculty Development Program ("FDP"). A copy of the MOA is attached as Exhibit A to this Complaint and incorporated herein by this reference.

8. The FDP was funded by a grant pursuant to Title III of the U.S. Department of Education and is designed to assist state universities, and specifically Historically Black Colleges and Universities (HBCU), to become self-sufficient 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 said institutions.

9. Pursuant to the FDP, eligible state universities have the authority to use said funds to support faculty exchanges, faculty development and faculty fellowships to assist faculty members in attaining advance degrees in their fields of instruction. Said funds could also be used for academic instruction in disciplines in which African-Americans are underrepresented.

10. In seeking to be selected as a participant in the FDP, Defendant submitted a proposed Professional Improvement Plan and Faculty Development Projection/Plan.

11. On March 5, 2008, Defendant gained admission to the Clemson University Graduate School in the Doctor of Philosophy degree program in Civil Engineering.

12. Upon being accepted to the graduate program, the Defendant submitted her proposed Professional Improvement Plan and Faculty Development Projection/Plan to SCSU officials, wherein she expressed her joy in possibly being appointed by SCSU to participate in the Faculty Development Plan. In her submission, Defendant proudly proclaimed her vow and desire to return to SCSU after completing the doctoral program at Clemson University.

13. As a result, on or about June 10, 2008, SCSU and Defendant entered into the MOA.

14. The parties agreed that SCSU would pay the Defendant a temporary salary adjustment, a stipend and Defendant's tuition and fees for pursuing a doctorate in Civil Engineering at Clemson University in consideration for her participating in the Professional Development Plan and returning to work as an employee at SCSU for a period of time equivalent to the amount of time she received financial assistance from SCSU.

15. The MOA was clear on its face regarding the Defendant's obligations and the consequences of her breach of the same. *See* Exh A, Section C ("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...").

16. Over the course of several years, from June 2008 to May 2012, Plaintiff paid $312,457.74 to the Defendant in the form of wages, tuition and stipends.

17. The Defendant was awarded a Doctor of Philosophy Degree in Civil Engineering from Clemson University on May 11, 2012.

18. Following the award of her degree from Clemson University, the Defendant was obligated to return to SCSU to continue her duties as a Professor pursuant to the express wording of the MOU.

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.

20. On August 16, 2012, Defendant communicated with Defendant via email and indicated that she had obtained, and intended to pursue, other employment.

21. Instead of returning to SCSU to educate predominantly 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.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

22. The Plaintiff incorporates by reference all of the foregoing paragraphs as set forth fully and verbatim herein.

23. South Carolina law imposes a duty of good faith and fair dealing upon every contract, including the MOA.

24. The Plaintiff and Defendant entered into a valid and mutually binding contract supported by due consideration.

25. The Plaintiff fulfilled all terms of the MOA by funding Plaintiff's tuition and other expenses to attend Clemson University, where Defendant obtained a Doctor of Philosophy in Civil Engineering on or about May 11, 2012.

26. Upon Plaintiff funding Defendant's tuition and other expenses, and Defendant completing the doctorate program and earning her degree, the Defendant was to return to work as an employee at SCSU for a period equivalent to the amount of time she received financial assistance from SCSU.

27. By failing to return to SCSU upon receiving her doctorate degree from Clemson University, Defendant did not abide by the terms and failed to meet the requirements of the MOA, and such failures constituted breaches of the MOA entered into with SCSU.

28. As a direct and proximate result of Defendant's breach, the Plaintiff has suffered and will continue to suffer substantial damages.

29. The MOA provides that Defendant shall be liable for the lump sum repayment of the entire amount paid by SCSU on Defendant's behalf.

30. The breach of contract alleged herein was the result of and/or constituted negligence, bad faith and/or willful misconduct by Defendant.

FOR A SECOND CAUSE OF ACTION
(Fraud)

31. The Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth fully and verbatim herein.

32. On or about June 10, 2008, Defendant represented to Plaintiff that upon receiving her doctorate degree at Clemson University she would return to work as an employee at SCSU for a period equivalent to the amount of time she received financial assistance from Plaintiff. These representations were false and Defendant knew the falsity of these statements at the time they were made in that based on Defendant's conduct, she had no intention of ever returning to SCSU as an employee.

33. Plaintiff relied on the representations of Defendant and otherwise would not have extended over $312,457.74 on behalf of the Defendant.

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.

35. As a direct and proximate result of Defendant's fraudulent intent, fraud, constructive fraud, and fraudulent concealment, the Plaintiff suffered and continues to suffer injury and damages all in direct violation of the laws of the State of South Carolina, including but not limited to loss of use of funds, loss or reputation, and an inability to compete in the market without the use of said funds.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

36. The Plaintiff incorporates by reference all of the foregoing paragraphs as if set forth fully and verbatim herein.

37. Defendant's fraudulent misconduct, as alleged in this Complaint, constituted a failure to abide by the terms of the MOA and constituted a breach of the MOA entered into with SCSU. SCSU has been directly and proximately damaged as a result of Defendant's breach.

38. Moreover, in breaching the MOA, Defendant exhibited a fraudulent intent relating to the breaches alleged in this Complaint.

39. The Plaintiff's 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.

40. As a direct and proximate result of the conduct of the Defendant, the Plaintiff has suffered and will continue to suffer substantial damages.

WHEREFORE, having fully made out its complaint against Defendant Denise Simmons, Plaintiff South Carolina State University prays unto this Honorable Court for the Following relief:

a. Actual damages;

b. Incidental and consequential damages;

c. Punitive damages;

d. The cost of this action and all attorneys' fees;

e. Prejudgment interest.

And for such other and further relief as this Court may deem just and proper.

Dickie, McCamey & Chilcote, P.C.

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(803) 285-0004

South Carolina State University

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300 College Ave.
Orangeburg, South Carolina
(803) 537-7084

Attorney for Plaintiff, South Carolina State University

Orangeburg, South Carolina

May 11, 2015

EXHIBIT A

2015 MAY 11

MEMORANDUM OF AGREEMENT
BETWEEN
SOUTH CROLINA STATE UNIVERSITY

AND

DENISE S. GRANT

A. Reporting Requirements

1. Official grade reports must be submitted for all courses taken prior to reimbursement.

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.

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.

B. Receipt of Assistance Requirements

1. For all courses pursued, a satisfactory grade must be obtained in order to receive reimbursement.

CLERK OF

2. Any changes or modifications in the Professional Improvement Plan must have the approval of all individuals who originally signed the Plan.

3. Failure to complete the Plan as agreed to without justifiable cause may result in mandatory repayment of all funds received.

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 this agreement and/or mandatory repayment of all funds received.

C. Faculty/Administrator Compliance Statement

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.

Denise S Grant
Signature

Witness

Notary Public

Signature, SCSU Authorized Official

SIGNATURE/APPROVALS*

Faculty/Administrator Date 6/10/2008

I, DENISE S. GRANT, certify that if this proposal is approved, funds will only be used to pursue the specific activities outlined above in keeping with Title III and South Carolina State University policies and procedures. Further, as well as the memorandum of agreement.

Chairperson Date 8/12/2008

I, Stanley N. Ihekweazu, certify that I have reviewed the proposed Professional Improvement Plan for the faculty/administrator named above and upon successfully completion of this Plan, this individual will be able to perform duties in the proposed area of concentration. An additional letter of support may be attached.

Dean Date 8/12/2008

I, Kenneth D. Lewis/, concur with the Plan as proposed and recommended by the chairperson for the faculty/administrator indicated above.

Additional Approval (if necessary) Date 8-13-08

Provost & Vice President for Academic Affairs Date 08-14-08

President Date 8-14-08

Title III Coordinator Date

*NOTE: Approval by chair and dean indicates interest in the unit in the project, availability of requisite internal resources, prior negotiation of cost sharing or released time, and appropriateness of the budget. A proposal involving services, consultation, media services, computer support or physical space beyond the confines of the department or school requires approval of the relevant director.

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina 29117

MEMORANDUM OF UNDERSTANDING

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.

Denise S/Grant
Name

6/10/2008
Date

Answer and Counterclaim

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	**ANSWER / COUNTERCLAIM**
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

Defendant, Denise Simmons, Individually, hereinafter referred to as ("Simmons" or "Defendant") by and through her undersigned attorney/s, answers the Complaint, provides affirmative defenses and/or counterclaim as follows:

FOR A FIRST DEFENSE

1. Defendant denies each and every allegation contained in Plaintiff's Complaint unless hereinafter expressly admitted.

2. Regarding Paragraph 1 of Plaintiff's Complaint, Defendant admits the allegations of this paragraph.

3. Regarding Paragraph 2 of Plaintiff's Complaint, Defendant admits the allegations of paragraph 2, as to her residence (Virginia), but denies the remainder of the paragraph as written.

4. Regarding Paragraph 3 of Plaintiff's Complaint, Defendant denies the allegations of this paragraph as written.

5. Paragraph 4 of Plaintiff's Complaint is admitted to the extent that the dispute is governed by the laws of South Carolina and South Carolina State University is physically located in the County of Orangeburg. Any and all other remaining allegations are denied.

6. Regarding Paragraph 5 of Plaintiff's Complaint, such allegations are admitted.

Facts Alleged:

7. Regarding Paragraph 6 of Plaintiff's Complaint, Defendant admits she was hired by South Carolina State University in or about 2004.

8. Regarding Paragraph 7 of Plaintiff's Complaint, Defendant admits that the signatures on the documents attached to the Complaint are her signature. Any and all remaining allegations within this paragraph are denied.

9. Regarding Paragraph 8 of Plaintiff's Complaint. Defendant is without sufficient knowledge to form a believe as to the truth of such allegations and, therefore, such allegations are denied and proof of same demanded.

10. Regarding Paragraph 9 of Plaintiff's Complaint. Defendant is without sufficient knowledge to form a belief as to the truth of such allegations and, therefore, such allegations are denied and proof of same demanded.

11. Regarding Paragraph 10 of Plaintiff's Complaint, Defendant admits that she submitted a plan (Professional Improvement Plan and Faculty Development Projection/Plan) to the Plaintiff. Any and all remaining allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

12. Regarding Paragraph 11 of the Plaintiff's Complaint. Such allegations are admitted in so much as Defendant was admitted to Clemson in 2008.

13. Regarding Paragraph 12 of the Plaintiff's Complaint. Such allegations are admitted in so much as Defendant, at some point, provided such documents to Plaintiff. Any and all remaining allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

14. Regarding Paragraph 13 of the Plaintiff's Complaint. Plaintiff and Defendant entered into an agreement/s in which grant funds would inure to Defendant's and Plaintiff's benefit for post graduate studies. Any and all remaining allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

15. Regarding Paragraph 14 of the Plaintiff's Complaint. Plaintiff assisted Defendant with funds in order to further her education while continuing to work with Plaintiff which inured to the benefit of both Defendant and Plaintiff. Any and all remaining allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

16. Regarding Paragraph 15 of the Plaintiff's Complaint. Such allegation is a conclusion of law and requires no response. Any and all remaining factual allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

17. Regarding Paragraph 16 of the Plaintiff's Complaint. Defendant is without sufficient information to form a belief in the truth or falsity of this allegation/s and therefore denies same.

18. Regarding Paragraph 17 of the Plaintiff's Complaint. Defendant admits she was awarded a PhD degree from Clemson University in 2012. Any and all remaining allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

19. Regarding Paragraph 18 of the Plaintiff's Complaint. Defendant denies the allegations of this Paragraph as written.

20. Regarding Paragraph 19 of the Plaintiff's Complaint. Defendant denies the allegations of this Paragraph.

21. Regarding Paragraph 20 of the Plaintiff's Complaint. Defendant denies the allegations of this Paragraph as written.

22. Regarding Paragraph 21 of the Plaintiff's Complaint. Defendant denies the allegations of this Paragraph as written.

Alleged breach of contract

23. Regarding Paragraph 22 of Plaintiff's Complaint. Such reiteration of allegations are denied or admitted as set forth above.

24. Regarding Paragraph 23 of Plaintiff's Complaint. Such allegation is a conclusion of law and no response is required from Defendant. Any and all remaining factual allegations express or implicit within this Paragraph of the Plaintiff's Complaint are denied.

25. Regarding Paragraph 24 of Plaintiff's Complaint. Such allegation is denied.

26. Regarding Paragraph 25 of Plaintiff's Complaint. Such allegations are denied.

27. Regarding Paragraph 26 of Plaintiff's Complaint. Such allegations are denied.

28. Regarding Paragraph 27 of Plaintiff's Complaint. Such allegations are denied.

29. Regarding Paragraph 28 of Plaintiff's Complaint. Such allegations are denied.

30. Regarding Paragraph 29 of Plaintiff's Complaint. Such allegations are denied.

31. Regarding Paragraph 30 of Plaintiff's Complaint. Such allegations are denied.

Alleged Fraud:

32. Regarding Paragraph 31 of Plaintiff's Complaint. Such reiteration of allegations are denied as set forth above.

33. Regarding Paragraph 32 of Plaintiff's Complaint. Such allegations are denied.

34. Regarding Paragraph 33 of Plaintiff's Complaint. Such allegations are denied.

35. Regarding Paragraph 34 of Plaintiff's Complaint. Such allegations are denied.

36. Regarding Paragraph 35 of Plaintiff's Complaint. Such allegations are denied.

Alleged breach of contract accompanied by fraudulent act:

37. Regarding Paragraph 36 of Plaintiff's Complaint. Such reiteration of allegations are denied as set forth above.

38. Regarding Paragraph 37 of Plaintiff's Complaint. Such allegations are denied.

39. Regarding Paragraph 38 of Plaintiff's Complaint. Such allegations are denied.

40. Regarding Paragraph 39 of Plaintiff's Complaint. Such allegations are denied.

41. Regarding Paragraph 40 of Plaintiff's Complaint. Such allegations are denied.

PLAINTIFF'S SECOND DEFENSE:

42. Plaintiff's causes of action and claims, each cause or all causes, fail/s to state a cause of action.

PLAINTIFF'S THIRD DEFENSE:

43. Plaintiff and Defendant did not enter into a mutual valid and enforceable contract with the substance as set forth in Plaintiff's allegations and therefore no legally recognizable damages exist.

44. Plaintiff did not provide legal consideration.

45. Plaintiff has failed to mitigate its damages, if any, relating to its claims.

PLAINTIFF'S FOURTH DEFENSE:

46. Plaintiff's alleged claims are for breach of contract and the implicit covenant of good

faith and fair dealing within contracts in addition to equitable claims. Punitive damages are not available or proper in such claims.

PLAINTIFF'S FIFTH DEFENSE:

47. If a contract existed requiring Defendant to seek and offer herself for a position with Plaintiff beyond what consideration already existed, which Defendant denies, Defendant made such offer and was rejected or constructively rejected by Plaintiff.

48. If a contract existed requiring Defendant to seek and offer herself for a position with Plaintiff beyond what consideration already existed, which Defendant denies, intervening and/or supervening event/s existed at the time of alleged performance disallowing either party to perform.

49. If a contract existed requiring Defendant to seek and offer herself for a position with Plaintiff beyond what consideration already existed, which Defendant denies, Plaintiff created conditions or conditions existed at the time of performance making performance by Defendant impossible.

PLAINTIFF'S SIXTH DEFENSE:

50. The action is barred by the applicable limitation of actions and/or statute of limitations / equitable waiver or latches period.

51. If a contract existed as set forth in Plaintiff's allegations, which is denied by Defendant, such terms and conditions of the contract were so broad and indeterminate as to disallow Defendant the ability to understand or comply with such terms.

PLAINTIFF'S SEVENTH DEFENSE:

52. Defendant denies any breach of contract, however, if any breach occurred such was subsequent to Plaintiff's breach requiring no further performance by Defendant.

PLAINTIFF'S TENTH DEFENSE/Counterclaim

53. Defendant incorporates by reference the allegations contained in Paragraphs One (1) through fifty two (52) as if set forth herein *verbatim*.

54. Plaintiff's Claims, upon information and belief, all or some, against Defendant are, in whole or part, frivolous complaints/claims under the provisions of S.C. Code Sec. 15-36-10 et seq., in that, among other things, (1) Plaintiff seeks to allege and litigate matters

against Plaintiff primarily for a purpose other than that of securing the proper discovery, joinder or parties or adjudication of claims upon which the proceeding is based and/or (2) the allegations of the Counterclaims are designed not to create a cause or causes of action for damages.

WHEREFORE, Defendant requests that this Court:

A. Dismiss Plaintiff's Claims against Defendant in this action and award Defendant the costs incurred in defending this action and award attorneys fees pursuant to all applicable statutes and common law.

B. Dismiss Plaintiffs Frivolous Claims against Defendant and award, if appropriate, attorneys fees for the legal costs to defend any claims found to be frivolous under the appropriate statute.

C. Award Plaintiff the costs and disbursements of this action;

D. Award Plaintiff such other and further relief as this Court may deem just and proper.

Date: September 21, 2015

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J. Charles Ormond, Jr.

South Carolina State University's Answer to Counterclaim

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	Case No. 2015-CP-38-00553
	)	
South Carolina State University,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**SOUTH CAROLINA STATE UNIVERSITY'S ANSWER TO COUNTERCLAIM**
	)	
	)	
Denise Simmons,	)	
	)	
Defendant.	)	
	)	

The Plaintiff-Counterclaim Defendant, South Carolina State University (referred hereinafter as "SCSU"), hereby responds to Denise Simmons' Counterclaim, as follows:

FOR A FIRST DEFENSE

1. SCSU denies each and every allegation not specifically admitted herein.

FOR A SECOND DEFENSE

2. SCSU denies the allegations of Paragraph 54.

FOR A THIRD DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

3. Simmons' counterclaims fail to state facts sufficient to constitute a cause of action, and therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE
AND BY WAY OF AFFIRMATIVE DEFENSE

4. SCSU will move at the appropriate time for sanctions against Simmons' for the filing of a frivolous counterclaim pursuant to S.C. Code Section 15-36-10 (2005).

WHEREFORE, having fully responded to the Counterclaim, South Carolina State University hereby prays unto this Honorable Court for judgment against the Defendant-Counterclaim Plaintiff and for such other and further relief that this Court deems just and proper.

South Carolina State University

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October 13, 2015

Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
South Carolina State University,	)	
Plaintiff,	)	C.A. No. 2015-CP-38-553
vs.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Denise Simmons ,	)	
Defendant.	)	

INTRODUCTION

Plaintiff South Carolina State University ("University") by and through the undersigned counsel, moved for summary judgment on March 31, 2017. Plaintiff submits that no genuine issues of material fact exist and it is entitled to summary judgment on its breach of contract claim against Defendant Denise Simmons ("Dr. Simmons"). Moreover, Plaintiff University submits that Defendant Simmons' South Carolina Frivolous Civil Proceedings Sanctions Act counterclaim against Plaintiff University is not properly brought and has no merit.

FACTS

Defendant 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. (Simmons Depo. Exh. 14, Simmons Curriculum Vitae.) Dr. Simmons was employed by the University beginning in 2004. *Id.* 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. (Simmons Depo. pp. 24, ll. 5-17, p. 27, ll. 6-8; Plaintiff's First Request to Admit, Exh. 2,

Faculty Development Program Submission, truth and accuracy of which admitted in Def. Resp. to Plaintiff's First Requests to Admit.) 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. Simmons' purpose as stated in her plan for her leave was consistent with the overarching purpose of the FDP under Title III. (Simmons Depo. p. 32, ll. 12-19; Plaintiff's First Request to Admit, Exh. 2, Faculty Development Program Submission, truth and accuracy of which admitted in Def. Resp. to Plaintiff's First Requests to Admit.) 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." (Simmons Depo. p. 48, ll. 3-22; Depo Exh. 5, Simmons Letter to Ihekweazu.) Dr. Simmons then entered an agreement on June 10, 2008, by which she committed herself, in part, to 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.

(Simmons Depo. Exh. 4, Memorandum of Agreement; Plaintiff's First Request to Admit, Exh. 1,

Faculty Development Program Submission, truth and accuracy of which admitted in Def. Resp. to Plaintiff's First Requests to Admit.)

The University provided funds for living arrangements, materials, and tuition. (Simmons Depo. p. 27, ll. 14-25; p. 28, ll. 1-25; p. 29, ll. 1-8; p. 30, ll. 17-24.) 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. (Simmons Depo. p. 106, ll. 4-22; Def. Responses to Plaintiff's First Request to Admit, ¶ 7) 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. (Simmons Depo. Exh. 15, Guinyard email and teaching schedule.) Guinyard's email reads, in part, "Looking forward to seeing you in August." 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. *Id.* 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. *Id.* 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. (Simmons Depo. Exh. 17, faculty meeting email and memorandum.) Dr. Simmons failed to attend the faculty meeting citing personal reasons (the death of a grandparent and funeral arrangements) as the reason for her absence. (Simmons Depo. p. 109, ll. 7-15.)

On August 17, 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." (Simmons Depo. Exh. 18, Simmons email to Okafor.) 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."" *Id.* 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. *Id.* Additionally, on August 23, 2012, she exchanged email 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. (Simmons Depo. Exh. 19, Ihekweazu email.) At no time leading up to these contacts did Dr. Okafor or Dr. Ihekweazu tell Dr. Simmons her position was terminated. In fact, Dr. Simmons testified the following in her deposition:

> Q: Okay. And did you have any reason to believe, at that point on August 23rd, that there was not a position for you at SC State?
>
> A: I don't know. I don't know. All I know is what she [Debra Darby, Administrative Professional, Academic Affairs] said was supposed to happen hadn't happened. How am I – I'm the employee. I have no control.

(Simmons Depo. p. 114, ll. 19-25.)

Dr. Simmons did not report to the University to teach her Fall 2012 class schedule. The University attempted to communicate with Dr. Simmons regarding her position with them. However, at least as early as spring 2012, Dr. Simmons was in communication with Virginia Polytechnic Institute and State University ("Virginia Tech") regarding a position at Virginia Tech. In Defendant's Responses to Plaintiff's First Request to Admit, to the request, "Admit that you submitted your application for employment to Virginia Tech prior to your graduation from Clemson University in May 2012," Dr. Simmons admitted to the following:

> Upon learning the news that SCSU officials had been terminated and there were significant allegations of mismanagement at SCSU and the entity was under an actual or potential Federal investigation, Simmons did tentatively place a fall back application to another institution, Virginia Tech. This was only a one year position. Defendant conveyed to agents of Virginia Tech that this was a back up application in case there were issues with a South Carolina State return.

(Def. Responses to Plaintiff's First Request to Admit, ¶ 8.) Further, for item 20 of Defendant's Responses to Plaintiff's First Interrogatories, Dr. Simmons stated that she could not recall the exact date upon which she submitted a "visitor professor inquiry and application," but she believed it was "[o]n or about March 2012." 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. At that time, she communicated by email to Dr. Okafor that she had not received and employment contract, and therefor she had "sought and secured employment." (Simmons Depo. p.102, ll. 6-9; Depo. Exh. 18) Dr. Simmons accepted an offer from Virginia Tech dated as August 15, 2012, to August 22, 2012, and signed that agreement for a position with Virginia Tech on August 23, 2012. (Simmons Depo. p. 57, ll. 6-9; Depo. Exh. 9, Virginia Tech Terms of Faculty Offer.) This was the same day that she was communicating with the University administrators, who told her she should report to the University for the Fall 2012. Dr. Simmons did not return to South Carolina State University to teach her classes in the Fall of 2012, despite communications with the administration that fall of 2012.

LEGAL ANALYSIS

A. Standard

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether a genuine

issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Curiel v. Hampton Cnty. E.M.S.*, 401 S.C. 646, 649, 737, S.E.2d 854, 855 (Ct. App. 2012) (internal citations omitted); *see also Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 398, 736 S. E.2d 863, 865 (Ct. App. 2012).

In examining a contract, whether the language of a contract is ambiguous is a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). It is the construction of an ambiguous contract that is a question of fact. *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). An ambiguous written agreement is one that is capable of being understood in more than one way, or is an agreement unclear in meaning because it expresses its purpose in an indefinite manner. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). "Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Summary judgment is proper when there is not a question as to the construction of a written contract and the contract is not ambiguous because the intent of the

parties can be ascertained from the four corners of the agreement. *HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007).

Based on the pleadings and admissions in this case, as well as Dr. Simmons' testimony, Plaintiff University has established facts sufficient to show Dr. Simmons entered an unambiguous contract with the University, breached that contract, and as a result, the University suffered damages. The intent of the parties at the time the agreement at issue was made may be ascertained from the four corners of the agreement.

B. Breach of Contract Claim

Plaintiff University brought a cause of action is for breach of contract. (Compl. p. 4, ¶¶ 22-30; Exh A.) Specifically, Dr. Simmons' failure to either remain in service to the University as agreed, or reimburse the University in accordance with their agreement, constitutes a breach of contract.

Under South Carolina law, in order to recover for breach of contract, a plaintiff must establish the following three elements: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damages suffered by the plaintiffs as a direct and proximate cause of the breach. *Fung Lin Wah Enterprises Ltd. v. E. Bay Imp. Co.*, 465 F. Supp. 2d 536 (D.S.C. 2006).

1. Plaintiff University has Established that Dr. Simmons Entered a Contract With the University

A "contract" is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Trident Const. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566 (D.S.C. 2003). The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Saucer v. Pub. Serv. Auth. of SC*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). The parties must have a meeting of the minds as to all essential and material terms of the agreement in order for a contract to be enforceable. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E. 2d 891, 894 (1989).

In the present case, the material terms clearly set out the intent of the parties at the time they entered the agreement. Dr. Simmons entered an agreement under which the University would provide support in the form of tuition and related fees and expenses, while Dr. Simmons obtained her terminal degree. In exchange, Dr. Simmons agreed to remain in the service of the University for the same number of years as she received financial support in furtherance of the purpose stated in Dr. Simmons' PDP as referenced in the agreement. That purpose was for the University, an HBCU, to receive the benefit of having a professor with advanced training and further professional development.

In this case, the existence of offer, acceptance, and valuable consideration is indisputable, and therefore, a contract existed.

2. The Plaintiff University has Established a Breach and Damages Resulted

An action for damages for breach of contract is predicated on the existence of the contract between the parties. *Tidewater Supply Co. v. Industrial Elec. Co.*, 253 S.C. 483, 485, 171 S.E.2d 607, 608 (1969). An unambiguous contract between the University and Dr. Simmons has been established, and it is also indisputable that Dr. Simmons breached the contract. Dr. Simmons did, in fact, obtain her doctor of philosophy degree from Clemson University with funds and time provided by Plaintiff University; yet, she failed to provide services to the University she agreed to provide upon receiving her degree, and she failed to reimburse the University for the financial support provided her in the absence of the services she agreed to provide.

Accordingly, there is no reasonable dispute regarding the existence of a contract or Defendant's breach of that contract. Rather, Defendant Dr. Simmons seems to argue that her breach is justified because she was available to be employed by the University, but she did not receive a timely assignment letter or employment contract for the Fall 2012 academic year. While it is Defendant's burden to show Plaintiff University's repudiation of the contract, no

evidence even suggests the University did not intend for Defendant to remain its employee. Further, Defendant's argument ignores the fact that the parties' contract is the one at issue in this lawsuit-the one under which she received the benefit of funding and time necessary to obtain her degree. No employment contract or assignment letter would supersede the agreement at issue, which was entered by the parties in 2008. If such an employment letter from year to year could supersede the original agreement, the parties would never have been able to carry out the terms of the original agreement, which provided for a term of service equal to the term of funding. Nowhere in the agreement exists a term by which the University would be required to proceed to "rehire" Dr. Simmons, or that she should expect some additional contract from the University to secure her employment for the years of service to which she agreed. Instead, the undisputed facts show only that, by the conclusion of her terminal degree program, the University was ready, willing, and able to continue Dr. Simmons' employment, but she had already made contacts regarding employment at Virginia Tech, and she signed her employment agreement with Virginia Tech just as classes for Fall 2012 were beginning.

It simply is factually and legally unsupportable for Defendant Simmons to assert she was not obligated to perform her responsibilities under the contract with the University under these circumstances, without inquiring of the University first. Defendant Simmons cannot willfully remain ignorant of the University's intentions and then seek to rely on her ignorance as justification for breaching the contract. See, e.g., *Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 619-620 (Ct. App. 1994) ("In order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract.") (citing *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993) *Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404,406 (Ct. App. 1984); (citing the "general rule that one who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract"); *Conrad Brothers v. John Deere Insurance Company*, 640 N.W. 2d231, 241 (Sup. Ct. Iowa 2001) (noting

that repudiation normally requires an affirmative statement or positive notice); *see also* CJS § 712, *Acts constituting renunciation or repudiation.* Moreover, even assuming repudiation on the University's part, Dr. Simmons' recourse would have been to seek damages from the University. *Id.*

C. Defendant's Frivolous Civil Proceedings Sanctions Act Counterclaim Must be Dismissed

Dr. Simmons has brought a counterclaim against the University under South Carolina Code of Law section 15-36-10, the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"). No rational argument based upon the evidence or law exists in support of such a claim, and no reasonable attorney in the same circumstances would believe that under the facts, his or her claim or defense was clearly not warranted under the existing law and that a good faith.

The FCPSA provides that an attorney or party filing a frivolous pleading may be sanctioned if a "reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." *See* S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). The standard in South Carolina to receive attorney fees, reasonable costs incurred by the party defending against a frivolous action, and court costs as a sanction under the FCPSA requires the aggrieved party to show that the party sought to be sanctioned acted frivolously. *See e.g., Father v. South Carolina Dept. of Social Services*, 353 S.C. 254, 258, 578 S.E.2d 11, 13 (2003) (holding that "while DSS's conduct in this matter was flawed in some respects, Father did not meet his burden of proving that DSS acted without a proper purpose in this case, and therefore affirmed the decision setting aside the FCPSA sanction"); *Collins v. Auto-Owners Ins. Co.*, 2011 WL 2491351 (holding that "[a]lthough Plaintiff's position was not the strongest of legal positions, and ultimately didn't prevail, the Court doesn't find that it was frivolous.").

The FCPSA provides that an attorney shall be sanctioned for a frivolous claim or defense if the court finds the attorney failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claims or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of law;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil lawsuit was intended merely to harass or injure the other party; or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other an securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(C)(1)(a)-(c). A court shall proceed to determine if a claim or defense was frivolous after a case has been dismissed by summary judgment or at the conclusion of trial and after a verdict. S.C. Code Ann. § 15-36-10(C)(1)(Supp. 2012); *Collins,* 2011 WL 2491351 at #2.

In this case, as a public educational institution receiving federal funds, the University has a responsibility to ensure that the federal funds received are utilized in a manner consistent with the purpose for which they were provided. *See, e.g.,* 34 C.F.R. §608.41(d) ("A grantee shall repay to the Treasury of the United States any grant funds it received that it did not expend or use to carry out the allowable activities included in its approved application within ten years following the date of the initial grant it received under this part."). The funds at issue were

expended for the purpose of returning Dr. Simmons' knowledge, relationships, and status to the University to benefit its students. Additionally, Dr. Simmons basis for her counterclaim appears to be that she believes the terms of the contract are not clear from the four corners of the document, which would not support a claim that a cause of action is frivolous. For instance, in response to item 17 of Defendant's Responses to Plaintiff's First Interrogatories, "Set forth in detail the facts supporting your assertion …supporting your contention that 'Plaintiff's Claims…against Defendant are…frivolous…under the provisions of S.C. Code Sec. 15-36-10,'" Defendant Simmons states only that, "Defendant's allegations speak for themselves. SCSU never provided or offered Dr. Simmons a teaching contract." Moreover, in this case, Dr. Simmons has not filed for summary judgment, or a motion to dismiss, which would seem appropriate if Dr. Simmons believes the University's claims are frivolous. Therefore, because this suit was not initiated to harass or injure Dr. Simmons and a reasonahle attorney in the same circumstances would believe that under the facts this claim may be warranted under the existing law, Dr. Simmons is unable to substantiate a frivolous claim defense, and therefore, her counterclaim is inappropriate and should be dismissed.

V. CONCLUSION

Based upon the foregoing, Plaintiff University's motion for summary judgment should be granted. Moreover, Dr. Simmons' counterclaim under the FCPSA should be dismissed.

Respectfully submitted,

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June 5, 2017
Columbia, South Carolina

Defendant's Memorandum in Support of Her Motion for a New Trial or, in the Alternative, New Trial Nisi Remittitur

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF HER MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, NEW TRIAL NISI REMITTITUR

The matter above was tried by Jury on July 31st and August 1st in Orangeburg County Circuit Court. The surviving causes of action for deliberation by the Jury were breach of contract and breach of contract accompanied by a fraudulent act. Punitive damages were not charged to the Jury. After approximately one hour of deliberation, the jury returned a verdict of $414,260.00 in actual damages against Defendant.

Defendant has moved this honorable Court for a New Trial Absolute, or in the alternative a New Trial Nisi Remittitur, as the Jury returned a verdict for damages grossly in excess and outside of the evidence set forth in the record. Defendant provides this memorandum in support along with the trial record.

FACTS:

The case captioned above was a contract case. Plaintiff alleged in its Complaint that Defendant breached an agreement, as set forth through a memorandum of understanding between the parties, by not returning to teach at South Carolina State University after accepting tuition

and other assistance from Plaintiff while she was pursuing a PhD at Clemson. The Complaint provided a specified sum alleged to have been expended by the University. Plaintiff presented evidence, through testimony, that approximately $312,000 dollars were forwarded to Defendant during her studies resulting in her earning a PhD, at Clemson University.[1] The Court did not give a charge on punitive damages to the jury and, therefore, the verdict could not contain punitive damages. The contract language was undisputed and is as follows:

> 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 on my behalf.* (Id) emphasis added.

The language of this contract expressly provides the only remedy for its breach. The Plaintiff provided evidence of the lump sum repayment for Defendant's education of approximately $312,000. Further, it was undisputed in the record that approximately one half of these funds were Federal Funds from the Title III Program granted specifically for the education of Defendant.

Defendant admitted that she agreed to the provision as set forth above. However, she presented undisputed evidence that Plaintiff never provided her a faculty contract of employment which she understood was required to remain or become an employee upon return and therefore Plaintiff did not perform its part of the agreement. Plaintiff provided no evidence in the record of

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[1] The jury was allowed to consider an additional cause of action, breach of contract accompanied by a fraudulent act.

other damages resulting from her non payment and did not provide any evidence of any further damages. However, Plaintiff, in its summation, argued that the Jury could add special damages to the sums set forth in the evidence. Plaintiff argued that it, the jury, should further compensate Plaintiff with special damages because Plaintiff did not obtain the benefit of Defendant's new education as she did not teach for the 2012/2013 academic year. In essence, the Plaintiff requested that the Defendant pay it back because she did not perform, as set forth in the agreement, and further compensate Plaintiff further for her failure to perform; teach at the University. The Plaintiff, in its summation used the likely yearly salary[2] Defendant would have been paid by Plaintiff, if a contract had ever been negotiated, as a guide for awarding additional "special" damages against Defendant. A such damages were in addition to the return of the funds expended in assisting her with completing her terminal degree. The testimony of Plaintiff's witnesses was that the teaching assignments which would have been Defendants were handled by existing faculty.

Regardless, Plaintiff argued that the jury could and should award special damages in an amount reflecting the likely salary she would have been paid[3] by Plaintiff. Such argument is logically inconsistent and without legal merit. Despite the inconsistencies and contrary jury charges, the jury awarded damages significantly outside of and in excess of the damages figures and supporting evidence provided in the record. Damages for loss of the benefit of the bargain in addition to the repayment of the funds, which was the expressed remedy within the agreement,

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[2]Plaintiff never forwarded to Defendant a contract with salary or any other terms of employment for the 2012-2013 academic year.

[3]Even though no such evidence was presented in the record related to salary or benefits Defendant might have contracted for.

was improper as a matter of law.[4]

ARGUMENT:

1) Evidence of damages within the record in this contract case could not exceed the amount presented within the record to have been expended by Plaintiff on Defendant's education.

In this matter, the damages awarded by the Jury grossly exceeded the evidence presented within the record by approximately one hundred thousand dollars.[5] A verdict is capricious if it is excessive and against the overwhelming weight of the evidence. *Beasley v. Ford Motor Company*, 117 S.E.2d 863 (SC 1963) In this matter, much of the verdict amount is absent any supporting evidence in the record.

If the amount of a verdict is grossly excessive so as to be the result of passion, caprice, prejudice or another influence outside of the evidence, a new trial absolute is warranted. *O'Neal v. Bowles*, 431 S.E. 2d 555 (SC 1993) The amount of this verdict was grossly excessive, greatly exceeding the maximum amount of potential damages set forth in the record by almost one hundred thousand dollars. If the verdict is simply inappropriately excessive or does not reflect the evidence presented at trial, a new trial nisi remittitur is appropriate. (Id.) The granting of a new trial nisi is within the discretion of the trial judge if the verdict is excessive. However, if the record does not contain some evidence which would support a particular verdict, a new trial is warranted. *V. E. Amick & Assocs. V. Palmetto Engineering Group*, 716 S.E.2d 295 (SC Ct. App.

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[4] The jury verdict was approximately one hundred thousand dollars more than the evidence of actual damages produced at trial, even exceeding the amount including the improper special damages.

[5] In South Carolina, post-trial relief in the form of motions for judgement not withstanding the verdict, new trial, or new trial nisi are available to defendants claiming a verdict is excessive. Gamble v. Stevenson, 305 SC 104 406 S.E2d 350 354 (SC 1991)

2011)(the trial court does not abuse its discretion in denying a motion for a new trial nisi remittitur when the "record contains adequate evidence to support the jury's verdict"); *see also: Burke v. AnMed Health,* 710 S.E.2d 84, 89 (SC Ct. App. 2011)

The contract alleged by the Plaintiff, as set forth above, provides the remedy for breach and the measure of damages; the repayment of the amount expended by the Plaintiff for her education. No other or additional evidence of damages was presented within the record and no other damages would be proper in a contract matter where the writing which sets forth the remedy for breach. In a contract case, where damages are capable of being measured by fixed principals, it is error for the jury to base its damages finding on other standards or no standards. *Charles v. Texas Co.*, 18 S.E.2d 719 (SC 1942); *Hutson v. Cummins Carolinas, Inc.* 214 S.E.2d 19 (SC Ct. App. 1984) Although a Court should not weigh evidence supporting a damages verdict, it must determine whether there is any evidence to support the actual damages award. In this case the damages awarded are well beyond the expressly contemplated remedy within the contract itself and there is no evidence or legal means within the record to support additional damages.

2) Special damages requested in Plaintiff's summation, in addition to the express remedy provided in the contract, are not recoverable as a matter of law and the Jury clearly awarded special damages above and beyond the contractual damages and well beyond damages which were legally appropriate or allowable.

Although it may be a question of fact as to whether the amount "expended" by the Plaintiff included funds specifically provided by a separate entity; the Federal Government, it is not a question of fact that the damages provided in the contract could not include both the repayment and damages for the failure to return and teach. Special damages must have been in

the contemplation of the parties at the making of the contract and a plaintiff must prove the fact of and amount of damages during trial. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *Adams v. Hardin Motor Co.*, 111 S.C. 493, 98 S.E. 381 (1919)(in order to recover for special damages for breach of contract, it is necessary to allege and prove defendant had notice, at time of making contract, of special circumstances from which damages might reasonably be expected to result); *Givens v. North Augusta Elec. & Improvement Co.*, 91 S.C. 417, 74 S.E. 1067 (1912); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990)(when plaintiff seeks special damages, he or she must prove both fact of damage and amount with reasonable degree of certainty); *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).

No evidence of these damages were ever presented and the first mention of such damages was during Plaintiff's summation.[6] Further, an award of a speculative loss of the amount of her yearly salary or more, for the loss of her teaching skills, is not proper as it is unsupported in the record and is contrary to the express remedy which is set forth in the agreement if Defendant did not return. An award for the full repayment of all expenditures made by the Plaintiff on behalf of Defendant and an additional amount for damages because Defendant breached the contract by not returning is nothing short of a double recovery. *Georgetown Towing Co. v. National Supply Co.*, 29 S.E. 2d 765 (SC 1944) The evidence in the record does not support the verdict in this matter and certainly, not of the size awarded against Defendant in this matter. Therefore, a new trial or new trial nisi is appropriate.

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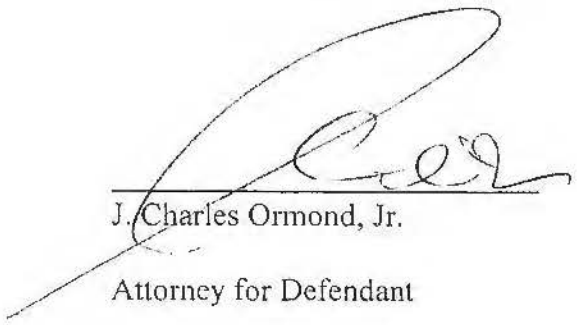
[6] A motion for a new trial should be granted in flagrant cases where inflammatory argument results in clear prejudice. Toyota of Florence, Inc. v. Lynch, 442 SE2d 524 (SC 1994)

SUMMARY:

The Jury's verdict was excessive and could not have been based on the specific damages evidence set forth in the record. This case is a contract case and both the remedy and the damages were not only expressed within the contract alleged to have been breached by the Defendant, but no other damages would be legally available.

WHEREFORE: The Defendant would respectfully request that this Court grant her a new trial absolute, or a new trial nisi remittitur in an amount supported by the evidence.

RESPECTFULLY SUBMITTED:



Date: November 29 , 2017

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Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for New Trial

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
South Carolina State University,	)	
	)	
Plaintiff,	)	C.A. No. 2015-CP-38-553
	)	
vs.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL**
	)	
Denise Simmons ,	)	
	)	
Defendant.	)	
	)	

South Carolina State University ("SCSU") respectfully submits this memorandum in opposition to Defendant's motion for a new trial. SCSU respectfully asserts Defendant's motion should be denied. The jury's verdict in favor of SCSU in the amount of $414,260.00 is well supported by the evidence admitted at trial and not a product of undue passion or speculation.

I. ARGUMENT

A. Standard of Review

The decision to grant or deny a motion for a new trial rests within the discretion of the trial judge, as the trial judge is in a unique position "...to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the Plaintiff in terms of damages." *Burke v. AnMed Health*, 710 S.E.2d 84, 88-89 (S.C. App. 2011). With respect to the specific issues of damages awarded by a jury,

> 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 (S.C. App. 1993) (quoting *Brabham v. Southern Asphalt*

Haulers, Inc., 76 S.E.2d 301, 306 (S.C. 1953). Additionally, 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. *The Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc.*, 371 S.E.2d 532, 536 (S.C. 1988).

B. Ample Evidence Supports the Jury's Verdict

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. (See, e.g., SCSU's Exhibit 1; Ms. Pyle testimony; Dr. Luke testimony.) The contract further expressly provided that, in the event of Defendant's breach of the contract by not remaining in SCSU's employ, the entire amount paid to her or on her behalf would be repaid by Defendant to SCSU. Unquestionably, the evidence supports the jury's verdict in an amount of $312,457, as direct damages determined by the express terms of the contract.

Under contract law principles, allowable damages also include all amounts necessary "...to place the nonbreaching party in the position he would have enjoyed if the contract had been performed." *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc.*, 399 S.E.2d 8, 12 (S.C. App. 1990). The fact that Defendant's continued employment upon completion of her Ph.D. degree was within the contemplation of both SCSU and the Defendant is clearly established, again, by the express language of the parties' agreement, which provides:

> FACULTY DEVELOPMENT PROJECT/PLAN
>
> *Major goals or objectives*:
>
> My entire objective for pursuing the PhD degree has always been to bring my experience back to South Carolina State University (SCSU) with the goal of exposing SCSU students to my areas of specialty, authoring scholarly works on sustainable development and engineering education, recruiting students to attend the University and enhancing the academic research capabilities of the University.

(SCSU's Exhibit 1.) Likewise, that Defendant's continued employment at SCSU was part of

SCSU's "benefit of the bargain," the denial of which would as a natural consequence cause SCSU to suffer a loss, is manifest in the contract. Defendant's own correspondence in connection with the parties' agreement states, "Dr. Ihekweazu... 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." (SCSU's Exhibit 1, Defendant's letter to Dr. Ihekweazu; testimony of Drs. Okafor, Ihekweazu, and Luke.)

Although there is no exact methodology for placing a dollar value on SCSU's loss in connection with Defendant's refusing to remain in SCSU's employ, the additional verdict amount of $101,803 ($414,260 - $312,457 = $101,803), as may have been determined by the jury, is reasonable and logical in light of the evidence, and it need not be viewed as speculative. Indeed, the testimony indicated (and Defendant even argued to the jury) that it took SCSU two years to find and employ a Ph.D.-degreed replacement for the position abandoned by Defendant at SCSU. Additionally, the value of Defendant's services as a Ph.D.-degreed college professor is reasonably established by the annual base salaries offered to her by SCSU ($55,719/year) and Virginia Tech ($82,500/year). (See, e.g., testimony of Drs. Ihekweazu, Luke and Simmons.) Accordingly, a jury determination of the loss to SCSU in the range of $55,719 at the low-end (for a one year loss of service at the lower salary amount) to $165,000 at the high-end (for two years loss of service at the higher salary amount), would be reasonable, logical, and wholly based on the evidence. See, e.g., *Perry v. Green*, 437 S.E.2d at 153. SCSU contends that the jury verdict amount possibly attributable as special damages of $101,803, falls almost exactly within the middle of this range, reflects its logical and dispassionate evaluation of the evidence and valuation of SCSU's loss as a natural consequence of Defendant's abandoning her position in breach of her contractual obligation to SCSU.

Moreover, SCSU's claim of breach of contract accompanied by a fraudulent act

was also submitted to the jury. This is a tort claim for which the jury may have properly awarded actual damages consistent with the principles of tort law. In tort, actual or compensatory damages may be awarded by the jury. Actual damages include compensation for all injuries which are naturally the proximate result of the Defendant's wrongful conduct. The measure of actual damages is the amount needed to compensate SCSU for the losses proximately caused by Defendant's wrong so that SCSU will be in the same position it would have been if there had been no wrongful injury. *Austin v. Specialty Transportation Services, Inc.*, 594 S.E.2d 867, 874 (S.C. App. 2004).

The fundamental question before the Court with regard to actual damages is whether "...there is any evidence to support the damages award...." *Id.* Clearly, and for the same reasons as discussed above in connection with contract damages, there is evidence to support the jury's award of $414,260 as actual damages. SCSU invested at least $312,457 in Defendant's education with the express expectation of and in exchange for Defendant agreeing to continue to work for and bring her expertise to SCSU and its students, faculty, and programs. Defendant abruptly and on the eve of a new school year wrongfully abandoned her commitment to SCSU, thereby proximately causing loss and injury to SCSU. A jury verdict of $414,260, as actual damages suffered by SCSU, is reasonable and supported by evidence presented at trial.

II. CONCLUSION

For the foregoing reasons, the jury's verdict in the amount of $414,260 is properly supported by the evidence, under either contract law or tort law. Defendant's motion for a new trial should be denied, and the jury's verdict in this case affirmed.

(Signature on next page)

Respectfully submitted,

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November 20, 2017
Columbia, South Carolina

Plaintiff's Proposed Jury Charges

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
South Carolina State University,		
	)	
Plaintiff,	)	C.A. No. 2015-CP-38-553
	)	
vs.	)	**[PLAINTIFF'S PROPOSED] JURY INSTRUCTIONS**
	)	
Denise Simmons ,	)	
	)	
Defendant.	)	
	)	

§ 1-1 General Instructions - Preliminary Charge (Given at Beginning of Trial)

Members of the jury, at this time I will make some brief comments about how this case will be presented to you. My only purpose in making these remarks is to better prepare you for what you are about to see and hear in order that you may understand the proceeding and be in a better position to render a true verdict at the end of the case.

Under the Constitution of the State of South Carolina and our code of laws, you and I have separate and distinct duties. You twelve jurors alone are the sole judges of the facts in this case. You are what is known as the finders of the facts and the evidence. The same constitution and laws that designate you the sole finders of the facts also make me the sole judge of the law, the sole instructor of the law.

I am not permitted to indicate in any way how I may feel about the testimony and evidence presented; nor may I indicate, nor will I, which party I personally feel should prevail. These determinations are solely within your province as the jury. I cannot invade your province and tell you what the facts are and you cannot invade my province and tell me what the law is. You will take the facts as you find them to be from the witnesses who testify from this witness stand and any exhibits that may be introduced into evidence. You will apply those facts, as you find them to be, to the law as I shall charge it to you at the conclusion of this trial, and thereby arrive at a true verdict under the solemn oath which you just took as jurors. The word "verdict" is derived from the Latin phrase, *veredicto*, meaning "to speak the truth."

In determining what the true facts are in this case, you, of necessity, must evaluate the credibility, which means believability, of the witnesses who take this stand. In passing upon the credibility or believability of the witnesses, you have the right to consider the interest of any witness, the bias of any witness, the prejudice of any witness, the demeanor of any witness.

Members of the jury, it is your duty under your sworn obligation as jurors to pay close attention to these witnesses, to observe these witnesses, to listen to these witnesses. It is imperative that you should at all times listen and observe carefully what you hear and see. Pay

close attention to the attorneys and to the court. Don't let your thoughts wander. Don't let your eyes rove around the courtroom. You should never let your interest in what is taking place get away from you. Often, it is at that very moment that some vital bit of evidence is presented. Give strict attention to the testimony in this case so that, at the conclusion of all of the testimony, after argument of counsel and the charge on the law by the court, you will then be in a position to determine what the true facts are and apply those facts to the law as I shall charge it to you at that time. Throughout this process, you have but one objective-to seek the truth, regardless of its source.

I do not intend that you or anyone else should construe these remarks, which I call my preliminary remarks, as a charge on the law, because it is not that. I will charge you the law applicable to the facts of this case, as you may find those facts to be, at the conclusion of this trial. This is merely an attempt on my part to very briefly explain to you what issues are involved in this case, certain legal definitions, and your duties under the oath that you took a few minutes ago as jurors. I have found in some instances the jurors do not understand these factors until the conclusion of the case when the judge charges them as to the law. I use this method of attempting to explain these factors to you at the commencement of the trial rather than at the conclusion. I hope it will be of some benefit to you in arriving at a fair, just and true verdict in this case-fair to the plaintiff, South Carolina State University, and fair to the defendant, Denise Simmons.

Under our procedure in South Carolina, a case such as this one is begun by the making of what are known as opening statements, the first being made by an attorney for the plaintiff, followed by a like statement by an attorney for the defendant. The opening statement is not intended to be and is not permitted to be argumentative. The opening statement is, first, merely an outline of the legal position of the party and, second, an outline of the evidence the party intends to present to support the party's legal position.

Following the opening statements, the evidence is then presented. The evidence which the parties present may be in the form of witnesses' testimony, maps and plats, medical reports, etc., or combinations of all these. Under the procedure, the plaintiff's evidence is presented first and is followed by that of the defendant.

After all of the evidence has been presented, the attorneys will return to make closing statements to you. These statements, as distinguished from the opening statements, are entitled to be argumentative. Indeed, they will be argumentative, in that the attorneys will be permitted to not only refer to and emphasize certain portions of the evidence presented to you, but will also be entitled to argue to you what they think any particular evidence means. This is sometimes referred to as arguing the inferences to be drawn from the evidence.

Following these final jury arguments, the court will instruct you, sometimes referred to as "charge" you, as to what the law is which governs this particular case.

A. Jurors' Discussion of Case

You cannot begin discussing this case or issues in the case until the attorneys have presented all the evidence, made closing arguments, and I have charged the applicable law. Prior to the submission of this case to you, do not form or express any opinion about this case or discuss this case with anyone, including your fellow jurors.

Jurors are not allowed to discuss the case with any person, including each other, prior to the submission of the case to you. Do not have any conversation or discussion of this case with a member of your family, a friend, or any other individual. It is a violation of your oath for you to discuss this case prior to the submission of the matter to you for final decision. This rule prohibits discussions or conversations in the jury room or at any other place until the case is given to you for a verdict. If a juror engages in conversations or discussions before the case is submitted to them, the juror may cause a mistrial of this case and the juror may be held in contempt of court.

- *See State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)(jurors should be admonished not to discuss the case with anyone, including each other, prior to the submission of the case to them); *State v. Parker*, 255 S.C. 359, 179 S.E.2d 31 (1971)(rule is well settled that jurors should not, prior to submission of case to them, converse with outsiders or among themselves on any subject connected with the trial, or form or express any opinion thereabout; and that jurors should be so admonished when they are permitted to separate during trial); *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967).

B. Charge Prohibiting Note-Taking

Regarding note-taking, you will not be taking notes because, while note-taking might appear helpful, often the note-taker gets the evidence or testimony down incorrectly. Then, in the jury room, that erroneous note may have an overbearing influence or impression upon those who did not take notes. The best system, and the time-tested system, is for each juror to listen carefully and observe carefully everything that takes place in this case. When you have done that, you will go to your jury room and discuss the facts intelligently and be in a position to arrive at a fair and just verdict. I am sure that each of you will do that.

The reason for the procedural rule prohibiting note-taking is to emphasize your duty and responsibility under your oath to pay close attention to the testimony. Please do not let your thoughts wander or your eyes rove around the courtroom, but give strict attention to the witness as he or she testifies. It will be your common memory that you rely upon in deciding factual issues involved in this case.

- *See State v. Trent*, 234 S.C. 26, 106 S.E.2d 527 (1959) (the issue regarding taking of notes by jurors rests in the sound discretion of the trial judge).

GIVEN _____

REFUSED _____

§ 1-2 General Instructions - Basic Charge (Given at Conclusion of Trial)

Members of the jury, please turn and face me and give me your attention. It is now that time in the trial of this case when I instruct you, or charge you, the law as it applies to the facts as you find them to be. This is an action in which the plaintiff alleges or claims Breach of Contract and Breach of Contract accompanied by a Fraudulent Act.

The word "juror" comes from Latin. The word means an "oath person." A juror is a person taking a solemn oath to bring their best talents and capabilities to the task of rendering a fair and impartial verdict. Your oath designates you as an official of the court. This oath is commensurate with the oath taken by the judge. The judge and jury blend their duties and responsibilities so as to achieve a fair and impartial verdict.

The word "verdict" emanates from Latin. The word "verdict" comes from two Latin root words: (1) verus, which means "absolute, pure truth"; and (2) dicto, which means "to speak." The two Latin root words are combined-the word "verdict" means "TO SPEAK THE TRUTH."

Under your oath as a juror, the verdict in this case must speak the truth in this controversy.

By the Constitution and laws of the State of South Carolina, you, the jury, are the sole judges of the facts and evidence in this case. I am not permitted to intimate any opinion that I may have in the case or to show any feeling to you as to what I think about the facts and evidence. I am not permitted to indicate how I feel about the merits of the case or which party should prevail. I tell you now I do not have an opinion in this case nor am I entitled to an opinion under the law.

Members of the jury, in determining what the facts are in this case, you, of necessity, must pass upon the credibility of the witnesses who have testified. Credibility in the law means believability. Can I believe this witness? Is this witness credible? The value and weight to be given to their testimony is in your sound discretion. You alone must decide the force and effect and the truth of the testimony. In making a determination as to the credibility of a witness, there are many factors that you may and should take into consideration, such as the appearance or manner of the witness as he or she gave testimony from the witness stand, known in the law as the demeanor of the witness. Did the witness have an interest in the outcome of the trial? Was the witness forthright or hesitant? Was the witness's testimony consistent or did it contain discrepancies? What was the ability of the witness to know about the facts concerning which he or she gave testimony? Did the witness have cause or reason to be biased or prejudiced in favor of the testimony that he or she gave? Was the testimony of the witness corroborated and made stronger by other testimony and evidence or was it made weaker and impeached by other testimony and evidence?

As jurors, you have the right to believe a small portion of a witness's testimony and disregard the larger portion. Or you may believe a larger portion of a witness's testimony and disregard the smaller portion. You may disregard a witness's testimony entirely if you have

sound reason in the record for doing so. You may believe the testimony of a single witness against that of many witnesses or the many witnesses as against the one. Most certainly, you do not determine the matter of credibility or believability merely by counting the number of witnesses for either side. Throughout this entire process, you have but one single objective and that is to seek the truth, regardless of from what source that truth may come.

Members of the jury, by the very same Constitution and laws which make you the finders of the facts and evidence in this case, I am, as the trial judge, made the sole and only instructor in the law. You must accept as correct the law as I charge it to you to be the correct law. And finally, in that regard, neither you nor I should be concerned with what the law ought to be in this State, but rather what I charge you the law to be in this State.

GIVEN _____

REFUSED _____

§ 1-3 General Instructions - Burden of Proof

A. Preponderance of the Evidence

1. As Related to the Plaintiff's Case

Members of the jury, the plaintiff in this case, having initiated and brought the action, has the burden of proof. That is to say, the plaintiff has the burden of proving her case by what is known in the law as the greater weight or preponderance of the evidence. When we say that a party must prove a proposition by the greater weight or preponderance of the evidence, we mean that the evidence on that proposition must be more convincing on that party's side than on the other side.

There is no procedure to weigh or evaluate evidence, except through the exercise of your good judgment and common sense. It is entirely a mental process. That evidence weighs with you which convinces you of its truth. What is meant by the greater weight or preponderance of the evidence may be illustrated by an ordinary set of merchant scales used in a place of business. When the case begins, the scales are evenly balanced. When the case ends after all the evidence has been presented and as you deliberate, if those scales remain evenly balanced or if those scales tip ever so slightly in the defendant's favor, then the plaintiff has not met the required burden of proof and your verdict would be for the defendant. If, on the other hand, those scales tip ever so slightly in the plaintiff's favor, then the plaintiff has met the required burden of proof in this matter and your verdict would be for the plaintiff.

The scales of justice are in perfect equipoise as the case begins [judge indicating with both hands parallel the perfect position of equipoise]. The preponderance of the evidence moves the scales of justice from the position of perfect equipoise in favor of the party producing the preponderance of the evidence.

As you evaluate the evidence and testimony, the scales of justice may tip ever so slightly in the party's favor on that factual issue and, if so, that party has met the burden of the preponderance of evidence on this factual issue. On the other hand, if the scales of justice remain in perfect equipoise on the factual issue, or if the scales tip ever so slightly in the other party's favor, then the party having the burden of proof has failed to meet the required burden.

In connection with my charge on burden of proof, I charge you that a party's allegations, that is, the stated case or defense, may be proved by any evidence, regardless of whether that evidence is brought out or introduced by the opposing party, or the opposing party's witnesses. That is to say, a party, in proving the claim or defense, is not limited solely to the testimony given by that party's own witnesses, but may rely upon any evidence presented and introduced by the opposing party and upon any testimony elicited from the opposing party's witnesses on direct or cross-examination.

- *See Ford v. Atlantic Coast Line R.R.*, 169 S.C. 41, 168 S.E. 143 (1932), aff'd, 287 U.S. 502, 53 S.Ct. 249, 77 L.Ed. 457 (1933); *Frazier v. Frazier*, 228 S.C. 149, 89 S.E.2d 225 (1955).

- *See also Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415

S.E.2d 384 (1992)(findings of fact based upon a preponderance of the evidence are those supported by the greatest weight, amount, credibility or truth, as reflected by the whole of the evidence before the court, or evidence which convinces as to its truth).

2. As Related to Affirmative Defenses of the Defendant

You will note I have been talking about the burden of proof as it relates to the plaintiff. As you consider the affirmative defense of _____, the burden of proof shifts and on that issue, that defense, the defendant has the burden of proving the defense by the greater weight or preponderance of the evidence. The burden has shifted in that regard and the defendant has the same burden as you consider the affirmative defense, to prove the defense to your satisfaction by the greater weight or preponderance of the evidence.

- *See Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 150 S.E. 789 (1929)(when a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and burden of proof rests upon him to establish his affirmative defense by preponderance of the evidence). *See, e.g., McClain v. Anderson Free Press*, 232 S.C. 448, 102 S.E.2d 750 (1958)(finding that, in action for libel, where answer pleads affirmative defense of qualified privilege, burden of proof is upon defendant to establish such defense by a preponderance of the evidence).

B. Clear and Convincing Evidence

Clear and convincing evidence is an elevated standard of proof, which lies between the lesser standard of "preponderance of the evidence," used in most civil cases, and the higher standard of "beyond a reasonable doubt," which is required in criminal cases. Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of fact a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

When the law places upon a party a burden of proof by clear and convincing evidence, the law means that the evidence is not ambiguous, doubtful, equivocal, or contradictory, but the evidence is pointed to the issue and satisfactory in the sense that the source from which it comes is one in which you as jurors can place credence.

- *See Anonymous (M-156-90) v. State Bd. of Medical Examiners*, 329 S.C. 371, 496 S.E.2d 17 (1998); *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261 n.4, 478 S.E.2d 282 n.4 (1996); *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993)(Toal, J., dissenting); *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. Dist. Ct. App. 1983).

- *See also Taylor v. Medenica*, 324 S.C. 200, 220, 479 S.E.2d 35, 45-46 (1996)("Our Court has previously held that when the trial judge first charges preponderance of the evidence, the jury can only be given the impression that 'clear and convincing' means a higher degree of proof. A trial judge's failure to elaborate on 'clear and convincing' is not error."); *Miller v. City of West Columbia*, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996)("To recover on a claim for defamation, the Constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth."); S.C. Code Ann. § 15-33-135 (2005)(in a civil action where punitive damages are claimed, burden of proof is by clear and convincing evidence).

GIVEN _____

REFUSED _____

§ 1-4 General Instructions - Direct and Circumstantial Evidence

Two kinds of evidence are recognized by the law: direct evidence and circumstantial evidence. These two kinds of evidence apply to the parties alike, the plaintiff and the defendant, and both are equally good in the law if they meet the test of the law. On a particular factual point, there may be direct evidence, circumstantial evidence or a combination of these kinds of evidence.

Facts in issue may be proved either by direct evidence or by indirect evidence, otherwise called circumstantial evidence. It is direct evidence if it proves a fact without an inference and which in itself, if true, conclusively establishes that fact. By direct evidence of a fact is meant the statements of persons who have perceived its existence by means of their senses, or the production of the thing itself before the court. "Direct evidence" is the testimony of a person who claims to have actual knowledge of a fact. It is evidence based on actual knowledge and proves a fact without inference or presumption. It is when a witness can be called to testify to the precise fact that is the subject of the issue on trial. Direct evidence immediately establishes the main fact to be proved. It is essentially evidence you could see, observe, or hear with your senses.

"Circumstantial evidence" does not tend to immediately prove a fact in issue; however, it does give rise to a legal inference that such a fact does exist. It means the proof of a chain of facts and circumstances indicating the existence of a fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn. In other words, you may infer that a particular event occurred based on proof of circumstances warranting such an inference. Circumstantial evidence immediately establishes secondary facts from which the main fact may be inferred, and is typically characterized by inference or presumption. It is not something that one observes; but from facts one can draw a conclusion.

By circumstantial evidence of a fact is meant the proof of some other fact or facts from which, taken either singly or collectively, the existence of the particular fact in question may be inferred as a necessary or probable consequence. Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. I charge you that inferences drawn from physical facts may be as strong as direct evidence, such inferences amount to circumstantial evidence and, when established, are as competent to prove a fact. Where circumstantial evidence is relied upon, it is incumbent upon the party presenting it to show the existence of such circumstances as would justify the inference that a particular event occurred, and not leave the question to mere speculation or conjecture. Additionally, where circumstantial evidence is relied upon, the facts and circumstances shown should be reckoned with in the light of ordinary experience, and such conclusions deduced from such evidence as common sense dictates. If the circumstances are proved to your satisfaction, you may infer a fact from those circumstances, but the circumstances must lead to the conclusion with reasonable certainty.

Circumstantial evidence is just as competent or capable of proving a fact in issue as is direct evidence. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

The proof as to circumstantial evidence is sufficient if shown by the preponderance of the evidence or the greater weight of the evidence. Both types of evidence are accepted as reasonable methods of proof and each is respected for such convincing force as it may carry.

In a civil case such as this, proof of circumstances warranting a given inference is sufficient because proof of a certainty is not required in a civil suit. In civil actions, every other reasonable conclusion need not be excluded. But the circumstances established, if any, in the minds of the jury must have sufficient probative force to produce a reasonable and probable conclusion and not a mere conjecture. The conclusion reached must be in the minds of the jury the most probable and reasonable one. So, if there are several reasonable inferences that may be drawn from all the circumstances and evidence, it is for you, the jury, to say which is established by the greater weight of the evidence.

- *See State v. Salisbury*, 343 S.C. 520, 524 n. 1, 541 S.E.2d 247, 248-49 n. 1 (2001)(evidence can be divided into two basic categories: direct and circumstantial; direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption; direct evidence immediately establishes main fact to be proved; circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred, and is typically characterized by inference or presumption); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000)(direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact; the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence); *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998)(for circumstantial evidence to be sufficient to warrant the finding of a fact, circumstances must lead to conclusion with reasonable certainty and must have sufficient probative value to constitute basis for legal inference, not for mere speculation; facts and circumstances shown should be reckoned with in light of ordinary experience, and such conclusions deduced therefrom as common sense dictates; existence of a fact cannot rest in speculation, surmise or conjecture); *Cox v. Lund*, 286 S.C. 410, 334 S.E.2d 116 (1985)(in civil actions, every other reasonable conclusion need not be excluded; proof of circumstances warranting a given inference is sufficient in such cases); *Attaway v. One Chevrolet 5-P Truck*, 228 S.C. 559, 91 S.E.2d 270 (1956)(an issue may be proven by circumstantial evidence; but for such evidence to be sufficient to warrant a finding of fact, it must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for legal inference and not mere speculation); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951)(in a civil action, proof to a certainty is not required); *McCready v. Atlantic Coast Line R.R.*, 212 S.C. 449, 48 S.E.2d 193 (1948)(any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proved, lead to the conclusion with reasonable certainty; a well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence, and may outweigh opposing direct testimony; it is sufficient if there is evidence from which the fact can properly be inferred); *Id.* (inferences drawn from physical facts may be as strong as direct evidence; such inferences amount to

circumstantial evidence and circumstantial evidence, when sufficiently strong, is as competent as positive evidence to prove a fact).

- *See also State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997); *St. Paul Fire and Marine Ins. Co. v. American Ins. Co*., 251 S.C. 56, 159 S.E.2d 921 (1968); *Sanders v. Charleston Consol. Ry. & Lighting Co*., 154 S.C. 220, 151 S.E. 438 (1930); *State v. Cherry*, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001)(Anderson, J., concurring and dissenting).

GIVEN _____

REFUSED _____

§ 1-8 General Instructions - Statements of Counsel

You must not consider as evidence any statement of counsel made during the trial. Statements of counsel do not constitute evidence, rather counsel is articulating the position and contention of his client. This rule applies to the opening statement of counsel and the closing argument.

GIVEN _____

REFUSED _____

§ 1-10 General Instructions - Objections

Attorneys are officers of the court. Attorneys have the absolute right and duty to bring matters to the attention of the court by way of objection. Do not inferentially, or otherwise, become upset or disturbed by counsel by virtue of an objection. Our trial procedure includes the objection process as a means of control of evidence, i.e., letting in proper evidence and keeping out improper evidence. Counsel, by objecting, are simply performing their role in the trial of the case.

Once the court makes a ruling on an objection, the jury is bound by that ruling. If the objection is sustained, the question is improper. If the objection is overruled, the question is proper. In that regard, the jury must not, under any circumstances, derive any inference from any ruling made by the court on objections as to any opinion the court may have on the case. The judge does not have an opinion on the evidence and is not entitled to an opinion under the law. The judge is performing his role in the trial of the case.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

GIVEN _____

REFUSED _____

§ 1-13 General Instructions - Unanimity of Verdict

Under the Constitution of this State, the jury verdict must be unanimous. Unanimity is mandated. Every single juror must agree on the jury verdict. There cannot be any split or divided vote in any form or fashion, such as eleven to one, ten to two, nine to three. Every single juror must agree on the jury verdict. When the foreperson writes the verdict and signs the name as the foreperson, that assures the court that the jury verdict is unanimous.

- *See* S.C. Const. art. V, § 22, which provides: "The petit jury of the Circuit Court shall consist of twelve members and the number of jurors of other courts must be determined by law. All jurors in any trial court must agree to a verdict in order to render the same."

GIVEN _____

REFUSED _____

§11-1 Damages

A person may recover punitive damages for breach of contract accompanied by a fraudulent act. *Welborn v. Dixon*, 70 S.C. 108, 49 W.E. 232 (1904). To recover punitive damages for a breach of contract accompanied by a fraudulent act, the plaintiff must provide three elements by clear and convincing evidence: (1) a breach of contract; (2) fraudulent intent relating to the breach of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of the contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

While fraudulent intent is a necessary element, a fraudulent intent or purpose in breaching the contract does not itself give rise to punitive damages. Even if there is a willful or deliberate breach of contract, only actual damages can be recovered unless there is clear and convincing evidence of a fraudulent act accompanying the breach of contract. *Vann v. Nationwide Ins. Co.*, 257 S.C. 217, 185 S.E2d 363 (1971).

In a fraudulent breach of contract action there must be proof of actual damages, or at least nominal damages, to support a verdict awarding punitive damages. *Monroe v. Bankers Life & Casualty Co.*, 232 S.C. 363, 102 S.E.2d 207 (1958).

GIVEN _____

REFUSED _____

§11-2 Fraudulent act defined

A fraudulent act is of like character to a fraudulent intention but imports some definitive act looking to the perpetration of the fraud. *Hardee v. Penn Mutual Life Ins. Co.*, 215 S.C. 1, 53 S.E.2d 861 (1949). The fraudulent act need not be some positive, affirmative or overt act, it can be a fraudulent omission to speak or act when one has a duty to speak or act.

If the fraudulent acts or representations are solely in the inception of the contract and do not accompany the breach, punitive damages cannot be recovered and the allegations of fraud may properly be stricken. *Branham v. Wilson Motor Co.*, 188 S.C. 1, 198 S.E. 417 (1938). However, the breach and the fraud do not have to be the same act, though they may be, since the fraudulent act may occur before the breach. What is required is that they be logically connected, the one being attendant upon the other. *Bradley v. Metropolitan Life Ins. Co.*, 162 S.C. 303, 160 S.E. 721 (1931).

GIVEN _____

REFUSED _____

§11-3 Fraudulent Defined

The word "fraudulent" means something that will deceive, cheat and mislead, inducing a belief in what is not true and action on such belief.

GIVEN _____

REFUSED _____

§ 13-2 Damages - Actual Damages

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. In other words, actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant.

Actual damages are awarded to a litigant in compensation for his actual loss or injury. Actual damages are such as will compensate the party for injuries suffered or losses sustained. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred.

The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. Actual damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant.

The existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation. However, proof of amount of loss with absolute or mathematical certainty is not required. Damages must be proved with a reasonable degree of certainty. The evidence presented by the plaintiff must enable you, the jury, to determine what amount is fair, just and reasonable.

The plaintiff bears the burden of proving by the preponderance of the evidence that he is entitled to compensatory damages.

- *See Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162 (1989); *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981)(in order for damages to be recoverable, evidence should enable jury to determine amount thereof with reasonable certainty and cannot be left to conjecture, guess, and speculation); *Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903)(actual damages are when the wrongful act has caused loss or injury which can be assessed in money; universal and cardinal principle being that the person injured shall receive compensation commensurate with his loss or injury and no more); *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Proctor v. Dep't Health & Environmental Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004); *Carrigg v. Blue*, 283 S.C. 494, 323 S.E.2d 787 (Ct. App. 1984); 22 Am. Jur. 2d *Damages* §§ 24, 25 (2003); *Black's Law Dictionary* 390 (6th ed. 1990).

GIVEN _____

REFUSED _____

§ 13-10 Damages - Speculative Damages

The existence or amount of damages cannot be left to conjecture, guess or speculation.

However, proof of amount of loss with absolute or mathematical certainty is not required. Damages must be susceptible of ascertainment with a reasonable degree of certainty.

- *See United Merchants & Mfrs., Inc. v. South Carolina Elec. & Gas Co.*, 113 F. Supp. 257 (D.S.C. 1953), *aff'd*, 208 F.2d 685 (4th Cir. 1953); *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 601 S.E.2d 332 (2004); *Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001); *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991); *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981)(in order for damages to be recoverable, evidence should be such as to enable court or jury to determine amount thereof with reasonable certainty or accuracy; while neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of amount of loss or damage is not required); *Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968); *Proctor v. Dep't Health & Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006); *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004); *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); *Yadkin Brick Co. v. Materials Recovery Co.*, 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000); *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996).

GIVEN _____

REFUSED _____

§ 13-11 Damages - Future Damages

A plaintiff cannot recover conjectural or speculative damages. However, if you find the plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future. Future damages need not be proved to a mathematical certainty and often must be approximated. These future damages must be the result of the defendant's negligence. Any future damages that you award must be reduced to their present-day value.

- *See Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001)(whether future damages are reasonably certain to occur is the standard of proof for future damages); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972)(only such future or prospective damages may be recovered as the evidence renders it reasonably certain will of necessity result from the alleged injury); *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972)(to recover future damages in a negligence case, plaintiff must prove damages are reasonably certain to occur; oftentimes verdict involving future damages must be approximated; wide latitude is allowed jury); *Ford v. A.A.A. Hwy. Express, Inc.*, 204 S.C. 433, 29 S.E.2d 760 (1944)(future or prospective damages must be confined to such as evidence renders it reasonably certain will result from original injury); *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004) (jury may be charged on mortality tables to quantify future damages) *cert. granted*, Feb. 1, 2006; *Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); *Campbell v. Paschal*, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986)(to recover for future medical expenses, the expenses must be established with reasonable certainty; a party need not prove future damages in a personal injury case to a mathematical certainty); *Hall v. Palmetto Enters. II, Inc.*, 282 S.C. 87, 317 S.E.2d 140 (Ct. App. 1984); 22 Am. Jur. 2d *Damages* §§ 153-55 (2003); 22 Am. Jur. 2d *Damages* § 191 (2003)(award for future medical expenses must be discounted to present value); 22 Am. Jur. 2d *Damages* § 461 (2003)(award based on net profits that were to be paid at some future date is reduced to present value of that net profit, the court taking account of fact that plaintiff is being awarded those profits in advance of time that he otherwise would have received them); 22 Am. Jur. 2d *Damages* § 483 (2003)(as a rule, allowance for future damages must be reduced to its present worth; 22 Am. Jur. 2d *Damages* § 792 (2003)(for purposes of determining decreased earning capacity, it is generally held that jury should be instructed it should reduce such damages to their present value).

GIVEN _____

REFUSED _____

§ 13-21 Damages - Punitive Damages

In this case, the plaintiff seeks punitive damages in addition to actual damages. Punitive damages, also known as exemplary damages, are imposed as punishment. They are not intended to compensate. Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party.

Punitive damages serve at least three important purposes: punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful invasion of the plaintiff's private rights. The paramount purpose for awarding punitive damages is not to compensate the plaintiff, but to punish and set an example for others. What would justify an award of punitive damages? As you consider the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides:

> In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.

Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's actions were willful, wanton, malicious, or in reckless disregard of the plaintiff's rights. A conscious failure to exercise due care constitutes willfulness. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the wrongdoer. Punitive damages will be allowed even when the defendant does not realize he is invading the plaintiff's rights so long as the act is committed in such a manner that a person of ordinary prudence would conclude it was done in reckless disregard of the rights of another.

The plaintiff cannot recover punitive damages based on negligent conduct. Negligence is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Mere negligence will not support a punitive damages award.

To recover punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant's actions were willful, wanton, or reckless. The words recklessness, willfulness and wantonness are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care.

Recklessness is distinguished from negligence. Negligence is the failure to use due care. Negligence is carelessness. Negligence is failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances.

Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of the plaintiff, or a reckless disregard of the rights of the plaintiff. Recklessness is an awareness of

wrongful conduct and a continuation to act regardless of consequences.

The test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party.

Before you can award punitive damages, you must first find the plaintiff is entitled to actual or nominal damages. There must be an award of actual or nominal damages for a verdict of punitive damages to be supported. This rule is premised on the fact that liability must be established before a plaintiff can seek punitive damages. Therefore, if you do not award actual or nominal damages, then you cannot award punitive damages.

There is no formula or standard that can be used as a measure for assessing punitive damages. However, factors relevant to your consideration of punitive damages are:

(1) the character of the defendant's acts;

(2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;

(3) defendant's degree of culpability;

(4) the punishment that should be imposed;

(5) duration of the conduct;

(6) defendant's awareness or concealment;

(7) the existence of similar past conduct;

(8) likelihood the award will deter the defendant or others from like conduct;

(9) whether the award is reasonably related to the harm likely to result from such conduct; and

(10) defendant's wealth or ability to pay.

The financial condition of a defendant is a factor you should consider in awarding punitive damages. However, there is no requirement that the defendant be a person of means before you are justified in awarding punitive damages. While the wealth of a defendant is a relevant factor in assessing punitive damages, it is not necessarily controlling. In other words, the financial worth of a defendant is a fact properly to be considered by you in determining the amount to be awarded as punitive damages, but evidence of net worth is not a prerequisite to a punitive damage award.

When under proper allegations a plaintiff proves, by clear and convincing evidence, a

willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages. Accordingly, if you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances.

NOTE: The *Gamble* factors to be considered in post-trial review of a punitive damage award are not required to be included in a jury charge on punitive damages. *See McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309, 457 S.E.2d 603, 608 (1995)(holding "[n]owhere in *Gamble* did we require the factors to be considered in post-trial review of a punitive damage award be included in the jury charge."). However, the *Gamble* factors relevant to posttrial evaluation of an award of punitive damages can be submitted to the jury to assist in its determination of the award of punitive damages. *See Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

- *See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005) (evidence of defendant's conduct that is out of jurisdiction and unrelated to plaintiff's injury improper consideration in determining punitive damages); *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) (new punitive damages phase ordered after jury heard evidence of defendant's conduct towards a third party); *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004) (a defendant's ability to pay does not prohibit a jury from awarding punitive damages and a punitive damages award will not be overturned due to defendant's inability to pay; the most important indicium of the reasonableness of punitive damages award is the degree of reprehensibility of the defendant); *Atkinson v. Orkin Exterminating Co.,* 361 S.C. 156, 604 S.E.2d 385 (2004) (due process violated where punitive damages award excessive); *Id.* (issue of punitive damages remanded where jury improperly considered evidence of defendant's unrelated misconduct); *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000)(purposes of punitive damages are to punish wrongdoer and deter wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996)(trial court is not required to make findings of fact for each factor to uphold punitive damage award); *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 478 S.E.2d 57 (1996)(trial judges have long been required, as a threshold matter, to assess culpability of defendant's conduct to determine whether punitive damages are available in a given case, i.e., whether the issue should be submitted to the jury; once trial judge determines punitive damage award is warranted under facts of case, amount to be assessed has historically been measured by jury against character of wrong committed, punishment to be applied, and ability of defendant to pay); *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996); *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993)(punitive damage charge survives constitutional scrutiny if (1) trial court's jury instruction explains nature, purpose and basis for award; (2) post-trial procedures enable court to scrutinize award; and (3) appellate review process ensures that award is reasonable and rational); *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991)(to ensure that punitive damage award is proper, trial court shall conduct post-trial

review and may consider the following: (1) defendant's degree of culpability; (2) duration of conduct; (3) defendant's awareness or concealment; (4) existence of similar past conduct; (5) likelihood award will deter defendant or others from like conduct; (6) whether award is reasonably related to harm likely to result from such conduct; (7) defendant's ability to pay; and (8) "other factors" deemed appropriate); *Id.* (upon completing its review, dedicated to the postulate that no award be grossly disproportionate to severity of offense, trial court shall set forth its findings on the record; amount of damages, actual or punitive, remains largely within discretion of jury, as reviewed by trial judge); *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162 (1989); *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984)(issue of punitive damages must be submitted to jury if more than one reasonable inference can be drawn from evidence as to whether defendant's behavior was reckless, willful, or wanton); *Martin v. Martin*, 262 S.C. 168, 203 S.E.2d 385 (1974)(test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party); *Harris v. Burnside*, 261 S.C. 190, 199 S.E.2d 65 (1973); *Gilbert v. Duke Power Co.*, 255 S.C. 495, 179 S.E.2d 720 (1971); *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963); *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962)(one of the chief purposes in awarding damages of this class is to punish the wrongdoer, not only to prevent by him a recurrence of the wrongful act, but to deter others from conduct of the same or similar kind); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958); *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952); *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942)(defendant's financial ability to pay is always a factor to be considered by jury in awarding punitive damages); *Sample v. Gulf Refining Co.*, 183 S.C. 399, 191 S.E. 209 (1937); *Cook v. Atlantic Coast Line R.R.*, 183 S.C. 279, 190 S.E. 923 (1937)(where pleadings allege and evidence shows conscious and willful violation, invasion, or infringement of legal right, law will presume damages sufficient to sustain action, even though such damages may be only nominal and not capable of exact measurement, and in such case verdict for punitive damages without finding of actual damages will be sustained); *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004); *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 556 S.E.2d 726 (Ct. App. 2001)(there can be no recovery of punitive damages without a finding of actual damages); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)(issue of punitive damages must be submitted to jury if more than one reasonable inference can be drawn from evidence as to whether defendant's behavior was reckless, willful, or wanton); *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000)(amount of punitive damages awarded is largely within jury's discretion, though reviewable by trial judge; trial judge is not required to make findings of fact for each factor to uphold punitive damages award); *Hawkins v. Pathology Assocs.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998); *Lister v. NationsBank*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997)(amount of damages, actual or punitive, remains largely within discretion of finder of fact, as reviewed by trial judge); *Carter v. R.L. Jordan Oil Co.*, 301 S.C. 84, 390 S.E.2d 367 (Ct. App. 1990); *Clamp v. Clamp*, 293

S.C. 142, 359 S.E.2d 86 (Ct. App. 1987); *Broom v. Southeastern Hwy. Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986)(in South Carolina, unlike most jurisdictions, award of punitive damages does not rest in discretion of jury but is recoverable as a matter of right); *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985)(proof of nominal damages can support award of punitive damages); *Camp v. Components, Inc.*, 285 S.C. 443, 330 S.E.2d 315 (Ct. App. 1985); S.C. Code Ann. § 15-33-135 (Supp. 2001)(in any civil action where punitive damages are claimed, plaintiff has burden of proving such damages by clear and convincing evidence); 22 Am. Jur. 2d *Damages* §§ 539, 542, 544, 553 (2003); *Black's Law Dictionary* 390, 1032, 1271, 1582, 1599 (6th ed. 1990).

GIVEN _____

REFUSED _____

§ 19-1 Contract - Defined

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

In South Carolina, a contract may be in writing or it may be oral, that is, by word of mouth, or it may be a combination of those types-some things in writing, some things oral.

For an agreement to be legally enforceable, the parties must manifest, by way of an offer to enter an agreement by one party and an acceptance of this offer by the other, an intention to enter a contract under terms which are completely understood by each party. This is sometimes referred to as a "meeting of the minds." The "meeting of the minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.

If the agreement is manifested by words, the contract is said to be express. If the agreement is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound. Without the actual agreement of the parties, there is no contract. An express contract, as well as an implied contract, rests on an actual agreement of the parties to be bound to a particular undertaking.

The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. To constitute a valid and binding contract, it is essential that both parties assent to the same thing in the same sense.

- *See Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989) (South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between parties with regard to all essential and material terms of agreement); *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978); *Gaskins v. Blue Cross-Blue Shield*, 271 S.C. 101, 245 S.E.2d 598 (1978); *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975); *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975); *Moore v. Palmetto State Life Ins. Co.*, 222 S.C. 492, 73 S.E.2d 688 (1952); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936); *Wallingford v. Columbia & G.R. Co.*, 26 S.C. 258, 2 S.E. 19 (1887); *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994)(promise to "pay what I can" does not manifest meeting of minds between parties as to contract price; such promise is not sufficiently certain to bind promisor contractually; too much is left to judgment of promisor); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988); *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987)(express contract is

obligation which arises from actual agreement of parties as manifested by words; implied in fact contract is contract which arises when assent of parties to agreement is manifested by conduct); *Timmons v. McCutcheon*, 284 S.C. 4, 324 S.E.2d 319 (Ct. App. 1984); *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984); *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984).

GIVEN _____

REFUSED _____

§ 15-5 Contract - Breach of Contract Defined

The word "breach," as it applies to contracts, is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence. When performance of a duty under a contract is due, any nonperformance is a breach. In other words, a party breaches a contract when he does not perform as he agreed to perform under the contract.

A party's contractual duty is found in the obligation assumed by the party to the contract. A party's failure to comply with the contractual duty constitutes the breach. Nonperformance of a valid contract is a breach thereof. A breach occurs when a party refuses or neglects to perform some duty required by the terms of the contract.

A breach of contract is any unjustified failure to perform any promise, express or implied, that is a part of the contract, or a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract, or the commission or omission of some act that violates the express or implied undertakings contained in the contract.

A breach may occur when a party without legal excuse fails to perform any promise that is all or part of the contract, or knowingly prevents, hinders or makes more costly the other party's performance, or in advance of the due date of his performance, repudiates his promise to perform-that is, repudiates or renounces the contract.

The plaintiff is entitled to recover only if you find that he has proved by the preponderance of the evidence that the defendant did, in fact, breach the contract between the two parties.

- *See Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965)(nonperformance of valid contract is breach); 17A Am. Jur. 2d *Contracts* § 699 (2994); Restatement (Second) of Contracts § 235 (1981); *Black's Law Dictionary* 188 (6th ed. 1990)(defining the phrase "breach of contract").

GIVEN _____

REFUSED _____

§ 19-1 Contract - Defined

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

In South Carolina, a contract may be in writing or it may be oral, that is, by word of mouth, or it may be a combination of those types-some things in writing, some things oral.

For an agreement to be legally enforceable, the parties must manifest, by way of an offer to enter an agreement by one party and an acceptance of this offer by the other, an intention to enter a contract under terms which are completely understood by each party. This is sometimes referred to as a "meeting of the minds." The "meeting of the minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.

If the agreement is manifested by words, the contract is said to be express. If the agreement is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound. Without the actual agreement of the parties, there is no contract. An express contract, as well as an implied contract, rests on an actual agreement of the parties to be bound to a particular undertaking.

The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. To constitute a valid and binding contract, it is essential that both parties assent to the same thing in the same sense.

- *See Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989) (South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between parties with regard to all essential and material terms of agreement); *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978); *Gaskins v. Blue Cross-Blue Shield*, 271 S.C. 101, 245 S.E.2d 598 (1978); *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975); *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975); *Moore v. Palmetto State Life Ins. Co.*, 222 S.C. 492, 73 S.E.2d 688 (1952); *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936); *Wallingford v. Columbia & G.R. Co.*, 26 S.C. 258, 2 S.E. 19 (1887); *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994)(promise to "pay what I can" does not manifest meeting of minds between parties as to contract price; such promise is not sufficiently certain to bind promisor contractually; too much is left to judgment of promisor); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988); *Rolandi v. City of Spartanburg*, 294 S.C. 161, 363 S.E.2d 385 (Ct. App. 1987)(express contract is

obligation which arises from actual agreement of parties as manifested by words; implied in fact contract is contract which arises when assent of parties to agreement is manifested by conduct); *Timmons v. McCutcheon*, 284 S.C. 4, 324 S.E.2d 319 (Ct. App. 1984); *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984); *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984).

GIVEN _____

REFUSED _____

§ 19-2 Contract - Breach of Contract - Defined

The word "breach," as it applies to contracts, is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence. When performance of a duty under a contract is due, any nonperformance is a breach. In other words, a party breaches a contract when he does not perform as he agreed to perform under the contract.

A party's contractual duty is found in the obligation assumed by the party to the contract. A party's failure to comply with the contractual duty constitutes the breach. Nonperformance of a valid contract is a breach thereof. A breach occurs when a party refuses or neglects to perform some duty required by the terms of the contract.

A breach of contract is any unjustified failure to perform any promise, express or implied, that is a part of the contract, or a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract, or the commission or omission of some act that violates the express or implied undertakings contained in the contract.

A breach may occur when a party without legal excuse fails to perform any promise that is all or part of the contract, or knowingly prevents, hinders or makes more costly the other party's performance, or in advance of the due date of his performance, repudiates his promise to perform-that is, repudiates or renounces the contract.

The plaintiff is entitled to recover only if you find that he has proved by the preponderance of the evidence that the defendant did, in fact, breach the contract between the two parties.

- *See Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003) (homeowners breached contract by terminating contract without giving builders opportunity to correct errors); *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965)(nonperformance of valid contract is breach); 17A Am. Jur. 2d *Contracts* § 716 (1991); Restatement (Second) of Contracts § 235 (1981); *Black's Law Dictionary* 188 (6th ed. 1990)(defining the phrase "breach of contract").

GIVEN _____

REFUSED _____

§ 19-3 Contract - Breach of Contract - Elements

What is a contract? A contract is an agreement between two or more parties, the preliminary step in the making of which is an offer by one and acceptance by the other in which the minds of the parties meet and concur in understanding the terms.

A contract is the meeting of the minds of at least two parties. It involves an offer and acceptance and it must bind both parties. The essentials of a contract are:

(1) a person or entity able to contract; [the defendant in this case is a corporation; it is able to contract and able to be contracted with];

(2) a person or entity able to be contracted with;

(3) a thing to be contracted for;

(4) good and sufficient consideration;

(5) clear and explicit words to express the contract; and

(6) the assent of both the contracting parties.

In South Carolina, a contract may be in writing or it may be oral, that is, by word-of-mouth, or it may be a combination of those types, that is, some things in writing, some things oral, or by word-of-mouth.

A contract contemplates an agreement enforceable at law between two or more parties for the doing or not doing of some specific thing, and a contract must create legal obligation. A contract is an agreement which creates an obligation and its essentials are:

(1) competent parties;

(2) a subject matter;

(3) consideration;

(4) mutuality of agreement; and

(5) mutuality of obligation.

A contract is a transaction involving two or more parties whereby each becomes obligated to the other with reciprocal rights to demand performance of what is promised by each respectively.

A contract is an agreement on sufficient consideration to do or not do a particular thing. Therefore, the consideration is a vital element in a binding contract, and no contract is complete without legal consideration. When the law says there must be consideration, the law does not require any form of consideration. The law says consideration is that which the parties agree to

as consideration. It may be money, it may be an agreement to do a particular thing, and it may consist of mutual promises. A valuable consideration in the sense of the law may consist either in some right, interest, profit, benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Consideration may consist in a benefit to the promisor, the one doing the promising or a detriment to the promisee, the one receiving the promise. Consideration may consist in doing or agreeing to do what one is not legally obligated to do. To make a thing a consideration for a contract, it must have been agreed upon as consideration. It must have been offered by one party and accepted by the other as consideration. Nothing is consideration which the parties do not regard as consideration. Consideration constitutes what each party to a bargain gives up to the other, or at the other's direction, determined at the time of the bargain.

Accordingly, to recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence:

(1) a binding contract entered into by the parties;

(2) breach or unjustifiable failure to perform the contract; and

(3) damage suffered by the plaintiff as a direct and proximate result of the breach.

A binding, valid contract must exist for there to be a cause of action for breach of contract. The plaintiff must prove each element of the contract sued on. The elements of a contract are offer, acceptance, and valuable consideration.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. To be binding, an offer must be definite. In addition, it must be one which is intended of itself to create legal relations on acceptance.

Complete compliance with the terms and conditions of the offer constitutes acceptance. Substantial compliance with the terms of the offer is required to make the contract enforceable. Conduct manifesting assent constitutes acceptance and acceptance may be inferred from conduct. If an offer prescribes the manner of acceptance, the offeree must comply with its terms in order to create a contract.

Consideration is a necessary element of a valid contract. No contract is complete without legal consideration.

A contract may give a right to demand performance, but no cause of action arises until a party refuses or neglects to perform some duty required by the terms of the contract. The plaintiff must prove a breach or unjustifiable failure by the defendant to perform the contract.

- *See Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401 (D.S.C. 1996)(acceptance may be inferred from conduct); *Prescott v. Farmers Tel. Coop.*, 335 S.C. 330, 516 S.E.2d 923 (1999); *McPeters v. Yeargin Constr. Co.*, 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986); *Gaskins v. Blue Cross-Blue Shield*, 271 S.C. 101, 245 S.E.2d 598 (1978); *Tidewater Supply Co. v. Industrial Elec. Co.*, 253 S.C. 483, 171 S.E.2d 607 (1969)(action for damages for breach of contract is predicated on existence of contract); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *Cain v. United Ins. Co.*, 232 S.C. 397, 102 S.E. 360 (1958); *Moore v. Palmetto State Life Ins. Co.*, 222 S.C. 492, 73 S.E.2d 688 (1952); *Smyth v. Fleischmann*, 214 S.C. 263, 52 S.E.2d 199 (1949); *Rabon v. State Fin. Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943); *Davis & Clanton v. C.I.T. Corp.*, 190 S.C. 151, 2 S.E.2d 382 (1939); *Broadway v. Jeffers*, 185 S.C. 523, 194 S.E. 642 (1938); *McLaurin v. Hamer*, 165 S.C. 411, 164 S.E. 2 (1932); *Holly Hill Lumber Co. v. Federal Land Bank*, 160 S.C. 431, 158 S.E. 830 (1931); *Baughman v. Southern Ry.*, 127 S.C. 493, 121 S.E. 356 (1924); *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893)(mere fact one enters into contract gives no cause of action; action does not arise until there is some breach), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); *Fender & Latham, Inc. v. First Union Nat'l Bank*, 316 S.C. 48, 446 S.E.2d 448 (Ct. App. 1994); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); *Sanchez v. Tilley*, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985)(release from legal contract was sufficient consideration for promise to furnish support); 17A Am. Jur. 2d *Contracts* § 113 (1991); Michael G. Sullivan, *Elements of Civil Causes of Action* 25-30 (2000).

GIVEN _____

REFUSED _____

§ 19-4 Contract - Modification

A "modification" of a contract is a change; an alteration or amendment which introduces new elements into the details of a contract, or cancels some of them, but leaves the general purpose and effect of the subject matter intact.

Parties to a written contract, after it has been executed and entered upon, may modify it. A written contract may be changed by a subsequent parol agreement, supported by valuable consideration, and evidence is admissible in proof of such parol agreement.

Parties to a contract may supersede a written agreement by an oral one. It is competent for the parties to change, modify, or supersede the written agreement by an oral one. It is entirely competent for the parties to a contract to modify or waive their rights under it and engraft new terms upon it.

It is true that a simple contract completely reduced to writing cannot be changed or modified by parol evidence of what was said or done by the parties at the time it was made, because the parties agree to put the contract in writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing before any breach of its provisions, either altogether to waive, dissolve, or abandon it, or vary or qualify its terms, and thus make a new one.

A written contract may be modified by the parties thereto in any manner they choose, notwithstanding agreement prohibiting its alteration except in a particular manner.

A written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract. South Carolina law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Accordingly, to be effective as a modification, the new agreement must possess all the elements necessary to form a contract.

A party to a contract who receives an offer to change its terms is under no obligation to respond to that offer. The offeree's silence is not an acceptance or acquiescence to the proposed change, where nothing else is shown.

A written contract may be modified by an oral agreement [even where the written contract explicitly states all changes must be in writing]. While a written contract can be orally modified, there must be a meeting of the minds as to the modification. Any modification of a written contract must satisfy all the requisites of a valid contract, including a meeting of the minds.

- *See King v. PYA/Monarch, Inc.*, 317 S.C. 385, 453 S.E.2d 885 (1995); *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989); *H.A. Sack Co. v. Forest Beach Pub. Serv. Dist.*, 272 S.C. 235, 250 S.E.2d 340 (1978); *Evatt v. Campbell*, 234 S.C. 1, 106

S.E.2d 447 (1959); *Mebane v. Taylor*, 164 S.C. 87, 162 S.E. 65 (1932); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999); *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d771 (Ct. App. 1997); *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 451 S.E.2d 907 (Ct. App. 1994); *Willms Trucking Co. v. JW Constr. Co.*, 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994); *Lazer Constr. Co. v. Long*, 296 S.C. 127, 370 S.E.2d 900 (Ct. App. 1988); *Sanchez v. Tilley*, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985)(written contracts may be orally modified by parties, even if writing itself prohibits oral modification); *Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 322 S.E.2d 471 (Ct. App. 1984); 17A Am. Jur. 2d *Contracts* §§ 513, 520 (1991); 17A Am. Jur. 2d *Contracts* § 522 (1991)(burden of proving modification of contract is upon party who asserts modification); *Black's Law Dictionary* 1004 (6th ed. 1990).

GIVEN _____

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§ 19-7 Contract - Rules of Construction

In construing a contract, you shall use the following rules of construction. In the construction or interpretation of a contract, common sense and good faith are the leading touchstones of the inquiry. All contracts should receive a sensible and reasonable construction and not such a construction as will lead to an absurd consequence. An interpretation which involves the more reasonable and probable contract should be adopted.

Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail. The rights of the parties must be measured by the contract which the parties themselves made, regardless of its wisdom, reasonableness, or failure of the parties to guard their rights carefully. A contract should be construed so as to give, if possible, full force and effect to every part of it.

When a provision is ambiguous, the intent of the parties controls. The intent of the parties is a question of fact to be resolved by you, the jury, when the contract is ambiguous. In attempting to ascertain the parties' intention, the situation of the parties, as well as their purposes at the time the contract was entered, must be determined.

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner.

Ambiguities must be construed against the party who prepared the contract. A provision of a contract which does not clearly express the intention of the parties should be construed against the one for whose benefit it was inserted. Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity.

The language in a contract is to be strictly construed against the party who prepared the contract, and most liberally in favor of the other party to the contract. Where a contract is entered into upon a printed form prepared by a party, the language of the contract will be strictly construed against that party.

Doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation. In case of doubt or ambiguity, a contract will be construed most strongly against the party who drew or prepared it or whose attorney drew or prepared it. The rule is that where doubt exists as to the construction of an instrument prepared by one party thereto or his attorney, upon the faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter.

In other words, where a contract is susceptible of more than one interpretation, a doubt

shall be resolved against the party whose business it was to speak without ambiguity. Where a party to a contract adopts a reasonable interpretation of documents furnished by another and relies upon it, that reliance is due to be protected notwithstanding that the other party's interpretation may also be reasonable. Where a contract is prepared by one party, it will be presumed that its words were employed deliberately and with intention.

Parties to a contract are not expected to exercise clairvoyance in spotting hidden ambiguities in the contract and they are protected if they innocently construe in their own favor an ambiguity susceptible of another interpretation.

When there is no ambiguity in a contract, it must be construed according to the terms which the parties have used and terms used in the contract should be taken and understood in their plain, ordinary, and popular sense. Language used in a contract must be interpreted in its natural and ordinary sense. Absent an obvious omission or a drastic conflict in provisions, a party to a contract is not normally required to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation.

The rights of the parties to a contract must be measured by the contract which the parties themselves made. The court is not in the business of making a contract for a party.

The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document. Where a contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The parties' intention must, in the first instance, be derived from the language of the contract. The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used. The intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any particular clause or provision therein. Every term contained in a contract must be considered and given effect if possible.

If the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

- *See Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988); *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985); *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984); *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981); *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976) *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975); *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 161 S.E.2d 179 (1968)(ambiguous contract is one capable of being

understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning); *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962)(where language of contract is free from ambiguity, its construction is for court); *Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 71 S.E.2d 889 (1952); *Tuten v. Bowden*, 173 S.C. 256, 175 S.E. 510 (1934); *Johnson v. Glens Falls Ins. Co.*, 131 S.C. 253, 127 S.E. 14 (1925); *Clark v. New York Life Ins. Co.*, 101 S.C. 258, 85 S.E. 594 (1915); *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007); *Southern Atlantic Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999); *Prestwick Golf Club, Inc. v. Prestwick Limited Partnership*, 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)(it is a question of law for court whether language of contract is ambiguous; once court decides language is ambiguous, evidence may be admitted to show intent of parties; determination of parties' intent is then question of fact for jury); *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 452 S.E.2d 628 (Ct. App. 1994); *Skull Creek Club Limited Partnership v. Cook and Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993)(construction of contract which is ambiguous, or capable of more than one construction, is question of fact; in arriving at intention of parties, contract must be construed as a whole and different provisions dealing with same subject matter are to be read together); *Kumpf v. United Tel. Co.*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993); *Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co.*, 311 S.C. 275, 428 S.E.2d 734 (Ct. App. 1993); *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990); *Popocar Enter. v. McGowan*, 300 S.C. 178, 386 S.E.2d 795 (Ct. App. 1989); *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 355 S.E.2d 286 (Ct. App. 1987); *Holcombe v. Orkin Exterminating Co.*, 282 S.C. 104, 317 S.E.2d 458(Ct.App.1984).

GIVEN _____

REFUSED _____

§ 19-8 Contract - Intent of Parties

Where the language of the contract is ambiguous, that is, it has more than one meaning, you are permitted to consider the circumstances that surround the making of the contract to help you determine the real intention of the parties. You may not, however, use such circumstances to give the contract a meaning that is not apparent on its face.

The paramount rule in interpreting contracts is to ascertain the intention of the parties and then to put these intentions into effect. To arrive at a correct conclusion as to the intention of the parties, it is proper that the contract be considered in the light of surrounding circumstances. The parties' intention must, in the first instance, be derived from the language of the contract. If its language is plain, unambiguous and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

The rights of the parties to a contract must be measured by the contract which the parties themselves made. The court is not in the business of making a contract for a party.

The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document.

Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what is reasonable to suppose was the real intention of the parties. In determining the intent of the parties, you may not consider the undisclosed or secret intentions of the parties but rather you must be guided only by the parties' outward expressions.

Where the contract has been put into writing, you should gather the intention and meaning of the parties primarily from the contents of the written document itself. Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

An agreement capable of an interpretation which will make it valid will be given such an interpretation if the agreement is ambiguous.

- *See Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002); *Kilgore Group, Inc. v. South Carolina Employment Sec. Comm'n*, 313 S.C. 65, 437 S.E.2d 48 (1993)(primary test of contract's character is intention of parties, which is to be gathered from whole scope of language used); *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993); *Peidmont Interstate Fair Ass'n v. City of Spartanburg*, 274 S.C. 462, 264 S.E.2d 926 (1980); *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976); *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 128 S.E.2d 171 (1962)(where contract is ambiguous, intention of parties becomes question of fact for jury, and for their aid, resort will be had to extrinsic evidence to show conditions surrounding parties, circumstances under which contract was executed, and negotiations between parties leading up to execution thereof); *Mishoe v. General Motors Acceptance Corp.*, 234 S.C. 182, 107 S.E.2d 43 (1958); *Wise v. Picow*, 232 S.C. 237, 101 S.E.2d 651 (1958); *Kable v. Simmons*, 217 S.C. 161, 60 S.E.2d 79 (1950); *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501 (1945); *Mingus v. Broom*, 203 S.C. 450, 27 S.E.2d 801 (1943); *Bolt v.*

Ligon, 144 S.C. 218, 142 S.E. 504 (1928)(where contract as a whole disclosed a given intention, and certain words or clauses would, if taken literally, defeat the intention, they will be construed so as to be consistent with the general intent); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007); *Southern Atlantic Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002); *Friarsgate, Inc. v. First Fed. Sav. and Loan Ass'n*, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)(because specific situation was left unaddressed in lease, court looked to circumstances surrounding bargain as aid to ascertaining intention of parties); *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990); *RentCo. v. Tamway Corp.*, 283 S.C. 265, 321 S.E.2d 199 (Ct. App. 1984)(cardinal rule in interpretation of contracts is to ascertain intention of parties and to give effect to their intention); 17A Am. Jur. 2d *Contracts* §§ 350, 352 (1991); 17A Am. Jur. 2d *Contracts* § 353 (1991)(it is within province of jury, and not for court, to ascertain and determine intent and meaning of contracting parties in their use of uncertain and ambiguous language); 17A Am. Jur. 2d *Contracts* § 356 (1991)(rule that surrounding circumstances should be considered in determining meaning of contract and intention of parties thereto, as of time of entering into contract, is limited to cases where resort to such circumstances is made necessary by reason of ambiguity and uncertainty of contract language, and rule does not apply where language of written agreement is plain and is not susceptible of more than one meaning).

GIVEN _____

REFUSED _____

§ 19-11 Contract - Parol Evidence

The parol evidence rule states that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary, or explain its terms. The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. This rule excludes evidence which would give a perfectly clear agreement a different meaning or effect than indicated by the plain language of the agreement.

If a contract is ambiguous, parol evidence is admissible to show the true meaning of the contract and intent of the parties. Parol evidence may be admitted to supply a deficiency and establish the true intent of the parties. Parol evidence is admissible to show the true meaning of an ambiguous written contract. An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. Where a written contract is silent as to a particular matter and ambiguity thereby arises, parol evidence is admissible to supply the deficiency.

- *See Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 409 S.E.2d 769 (1991)(parol evidence rule states that where terms of written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary, or explain its terms); *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993)(absent fraud, accident, or mistake, when terms of written agreement are unambiguous, extrinsic evidence of contemporaneous statements, allegedly made by parties to agreement, are inadmissible if they contradict or vary terms of written agreement); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)(parol evidence rule generally excludes evidence which would give a perfectly clear agreement a different meaning or effect than that indicated by plain language of agreement; however, where contract is ambiguous, parol evidence may be admitted to supply deficiency and establish true intent); *Goiser v. Harper*, 307 S.C. 64, 413 S.E.2d 845 (Ct. App. 1991)(parol evidence is admissible to establish allegations of fraud in the execution or inducement of a written contract); *Popocar Enters. v. McGowan*, 300 S.C. 178, 386 S.E.2d 795 (Ct. App. 1989); *Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989)(where contract is silent as to particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply deficiency and establish true intent); *Smith v. South Carolina Dep't of Hwys. & Pub. Transp.*, 296 S.C. 11, 370 S.E.2d 101 (Ct. App. 1988); *Mattox v. Cassady*, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986)(parol evidence is admissible to show true meaning of ambiguous written contract).

GIVEN _____

REFUSED _____

§ 19-21 Contract - Excuse for Nonperformance - Repudiation of or Refusal to Perform Contract

Repudiation of a contract means refusal to perform a duty or obligation owed to the other party. It refers to the rejection or refusal of an offered or available right or privilege, or of a duty or relation.

Where one party to a contract repudiates it or refuses to perform it, the other party is not obligated to perform his promise, and such nonperformance does not render the other party liable in damages. A refusal by one party to perform obviates the necessity of a tender of performance by the adverse party.

An anticipatory repudiation or breach by a party to a contract generally excuses performance by the other party. That is, where one party repudiates in advance his obligations under the contract and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is excused from further performance on his part.

Where, before performance is due, a party states that he will not perform, such repudiation excuses nonperformance of conditions by the other party, so that the other party may maintain an action on the contract without performing such conditions. In other words, when one party to a contract gives notice to the other, before the latter is in default, that he will not perform such contract on his part, and does not retract such notice before performance on his part is due, such other party is entitled to enforce the contract without previously performing or offering to perform the provisions of the contract upon his part in favor of the former party, even though such performance is a condition precedent to the obligation of the repudiating party to perform.

In any event, the refusal to perform a contract which will release the other party from performance must be a distinct, unequivocal, absolute refusal, and deal with the performance of the entire obligation to which the contract binds the parties.

- *See* 17A Am. Jur. 2d *Contracts* § 704 (1991); *Black's Law Dictionary* 1303 (6th ed. 1990).

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REFUSED _____

§ 19-23 Contract - Duty to Read

A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. A person signing a document is responsible for reading the document and making sure of its contents. That is to say, every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One who signs a written instrument has the duty to exercise reasonable care to protect himself. Such duty requires that he read the contract which he signs.

If the person cannot read, he has the affirmative duty to ask someone to read the document to him. Simply stated, a person who signs a contract or other written document is bound by the terms and conditions of the writing.

NOTE: This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986); *Thomas v. American Workman*, 197 S.C. 178, 14 S.E.2d 886 (1941). This exception is, however, very strictly interpreted by our Court. *Id*. In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered. *Id.*

- *See Citizens and Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d549 (1994); *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986)(every contracting party owes duty to other party to contract and to public to learn contents of document before he signs it; one cannot complain of fraud and misrepresentation in contents of document if truth could have been ascertained by reading it; rule is subject to exception that if party is ignorant and unwary, his failure to read document may be excused; this exception is, however, very strictly interpreted by our court; in determining whether party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered); *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 281 S.E.2d 121 (1981)(holding that in the absence of showing of fraud, mistake, unfair dealing or the like, party to contract incorporating arbitration provision cannot escape obligation of such provision by simply declaring he did not read the whole agreement); *Allen- Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971); *Maw v. McAlister*, 252 S.C. 280, 166 S.E.2d 203 (1969); *Parks v. Morris Homes Corp.*, 245 S.C. 461, 141 S.E.2d 129 (1965); *White v. Southern Ry. Co.*, 208 S.C. 319, 38 S.E.2d 111 (1946); *Souba v. Life Ins. Co.*, 187 S.C. 311, 197 S.E. 826 (1938)(if party who signs written contract in ignorance of its contents without reading it or having it read is induced to sign by conduct of other party which amounts to actionable fraud, this may give signer right to avoid contract as against him on ground of fraud); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).

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§ 19-27 Contract - Damages for Breach of Contract

What damages are recoverable under a contract theory?

The damages recoverable for a breach of contract are those which follow as a natural consequence of the breach or those damages which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into. Generally, the damages to which one is entitled for breach of contract are those which arise naturally from the breach or those which reasonably may be supposed to have been within the contemplation of the parties at the time the contract was entered into.

One who seeks to recover damages for a breach of contract to which he was a party must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.

A party who has been injured by the breach of a contract is entitled to recover the amount of the loss. That is to say, he is entitled, insofar as this can be done by a monetary award, to be placed in the same position he would have occupied if the contract had been performed.

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.

- *See Bencsh v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003); *Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 423 S.E.2d 124 (1992); *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Drews Co. v. Ledwith-Wolfe Assoc.*, 296 S.C. 207, 371 S.E.2d 532 (1988); *Goodwin v. Hilton Head Co.*, 273 S.C. 758, 259 S.E.2d 611 (1979), *overruled on other grounds*, *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602 (2007); *Holmes v. Nationwide Life Ins. Co.*, 273 S.C. 711, 258 S.E.2d 924 (1979); *Hutson v. Continental Assurance Co.*, 269 S.C. 322, 237 S.E.2d 375 (1977), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993); *Dunsil v. E.M. Jones Chevrolet Co.*, 268 S.C. 291, 233 S.E.2d 101 (1977); *Kline Iron and Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 201 S.E.2d 388 (1973); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *South Carolina Fin. Corp. v. West Side Fin. Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960); *Charles v. Texas Co.*, 199S.C. 156, 18 S.E.2d 719 (1942); *Collins Music Co. v. Smith*, 332 S.C. 145,503 S.E.2d 481 (Ct. App. 1998); *Hawkins v. Greenwood Dev. Corp.*, 328S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *Minter v. GOCT, Inc.*, 322 S.C.525, 473 S.E.2d 67 (Ct. App. 1996); *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990), *aff'd*, 310 S.C. 232, 423 S.E.2d 114 (1992).

- *See also Gauld v. O'Shaugnessy Realty Co.*, Op. No. 4455(S.C. Ct. App. filed Nov. 14, 2008) (Shearouse Adv. Sh. No. 43 at 47)(generally, evidence should allow a jury or the

court to determine the amount of damages with reasonable certainty or accuracy; the general rule is that a landowner can give a reasonable estimate of the value of her land and the damages thereto even though she is not an expert; it is up to the jury to assess the weight of the landowner's testimony on damages unless the landowner's lack of qualification and knowledge is so complete that it would render the testimony worthless; however, bald allegations of diminuation of property value are insufficient to create a genuine issue of fact of damages without some evidence tending to establish those damages).

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REFUSED _____

§ 19-31 Contract - Special Damages

Special or consequential damages may be recovered if they either flow as a natural consequence of the breach or have been reasonably within the contemplation of the parties at the time of the contract. When a plaintiff seeks special damages for breach of contract, he must prove both the fact of damage and the amount of damage with a reasonable degree of certainty. The fact of damage is proved by showing:

(1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract; and

(2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.

The amount of damage may be established by proving the actual amount of the out-of-pocket loss or a reasonably accurate estimation thereof.

To recover special damages for the breach of a contract, the plaintiff must establish the special circumstances under which the contract was made were communicated by the plaintiff to the defendant. In any instance, the plaintiff cannot recover special damages if the special circumstances were wholly unknown to the defendant when the contract was entered into. Notice at the time of the contract of circumstances from which special damages may reasonably be expected to result will make the defendant liable for such damages on the ground that they were within the contemplation of the parties, and therefore are regarded as forming a part of the contract. Accordingly, special damages, such as loss of income or profits, are recoverable if they were within the reasonable contemplation of the parties at the time of the making of the contract. However, if the plaintiff's proof is speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied.

Special damages are by their very nature conditioned by the particular circumstances of each case. The party claiming special damages must show that the defendant was clearly warned of the probable existence of unusual circumstances or that because of the defendant's own education, training, or information, the defendant had reason to foresee the probable existence of such circumstances. While it is true that the defendant need not foresee the exact dollar amount of the injury, the defendant must know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from a breach of the contract or delayed performance. The special circumstances must exist when the contract was made. When the above elements are met, special damages are considered within the contemplation of the parties at the time the contract was signed.

- *See Norell Forest Products v. H & S Lumber Co.*, 310 S.C. 368, 426 S.E.2d 800 (1993); *Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 423 S.E.2d 124 (1992); *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Drews Co. v. Ledwith-Wolfe Assocs, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988); *Kline Iron and Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 201 S.E.2d 388 (1973); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *Adams v. Hardin Motor Co.*, 111 S.C. 493, 98 S.E. 381

(1919)(in order to recover for special damages for breach of contract, it is necessary to allege and prove defendant had notice, at time of making contract, of special circumstances from which damages might reasonably be expected to result); *Givens v. North Augusta Elec. & Improvement Co.*, 91 S.C. 417, 74 S.E. 1067 (1912); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990)(when plaintiff seeks special damages, he or she must prove both fact of damage and amount with reasonable degree of certainty); *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).

GIVEN _____

REFUSED _____

§ 19-36 Contract – Duty of Good Faith and Fair Dealing

In every contract there exists an unspoken, but legally enforceable, promise of good faith and fair dealing. This unspoken promise is an implied covenant of good faith and fair dealing. However, there is no breach of an implied convenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do.

- *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996); *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 465 S.E.2d 84 (1995); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 85 (1992); *Tharpe v. G.E. Moore Co., Inc.*, 254 S.C. 196, 174 S.E.2d 397 (1970); *Time Warner Cable v. Condo Services, Inc.*, 381 S.C. 275, 672 S.E.2d 816 (Ct. App. 2009); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 459 S.E.2d 851 (Ct. App. 1995).

GIVEN _____

REFUSED _____

§22-29 Unjust enrichment

If you find that 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. *Harper v. McCoy*, 276 S.C. 170, 276 S.E.2d 782 (1981); *Niggel Assoc., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988); *Moore-Hudson Oldsmobile/GMC, Inc., v. Waterman*, 298 S.C. 107, 378 S.E.2d 279 (Ct. App. 1989); *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988).

Unjust enrichment is usually a prerequisite 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 therefor. 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 or 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 the loss of another, or the retention of money or property of another, against the fundamental principles of justice or equity and good conscience.

Where a person has received a benefit from another that fact alone does not make an unjust enrichment. The receipt of the benefit is unjust enrichment only if the circumstances of its receipt or retention are such that, as between the parties, it is unjust for the recipient to retain the benefits without paying for them.

The right of restitution does not depend on fault or wrong on the part of the recipient, but depends on the principles of justice and equity and good conscience.

GIVEN _____

REFUSED _____

Defendant's Proposed Jury Charges

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 1

CONTRACT CONSTRUCTION:

In construing a contract, you shall use the following rules of construction. In the construction or interpretation of a contract, common sense and good faith are the leading touchstones of the inquiry. All contracts should receive a sensible and reasonable construction and not such a construction as will lead to an absurd consequence. An interpretation which involves the more reasonable and probable contract should be adopted.

Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail. The rights of the parties must be measured by the contract which the parties themselves made, regardless of its wisdom, reasonableness, or failure of the parties to guard their rights carefully. A contract should be construed so as to give, if possible, full force and effect to every part of it.

When a provision is ambiguous, the intent of the parties controls. The intent of the parties is a question of fact to be resolved by you, the jury, when the contract is ambiguous. In attempting to ascertain the parties' intention, the situation of the parties, as well as their purposes at the time the contract was entered, must be determined.

A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. An ambiguous contract is one that can he understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner.

Ambiguities must be construed against the party who prepared the contract. A provision of a contract which does not clearly express the intention of the parties should be construed against the one for whose benefit it was inserted. Ambiguous language in a contract should be construed liberally and most strongly in favor of the party wbo did not write or prepare the contract and is not responsible for the ambiguity.

The language in a contract is to be strictly construed against the party who prepared the contract, and most liberally in favor of the other party to the contract. Where a contract is entered

into upon a printed form prepared by a party, the language of the contract will be strictly construed against that party.

Doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation. In case of doubt or ambiguity, a contract will be construed most strongly against the party who drew or prepared it or whose attorney drew or prepared it. The rule is that where doubt exists as to the construction of an instrument prepared by one party thereto or his attorney, upon the faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter.

In other words, where a contract is susceptible of more than one interpretation, a doubt shall be resolved against the party whose business it was to speak without ambiguity. Where a party to a contract adopts a reasonable interpretation of documents furnished by another and relies upon it, that reliance is due to be protected notwithstanding that the other party's interpretation may also be reasonable. Where a contract is prepared by one party, it will be presumed that its words were employed deliberately and with intention.

Parties to a contract are not expected to exercise clairvoyance in spotting hidden ambiguities in the contract and they are protected if they innocently construe in their own favor an ambiguity susceptible of another interpretation.

When there is no ambiguity in a contract, it must be construed according to the terms which the parties have used and terms used in the contract should be taken and understood in their plain, ordinary, and popular sense. Language used in a contract must be interpreted in its natural and ordinary sense. Absent an obvious omission or a drastic conflict in provisions, a party to a contract is not normally required to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation.

The rights of the parties to a contract must be measured by the contract which the parties themselves made. The court is not in the business of making a contract for a party.

The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document. Where a contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The parties' intention must, in the first instance, be derived from the language of the contract. The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used. The intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any particular clause or provision therein. Every term contained in a contract must be considered and given effect if possible.

If the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

See Lewis v. Premium Investment Corp., Op. No. 25510 (S.C. Sup. Ct. filed Aug. 5, 2002)(Shearouse Adv. Sh. No. 27 at 38); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *C.A.N. Enter., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988); *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985); *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984); *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981); *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976) *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975); *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 161 S.E.2d 179 (1968)(ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning); *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962)(where language of contract is free from ambiguity, its construction is for court); *Greenwood Mfg. Co. v. Worley*, 222 S.C. 156, 71 S.E.2d 889 (1952); *Tuten v. Bowden*, 173 S.C. 256, 175 S.E. 510 (1934); *Johnson v. Glens Falls Ins. Co.*, 131 S.C. 253, 127 S.E. 14 (1925); *Clark v. New York Life Ins. Co.*, 101 S.C. 258, 85 S.E. 594 (1915); *Southern Atlantic Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999); *Prestwick Golf Club, Inc. v. Prestwick Limited Partnership*, 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)(it is a question of law for court whether language of contract is ambiguous; once court decides language is ambiguous, evidence may be admitted to show intent of parties; determination of parties' intent is then question of fact for jury); *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 452 S.E.2d 628 (Ct. App. 1994); *Skull Creek Club Limited Partnership v. Cook and Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993)(construction of contract which is ambiguous, or capable of more than one construction, is question of fact; in arriving at intention of parties, contract must be construed as a whole and different provisions dealing with same subject matter are to be read together); *Kumpf v. United Tel. Co.*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993); *Twenty Ninth Ave. Corp. v. Great Atlantic & Pacific Tea Co.*, 311 S.C. 275, 428 S.E.2d 734 (Ct. App. 1993); *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990); *Popocar Enter. v. McGowan*, 300 S.C. 178, 386 S.E.2d 795 (Ct. App. 1989); *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 355 S.E.2d 286 (Ct. App. 1987); *Holcombe v. Orkin Exterminating Co.*, 282 S.C. 104, 317 S.E.2d 458 (Ct. App. 1984).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 2

CONTRACT PREVENTION:

One who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract.

See Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994); *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 3

Non-contradictory terms and conditions may be implied in a contract when the circumstances warrant it to effectuate the manifest intention of the parties. A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances. Terms which may clearly be implied from a consideration of the entire contract are as much a part as though plainly written on its face. In the absence of an express provision therefor, the law will imply and agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

Southern Realty & Constr. Co. v. Bryan, 290 S.C. 302, 304, 350 S.E.2d 194, 195 (S.C. Ct. App. 1986)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 4

A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Thus, for a contract to be binding, material terms cannot be left for future agreement. 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. The court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood.

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 572, 762 S.E.2d 696, 698, (SC 2014)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 5

Contract - Performance by Non-Breaching Party

The defendant claims that the plaintiff failed in to perform its obligations under the contract, and for that reason the defendant was justified in refusing to perform her own obligations.

An obligation to perform arises upon the making of a binding contract, even though it is not to be performed until a future date. "Performance" of a contract refers to the doing of the acts required by the agreement at the time and place therefor and in the manner stipulated. For a party to recover upon a contract for nonperformance by the other party, he must establish his own performance, or his offer and ability to perform, or a valid excuse for his failure to perform. That is to say, one who seeks to recover damages for breach of a contract, to which he was a party, must show the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready and willing to so perform it.

A party may not insist upon the performance of a contract where he has brought about its breach. A plaintiff cannot prevail in an action for nonperformance of a contract if he alone is responsible for the nonperformance. If the impossibility of performance arises directly or even indirectly from the acts of the promisee, it is a sufficient excuse for nonperformance.

Furthermore, a party may not insist upon the performance of a contract or a provision thereof where he himself is guilty of a material or substantial breach of that contract or provision. The party first committing a substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform if the promises are dependent.

It is an implied condition of every contract that one party will not prevent performance by the other party. A contracting party who prevents the other party from performing under the contract cannot urge or avail himself of the nonperformance which he himself has brought about. Stated differently, nonperformance of a promise in accordance with its terms is excused if performance is prevented by the conduct of the adverse party.

See Parks v. Lyons, 219 S.C. 40, 64 S.E.2d 123 (1951); 17A Am. Jur. 2d *Contracts* §§ 606, 701-02, 717 (1991).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 6

Contract - Excuse for Nonperformance - Repudiation of or Refusal to Perform Contract

Repudiation of a contract means refusal to perform a duty or obligation owed to the other party. It refers to the rejection or refusal of an offered or available right or privilege, or of a duty or relation.

Where one party to a contract repudiates it or refuses to perform it, the other party is not obligated to perform her promise, and such nonperformance does not render the other party liable in damages. A refusal by one party to perform obviates the necessity of a tender of performance by the adverse party.

An anticipatory repudiation or breach by a party to a contract generally excuses performance by the other party. That is, where one party repudiates in advance his obligations under the contract and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is excused from further performance on his part.

Where, before performance is due, a party states that he will not perform, such repudiation excuses nonperformance of conditions by the other party, so that the other party may maintain an action on the contract without performing such conditions. In other words, when one party to a contract gives notice to the other, before the latter is in default, that he will not perform such contract on his part, and does not retract such notice before performance on his part is due, such other party is entitled to enforce the contract without previously performing or offering to perform the provisions of the contract upon his part in favor of the former party, even though such performance is a condition precedent to the obligation of the repudiating party to perform.

17A Am. Jur. 2d *Contracts* § 704 (1991); *Black's Law Dictionary* 1303 (6th ed. 1990).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON
PLEAS		
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 7

CONTRACT - DEFAULT

A party cannot take advantage of his own default in the performance of a contract. Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom rests all liability for the nonperformance.

See Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994); 17A Am. Jur. 2d *Contracts* § 621 (1991).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 4

CONTRACT - PAROL EVIDENCE

The parol evidence rule states that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary, or explain its terms. The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. This rule excludes evidence which would give a perfectly clear agreement a different meaning or effect than indicated by the plain language of the agreement.

If a contract is ambiguous, parol evidence is admissible to show the true meaning of the contract and intent of the parties. Parol evidence may be admitted to supply a deficiency and establish the true intent of the parties. Parol evidence is admissible to show the true meaning of an ambiguous written contract. An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purpose in an indefinite manner. Where a written contract is silent as to a particular matter and ambiguity thereby arises, parol evidence is admissible to supply the deficiency.

See Penton v. J.F. Cleckley & Co., 326 S.C. 275, 486 S.E.2d 742 (1997); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 409 S.E.2d 769 (1991)(parol evidence rule states that where terms of written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary, or explain its terms); *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993)(absent fraud, accident, or mistake, when terms of written agreement are unambiguous, extrinsic evidence of contemporaneous statements, allegedly made by parties to agreement, are inadmissible if they contradict or vary terms of written agreement);

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 9

CONTRACT - BREACH:

A breach of contract is any unjustified failure to perform any promise, express or implied, that is a part of the contract, or a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract, or the commission or omission of some act that violates the express or implied undertakings contained in the contract.

A breach may occur when a party without legal excuse fails to perform any promise that is all or part of the contract, or knowingly prevents, hinders or makes more costly the other party's performance, or in advance of the due date of his performance, repudiates his promise to perform–that is, repudiates or renounces the contract.

The plaintiff is entitled to recover only if you find that it has proved by the preponderance of the evidence that the defendant did, in fact, breach the contract between the two parties without justification.

See Tillinghast v. Boston & Port Royal Lumber Co., 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965)(nonperformance of valid contract is breach); 17A Am. Jur. 2d *Contracts* § 716 (1991); Restatement (Second) of Contracts § 235 (1981); *Black's Law Dictionary* 188 (6th ed. 1990)(defining the phrase "breach of contract").

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: 10

Contract - Damages for Breach of Contract

What damages are recoverable under a contract theory?

The damages recoverable for a breach of contract are those which follow as a natural consequence of the breach or those damages which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into. Generally, the damages to which one is entitled for breach of contract are those which arise naturally from the breach or those which reasonably may be supposed to have been within the contemplation of the parties at the time the contract was entered into.

One who seeks to recover damages for a breach of contract to which he was a party must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.

A party who has been injured by the breach of a contract is entitled to recover the amount of the loss. That is to say, he is entitled, insofar as this can be done by a monetary award, to be placed in the same position he would have occupied if the contract had been performed.

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.

See Stern & Stern Assocs. v. Timmons, 310 S.C. 250, 423 S.E.2d 124 (1992); *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Drews Co. v. Ledwith-Wolfe Assoc.*, 296 S.C. 207, 371 S.E.2d 532 (1988); *Goodwin v. Hilton Head Co.*, 273 S.C. 758, 259 S.E.2d 611 (1979); *Holmes v. Nationwide Life Ins. Co.*, 273 S.C. 711, 258 S.E.2d 924 (1979); *Hutson v. Continental Assurance Co.*, 269 S.C. 322, 237 S.E.2d 375 (1977), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993); *Dunsil v. E.M. Jones Chevrolet Co.*, 268 S.C. 291, 233 S.E.2d 101 (1977); *Kline Iron and Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 201 S.E.2d 388 (1973); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *South Carolina Fin. Corp. v. West Side Fin. Co.*, 236 S.C. 109, 113 S.E.2d

329 (1960); *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942); *Collins Music Co. v. Smith*, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996); *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990), *aff'd*, 310 S.C. 232, 423 S.E.2d 114 (1992).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

REQUESTED Jury Charge: VI

CONTRACT - INTENT OF PARTIES:

Where the language of the contract is ambiguous, that is, it has more than one meaning, you are permitted to consider the circumstances that surround the making of the contract to help you determine the real intention of the parties. You may not, however, use such circumstances to give the contract a meaning that is not apparent on its face.

The paramount rule in interpreting contracts is to ascertain the intention of the parties and then to put these intentions into effect. To arrive at a correct conclusion as to the intention of the parties, it is proper that the contract be considered in the light of surrounding circumstances. The parties' intention must, in the first instance, be derived from the language of the contract. If its language is plain, unambiguous and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

The rights of the parties to a contract must be measured by the contract which the parties themselves made. The court is not in the business of making a contract for a party.

The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document.

Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what is reasonable to suppose was the real intention of the parties. In determining the intent of the parties, you may not consider the undisclosed or secret intentions of the parties but rather you must be guided only by the parties' outward expressions.

Where the contract has been put into writing, you should gather the intention and meaning of the parties primarily from the contents of the written document itself. Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

An agreement capable of an interpretation which will make it valid will be given such an interpretation if the agreement is ambiguous.

See Lewis v. Premium Investment Corp., Op. No. 25510 (S.C. Sup. Ct. filed Aug. 5, 2002)(Shearouse Adv. Sh. No. 27 at 38); *Kilgore Group, Inc. v. South Carolina*

Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993)(primary test of contract's character is intention of parties, which is to be gathered from whole scope of language used); *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993); *Peidmont Interstate Fair Ass'n v. City of Spartanburg*, 274 S.C. 462, 264 S.E.2d 926 (1980); *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976); *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 128 S.E.2d 171 (1962)(where contract is ambiguous, intention of parties becomes question of fact for jury, and for their aid, resort will be had to extrinsic evidence to show conditions surrounding parties, circumstances under which contract was executed, and negotiations between parties leading up to execution thereof); *Mishoe v. General Motors Acceptance Corp.*, 234 S.C. 182, 107 S.E.2d 43 (1958); *Wise v. Picow*, 232 S.C. 237, 101 S.E.2d 651 (1958); *Kable v. Simmons*, 217 S.C. 161, 60 S.E.2d 79 (1950); *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501 (1945); *Mingus v. Broom*, 203 S.C. 450, 27 S.E.2d 801 (1943); *Bolt v. Ligon*, 144 S.C. 218, 142 S.E. 504 (1928)(where contract as a whole disclosed a given intention, and certain words or clauses would, if taken literally, defeat the intention, they will be construed so as to be consistent with the general intent); *Southern Atlantic Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002); *Friarsgate, Inc. v. First Fed. Sav. and Loan Ass'n*, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992)(because specific situation was left unaddressed in lease, court looked to circumstances surrounding bargain as aid to ascertaining intention of parties); *Chan v. Thompson*, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990); *RentCo. v. Tamway Corp.*, 283 S.C. 265, 321 S.E.2d 199 (Ct. App. 1984)(cardinal rule in interpretation of contracts is to ascertain intention of parties and to give effect to their intention); 17A Am. Jur. 2d *Contracts* §§ 350, 352 (1991); 17A Am. Jur. 2d *Contracts* § 353 (1991)(it is within province of jury, and not for court, to ascertain and determine intent and meaning of contracting parties in their use of uncertain and ambiguous language); 17A Am. Jur. 2d *Contracts* § 356 (1991)(rule that surrounding circumstances should be considered in determining meaning of contract and intention of parties thereto, as of time of entering into contract, is limited to cases where resort to such circumstances is made necessary by reason of ambiguity and uncertainty of contract language, and rule does not apply where language of written agreement is plain and is not susceptible of more than one meaning).

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
Denise Simmons,	)	
Defendant,	)	
	)	

BREACH OF CONTRACT - Elements 12

What is a contract? A contract is an agreement between two or more parties, the preliminary step in the making of which is an offer by one and acceptance by the other in which the minds of the parties meet and concur in understanding the terms.

A contract is the meeting of the minds of at least two parties. It involves an offer and acceptance and it must bind both parties. The essentials of a contract are:

(1) a person or entity able to contract; [the defendant in this case is a corporation; it is able to contract and able to be contracted with];
(2) a person or entity able to be contracted with;
(3) a thing to be contracted for;
(4) good and sufficient consideration;
(5) clear and explicit words to express the contract; and
(6) the assent of both the contracting parties.

In South Carolina, a contract may be in writing or it may be oral, that is, by word-of-mouth, or it may be a combination of those types, that is, some things in writing, some things oral, or by word-of-mouth.

A contract contemplates an agreement enforceable at law between two or more parties for the doing or not doing of some specific thing, and a contract must create legal obligation. A contract is an agreement which creates an obligation and its essentials are:

(1) competent parties;
(2) a subject matter;
(3) consideration;
(4) mutuality of agreement; and
(5) mutuality of obligation.

A contract is a transaction involving two or more parties whereby each becomes obligated to the other with reciprocal rights to demand performance of what is promised by each respectively.

A contract is an agreement on sufficient consideration to do or not do a particular thing. Therefore, the consideration is a vital element in a binding contract, and no contract is complete without legal consideration. When the law says there must be consideration, the law does not

require any form of consideration. The law says consideration is that which the parties agree to as consideration. It may be money, it may be an agreement to do a particular thing, and it may consist of mutual promises. A valuable consideration in the sense of the law may consist either in some right, interest, profit, benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Consideration may consist in a benefit to the promisor, the one doing the promising or a detriment to the promisee, the one receiving the promise. Consideration may consist in doing or agreeing to do what one is not legally obligated to do. To make a thing a consideration for a contract, it must have been agreed upon as consideration. It must have been offered by one party and accepted by the other as consideration. Nothing is consideration which the parties do not regard as consideration. Consideration constitutes what each party to a bargain gives up to the other, or at the other's direction, determined at the time of the bargain.

Accordingly, to recover for a breach of contract, the plaintiff must establish three elements by the preponderance of the evidence:

(1) a binding contract entered into by the parties;
(2) breach or unjustifiable failure to perform the contract; and
(3) damage suffered by the plaintiff as a direct and proximate result of the breach.

A binding, valid contract must exist for there to be a cause of action for breach of contract. The plaintiff must prove each element of the contract sued on. The elements of a contract are offer, acceptance, and valuable consideration.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act amounts to an offer. To be binding, an offer must be definite. In addition, it must be one which is intended of itself to create legal relations on acceptance.

Complete compliance with the terms and conditions of the offer constitutes acceptance. Substantial compliance with the terms of the offer is required to make the contract enforceable. Conduct manifesting assent constitutes acceptance and acceptance may be inferred from conduct. If an offer prescribes the manner of acceptance, the offeree must comply with its terms in order to create a contract.

Consideration is a necessary element of a valid contract. No contract is complete without legal consideration.

A contract may give a right to demand performance, but no cause of action arises until a party refuses or neglects to perform some duty required by the terms of the contract. The plaintiff must prove a breach or unjustifiable failure by the defendant to perform the contract.

See Laidlaw Envtl. Servs. (TOC), Inc. v. Honeywell, Inc., 966 F. Supp. 1401 (D.S.C. 1996)(acceptance may be inferred from conduct); *Prescott v. Farmers Tel. Coop.*, 335 S.C. 330, 516 S.E.2d 923 (1999); *McPeters v. Yeargin Constr. Co.*, 290 S.C. 327, 350

S.E.2d 208 (Ct. App. 1986); *Gaskins v. Blue Cross-Blue Shield*, 271 S.C. 101, 245 S.E.2d 598 (1978); *Tidewater Supply Co. v. Industrial Elec. Co.*, 253 S.C. 483, 171 S.E.2d 607 (1969)(action for damages for breach of contract is predicated on existence of contract); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962); *Cain v. United Ins. Co.*, 232 S.C. 397, 102 S.E.2d 360 (1958); *Moore v. Palmetto State Life Ins. Co.*, 222 S.C. 492, 73 S.E.2d 688 (1952); *Smyth v. Fleischmann*, 214 S.C. 263, 52 S.E.2d 199 (1949); *Rabon v. State Fin. Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943); *Davis & Clanton v. C.I.T. Corp.*, 190 S.C. 151, 2 S.E.2d 382 (1939); *Broadway v. Jeffers*, 185 S.C. 523, 194 S.E. 642 (1938); *McLaurin v. Hamer*, 165 S.C. 411, 164 S.E. 2 (1932); *Holly Hill Lumber Co. v. Federal Land Bank*, 160 S.C. 431, 158 S.E. 830 (1931); *Baughman v. Southern Ry.*, 127 S.C. 493, 121 S.E. 356 (1924); *Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893)(mere fact one enters into contract gives no cause of action; action does not arise until there is some breach), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988); *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); *Fender & Latham, Inc. v. First Union Nat'l Bank*, 316 S.C. 48, 446 S.E.2d 448 (Ct. App. 1994); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993); *Sanchez v. Tilley*, 285 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985)(release from legal contract was sufficient consideration for promise to furnish support); 17A Am. Jur. 2d *Contracts* § 113 (1991); Michael G. Sullivan, *Elements of Civil Causes of Action* 25-30 (2000).

Testimony of Ms. Deborah Darby

The witness, DEBORAH DARBY, was first duly sworn and Testified as follows:

DIRECT EXAMINATION

BY MS. BLACKBURN:

Q Good morning, Ms. Darby, or good afternoon, I should say, Ms. Darby.

A Good afternoon.

Q You've stated your name for the record. Can you describe for us your educational and professional background?

A Sure. I received both of my degrees, my Masters and undergrad degree from South Carolina State University. And I am employed at South Carolina State University in the Office of the Provost.

Q Okay. And what is your current position in the Office of the Provost?

A Administrative coordinator.

Q And how long have you been an administrative professional in the Academic Affairs Office, or in the Office the Provost.

A It has been over 30 years.

Q And what are your job responsibilities as an administrative coordinator in the Office of the Provost?

A I assist the Provost with payroll documents, hiring. I also attend meetings on his behalf, attend meetings with

him. Also coordinate special assignments, such as workshops, institutes.

Q Okay. And do you ever coordinate employment agreements or assignment letters?

A Yes.

Q Okay. And do you also coordinate forms that are related to salaries and positions?

A Yes.

Q And do you make decisions regarding hiring faculty?

A No, I do not.

Q Okay. Who makes those decision regarding hiring faculty?

A It's the Provost.

Q And how about decisions regarding the termination of an employee or the firing of an employee?

A No, I do not .

Q And as an administrative coordinator in the Provost's office, were you familiar with Denise Simmons?

A Yes.

Q And how did you come to know Denise Simmons?

A She was employed in the civil engineering department and we would prepare her agreements.

Q And have you ever spoken with Denise Simmons?

A Yes, I have.

Q On one occasion or multiple occasions?

two of the 2007 agreement.
A Oh, I'm sorry, yes. It was -- it says signed contract when received on August 15th, 2007.
Q Okay. So what is your understanding of when Dr. Simmons actually received the 2007 agreement?
A She's saying here she received it on August 15th.
Q Okay. And can you tell me based on paragraph 14 when that contract was actually due?
A It was due by August 10th --
Q Okay.
A -- of 2007.
MS. BLACKBURN: Your Honor, I offer Exhibit Two into evidence.
THE COURT: Any objection.
MR. ORMOND: No, Your Honor.
THE COURT: Plaintiff's Number Two is in evidence without objection.
Q Did South Carolina State issue employment agreements or assignment letters to Dr. Simmons each year while she was at -- while she was on leave?
A Those were P4's that was submitted.
Q Okay. And what is a P4?
A A P4's are submitted to HR, which would keep her salary in the system, her base salary. And also on that P4 a percentage of her salary was recorded as well. And it's a

A Yes.
Q -- is that correct? And is this a true and accurate copy of the email and the agreement that was attached to your knowledge?
A It is, yes.
MS. BLACKBURN: Your Honor, I would like to offer Exhibit 4 into evidence.
THE COURT: Any objection?
MR. ORMOND: No objection.
THE COURT: Plaintiff's Number 4 is in evidence without objection.
MS. BLACKBURN: All right. No further questions at this time, Your Honor. Please answer Mr. Ormond's questions, Ms. Darby.
THE COURT: Mr. Ormond?
MR. ORMOND: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ORMOND:
Q So looking at Exhibit 4, after 2000 at least Dr. Simmons would know that while she's doing her Ph.D she doesn't need to have contracts each year; is that correct?
A That's correct.
Q But that wouldn't be so if she's actually working as a faculty member there, correct?
A Okay. Pardon me?

Q She would need a contract if she was working as a faculty member there, right?
A Yes.
Q And she was working summers. She was the director in the field station, correct, in Akin?
A That's true.
Q And she got a contract each year for that, correct?
A No. I know she received P4's. Well, the P4's were on file, personnel action request forms.
Q Okay. And she would receive those.
A She would receive copies if she requested, yes.
Q Okay. And it would be required for someone to send a contract to a professor, mail them out, right?
A Right.
Q And they would get them after they were mailed out.
A Yes.
Q So they would be sent before they were received.
A Right.
Q And then when they would be received they wouldn't be signed because they hadn't gotten them yet.
A Okay. Repeat that, please?
Q Well, somebody that gets sent a contract, a form contract and there's a little signature line, they wouldn't have signed it yet because they just got it.
A That's true.

Testimony of Dr. Stanley Ihekweazu

The witness, STANLEY IHEKWEAZU, was first duly sworn
And testified as follows:

DIRECT EXAMINATION

BY MR. REAGLE:

Q Good morning, Dr. Ihekweazu. Can you please state your current position at South Carolina State University?

A I'm currently serving as Interim Dean of the College of Science --

Q Would are your responsibilities as Dean?

A As Dean of College my major responsibility is to oversee the running of the college, and that includes supervising the department chairs, making sure we have enough budgets, requesting for budgets, ensuring that classes have been scheduled, faculty are assigned classes. Everything that has to do with efficient running of the college rests with me.

Q And in the fall of 2012, what was your position with South Carolina State?

A At that time I was the Interim Dean of the college.

Q And can you briefly describe your educational and professional background please?

A I have a Master of Science Degree in Mechanical Engineering. A Master of Science in Engineering Management. A diploma in Industrial Management. A Ph.D in Engineering and Science. I'm also a certified manufacturer engineer.

Q Did she, to your knowledge, make a lump sum repayment to the University?
A Not to my knowledge.
Q And going the first page, this professional leave request actually begins with a letter to you, Dr. Stanley Ihekweazu, correct?
A Yes.
Q And if you can go to page two, there's the third paragraph, Dr. Ihekweazu. Does she state there her entire objective for pursuing her Ph.D?
A That's correct.
Q And can you read what she wrote to you in 2008?
A It says, "Dr. Ihekweazu, my entire objective for receiving the Ph.D degree has always been to bring my experience back to SCSU, with the goal of exposing SCSU students to my areas of specialty. Offering scholarly works in my specialty -- including students to the enter University and enhancing the students research capabilities of the University. I only need the time and financial support from SCSU to accomplish this objective. My expected graduation date from the Ph.D degree program is December of 2011. 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."
Q And did you support her proposal?

A Absolutely.

MR. REAGLE: Thank you very much.

THE COURT: Mr. Ormond?

MR. ORMOND: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ORMOND:

Q Dr. Ihekweazu.

A Yes, sir.

Q I think it's the exhibit you're looking at now, can I take a look at it to see which one it is? Would you read Dr. Simmons' response to you?

THE COURT: That's Number 9?

MR. ORMOND: I don't think it's 9.

THE COURT: What's the number on that one?

MR. ORMOND: Exhibit 8.

THE COURT: Thank you, I'm sorry.

A Read it?

Q Yes, sir.

A It says, Hello, Dr. Stanley. I believe you have not been accurately informed. I have received so far one email last week from Dr. Okafor and the phone calls today from Dr. Okafor. I have responded to both. Deborah Darby has also called leaving me a message yesterday and we spoke earlier on today. Please let me know if you have missed something else."

don't go too far afield.

MR. ORMOND: Can I ask him that question?

THE COURT: You can ask him and you're going to be stuck with his answer.

Q Can you recall that?

A Can you repeat the question, please?

Q There were six to eight members of the administration terminated in early February, or in February of 2012 from South Carolina State for breach of trust. Do you recall that?

A Yes, but they were not faculty members.

Q Right, administrators.

A They were not faculty.

Q So you understand why someone might worry or be concerned that maybe they hadn't gotten a contract because there was a difficulty in funding that contract?

A Nothing was said of any faculty being in jeopardy, all awful us were still there.

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.

MR. ORMOND: That's all I have, Your Honor.

THE COURT: Anything on redirect?

MR. REAGLE: Yes.

REDIRECT EXAMINATION

BY MR. REAGLE:

Q Let's start, Dr. Ihekweazu, with this email. When Denise Simmons wrote back to you at 9:05 p.m. on August 23rd, did she mention that she has any concern with not knowing her salary?

A No, she did not. And I was hoping that -- if she had

Testimony of Dr. Larry Luke

The witness, DR. LARRY LUKE, was first duly sworn and Testified as follows:

DIRECT EXAMINATION

BY MR. REAGLE:

Q Good morning, Dr. Luke. Can you please tell the jury what your position is at South Carolina State University?

A I'm the Provost and Vice President for Academic Affairs.

Q What are your responsibilities for Provost and Vice President for Academic Affairs?

A I oversee the entire academic enterprise, all of the deans of the colleges. Determine policies for the University, and guide the running of academic units, such as the library, et cetera.

Q All right. And in the fall of 2012, what was your position at South Carolina State?

A In 2012 I was the Interim Associate Vice President for Academic Affairs.

Q What were your responsibilities in that capacity?

A I provided and gathered oversight of all of the academic support units, assisted the Vice President for Academic Affairs in many matters coming to her or him. And generally provided a general oversight of the support units for the division.

Q And can you please describe generally your education

and professional background?
A I have a Bachelors Degree in Theology and History and a Masters Degree in History and a Doctorate in History.
Q I think you're the first person that's not an engineer. Well, when did you start at South Carolina State University?
A 2001.
Q And while you were at South Carolina State University, did you become familiar with Denise Simmons?
A I did.
Q And let me show you what has been marked already as Exhibit 1 and ask if you can identify this document. What is that?
A This is Denise Simmons' request for professional leave to complete a Ph.D at Clemson.
Q And if you would flip to the back page I would ask, was that request approved?
A Yes. It was approved up to by myself, including the President and the Vice President for Academic Affairs and the Title III Coordinator.
Q So in 2008 what was your position when you approved the professional leave for Denise Simmons?
A I was Interim Associate Vice President for Faculty and Programs.
Q Okay. So you've worn a lot of hats at South Carolina State.

A A lot.
Q What was your understanding of the purpose for Denise Simmons requesting professional leave and support?
A Dr. Simmons, it was Simmons at the time, requested financial support to earn a Ph.D. And in this document she vowed to return to the University, and signs this agreement to return to the University to teach, et cetera.
Q Okay. And if you would go to page two of the document on the third paragraph, it actually states her objective for the professional leave?
A Yes. It says, "Dr. Ihekweazu, my entire objective for pursuing the Ph.D degree has always been to bring my experience back to SCSU with the goal of exposing SCSU students to my area of specialty, authoring scholarly works in my specialties, recruiting students to attend the University, and enhancing go the academic and research capabilities of the University. I only need the time and financial support from SCSU in order to accomplish this objective. My expected date of graduation from the Ph.D program is December 2011. 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."
Q And if you would go to the next to the last page of the document, and I ask if she signed a compliance statement?

A Yes. It says, "I, Denise S. Grant agree that I will remain in the active service for South Carolina State University upon completing this agreement for a period equivalent to the amount time for which financial assistance was received. For the purpose of this agreement a summer session as well as each conference workshop seminar, et cetera, et cetera, for which assistance was provided as outlined in the Professional Improvement Plan is considered to be 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 on my behalf."

Q So what would be your understanding of the obligations that Denise Simmons assumed and agreed to in the professional leave that she was provide by the University?

A That she would return to work for the University. That she would teach, provide scholarly support, engage in scholarly activities. That she would basically return to work for the University.

Q Okay. And what's your understanding of what South Carolina State's responsibility under the agreement was?

A We provided financial support while she pursued her Ph.D, or in order for her to pursue the Ph.D, pay tuition, pay a salary, pay her stipend, those type of things.

Q And did South Carolina State fulfill its obligation?

A It certainly did, to the tune of over $300,000.
Q And Denise Simmons fulfill her obligations to the University?
A She did not.
Q And how so?
A She has not yet returned to the University.
Q Now, in addition to the Title III funds that were -- that the University spent on behalf of Dr. Simmons, were there additional funds utilized for her financial support while she was on professional leave?
A Yes. Denise Simmons made a request for financial support endorsed by her Dean and approved by university administration. She got 80 percent of her salary at the time.
Q And let me show you what has been marked previously as Exhibit -- Plaintiff's Exhibit 9 and ask if you can identify that document, please?
A This is a document I returned to Vice President, Dr. (inaudible). By Dr. Ihekweazu was the Chairman of Civil and Mechanical Engineering and Technology Department at the time. And he writes to request -- he indicates his support for Ms. Grant's application for study leave, to obtain a Ph.D and for support up to 80 percent of her current salary at the time.
Q Okay. And did you agree with the request for

80 percent, for financial support based on 80 percent of her salary?

A The request also came with a note to the vice president saying that there was a request for additional funding to pay for adjunct faculty to teach in Ms. Simmons' place. And my recommendation to the vice president was that instead of 80 percent the amount should be 64 percent to ensure we had enough funding to pay these adjuncts.

Q Do you know whether your recommendation or Dr. Ihekweazu's recommendation was ultimately agreed to by the University?

A Ultimately Vice President approved the original request of 80 percent.

Q Now, let me show you what has been --

MR. REAGLE: Let me have this marked for identification, please. And I just want to be clear, this document has a social security number of, the copy that I have given to the clerk does not have that on it. I want that to be clear that the record will not have her --

Q Can you identify what's been marked as Plaintiff's 10?

A The Plaintiff's 10 is a personnel actions request form which call a P4 form, and it's 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 Okay. So this was in addition to anything she was receiving from the Title III.
A The request had to do with both financial support for tuition, et cetera, as well as other financial support, you know, just generally.
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 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 justification.
A Right. So account number 5730 is the account for the

civil and mechanical engineering department, or program actually. And the field station -- Dr. Simmons served as the interim director of field station, and the account 5040 we show the salary split accounts for which salaries are drawn to reflect faculty's work load or work time. And as coordinator or director of the field station the salary would be drawn from an account associated with that unit.

Q And this indicates there's $11,143 per year of this financial support was drawn from the field station account, correct?

A Right.

Q Was that -- did she receive additional money from the field station account for work she actually performed at the field station?

A In the summer the my understanding her field station work was mostly paid from grants. The University through its professors, et cetera, write grants to get funding for the field station, federal grants, and summer salary tends to be drawn from there.

Q But what she received for her summer salary was above and beyond this 11,000.

A Yeah. Certainly above and beyond her nine month contract would be.

Q Okay. And when she was at the field station, did she have an assignment letter placing her at the field station

telling her what she would make?
A Those would be what we call temporary, we call those P13's, we have a lot of P's. So I'm more familiar with the abbreviations. So the P13, which is like a temporary work assignment, says what your salary would be for the summer, what the title of your position is, and it usually is associated, especially the first time, with the job duties, list of duties.
Q And this P4 that we're looking at here, Exhibit 10, indicates on it what her salary is?
A This is a nine month salary.
Q Okay.
A Faculty at SC State are nine month faculty. Generally they have no obligation under that nine month contract so to speak for the summer. In the summer -- if they work during the summer they get paid additional money.
Q But this P4 that we're looking indicates a base salary of 55,719?
A That's correct.
Q And it indicates her position, Assistant Professor of Engineering Technology, correct?
A Yes.
Q Just like the P13 for the field station would indicate what her salary and title was for that?
A That's correct.

Q There would not have been for the field station a contract such as Exhibit 2?
A No. This Exhibit 2 specifically and only pertains to a nine month faculty assignment.
Q And there wasn't a professional assignment letter for the field station.
A No. Not of that nature, no.
Q So it's possible to be paid and work and be employed by South Carolina State University without having an employment agreement or an assignment letter?
A That's correct.
Q And was Denise Simmons a tenure track employee at State in 2008?
A She was.
Q When she came off of professional leave in 2012, would her status as a tenure track employee change?
A No. Faculty are on the tenure track, as we say, until they are required to submit a dossier or binder for tenure.
Q And could Denise Simmons have been demoted from tenure track position without formal notice to her by South Carolina State University?
A No. Once you're put on tenure track you are given X amount of years to apply for tenure.
Q And could her salary have been reduced from her base salary without notice to her at South Carolina State

University?
A Not at all.
Q And could she have been fired by South Carolina State University or terminated following her professional leave without affirmative advance notice to her by South Carolina State University?
A No. The faculty handbook specifically says that once you're employed at the University for at least 12 months we must give you a -- we must give you -- a notice 12 months in advance.
Q So if she came off of professional leave, her base salary was established and couldn't have been changed without notice by South Carolina State.
A Typically salaries are negotiated. So Dr. Simmons certainly had the opportunity to approach the administration concerning her salary.
Q If she wanted a raise.
A If she wanted a raise.
Q But it wouldn't have been reduced?
A No, it would not have been reduced. In fact, the University would generally give you an increase for getting a doctorate degree.
Q And we just talked to about as set out in the employee faculty handbook you said?
A Excuse me?

Q What we just talked about, that's set out in the faculty handbook?
A The increase for the Ph.D?
Q No. That she couldn't be demoted or reduced in salary or removed from tenure track without notice and process by South Carolina State University.
A Right, definitely termination. There was termination set out how and when faculty can be terminated. The rights of faculty are laid out in the faculty handbook.
Q When Dr. Simmons didn't return to South Carolina State University for the fall semester in August of 2012, did South Carolina State receive any of the benefits that she had indicated it would receive in the letter to Dr. Ihekweazu dated June of 2008?
A 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 comes with her Ph.D, the contribution she could have made to our accreditation effort, we lost that. 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.

Q Now, in 2012 was South Carolina State in financial trouble?

A Not that I can recall in 2012, no. I mean, we weren't even on furloughs then, no.

Q And there has been questions about controversy or financial trouble at state in 2012. Do you know what that would be in reference to?

A I mean, the financial woes of the University are pretty recent. So they were -- there was serious financial trouble at the University it may have been '14. I'm in academic affairs. I understand the general operation of the University, but when we talk about financial trouble and whether we pay faculty or not, financial -- was only recently pled in 2015, so I guess it all depends on what you call financial trouble. But in terms of paying off faculty, et cetera, I mean, 2012 that would not have been an issue.

Q Okay. If Dr. Simmons had shown up to teach at South Carolina State in August of 2012, would she have been issued an assignment letter?

A She would have.
Q Does it happen from time to time that faculty are not given employment agreements or assignment letters by the start of classes?
A Faculty, you know, is pretty much secure in their tenure at SC State, especially in light of fact that the faculty handbook recognizes that they can't be terminated without a years notice if they had been there for a year except for cause, of course, and from time to time that would have happened. I think last year we had two faculty in the speech department, they were working and getting paid and said, "I didn't get my letter." Because they are employed through our HR system so the employment is secured there. We send them these reappointment letters every year but there is no insecurity as to whether they will be paid, whether they will work, anything like that. And faculty --
MR. ORMOND: I would just object to the faculty, whether they would be insecure or not, I think that's speculative.
MR. REAGLE: I think he's put the whole reasonableness of thinking she didn't have a job and does --
THE COURT: I'll let him answer the question. I will note your objection on the record, it will be preserved. Go ahead.
Q Go ahead.

A Right. So I don't think the faculty not having the reappointment letter, especially if they continue to get paid, I don't see why they would worry much.
Q And was Ms. Simmons paid all through the summer for the field station in 2012?
A She was paid for work at the field station, yes.
Q So she was getting paid by South Carolina State all through that summer of 2012.
A She continued to get paid.
Q And this is part of Exhibit 2, the collected employment agreement tenure track faculty document. I'll show you the signature page for what would be the 07/08 school year. And it says at the bottom, "This agreement must be signed by the employee and returned to the Office of the Vice President for academic affairs by 12 noon on August 10th of 2007," right?
A Right.
Q And there's a notation there that says, "Sign contract when received on August 15, 2007." Is it common that contracts are signed and received after what might be stated in the bottom as their expiration date?
A Yes. Sometimes faculty travel in the summer and would effected when they are away, so signing is pretty much a formality.
Q And you mentioned before about the employment being

secure when they're in your HR system?
A Yes, they are.
Q Is that what the form P4 would be is --
A Right. The P4 authorizes salary increases or decreases. But the -- remember, her employment started since like 2004, I can't remember the exact year. But her employment with the faculty, once she was not terminated within her first year, the employment just continues and it just rolls until you're informed that you'll be terminated. And again, it's either for cause or we must give you a years notice after you pass a year.

MR. REAGLE: That's all. Thank you very much, Dr. Luke.

THE COURT: Anything on cross?

CROSS EXAMINATION

BY MR. ORMOND:
Q Dr. Luke, it's your opinion that signing those contracts by faculty are just a formality?
A Faculty are very important, but faculty signed them and they are not always signed on the date that we say that they should be signed, and in that sense they're a formality.
Q So --
A We don't terminate a faculty that didn't sign it on that date.
Q So if their -- if another witness with academic affairs

Testimony of Dr. Kenneth Okafor

The witness, DR. KENNETH OKAFOR, was first duly sworn
And testified as follows:

DIRECT EXAMINATION

BY MR. REAGLE:

Q Good afternoon, Dr. Okafor. What is your current position at South Carolina State University?

A I'm a Professor of Nuclear Engineering.

Q All right. And in 2012, what was your position with South Carolina State University?

A I was interim chair of the Department of Civil, Mechanical and Nuclear Engineering.

Q All right. Is that the department that Dr. Denise Simmons was to serve under?

A Yes, sir.

Q And briefly describe your educational and professional background.

A I received a Ph.D in Nuclear Engineering from the Ohio State University, and that was in 1988. I came down to South Carolina to the Savannah River Site, worked there for about 16 years, and then came to SC State in 2005.

Q And as a professor at South Carolina State, were you familiar with Denise Simmons?

A Yes, sir.

Q And could you please describe your relationship with Denise Simmons?

A It was cordial, of course, she was a colleague. We all hung around the building and talked and so on and so forth about stuff, different stuff.
Q In 2012 as chair of the engineering department, what was your responsibilities regarding Denise Simmons?
A Just do something for any of the faculty members which we had in the department.
Q What were those?
A Making sure that everybody was covered concerning classes. Encouraging professional development. Making sure that the students were taken care of as far as the advisement and development concerns.
Q And was Denise Simmons assigned by the engineering department to take courses at South Carolina State University for the fall semester of 2012?
A Yes, sir.
Q Did you, in fact, have an email exchange with her regarding her course assignments in April of 2012?
A Yes, sir.
MR. REAGLE: May I have this marked for identification, Plaintiff's 5?
Q Dr. Okafor, can you identify what's been marked as Plaintiff's Exhibit 5 for identification?
A Yes.
Q And what is this document that's been marked as number

5?
A It's an email thread between Dr. Simmons and I.
Q Okay. And where does this thread start on April 9th?
A Just a minute. At the bottom.
Q All right. On April 9th of 2012, did Janice Guinyard with South Carolina State email to Dr. Simmons a copy of a teacher's schedule for her for the fall semester of 2012?
A Yes, sir.
Q If you look at that back page it had a teachers schedule. Does that identify the semester on it?
A Yes, fall of 2012.
Q Okay. And how does that indicate whether she's part-time or full-time?
A There is a check on the full-time.
Q Okay. And this -- and below it, does this list out three courses that were assigned for her to teach in the fall of 2012?
A Yes, sir.
Q Is this schedule a schedule for a full-time professor for the fall of 2012?
A It is a schedule for a faculty member that has the release time, 25 percent of release time. So you get to teach three courses, and then the rest of 25 percent you use for like research.
Q Was that your decision to give her 25 percent of her

time to use her research?
A Or it's just University policy.
Q What is that policy?
A In other words if you have a grant, a research grant, or the University gives you 25 percent of the time for you to execute the grant and then it's combined with the classes that you teach. So that requirement is the three classes plus the 25 percent of time that you take to do your work.
Q Okay. And did Dr. Simmons write you about this teaching schedule on April 9th, 2012?
A Yes, I think she did.
Q Okay.
A Yes.
Q In fact, it looks like she wrote to you within almost two hours of receiving the proposed schedule, correct?
A Yes.
Q And then you responded to her on April 11, 2012?
A Yes, sir.
Q And can you read to the jury, please, just what you wrote in response?
A Okay. This was my response to Dr. Simmons on the 11th. It says, "Ms. Simmons, how are you doing? I hope fine. I saw your email and I wanted to call you but could not reach you on your campus phone number provided. Regarding your question, it may not be possible to exchange the courses

were shared between you and two other professors in the program, unless you can arrange privately with one of them to make the exchange. If you have any further questions please let me know. Thanks."

Q Okay. And do you recall then the next time you received an email from Dr. Simmons?

A Not particularly.

Q Okay. But after April 11th when you wrote if you have any further questions please let me know, did you hear from her with any questions?

A Not really.

Q And then did you see Dr. Simmons in person in June of 2012?

A Yes, sir.

Q What were those circumstances?

A I was at a meeting, a ASEE meeting in Atlanta, Georgia, was there for a conference.

Q How did you come to see Dr. Simmons at that meeting?

A Oh, there were too many people there, so I ran into her in the hall, the hallway. And it just happened that I was walking behind her and I saw her phone drop, so I picked up the phone and chased her and called her attention, gave her back the phone. And there was no exchanges, and I turned around and left.

Q Did she ask you where her contract was?

A No.
Q Did she ask you where her assignment letter was?
A No, sir.
Q Did she ask you that she had concerns with her salary, didn't know what that would be?
A She did not utter a word to me.
Q Did she say thank you for giving her back her phone?
A No.
Q The courses that were assigned in April of 2012 for Dr. Simmons to teach in the fall semester, did she ever teach those courses?
A You mean before that?
Q No, I mean in the fall of 2012.
A No, she did not.
Q Did she ever show up on campus in the fall of 2012?
A Not that I know of.
Q Did Dr. Simmons ever tell you where she was going to teach when she didn't return to SC State?
A No, sir. I found out from the very last email she sent to me, I think, August the 23rd.
Q Now, are you familiar with a Title III Professional Development Grants?
A Yes, sir.
Q And can you generally describe your understanding of those grants?

A Title III is a federal program run through the Department of Education to support and to enhance HBCU's. There are two parts to it. There's a part A, that is concentrated to the majority schools. And there is a part B that's specifically for the HBCU's that are used for programs like professional development endowment fund, all kinds of stuff concerning students, so on and so forth. In other words, the program is to enhance the student outcome.

Q And did Denise Simmons receive a professional development grant from South Carolina State University?

A Yes, sir.

Q What was your understanding of the agreement between South Carolina State and Denise Simmons profession in the grant?

A That she would return at the end of her studies to continue teaching the students.

Q And what were your expectations as chair of the engineering department about whether Denise Simmons would be returning to teach at South Carolina State in August of 2012?

A I expected her to return and teach the assigned classes.

THE COURT: Mr. Reagle, did you want to do anything about Plaintiff's 5?

MR. REAGLE: I move Plaintiff's 5 be put into evidence.

MR. ORMOND: No objection.

THE COURT: All right. Plaintiff's 5 in evidence with no objection.

Q Please identify Plaintiff's 6.

A Yes.

Q What is Exhibit 6?

A It's an announcement from the administrative secretary of the department announcing a departmental meeting.

Q Okay. And was this sent -- did you look at the email distribution list? Was this sent to Denise Simmons?

A Yes, sir.

Q And then did you resend it to your department?

A I did.

Q And in doing that, did you send it to Denise Simmons as well?

A Yes, sir.

Q So this would have been sent twice to each of your faculty.

A Yes, sir.

Q And there was a memorandum attached?

A Yes, with the agenda.

Q And that says in the memorandum, "Please do everything to attend this plea meeting, it is critically important;"" is that correct?

A Yes.

Q And it's lived as a memorandum the faculty staff civil and mechanical engineering, technology and nuclear engineering.
A Yes, sir.
Q Why did you send this to Denise Simmons?
A Because she was a member of the faculty in the department.
Q And were you expecting her to attend this meeting?
A Yes, sir.
Q And did she attend the meeting?
A No, sir.
Q Did you hear from her for this meeting if you recall?
A No, I don't.
MR. REAGLE: I would move Exhibit 6 into evidence.
THE COURT: Any objection?
MR. ORMOND: No objection.
THE COURT: Plaintiff's Exhibit 6 in evidence without objection.
Q All right. I'll mark for identification Exhibit 7. Can you please identify Exhibit 7?
A Yes.
Q And what is that document?
A That's another email thread between Dr. Simmons and I.
Q Okay. So on August 13th you sent what was marked as Exhibit 6, the notice of the faculty meeting, correct?

A Yes.
Q And then on August 16th Dr. Simmons did not show up at the faculty meeting but did write you on that day.
A No. I think there was the following day, it was August 17th.
Q If you look at the bottom of Exhibit 7 it says from Denise Simmons to Okafor, Kenneth C.?
A The bottom? Oh, okay. Yes, I can see that.
Q So 4:53 p.m. Dr. Simmons sent you an email?
A Yes, sir.
Q And can you read, please, what her email to you was on August 16th?
A It says, Dr. Okafor, I hope that you had a productive summer. 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. Please call me if you would like to discuss the matter further."
Q And did you respond to that email on August 17th?
A I did.
Q And what did you write to her?
A I wrote, "Dr. Simmons, thanks for your email. I hope your summer went well based on your email there is no viable number to call you at. There is a school number and you have not been here for awhile. I had also contacted you for

our semester departmental meeting, or did you not get the email? If possible can you call me at that number so we can discuss. By the way, a lot of people have not yet received their contracts so that should not discourage you. Thanks."

Q Were you surprised to learn that Dr. Simmons had, let me use her words, sought and secured employment elsewhere?

A I was.

Q Why were you surprised?

A Because I never expected that she was doing differently from what everybody expected concerning the PIP.

Q And that's a professional improvement plan?

A Yes.

Q And how many days -- August 16th when you were informed she had sought and secured other employment, how many days before that approximately did classes start?

A Classes started on the 17th, so just one day.

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 That year?

Q Yeah.

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 members that have Ph.D's, so it's no different with SC State.

Q And you were not chair of the engineering department in 2008 when Denise Simmons PIP was approved, correct?

A No, I wasn't.

Q We have heard testimony that she wrote to Dr. Ihekweazu saying, "My entire objective for pursuing the Ph.D Degree has always been to bring my experience back to SCSU with the goal of exposing SCSU 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." In 2012 you were chair of engineering department. Did the

engineering department realize any of those benefits promised by Dr. Simmons?

A No, we didn't.

Q And on August 23rd, if you look at Exhibit 7, the last email, the top of that email stream I believe is from Dr. Simmons to you?

A Yes.

Q And what does that email say?

A You want me to read it?

Q Yes, please.

A It says, "Hi, Dr. Okafor. I left you a phone message. My cell phone number has not changed (same that's on record with the department." Ms. Darby and I spoke this morning. She has a time related issue that needs to be resolved today and she needs to hear from you. We need to speak regarding employment."

Q And had you tried to call Dr. Simmons?

A Yes I did.

Q Were you ultimately able to reach her?

A Yes, I did.

Q And do you recall about when you were able to reach her on the telephone?

A I was coming back from a conference in Jackson State, Mississippi, and on my way driving back I gave her a call and we talked.

Q Do you recall the substance of that conversation?
A It concerned the same -- the course she was complaining about. And I remember, I told her, I said, "Why don't you come to the campus and let's discuss all of your issues?" That was the message I left on that afternoon.
Q Do you recall her saying she was concerned she didn't have a contract?
A No. She didn't tell me anything about a contract.
Q Did she say she was concerned she didn't know what her salary was?
A No. We did not discuss anything about salaries.
Q Did she say she was concerned about whether she would be tenure track or not tenure track?
A No, we did not discuss that. What she told me was that she had a death in the family and that was it.
Q Are you aware of whether or Dr. not Ihekweazu wrote to Dr. Simmons on August 23rd of 2012?
A Yes, I'm aware of that.
Q Okay. And why was Dr. Ihekwaezu -- what was your involvement in Dr. Ihekwaezu writing to Dr. Simmons?
A Dr. Ihekwaezu was the Dean, or he's still the Dean today, but he was the Dean at the time. And when I got the email from Dr. Simmons saying that she found employment somewhere else, as far as I was concerned as the chair the case was closed. So I have to go to the next step, so I

took it to the Dean. I said this is the situation we have right now, and then that was it.

Q And did Dr. Ihekwaezu copy you on this correspondence with Denise Simmons?

A He did.

MR. REAGLE: I will mark this as Exhibit 8.

Q It is identified Plaintiff's Exhibit 8. Can you identify that document?

A Yes.

Q And what is it?

A It's between the Dean and Dr. Simmons.

Q What did the Dean write to Dr. Simmons?

A It reads, "Hello, Denise. I have been informed that you have not reported to SC State since the beginning of the semester. According to our teaching schedule you were assigned three courses. I need you to return to SC State while the University addresses your concerns about your letter of employment. Any delay in your returning to classes will not bode well with our students. Please, do not forget that you owe an obligation to the University and we need your services. Thank you."

Q And what did -- on that same day, what did Dr. Simmons write back to Dr. Ihekwaezu?

A The email reads, "Hello, Dr. Stanley. I believe you have not been accurately informed. I have received so far

one email last week from Dr. Okafor and phone calls today from Dr. Okafor. I have responded to both. Deborah Darby has also called leaving a message yesterday and we spoke early a.m. today. Please let me know if I have missed something else."

Q So she did not say, "Of course will come back and work out my concerns with my letter of employment," did she?

A No she did not.

Q She doesn't even say whether she will come back to the University, does she?

A No, she did not.

Q And at this point, were you involved in the issues involving Dr. Simmons?

A No, sir.

Q Once it went up to the Dean you were not involved?

A Yes, sir.

Q And do you know whether Dr. Simmons was tenure track?

A Yes, she was tenure track faculty.

Q And forgive me if I have already asked this, how did you learn that Denise Simmons had taken employment at Virginia Tech.?

A I learned that from the -- I didn't know it was Virginia Tech., but I learned she got employment somewhere else from her last email to me on the 23rd.

Q Do you recall how you learned it was Virginia Tech.?

A It was floating around the campus.
Q Did Denise Simmons ever tell you "I'm going to Virginia Tech.?"
A We never discussed anything concerning whatever she was doing.
MR. REAGLE: I move to admit 7 and 8 into evidence.
THE COURT: Any objection?
MR. ORMOND: No, Your Honor.
THE COURT: Plaintiff's 7 and 8 are in evidence without objection. All right. Mr. Ormond, on cross?
MR. ORMOND: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ORMOND:
Q When Denise Simmons wrote you in April of 2012 about the three courses she had been assigned for the academic year, did you understand her to be upset about that?
A Upset?
Q Yes.
A Why would I be upset?
Q No, was she upset?
A I don't think so.
Q Was there anything that would lead you to believe that she wasn't coming back to South Carolina State University?
A No.
Q Now, when you saw her in June at the -- I believe it

was the ASEE meeting --
A Yes, sir.
Q -- you hadn't gotten your contract at that time yet, had you?
A I don't remember.
Q Contracts are usually sent out in late June or late July?
A I don't remember.
Q But in early June your contracts wouldn't have been sent out.
A I don't know their schedule.
Q Well, if she didn't ask you about her contract problems in June of 2012 that would make very sense since contracts weren't sent out that early, were they?
A I have no idea.
Q Neither were appointment letters.
A Sir, I don't know.
Q Let's turn to --
THE WITNESS: Can I add something, Your Honor?
THE COURT: Pardon me?
THE WITNESS: Can I add something to --
THE COURT: To your answer?
THE WITNESS: Yes.
THE COURT: In response to --
THE WITNESS: Yeah, in response.

THE COURT: Okay.

A Sir, the mere fact that she was talking to somebody who is supposed to be the chair, is there any doubt that she still had her job there or not? To me -- it makes sense to me that if there was such a situation I would have told her.

Q So you would have told her if you would have known that there was a problem with the --

A That there wasn't a job for her.

Q You would have told her that.

A I would have told her as the chair.

Q And she should have known that.

A If I told her.

Q And this would have been in June.

A Anytime.

Q Now, you were an associate professor prior to 2011, correct?

A Yes, sir.

Q And then you became the interim chair?

A Yes, sir.

Q And each year you were an associate professor, before the beginning of each academic year you got a contract, right?

A Yes, sir.

Q It was a written contract.

A Yes, sir.

Q Had your salary.
A Yes, sir.
Q Had whether you were tenure track or tenured, correct?
A Yes, sir.
Q Provided your duties?
A Yes, sir.
Q And from 2008 until 2012 Dr. Simmons wasn't a faculty member at South Carolina State, or at least she wasn't teaching courses there, right?
MR. ORMOND: I'm going to object, I think it's a compound question.
MR. REAGLE: I will rephrase.
THE COURT: Yeah, if you don't mind.
Q From 2008 until 2012 Dr. Simmons was not teaching at South Carolina State University --
A Yes, sir.
Q -- is that correct?
A Yes, sir.
Q Okay. And you've gone over some Title III grants. Is Title III grant money, is that all federal money?
A Yes.
Q And in 2012 the other professors there other than yourself in your department were Dr. Danjani, Dr. Ilia Mandori both phonetically, Dr. Chang, Dr. Lagru and Mr. Laurie (all phonetically) is that correct?

A Yes, sir.
Q And even at that time in 2012 you didn't know that Dr. Simmons had continued on as Director of the Environmental Field Study in Akin, right?
A No.
Q So if she wasn't going to be on the campus of South Carolina State, she would be at Akin?
A I don't know.
Q Have you ever been to the Akin Field Station?
A No, sir.
Q And do you know that Dr. Simmons had her transcripts sent from Clemson to South Carolina State University in June and July?
A I did not know that.
Q Now, on the 16th you wrote Dr. Simmons or emailed and said, "I hope you had a productive summer -- I'm sorry. Dr. Simmons wrote you on the 16th. That's the problem with these emails, you have to read them from back to front. "I hope you had a productive summer. I have not received an employment contract to date and have not otherwise heard from you and your office." And then she said she's a bit distressed, she sought other employment. Do you recall that?
MR. REAGLE: I object that's not -- if we're going to read it but that's not what it says. He should read it

verbatim I think rather than paraphrase it.

THE COURT: Yeah. I don't remember exactly but if you would just read what it says.

Q All right. "I am a bit distressed but I have sought and secured employment. Please call me if you would like to discuss the matter further." Do you recall that? That was on the 16th of August?

A Yes.

Q Classes are starting the next day.

A Yes.

Q But you didn't call her.

A I don't remember. But first of all --

Q Well, first of all, do you remember if you called her or not?

A I don't remember. Do you want me to finish my sentence?

Q Sure?

A I don't see the connection between being distressed and finding a job. Like I said, here is the department chair talking to you about classes already assigned. Why are we talking about being distressed and finding another job? That's something I don't understand.

Q Okay. And then you responded, and I will read it verbatim, "Thanks for your email. I hope your summer went well. Based on your email there is no viable number to call

you at since the number there is a school number and you have not been here for a while. Of course you didn't know she was in Akin at the South Carolina Field Station.

A I didn't know that.

Q But she did have her cell number on file, right?

A Okay. I don't know.

Q And her administrative assistant, Ms. Eckles, was right there in the department with those numbers.

A I don't know.

Q Okay. "I had also contacted you about our special department meeting, or did you not get the email?" Now this was a forwarded email, correct?

A Yes.

Q To a whole bunch of people.

A To the department and faculty members and staff.

Q Okay. "By the way, a lot of people have not yet received their contracts so that should not discourage you." And you put contracts in quotes?

A Uh-huh.

Q You want to see it?

A Yeah.

Q Why did you do that?

A Because that's the kind language she was using.

Q She was using the language of contracts.

A Yeah. I did not get any contract, so on and so forth.

Q Did you think that was silly or a concept you didn't understand?
A No. Does it say anything about silly there?
Q No, no, it just has quotes.
A Yeah.
Q Sometimes --
A Quotes means it is something that somebody else said.
Q So you were quoting it as this is what her concern was.
A Yeah, that's the concern.
Q Did you contact anybody and say, "Hey, let's get her a contract?"
A No. I told her to come to campus and we will discuss all of her issues.
Q Well, what were her issues other than not getting a contract?
A The primary issue was her inability to teach one course, Plane Surveying.
Q And you're talking about in April when she said she didn't have a lot of experience in that, maybe somebody else did.
A Including August.
Q Did she ever mention that in August?
A But that was primary stuff. What I discussed with her mostly was that particular course.
Q Well, I asked you earlier if you thought she was upset

about the fact she had to teach a course --
A No.
Q Well, then she wasn't upset in August either, was she?
A No. But what connection do we have there?
Q Fair enough. Do you remember taking a deposition with me?
A Yes.
Q Do you remember that at that deposition you didn't recall calling her at all in August?
A Yeah. I mean, it has been a long time, I can forget stuff.
Q So you forgot it then, but now you remember calling her?
A Yeah. When I look at stuff, when I look at papers, emails and so on and so forth things start coming together.
Q You don't remember I showed you all of these emails in the deposition?
A I don't recollect.
Q Now, you said in the email that a lot of persons hadn't gotten their contracts yet. But in truth you had absolutely no way of knowing whether that was true or not, did you?
A It's customary -- in other words, over the years I could tell you, I could tell you whether people got it in June or in July or in August, okay? I could say that. So I wasn't just saying -- pulling from the air. I had some

background to be able to have said that.
Q Okay. You do remember you were under oath in that deposition, correct?
A Yes, sir.
Q Is this your deposition?
A Yes, sir.
Q Do you notice all of those tabs in the back? Can you see if those were all of those emails that we're talking about where you were involved?
A Some of them.
Q Okay. Turn to page 34, please.
A Okay.
Q If you would read along with me starting on line three, that would be on the left-hand side of your page. I asked, "Okay. Did she have a contract to come back and teach at South Carolina State University in 2012 -- I'm sorry, in the fall of 2012? Yes, she did. Did any of the professors not have a contract? And I'm talking about professors here that taught engineering under you in 2012?" You answered, "The contract is a confidential document." Do you recall that?
A Yes.
Q "So I wouldn't know." Did you say that? Answer, "I wouldn't know." Correct?
A Yes.
Q "So you don't know whether there were any professors

who were working without a contract? I don't know." Do you agree that that's what you answered?
A Say that again.
Q Look at line 14, that was my question.
A Okay.
Q "Okay," I said. I wish I hadn't but I said it. "So you don't know whether there were any professors who were working without a contract." I'm asking you?
A Okay.
Q And this is all in relationship to your August 17th email. "I don't know."
A Yeah.
Q "And you would have no idea or knowledge whether the professors had gotten a contract at that time or not; is that correct? Say that again. Would you have any knowledge in August or July of 2012 whether s the professors that were under you had gotten a contract? I'm not supposed to know." Okay. The next page, 35. This is my question, "So you wouldn't know. I wouldn't know, yes." Do you agree --
A Yes, yes. However, the fact that that professor came back for semester means that he or she got a contract, that's how I can affirm that. I don't have to see he or her contract, that professor is back to class.
Q Okay. So if a professor is back to class then you assume they must have gotten a contract.

A Yes.
Q And if they're not back at class you probably assumed they didn't get a contract, right?
A Obviously.
Q Okay. Thank you. So on the 17th Dr. Simmons emails you -- or the 16th, and the 17 you replay that lots haven't got and contracts. By that time, and this is August 17th, school has started.
A Yes.
Q But you really didn't know whether they had gotten contracts or not, you just knew that they were there; is that correct?
A Sir, if you didn't have a contract you would not have appeared in the August 16th meeting as a faculty member.
Q And Dr. Simmons may or may not have gotten an email, but she didn't appear at that August 16th meeting and she didn't have a contract, did she?
A I don't know whether she got a contract or not. But I did invite her to the meeting, which means that there is nothing wrong or nothing amiss about her contract. That's what it meant at the time. I don't have to see her contract. I don't have to issue any contracts to her.
Q Okay. A contract would contain your salary, correct?
A Yes.
Q Were you responsible for negotiating her salary when

she came back?
A Yes, I can do that.
Q Was that you that was supposed to do that?
A Yes, I can do that.
Q Did you do that?
A I didn't have a chance to do that.
Q But we're talking about you didn't speak to her until August 23rd, correct?
A Yes. No. I spoke to her before that.
Q When?
A I don't remember but we talked before that.
Q Well, how long before that?
A I don't quite remember.
Q Did you talk to her about salary?
A No. Let me repeat. We discussed about her not being able to teach one of the classes assigned to her.
Q And that was in April, six or seven months prior.
A That's not the only time. I meant from April all of the way to August 17th when classes had started.
Q So when you testified earlier in direct that after that April email exchange about the courses and one of the courses she thought she didn't have a lot of experience for, when you said that you didn't talk to her about it again, that was not true?
MR. REAGLE: We object. I don't think that's a fair

characterization of his testimony.

THE COURT: If you would let him explain it I would like to clarify that.

Q All right. Did you ever talk in April when there was an email exchange about the course work that Dr. Simmons had after April of 2012.

A I can't remember. We talked. However, all I tried to do was -- that's why I told you that when I was coming back from Jackson, Mississippi I told her that let her stop by the University so that we can discuss all of her issues including the Plane Surveying course and whatever else it is that might be an issue for her.

Q And she didn't tell you that that day was the last day she had to sign that alternate employment agreement?

A No. We did not discuss any other thing.

Q And she didn't ask you about a contract, where is it or negotiating a contract?

A No.

Q Did you understand that Ms. Darby that same day called her and told her that you were the one to do it and that she should talk to you?

A No, I wasn't aware of the call. Like I said, I was not in school, I was at a conference. That was why I called her on my way back to school.

Q Now, when we discussed you calling her, you could not

remember the number you tried to call her.
A No, I don't remember. Probably her cell phone, I don't remember.
Q If she checked her cell phone from any messages from you and didn't find it, it is possible maybe you didn't call that cell phone or had the wrong number?
A I don't know. But what I know is that I talked to her on my way back to school.
Q And you couldn't remember in your deposition whether or not it ran to voice mail or you left any messages?
A No, I don't remember.
Q Student population was down in 2012, correct?
A Yes, sir.
Q And it was also down in the engineering department?
A Yes, sir.
Q Now, when you did your Ph.D at the Ohio State University, you financed that by taking an assistantship, teaching and research assistantship, true?
A I didn't take any assistantship, they gave me assistantship.
Q Okay. And that waived tuition, or paid partial tuition and gave you a stipend, right?
A Yes, sir.
Q And that's how engineering students, especially Ph.D level, can finance their education.

A Most of them.
Q And that way they can do it without taking out loans and things like that, right?
A It is rare that you take out loans to do a Ph.D. You can take a fellowship, you can -- the government has all kinds of programs. There are fellowships and all kinds other ways to pay for it.
Q There's lots of ways for someone who is wanting to get a Ph.D in engineering to finance that without going through Title III, would you agree with that?
A Yes.
Q And there was no faculty hired in your department until Dr. Farajapoor (phonetically) in the fall of 2014.
A Yes, sir.
Q So that was two years later.
A Yes, sir. And by the way, we had a hard time in the department because the program was coming under a better accreditation. That's why we were hurrying to find somebody to replace Dr. Simmons.

MR. ORMOND: All right. Thank you, Your Honor that's all I have.

THE COURT: Anything on redirect?

MR. REAGLE: Just briefly.

RECROSS EXAMINATION

BY MR. REAGLE:
Q As chair of the department, you indicated you had invited Dr. Simmons to the faculty meeting, correct?
A Yes, sir.
Q Had she come to the faculty meeting, had she come to campus at all to talk to you, would you have ensured she got an assignment letter?
A No.
Q Okay. Why not?
A Because it wasn't my responsibility to do that.
Q Okay. Whose responsibility was it?
A Whether you call it a contract or assignment or whatever comes from the academic affairs.
Q Now, whether she taught those classes and was paid, would it have mattered if she had the assignment letter?
A At the time we are talking about she didn't need all of that to teach those classes. She was already a faculty member in the department. She just went for a professional development and she was supposed to come back and teach, and if she had any issues we would have been able to resolve them when she was back to the department.
Q So those issues -- and the only issue she raised with you were her schedule, class schedule?
A Class schedule. That was why -- if you notice on one of the last -- I don't remember the date -- emails that she

Testimony of Ms. Gloria Pyles

The witness, GLORIA DEAN PYLES, was first duly sworn
And testified as follows:

DIRECT EXAMINATION

BY MS. BLACKBURN:

Q Good afternoon, Ms. Pyles.

A Good afternoon.

Q Thank you for being here today. Can you -- you've stated your name for the record. Can you briefly describe your educational and professional background for us?

A I'm Gloria Dean Pyles again. I graduated from high school in New York City, graduated from South Carolina State University with a Bachelors Degree. And then went back home and graduated from Columbia University with two degrees, a Masters and a Masters of Education. Then returned to South Carolina State University to work.

Q Thank you. And what is your current position at South Carolina State University?

A I'm the director of title three program at South Carolina State college -- University, I'm sorry, it was a college whether I was there first, which is a federally funded program that was established by the federal government in 1965 to provide federal funds to institutions to historic black colleges and universities to upgrade their university, to develop programs, keep their accreditation Also provide a professional development plan for faculty to

go to school to get their degrees. Also provide funds for our IT system. Provide funds to construct and renovate buildings. So those funds come in every year to South Carolina State University.

Q Okay. Thank you. And how long have you been the title three director at South Carolina State University?

A Thirty-six years.

Q And what are your job responsibilities as Title III director?

A My job as Title III director is to make sure all of these activities are well written, sent to the federal government for funding and then I disperse the funds. But all of this has to go through -- all through paperwork where they have to get approved by other people before it gets to me, such as a dean, a chairperson and then the provost, then it comes to me and then I will sign off on them.

Q Okay. Thank you. And as part of your job, do you oversee the commitment of Title III funds then to various activities or areas in the university?

A Yes.

Q And you told us a little bit about what Title III is. Are there parameters on how Title III grant funds can be allocated?

A Well, the parameters are whenever you write in your grant have to make sure that you are following everything

that you say you are going to do. And the faculty development activity that Ms. Simmons was in, there's a statement in there that indicates that you will return to the institution and give us a year for every year that we pay for you to go to school. The others have different type of parameters, but that was the parameter in that one. And that gets approved through a dean, and then a chairperson approves the application -- well, that application goes through a process. First of all the university will choose people to get their Ph.D's, and sometimes an employee will request the funds. So in order to get the funds there's an application that they have to fill out, which is a professional development plan. And in this plan they will have to go through the process of having a dean chair -- a chairperson, I'm sorry, complete it first, and then a dean, then the provost. Once that is completed, then all I have to do is make sure there are funds for those funds, and the person will be eligible to attend graduate school.

Q Thank you. And are there other areas besides faculty development that Title III grants can be spent on?

A Yes. We spend funds on equipment, renovations of buildings. We maintain our accreditations by using federal funds. We pay for resources in the library. There are many other things that we use for it.

Q Okay. And as Title III director then, are you familiar

with Title III faculty development program leaves?
A Familiar with what?
Q With factory development program leaves of absence?
A Yeah.
Q Okay. And is South Carolina State University a Historically Black College or university?
A Yes, it is.
Q Okay. And as Title III director, are you familiar with Denise Simmons?
A Yes.
Q How did you come to know Denise Simmons?
A I was became familiar -- I knew Denise on campus because she was very good in the engineering department. She had -- I knew the summer program that she had, the summer institute down there in Akin where she worked sith students in math, science and engineering. And when she applied for the application, she applied to go to graduate school I saw her application, and then we spoke about it. And then she would always send her information to the provost requesting her funds, and they would also cc me a copy and I would get it. So that's how I knew Denise.
Q So in 2008 then did Denise Simmons submit a factory development application?
A Yes, she did.
MS. BLACKBURN: Your Honor, I have in my hand a

document I would like to have marked for identification as Exhibit One. Your Honor, may I approach?

THE COURT: That's Plaintiff's Exhibit One?

MS. BLACKBURN: Yes, Your Honor.

THE COURT: Are you going to want her to look at it?

MS. BLACKBURN: Yes, Your Honor.

Q Now, Ms. Pyles, I would like to show you what I've marked as Plaintiff's Exhibit 1. And do you recognize these documents?

A Yes.

Q Okay. What are they?

A These are documents that -- this is Denise Simmons' application for support to go to Clemson.

Q Okay. And are there also documents at the back of that packet that are approval documents as well?

A Yes. These are all documents where she signed, and when she requested funds each time, and what she said she was going to do after she was received her degree.

Q Okay. Thank you. And how are you familiar with these documents?

A Each semester Denise would have to submit -- let's say the first semester -- she went to summer school but let's say the first semester that August. She would submit to us requesting two-thirds of her stipend, which we would send to her. Then she would receive the her stipend after he were

after her grades were received. She did this each semester and we would make sure she received the funds. Also she would submit how much it cost to go to Clemson, and then we would submit those funds to Clemson University.

Q Okay. And can I ask you, are you familiar with Dr. Simmons' signature?

A Yes, I think I am.

Q Okay. And how are you familiar with her signature?

A Well, you know, I didn't take it and see if it's the same each time, but I would recognize it when I saw it on the application.

Q Okay. And I'm going to ask you to look at page two of the document in front of you --

A Page two?

Q -- page one and two. If you would just look at that.

A Okay. This is Denise Grant.

Q And is that Dr. Simmons' signature on that second page?

A Yes.

Q And what is your understanding of what the first two pages are?

A This is the -- she was writing to submit the application, and she was informing the Provost and informing the Dean what she wanted to do.

Q Okay. So this letter is addressed to whom?

A Dr. Stanley.

Q And when you say Dr. Stanley, is that Dr. Stanley Ihekweazu.
A Ihekweazu, I'm sorry.
Q And this letter is from Denise Simmons?
A Right.
Q And it says Denise Grant, was had that her name at --
A Her maiden name, uh-huh.
Q Now, I'm going to ask you to look at the back of the document, the back four pages of this document. And can you tell me what those four pages specifically are?
A One document reads that she agreed that she would remain in active service with the South Carolina State University after completing her agreement equivalent to the amount of time for assistance was received for purposes of this agreement. A summer session as well as each conference, workshop, improvement is considered. Failure in any part to carry out the above agreement will result in the lump sum payment or the entire amount expended by South Carolina State University on my behalf.
Q Okay. And is Dr. Simmons' signature on these documents as well?
A Yes.
Q Okay. And is your signature on these documents?
A My signature is on the last document after it was signed by the President and all of the other appropriate

signatures are there, and then I'm the last one to sign.
Q Okay. Ad so was Dr. Simmons' application for faculty leave and support approved.
A It was approved.
Q And do the signatures on this document indicate that Dr. Simmons' proposal for professional faculty development leave approved?
A Yes.
Q And is this true and correct copy of the Denise Simmons' grant application and approval records for her faculty development leave?
A Yes, it is.
Q Only I'm going to ask you again to look at page one and two of this exhibit. Can you read aloud the second paragraph on the second page?
A The second paragraph?
Q The second complete paragraph?
A When doctor -- okay. "My entire objective for pursuing the Ph.D Degree has always to bring my independence back to South Carolina State University, provide the goal of exposing students" -- now, this is very, very small writing, I'm sorry -- "to my area of specialty for performing scholarly work 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. My expected graduation date from the Ph.D program is December 2011. I will stipulate as many -- I will stipulate as many of the years employment as you deem appropriate in exchange for your support of this proposal and my degree completion at Clemson University.

Q Thank you. And did you understand that paragraph to describe Dr. Simmons' stated objectives for seeking the faculty development leave?

A Yes.

Q And is the objective for her request for leave as stated in her application records consistent with your understanding of the position as Title III Director with South Carolina State University's purpose --

A Yes.

Q -- for providing Dr. Simmons that leave and support?

A Yes.

Q Okay.

MS. BLACKBURN: And, Your Honor, I would like to offer Exhibit One into evidence.

THE COURT: Any objection.

MR. ORMOND: No objection.

THE COURT: Plaintiff's Exhibit Number One is in evidence without objection.

MS. BLACKBURN: Thank you.

Q And, Ms. Pyles, to your knowledge, did Dr. Simmons remain in the active service of South Carolina State upon completion of her degree?
A No.
Q Okay. Is it your understanding that she obtained a position elsewhere?
A Yes. After she didn't come back, yes, uh-huh.
Q Okay. How did you discover that she had obtained a position elsewhere?
A Well, you know, I was going through my files and we realized that she had not come back. And then I was asking around if anyone knew where she was and no one knew. So someone mentioned to me that she might be in Virginia. So I researched it, and I -- you can go on the web pages at the university be find out where people are and I found out she was at Virginia Tech.
Q Okay. Thank you. And as the Title III Director, what was South Carolina State University's expectation about whether Denise Simmons would be returning to teaching at South Carolina State after the completion of her degree program?
A The goal was that Dr. Simmons was an excellent professor there and he she really loved the young students that we had and worked with them. And in her application she said that she wanted to come back and expose our

students to her specialty, and also enhance our research. So it would have been best for her to come back because we expected her to come back, but she didn't, so --

Q Okay. And what was your understanding about what funds would be provided to support Denise Simmons' degree program at Clemson?

A Well, we provided all of her stipend, we provided all of her tuition and fees, and we purchased a few books for her.

Q And was your department responsible for making sure that the Title III funds were dispersed?

A Yes.

Q And were your Title III funds for Dr. Simmons faculty development leave disbursed in one lump sum?

A No. There was -- each semester she received four checks. She received two-thirds of her stipend and one-third for the first semester, and the same for the second semester. And then when she went to summer school she received checks also.

Q Okay. And did Dr. Simmons request her funds every semester as she was required to?

A Yes, she did.

Q Did Dr. Simmons contact -- I'm sorry, I'm going to change that question. As Title III Director, did you determine the entire amount was expended by South Carolina

Testimony of Dr. Denise Simmons

The witness, DENISE RUTLEDGE SIMMONS, was first duly Sworn and testified as follows:

DIRECT EXAMINATION

BY MR. ORMOND:

Q Dr. Simmons, where were you born and raised?

A Charleston, South Carolina.

Q Did you go to primary schools there?

A I did.

Q Did you go to college?

A I did.

Q How did you manage to go to college?

A I worked my way through college.

Q Did you take student loans?

A I did. So between working during school and in the summers I was able to finance part, and then a significant piece was student loans.

Q Where did you go?

A Clemson University.

Q After -- well, what was the degree in?

A Civil Engineering.

Q Did you work after that?

A I did.

Q Where did you work after college?

A I was immediately employed by Duke Energy in Charlotte, North Carolina.

Q Did you work anywhere else?
A I did. I have worked for a couple of energy companies and then in a consulting firm.
Q Did you obtain a Masters Degree in Engineering?
A I did.
Q When did you do that?
A Right around '95.
Q How long had you been working before you did that?
A About four, four and a half years.
Q Are you married?
A I'm not, I'm divorced.
Q After your Masters Degree, did you go back and work in the industry?
A I did.
Q Where did you work?
A Immediately after the Masters, that was for SCE&G.
Q What did you do at the utilities?
A For SC&G particularly I was a systems engineering, so I had a responsibility for natural gas systems across the three states that they had facilities.
Q Did you work anywhere else?
A I did. I worked for awhile for Memphis Light Gas and Water. At the time my spouse had found employment there in Memphis, I followed him. And then we returned to the State of South Carolina where I was doing consulting work at that

time.
Q Did you earn a professional engineering license during this time?
A I did. I earned that, yes, somewhere around 1995/96ish, somewhere around in there it seems like.
Q And that's the license you need to practice engineering, if you will?
A Exactly. It allows me to stamp drawings and gives me a little bit more freedom in terms of professional and what I can do, and also the value I would add to my employer.
Q Can you describe very briefly the process that is required to get a professional engineering license?
A Sure. It's a minimum of four years of practice under another professionally licensed engineer, and then it's a day long exam.
Q How many years did you work in private industry?
A Just shy of 15 years.
Q Now, did you come to work at South Carolina State University in about 2005?
A That's correct.
Q Why did you make that change?
A So as my responsibilities in industries sort of grew I had gained a passion around mentoring and developing my employees, and I thought I could have a larger platform doing that in academia. If you asked my mom she would say

she always knew I was going to be a teacher, but I didn't want to be a teacher anywhere. I wanted it to be particularly at an HBCU.

Q Okay. What's an HBCU?

A An Historically Black College and University.

Q From private industry did you take a bit of a pay cut to go teach at college?

A I did.

Q Did you determine during your time teaching at South Carolina State whether you liked it or not?

A I did.

Q Would you tell us a little bit about that?

A I did. So I came -- it was made clear to me I would not be able to progress through tenure without the terminal degree, and I guess I wanted to be sure that I actually really liked it before I pursued it. Because pursuing a Ph.D is not for the faint of heart, it's quite a bit of work and commitment and effort and time and energy. And not only did I like it, I think it was clear to me from some of the reviews I was receiving that I was being -- that it was being impactful, that it was having a positive impact in that environment. So that was rewarding to me and sort of fueled my passion to say, okay, I think this is the right path for me.

Q About when did you make that decision, do you recall?

A Probably after I was there for about a year.
Q When you were at South Carolina State University, did you work on yearly faculty contracts?
A I did.
Q These have already been admitted into evidence as Defendant's 1. Were these the contracts that you worked on before, or were given before?
A Yes, uh-huh.
Q When were you given those contracts?
A Usually the earliest I would have seen them would be in July. Typically it would cluster late July, definitely early, like early August.
Q Were these form contracts? Were they about the same each time you got them?
A They were about the same. Sometimes they would be maybe a new class or something. They did evolve slightly because there would be places, and I'm reminded because I see where, where I would have to initial, where before in a previous year I didn't have to initial. You would also know if there was a change or if you got a raise you would know that as well on the contract.
Q Did you understand these contracts to be important?
A Yes.
Q Did you understand that if you didn't sign this contract you weren't an employee there?

A Yes.
Q Why did you understand that?
A When I was originally hired in the department, the department chair at the time was Tom Whitney, and I was mentored for awhile by Tom Whitney. And I was just coming from industry so I know industry lingo really very well and what was to be expected. I had no idea what was to be expected in academia, and so he really helped me a lot understand. And the first thing he told me was without a contract you will not be paid, so you should definitely have a contract before you show up.
Q Now, how would you receive the contracts? By mail or email? Can you recall?
A It seems -- it's not by mail. It seems like -- I think I would always -- it never came -- I don't remember.
Q Okay.
A I really --
Q Did you get the contracts, or contract, in some form and then have an opportunity to take a look at it to see if it was right or to see if it what was agreed to and so forth?
A Usually. And there's -- since it typically followed a particular form I would look in key places. Like for instance, it would be called out to my attention if there was a new place where I needed to initial, which I always

appreciated because that let me know maybe something changed so they were drawing our attention to maybe a new condition or something.

Q Did you ever engage in discussions with your mentor or your faculty chair prior to signing a contract about salary or about any of the terms of the agreement?

A Say that again.

Q Did you ever engage in conversations or discussions prior to you signing an academic year agreement about any of the terms, whether it be tenure or salary or anything like that? Did you have any idea of what that was prior?

A No. You would just know by the terms here. I wouldn't even know before if I was getting a raise, it would just be noted there.

Q If you felt you should have gotten a raise or if it raise you would had been told about was not reflected in the contract, would you have an opportunity before signing it to go ask questions?

A No. That was not my understanding of how things -- how we -- or how we operated in my department.

Q All right. Now, in 2007 apparently you signed a contract that was after the stated deadline within the contract, do you recall that?

A I do.

Q Can you tell us the circumstances?

A Yes. Because they had changed some of the forms to make us initial in certain places, since that was bolded it caught my attention, so I was used to paying attention to things that were bold or underlined. And because it said if I didn't sign it by then I wouldn't have a valid contract, I thought it should be noted that I didn't get it until that date, so I wrote it in.

Q Now, was this still prior to classes starting?

A Yes.

Q Have you ever signed or been given a contract after classes had actually already started?

A Never.

Q Did you have any knowledge of what a drop dead date would be for getting a contract if it were an academic year contract?

A Not formally. But the implied -- to me it seemed implied that right around the 15th or the 16th should be like that's the absolute last day.

Q Okay. Now, you indicated earlier that you had made -- come to some decision to try to get a Ph.D degree. What reason did you have for doing that?

A To maintain my employment at South Carolina State and to progress through the ranks.

Q Now, did you have any option on how to finance that degree?

A Uh-huh, yeah, lots of options.
Q Tell me some of them.
A There's many federal funding opportunities to fund particularly engineering students or any STEM programs. So you can access those directly through the federal government, so apply just like a student who first enters, you can apply for external scholarships. I could have applied to Clemson for consideration of funding at Clemson, so what would be considered sort of funds at the University. Those are I would say the primary sort of bundles.
Q Are there things like fellowships?
A Uh-huh. And that would be on the federal side, those are federally funded.
Q Do colleges like Clemson have a resident research assistant or teaching assistant?
A Exactly. So those would be things that you would access through the University.
Q And would those supply tuition and a stipend?
A It would.
Q Did you decide on Title III to fund your Ph.D?
A I didn't know about Title III originally. I had spoken first with my Dean at the time, who was Kenneth Lewis, who made me aware that -- who first brought that to my knowledge, that this was a possibility as one of the avenues for funding my studies.

Q Did Dr. Ihekweazu have any influence on that?
A Uh-huh, he did.
Q What did he do?
A I understood from Dean Lewis that approval for it first had to be initiated at the Chair's level, and then it would work its way sort of up the progression. And then it required everyone to agree that this was something they were willing to do.
Q So did you decide to request a Title III Grant?
A I did.
Q Denise, I'm giving you a portion of the application process, things you wrote. This would be Defendant's 3. And take at that look at it. Okay. In is Defendant's 3, could you take a look at that and tell me if you prepared that?
A Yes, I did.
Q It's long and it has been read in, or at least parts of it read into the record in earlier testimony. But in essence it says you want to return to South Carolina State and you want to teach those kind of students; is that correct?
A Absolutely.
Q Tell me why -- tell me why you wanted to continue on with South Carolina State.
A I think at this point in my career having been a part

of sort of a corporate entity where sometimes plans are made for you, at some point I took charge of my career and said I think I need to stay quiet for a moment and figure out what my passions are. And when I started mentoring my employees and see how they were able to progress in positions and sort of get to places they wanted to be, I thought, well, that was just personally rewarding to me. So the passion of the teaching, particularly I wanted to bring that passion to -- I only have brothers so I would say sisters only figuratively to people that would be like my brothers and sisters. So I said, I think I may want to share with people that don't really know this and they look more like my brothers and my sisters. So I really wanted to stay and then stay within the state as well.

Q When leaving industry with a Masters Degree, were there other options at other colleges that you could have gone to and taught?

A Oh sure.

Q Did you consider any of those?

A No. For me, especially coming from Charleston, South Carolina State has a great reputation. In fact, my very best friend who I grew up with graduated from South Carolina State. And that's not just one example, a lot of my friends attended the institution. I think I learned a lot from hearing about the institution through them that further sort

of made me think this is where if I'm going to have a teaching impact I want to have it, I want to have it there.
Q Was there any time during -- prior to going to Clemson University that you thought twice about trying to remain or trying to continue with South Carolina State University?
A No, absolutely not.
Q Were you accepted by Clemson in the Ph.D Engineering Program?
A I was.
Q What do you know about the Title III Program?
A What I understood about Title III was it was available to help, particularly -- my characterization was under represented faculty members to obtain a Ph.D. And I wasn't sure if it was particularly targeted towards them, that was any understanding. I could be wrong on that understanding but that was my understanding. And that particularly for faculty members who were already in teaching positions who didn't yet have the terminal degree who were under represented to obtain that terminal degree.
Q And were you accepted in the program at some point?
A I was.
Q And did you sign the documents that have been entered into evidence already, like the memorandum of understanding?
A I did.
Q And the memorandum of understanding was at the end of a

group of other contracts, or other documents; is that correct?

A It is.

Q Now, after you were admitted to Clemson in 2008, did you and the administration of South Carolina State discuss remaining as field director -- field station director?

A Yes. At this point I guess I had been field station director maybe like three years. And at the time I became the director the field station's funding had dwindled, and Dean Lewis had brought -- had asked that I take on this position and see what can be done to revitalize these relationships and return the funding to it. And I particularly felt obligated to continue because I was successful at that and transitioning it to someone else might actually cause a set back. I was successful at it and it seemed it was almost sort of -- I sort found is niche, it sort of hit a strength of mine so I was able to do that and actually even to let my adviser know that this is something I would be continuing to do.

Q Very briefly, what is the South Carolina State Environmental Field Station?

A The South Carolina State Environmental Field Station is a consortium of 29 institutions, 21 of those being HBCU's it was created by a faculty member at South Carolina State named Dr. Anuro (phonetically.) And Dr. Anuro sort of had

this vision around students who were in the biological sciences who had progressed through to a certain point in their career undergraduate wise, and were thinking they were going to medical school but did not maybe, and either decided they were going to change their mind and didn't have a plan B. With this the field station allowed a number of institutions to sort of co-locate at a national lab, the Savannah River lab, which is run by the Department of Energy, and we could bring in teaching faculty from whatever institution to teach them courses in environmental sciences, environmental engineering, biology. And the curriculum was designed around giving them minimum competencies to be hired at the Department of Energy and USDA, thereby offering these students an option for their career paths so it is one of these sort of capacity building sort of opportunities for students.

Q Now, prior to each summer in doing the field station, did you receive some sort of appointment letter?

A I did.

Q And was that a P13?

A I did, yes.

Q And that had your salary and what was going to happen and all of that.

A Correct.

Q Did you ever work without a P13 or employment letter

even at the field station?
A Never.
Q Did you continue on as director of the field station during the time you were at Clemson?
A I did.
Q Did this also require some time during the academic year?
A Absolutely.
Q What kinds of things did you need to do during the academic year?
A So I met with my staff weekly. So through the grant we hired two persons to remain here at South Carolina State. They were working with me before I left and we were able to employ them -- I was able to employ them through the grant money. And for these persons they maintained both the fiscal side and some of the operating things that needed to be done on campus, so I met with them weekly. I also maintained a vehicle that was funded through the field station which allowed me to travel freely if I needed to go to Akin to meet with folks. I also actively recruited students, so I would make campus visits through the nine months to recruit for the field station. I also maintained relationships with our funding agencies to make sure I understood what grant opportunities were coming up and how funding was going to be handled in case budgets are going to

be cut or something, so I could understand the priorities of our funders so that I could react and make sure the field station was positioned to receive those funds.

Q Now, was the Clemson Ph.D program relatively intense in engineering?

A Yes.

Q Did you take courses?

A Yes.

Q Did it require a dissertation?

A Yes.

Q What was your dissertation topic?

A I'd studied first generation college students and how the influence of mentors and faculty help them succeed in engineering.

Q Now, in November of 2011 you were beginning to wrap up your Ph.D program; is that correct?

A That's correct.

Q Did you inform South Carolina State University that you would be graduating?

A I did.

Q Did you keep up with the paperwork and the requirements of the Title III grant during this time?

A I did.

Q Was that once a semester or was it more often than that?

A It was more often than that.
Q Did that require reporting your grads and your status?
A Exactly. Typically what I would have to do is report a course schedule once I had signed up for courses. I would also have to report grades at the end of the semester. I also had to, you know, sort of give them sort of this progress update in terms of my expected sort of graduation date so they would know when I was returning.
Q In April of 2012, did you receive an email from Dr. Okafor?
A I did.
Q If you could take a look at Defendant's 4 and see if you recognize that.
MR. ORMOND: At the same time I would ask the Court if we could enter into evidence Defendant's 3?
THE COURT: Any objection Defendant's 3, which was part of plaintiff's --
MR. REAGLE: No objection. Yeah it was part of exhibit -- Plaintiff's Exhibit 1. No objection.
THE COURT: All right. Defendant's 3 is in without objection.
Q Did you recall that?
A Yes, I do.
Q And this is an email in which they were talking about what courses you might teach the following fall.

A Yes.
Q Did you have any thought that you might not be teaching the following fall at South Carolina State University?
A No. This let me know clearly that I definitely had to have a course schedule set aside.
Q Okay. And apparently one of the courses was something you hadn't done before. Can you discuss with us just briefly what that issue was?
A Yes. Probably on my record I had taught about six to eight different kinds of courses at South Carolina State, and when I got my teaching schedule one class was something I hadn't taught before. And so two concerns that were raised in my mind, the first time you teach a class, first of all there's a lot of effort on the front end, which in and of itself is not a problem, but this one also required quite a bit of instruments that I had not yet operated. And because I was involved in (inaudible) accreditation for the department faculty had been cited before in courses where they were operating instruments that we were unfamiliar with. I was concerned that -- and in my email pointed to two other professors who I knew had done the class before that might have more competency in that area so that the students would get a good experience.
Q Essentially Dr. Okafor, if you would look at it, wrote you back and said essentially, sorry, and unless you can

work with somebody else you're going to have to teach this. Was that a problem for you?
A No. I figured I would figure it out.
Q Okay. Did it make any difference in your determination to return to South Carolina State University?
A No.
Q Did you graduate from the Clemson program some time in the spring of 2012?
A I did.
Q Did you finish your dissertation?
A I did. I successfully defended it at the end of April.
Q And if you defend a dissertation you are essentially in front of faculty members and asked questions about it and so forth, correct?
A Correct.
Q It's a relatively grueling situation?
A It's very stressful.
Q In the spring of 2012, did you request that Clemson fill out the paperwork and get the transcripts from Clemson to South Carolina State University?
A Yes. And I did that actually before I applied for graduation. You can request that -- upon graduation transcript get sent to different places, so I would have to wait until I graduated to do that. And because I was going to be on campus to defend I wanted to take care of that

documentation while I was on campus, so I made sure to do that. And I did it at the end of April.

Q And why did you do that?

A Because I understood for me it was the final process of notifications of things that I needed to do in terms of my responsibility for professional leave.

Q You needed to do that before you could return and teach?

A Exactly.

Q If you weren't going to return and teach, did you need to do that?

A No.

Q Did you make sure that final transcript were sent to Clemson -- from Clemson to South Carolina State in the summer of 2012?

A I did. In fact, I got notification from Title III that they had a copy. But then in the summer Ms. Darby had contacted me and said she didn't have it in her office. So I forwarded her the copy of the email I had gotten from Title III and said, you know, they got it like in May, and she says, "Got it, located it."

Q Now, were you working that summer, this is the summer of 2012, full-time at the field station?

A I was.

Q Did that require you to be in Akin?

A Yes.
Q Did you do traveling also?
A Uh-huh, I did.
Q Was that true for the past seven or eight years?
A Uh-huh, yes.
Q And you did confirm, in fact, that the final transcripts in July had been accepted and gotten or received by South Carolina State University?
A Yes, I did.
Q And did you keep your Columbia home?
A I did.
Q Why did you do that?
A Number one, I loved it and I was returning, so it made no sense. The Clemson thing was just temporary.
Q When you worked at South Carolina State prior, did you live in Columbia and commute?
A I did.
Q Did you look for teaching positions or faculty positions in other colleges at all during the summer or spring of 2012?
A I did not look for faculty positions in the summer or spring of 2012. There was a visiting professor position available at Virginia Tech. that I had a mentor at the time that said in terms of sort of, you know, you might want to put your name in just to get some experience in looking at

what, you know, sort of interviews do. You're getting ready for putting in your -- at South Carolina State. You might want to get some experience in case you don't get tenure, go and sort of look at it. I wasn't selected for the visiting professor's. The same mentor told me, you know, you weren't selected, this is why. There were certain deficiencies in terms of my dossier or my CV, explained to me that I wasn't a candidate and she used it as a mentoring opportunity to show me how to sort of improve my experience and training.

Q What would you have done had you been accepted? Was this a short term --

A No. The position was just a year, the visiting professorship.

Q Would that have interfered if you had taken it with any obligation to coming back to South Carolina State University?

A Ask that again.

Q Would that have interfered with coming back to South Carolina State University?

A The visiting professorship?

Q Yes.

A If I accepted the position it would have interfered with me going for that year.

Q Would you have accepted that position if offered?

A For the -- so thinking about it, I went into it just as

my mentor had introduced it, it was a professional development thing. I don't know that I had processed it beyond accepting.

Q Was there any time in the summer or the spring of 2012 that made you think you did not want to come back to South Carolina State University?

A No.

Q Now, were there anything that was happening that maybe concerned you that South Carolina State University might be having some issues?

A I was concerned about their financial stability. There was quite a bit of news going on both in print and on TV about what was happening at South Carolina State. I guess I understood their budget to come from student tuition and from the state primarily. And what was in the news was state funds were being cut to the institution and enrollment was down, and so it was going to be a challenging financial situation. Also in the news was --

MR. REAGLE: Let me object to the reports of what's in the news as hearsay. I think if it's to her state of mind, fine --

THE COURT: Sustain the objection?

A So --

MR. ORMOND: It's not offered for the truth of matter, it's offered just for her state of mind, what she was

thinking and why she was thinking it.

THE COURT: Okay. Whatever is in the news or anything like that -- she's already mentioned what her state of mind. She was concerned about the financial situation at State, that's good, she can stop there.

Q Did there come a time -- well, did you look for any faculty positions anywhere else in the summer of 2012?

A No.

Q Did you continue working at the South Carolina State Field Station in the summer of 2012?

A I did.

Q Did you talk to Virginia Tech.? And this is before mid-August of 2012.

A No.

Q Did there come a time when you began to be concerned that you would not or were not being given a contract, there might not be contract by South Carolina State University?

A I think it was always me my mind after -- in terms of just sort my state of mind after learning what I learned. But there would be little things. So the teaching schedule says, okay, good I'm going to be hired. But then there would be a conversations, like my conversations with the chair that seemed like, well, maybe I'm not going to be hired. So there was -- I had no idea. I really thought -- my state of mind was they didn't have the money to hire me

and that I wouldn't, you know -- seems like I would not be hired back.

Q Had you gotten an appointment letter?

A No.

Q Had you gotten the form contract?

A No.

Q Now, did school start at about August 17?

A That's what I understand, now. I don't think I knew at the time when school started.

Q Had you been sent an employment contract by any means?

A No.

Q Had anybody discussed salary or what would be different or the academic year contract, any of the terms?

A No.

Q Did anybody call you at all?

MR. REAGLE: I'm going to object. I don't know if she knows if they called her.

MR. ORMOND: I'll rephrase.

THE COURT: Thank you.

Q Do you recall getting a phone call from anyone at South Carolina State University prior to August 23?

A The only person I spoke to was Deborah Darby.

Q Was that on August 23 or was that before then?

A So in getting the transcripts I don't know if this was through phone calls or through emails or both, but that was

the only -- that was the only person.
Q Now, apparently in June of that summer you ran into at an ASEE meeting Dr. Okafor. Do you recall that exchange?
A Yeah. I -- not before he recounted it I hadn't remembered it. But I do remember -- I remember as he recounted it, which was when I first noticed he was there, clearly he had the vantage point of walking behind me, I had no idea. I think I dropped my phone. I probably almost coincident with hearing it drop I think I remember turning around and all you're doing is looking at your phone, here is a hand handing it back. I turned around, it was him and he sorted of pivoted and went the other direction. I also remember, which is what he sort of recounted yesterday, I do remember that happening.
Q I assume you didn't discuss anything with him about your contract status.
A No.
Q Why?
A For one there wasn't an opportunity. If your phone drops -- I was focusing on let me get my phone, here is somebody helpful, you want to say thank you, so he sort of went in the other direction. But at the time in June -- I had never received a contract as early as June, so it wasn't in my mind.
Q In June of 2012, did you assume that you were going to

be hired by South Carolina State University?
A Oh, yeah.
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.
Q Okay. Is she an engineering professor at Clemson?
A She is.
Q What did she do regarding this?
A So Julie was in the process of taking a temporary position but had just obtained grant funding for a grant that she was working with someone at Virginia Tech. And I had been involved as a grad student with the earlier

starting of this project, and she said, "You know, if you're not going to be employed I could probably try to work out something where you could work on this project while I'm taking this temporary position."

Q Tell me exactly -- you said it was a temporary position. Was there any possibility that this position lasted more than an academic year, nine months?

A The position I was taking?

Q Yeah, the position you were looking at.

A The post-doc. typically is a continuation of your training anyway. So it's -- you know, if you found another job or something like that you can leave that, so it's not -- it's not anything that's permanent for sure.

Q Okay. Is this that post-doc. position you discussed?

A Yes.

Q If you could take a look at the left and above, it says date of offer. Can you read that?

A The date of offer says August 15th.

Q Is that about correct when this was roughly offered at that time?

A That seems about right.

Q Okay. And the response due date was August 22, 2012?

A Yes.

Q Okay. Did you wait to sign this?

A Yes.

Q Why did you wait to sign this?
A Because I was still hopeful that something was going to occur at South Carolina State.
Q Did you write Dr. Okafor an email on the 16th?
A I did.
Q I would like to put that in.
THE COURT: Defendants 5?
MR. ORMOND: Defendants five.
THE COURT: Any objection?
MR. REAGLE: That's the email she wrote to Dr. Okafor.
THE COURT: No, this is post doctorate document.
MR. REAGLE: Yeah, no objection.
THE COURT: Defendant's 5 is in evidence without objection.
MR. ORMOND: Your Honor, I would ask that Defendant's 4 be moved into evidence, I didn't realize it hadn't been.
THE COURT: All right. Defendant's 4 was that the email that she sent -- Mr. Reagle, any objection to Defendant's 4 going in?
MR. REAGLE: No objection.
THE COURT: So Defendant4 four is in without objection also.
Q This has been read in before. Let me ask you this, did Dr. Okafor ever call you prior to August 16th?
A No, he didn't.

Q I'm going to ask you a little bit different way. Did you receive a call from Dr. Okafor prior to August 16th?
A No.
Q Did you receive a message on voice mail regarding a contract regarding your hire before this email went out?
A No.
Q Do you have a cell phone?
A I do.
Q Does it have voice mail?
A It does.
Q And you have an email?
A I do.
Q And this -- would you agree that you indicated to him you hadn't received a contract to date and otherwise hadn't heard from him?
A Correct.
Q You go on to say, "I'm a bit distressed and have sought and secured employment. Please call me if you would like to discuss the matter further." Is that what you said?
A Yes.
Q Did he call you to discuss the matter the next day?
A I don't recall if it was the next day but he did call.
Q Did he send you an email on the 17th?
A Yes.
Q And he essentially said there's no viable number to

call you?
A Yes. And he offered -- so maybe -- perhaps I might have called him. He offered his phone number in that email on the -- yeah, his phone number, on that email on the 17th.
Q All right. He states in there a number of people haven't received their contract. How did that make you feel?
A It literally made the hairs on the back of my neck stand up. Because I thought for me it's further supporting what I was thinking before, there's not money to hire folks, because why would contracts not be sent out to more than just me. So I thought that this isn't going.
Q On August 23rd, did you respond to his email of the 17th?
A I did.
Q Why don't you go ahead and read that for us.
A So I said, "Hi, Dr. Okafor. I left you a phone message. My cell phone number hasn't changed, same as is on record with the department" -- and I gave them the number. I said, "Ms. Darby and I spoke this morning. She has a time related issue that needs to be resolved today and she needs to hear from you. We need to speak regarding employment."
Q Now, had you already heard from Deborah Darby that day?
A I did, uh-huh.
MR. ORMOND: I would like to move that in as 7 -- 6.

THE COURT: Defendants 6?

MR. REAGLE: No objection.

THE COURT: Defendant's six 6 is in without objection.

Q Now, Defendant's 5, your the post-doc. offer, it says in response the date was due on August 22nd. Did they move that to the 23rd?

A Yes.

Q So on the 23rd of August, was this the last day to take this post-doc. position?

A Yes.

Q And again, was a post-doc. position a grant that was between Clemson and Virginia Tech.?

A It was.

Q The salary there is $48,000; is that correct?

A That's correct.

Q Is that significantly less than you may the last year as a faculty member at South Carolina State University?

A It is.

Q Tell me what you and Deborah Darby spoke about on the 23rd.

A So the first thing she told me was that she had learned that I hadn't received -- I'm going to continue to use the word contract because I believe that was the word that was used with me -- that I hadn't received an employment contract. She was trying to figure out why. She also told

me that she had left several messages for Dr. Okafor and he hadn't returned her phone calls, and so that's why I wrote the email to him letting him know that she and I had spoken and she is trying to contact him. She says, "If he gets in contact with me we can resolve it."

Q Did you speak -- were there any other substantive discussions you had with Ms. Darby?

A No.

Q Did you speak with Dr. Okafor that day on the 23rd?

A I don't recall that we spoke on the 23rd. I recall we had a phone conversation, but my recollection was it was before the 23rd. I don't recall after the 23rd us speaking by phone.

Q Okay. Well, tell -- on the 23rd you wrote, "Dr. Okafor, I left you a phone message, my cell phone hasn't changed." Do you recall if he called you after that, or if he called?

A He must have called -- he had to have called after I left the message and also gave him my phone number in this 23rd.

Q Tell me what you can remember you two discussed, you and Dr. Okafor.

A So the phone conversation with Dr. Okafor was he wanted -- he wanted to ask me what was my concern and I said, "I hadn't gotten a contract." And so he said to me

two things, he said -- number one he says, "I didn't know you were returning and you haven't been in contact with me since you left." And I told him that "I'm sorry you didn't know I was returning, but I had been in contact through what I thought were the formal channels that were laid out for me during the professional development program. What was concerning to me after the phone call was it didn't make sense to me that he didn't know I was returning after the phone call because he had sent me a teaching schedule.

Q What was the tone of the conversation?

A He was very firm and terse with me, that I needed to return, and this is even after I had told him I was working through the death of my grandmother. So it sort of struck a certain tone with me that I thought was just, you know, he's just like "You need to come."

Q Did you tell him you needed a contract?

A I absolutely on the phone call told him if he sends the contract then I would be happy to return.

Q Did he say he was going to send a contract?

A I don't recall him on that phone call saying he was going to do anything related to the contract.

Q Okay. Was it possible he said it but you just don't remember that?

A No. Because the thing that stood out to me was his tone.

Q Did you understand you could go to work there without a contract?
A No.
Q At least on the 16th did he know that you felt like you needed a contract?
A Yes.
Q Had you known of any other professor there that didn't have a contract before starting classes?
A Not that I knew of.
Q What did you come away from -- come away with from this conversation on the 23rd?
A I think a feeling of uneasiness. I think for me if I was trying to weigh out am I going to be hired or not, him saying he didn't know I was going to return after I thought about him sending the teaching contract, I thought -- the only conclusion I could sort of come to in my mind I said maybe if it was not a financial situation maybe he doesn't want me to return. So I just couldn't reconcile why he would say he did not know I was coming back that fall.
Q Did you understand that classes had been going on for six days by now?
A I think the first reference I knew to classes was the email from Dr. Ihekweazu that had stated classes had started in the fall of 2012. I don't think I had a recollection of the actual start date for classes. So after Dr. Ihekweazu

said classes had started I knew then.
Q Okay. If you had been given a contract at any time, would you have returned to South Carolina State University?
A Absolutely.
Q Was that your goal and desire?
A It's the only reason I went to the Ph.D program.
Q Did you on the last possible date sign this post-doc. agreement?
A I did.
Q And that was on 8/23/2012, that would be Exhibit 5?
A Yes.
Q Did you begin to engage in that work then?
A I did.
Q Now would this post-doc. position be anymore academic work?
A No.
Q Did this employment this post-doc. assist you with a year of tenure at any University?
MR. REAGLE: Your Honor, I object as to it relates to what any University might do in the future.
THE COURT: I'm going to let him ask it?
A Like I said, the post-doc. is actually considered education, it's not necessarily counted towards tenure.
Q Would you have had a chance if you started in August to get a faculty position at another University?

A No.
Q Why?
A Because most universities hire for their faculty at certain times of the year, and August is a contracting period that is in place for most universities. There's some universities that are on maybe quarter systems where that date might slide just a little bit, but if you're on a semester system, mid-August is that date, that drop dead date for a vast majority of the colleges and universities in this country.
Q Even after the 23rd, did anyone at South Carolina State University ever send you a contract or an appointment letter or describe to you what the terms of your employment might be?
A No.
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.
Q Now, in February or so of 2013, did you get something from South Carolina State University?
A I did.
Q What was it?
A I was served with legal documents that they were going to take me to court.
Q Was it a letter from a lawyer?
A Yes.
Q Dr. Simmons, were you planning to return a contract with South Carolina State in the year from 2012?
A Absolutely.
Q Did you change your mind from any of these statements that you made if your Title III application?
A Absolutely not, I still affirm them. In fact, it was asked to hear them read, and read several times. It made me smile and remember the passion of why I was pursuing the

Ph.D.

Q Why didn't you begin teaching at South Carolina State University in the fall of 2012?

A Because there were no terms offered to me in terms of employment so I could -- to actually seal that particular employment arrangement.

Q Did you understand that -- what did you understand about your employment as field director, which was that summer and partial academic year program at South Carolina State University after 2012?

A After 2012 I would continue in that role, and, in fact, the spring teaching contract indicates that. Because I've got a 25 percent release time noted there. That 25 percent release time was so that I could continue the work as director of the field station.

Q Did you learn at some point that you had been terminated as director from that program?

A Yes.

Q When did you learn that?

A I saw -- there was an outline interface that I could look up and it says -- when I looked up my employment number it said that I had been terminated, and that was in September.

Q September of what year?

A 2012.

Q Dr. Simmons, do you have any other relevant facts that would be related to this lawsuit brought against you that the jury needs to know?

MR. REAGLE: I object to the question, he's got to ask.

THE WITNESS: You can answer the question but we are not doing any fishing.

MR. ORMOND: Your Honor, I'm not trying to fish. I was just asking if I missed something or have any knowledge that might be relevant --

THE COURT: Well, no. If you have got a question ask her.

MR. ORMOND: I guess that's all I've got.

THE COURT: Anything on cross?

MR. REAGLE: Yes, I hope briefly.

CROSS EXAMINATION

BY MR. REAGLE:

Q Good afternoon, Dr. Simmons.

A Good afternoon.

Q In 2008 it was your entire goal in going to Clemson and getting your Ph.D to return to South Carolina State as a professor, correct?

A That's correct.

Q And that continued to be your entire goal right up until August of 2012?

A It continued beyond that.

Q Okay. And it was your understanding while you were studying in Clemson from 2008 to 2012 South Carolina State would provide you financial support, correct?
A That's correct.
Q Did you also receive financial support from Clemson University?
A During --
Q While you were getting your Ph.D?
A From Clemson?
Q Yes. An IRA or a TA or any of those, research assistant, teaching assistant, things that -- things that Mr. Ormond mentioned in his opening?
A No.
Q Okay. In 2008 you understood that your failure to carry out the terms of your faculty development plan agreement professional leave could result in your lump sum repayments of the entire amount expended by South Carolina State on your behalf, correct?
A I understood that if I wasn't going to be employed or that I willfully didn't return, that yes.
Q So that was your understanding, if you didn't willfully return then you would have to repay the lump sum amount that the State had expended on your behalf in getting your Ph.D.
A My expectation was they would send me an employment contract, then if for some reason I didn't sign that

employment contract that would be a willful not return and that I would have to repay.

Q Do we have Plaintiff's Exhibit 1? Let me show you what has been marked as Plaintiff's Exhibit 1. Can you identify section C there where your name appeared?

A Yes.

Q Can you read that, please?

A Yes. It says, "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, et cetera, for which assistance was provided as outlined by 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 a lump sum repayment of the entire amount expended by South Carolina State University on my behalf."

Q And it doesn't say there South Carolina is obligated to give a document called an assignment letter, does it?

A It doesn't say that there, but it doesn't -- there's a lot of things missing from that, though. So there was written and then there's implied, and it is the implied piece that's missing.

Q Well, the implied piece is you were to remain under the employment.
A No. The implied piece says they would actually extend an employment document. The written piece is that I would have remained.
Q And Doctor, could you please read page two of that agreement? This is your letter dated June 12th of 2008 to Dr. Ihekweazu?
A It is.
Q Okay. And go to page two, that's your signature at the bottom?
A It is.
Q Can you read that third paragraph, please?
A Uh-huh. It says, "Dr. Ihekweazu, 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. My expected graduation date from the Ph.D program is December 2011. 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."
Q And you wrote those words, correct?
A I did.
Q And if you could go back to the compliance statement that you read before that says you'll repay a lump sum repayment, second page of the back?
A Yes.
Q Is that your signature under that compliance statement?
A It is.
Q And Dr. Simmons, did you prepare a CV, a curriculum vitae?
A Have I -- can you ask --
Q Did you have a curriculum vitae or a CV?
A I do.
Q And do you recall, did you have one in 2012?
A I feel certain I did.
Q Can you please identify Plaintiff's 11, which says Denise Simmons' CV, December 2, 2012?
A Yes.
Q And is that your CV on or around December of 2012?
A I'm going to say yes. It's the file name, the file name says December 2nd, 2012.
Q And this document of professional experience starts in 2012 to present, Post-doctorial Assistant, Virginia Tech.?
A That's correct.

Q So this would have been some time in the fall/winter of 2012?
A I don't recall. I said that's the file name. I don't want to say the file name is the exact date of when this was, I don't know.
Q Is this a CV that you prepared?
A Yes, it definitely looks like it.
Q And why do you prepare a CV?
A Similar to a resume' when you're working. You always keep a current resume', you keep a current CV to show your education, your professional experience and things of that nature.
Q Okay. And it's important that this be an accurate document? This is something you share with professional colleagues and other institutions?
A I would say yes.
Q And if you could turn to page four of seven on the CV.
A Uh-huh.
Q And down under engineering education professional development, under 2010 you write, correct me if I misread, it, 2010 Virginia Tech. Future Faculty Development Program participant. So Virginia Tech. Future Faculty Development Program is exciting and rewarding two day event for a small group of doctoral students and post-doctoral students in pursuing academic careers. The program brings together

post-doctorate candidates and post-doctoral scholars to Virginia Tech. for an all expense paid workshop. As part of experience participants are hosted by a Virginia Tech. department to tour research facilities and meet with current faculty to gain a greater awareness of research and teaching opportunities, and to discuss their career prospects and academic work. The program is part of comprehensive strategic recruitment in Virgina Tech." Is that correct?

A That's correct.

Q And that was an all expense paid workshop for strategic faculty recruitment at Virginia Tech. that you attended in 2010.

A That's correct.

Q And then in addition to attending the all expense paid workshop at Virginia Tech. in 2010, you also while at Clemson helped with a collaborative grant between Clemson and Virginia Tech., correct?

A I'm not sure the characterization --

Q We talked about you discussed this in your deposition, do you recall that?

A I do.

Q I show you the original of that deposition.

A Yes.

Q And can you please turn to page 60?

A Yes.

Q Okay. And at line 22 you were asked, And she indicated that there was funding for a post-doc. Can you tell me how you came to be employed by Virginia Tech.?" First I ask you who is she that you are referring to there?
A Which line are you on?
Q Line 22 on page 60.
A I think she is referring to Julie Martin.
Q And that's your mentor professor at Clemson.
A Correct.
Q So you were asked, "She indicated there was funding for a post-doc. Can you tell me how you came to be employed by Virginia Tech.?" You answered, "Yes. So this particular project, I had helped write the grant for and the grant was a collaborative grant between Clemson and Virginia Tech." Is that correct?
A Yes.
Q And what was the time period that Clemson and Virginia Tech. were collaborating on that grant?
A What was the time period?
Q Time period. Did they start collaborating on that grant in 2011, 2001, do you know?
A So I think the -- so I think the grant was awarded in 2012.
Q Okay. When did Clemson and Virginia Tech. start collaborating on it?

A So I would probably -- this funding is not immediate, I would imagine it started three, it could have been four years prior.
Q Okay. And when did you start -- become involved in collaborating of that grant?
A So just a correction here, not collaborating on the grant. This particular grant was written and encouraged to be written based on a conference paper I had presented three to four years prior, and it was encouraged that that research be continued. So I didn't write the grant, but it was certainly based on that paper that I had written.
Q Okay. And it's your words, not mine, where you say that the grant was a collaborative grant between Clemson and Virginia Tech.
A That's correct.
Q In the three to four years approximately before the grant was awarded, 2009 or so, you were involved in the grant project?
A No, I wouldn't say that.
Q So did Julie Martin and someone at Virginia Tech. write the grant --
A Correct.
Q -- just based on your paper.
A I wouldn't -- no. I wouldn't characterize it that way.
Q Did they consult you in the grant writing process?

A No.
Q And in March of 2012 you applied for a visiting professor position at Virginia Tech., correct?
A That's true.
Q And then on August 23rd of 2012 you accepted an offer of employment from Virginia Tech., correct?
A Yes, as a post-doc.
Q And isn't it correct that you actually signed that document right around the same time you received it?
A I don't recall that.
Q Well, let's look at 73 -- page 73 in your deposition, please. Line seven. And the question was put to you, "Can you tell me when you did receive an offer of employment from Virginia Tech.?"
A Which line?
Q Line seven.
A Got it.
Q And you answered, line nine, "On or about August 23rd." And the question was, "Okay. So are you saying that where this document says August 15th, that's inaccurate?" Answer, That's not accurate, that's not when I got offer. Okay. And it says -- it was a question. Question, "Okay. It says response to date August 22, 2012." Answer, "Uh-huh." Question, "So you signed it on the 23rd?" Answer, "Uh-huh." And then the question, "And you indicated that you received

it on or about the 23rd. So August 22nd being the response due date, you did not have this document on August 22?" Answer, "I didn't say that. I know it was near the 23rd, that's why I said on or about. So I can't make a more determined statement than on or about the 23rd because that's when I affixed my significance." Question, "Okay. Do you recall if you signed it as soon as you received it?" Answer, "Yes, correct." But did you or not sign it as soon as you received it?

A So to clarify, the document that I signed as soon as I received it had fixed signatures, and I had seen prior to that probably an early version so drafting in that. So I was aware that this document might have been being prepared, and I think this is why some of the conversation my mind was unsure about it. But certainly once I got it on the 23rd -- and I can look back at the document if you show me which one of the exhibits, it would have had someone else's signature already on it. So by the time I got it with that person's signature, yes, I signed it on that day.

Q Okay. That's exhibit -- Defendant's Exhibit 5.

A Yes. So all of the signatures were prior to mine. So I probably saw some early draft version and sort of signed it maybe on or about the 23rd.

Q So you were waiting to see what State would do? You had, in fact, not received the finalized offer from Virginia

Tech., correct?
A That's not correct.
Q Okay. I thought you said you didn't receive the offer with the signatures on it until the 22nd or 23rd.
A No. But your original part of that was I was not waiting for South Carolina State, that's the incorrect piece. I was waiting on South Carolina State. Can I add one thing? Not only was I waiting, this was never a permanent position and it was training, I could have gotten out of it at anytime.
Q Okay. You didn't write them that in September, did you? You didn't say -- you wrote twice, I think the testimony was, to Dr. Okafor call me or let's talk about this. You never once in either of those correspondence said, you know, "This is just a one year position. Can I have professional leave for another year?" That's not in those emails, is it?
A We never discussed at all about what my position was. I said -- because I didn't want them to think I was not coming back because I was coming back. I wanted them to help me negotiate the contract with them.
Q In September you were still writing them on South Carolina State email, correct?
A I don't recall.
Q They didn't even know you were at Virginia Tech., did

they?
A I don't know what they knew.
Q You didn't tell them, did you?
A I didn't tell them, they didn't ask. What I did tell them was I had employment, so if they wanted to know they could have asked.
Q And that was on the 16th, you told Dr. Okafor you had obtained and secured other employment.
A Yes.
Q And then on the 23rd you were surprised when he said, "I thought you weren't coming back?" You told him on the 16th you had secured and obtained other employment.
A That's not what I said.
Q That's exactly what you said, ma'am. I'm sorry.
THE COURT: Now, if you want to pull the email and ask her, we're not going to get argumentative.
MR. REAGLE: I understand. I apologize, Your Honor.
THE COURT: That's okay.
Q Let me show you what has been marked as Plaintiff's Exhibit 7. And you state, "I am a bit distressed but have sought and secured employment," correct?
A That's what I said.
Q Okay. Thank you.
A I think I also note in here later, because you asked me about the 23rd what I said, because that's not what I said

on the 23rd. On the 23rd I said, "I would like to discuss employment."

Q I think what you testified to was that you were surprised at Dr. Okafor's tone when said, "I thought you weren't coming back?"

A No.

Q And that was --

A That's not what I said.

Q Well, the jury will just have to remember what you testified to.

A What I said was he told me, "I did not know you were coming back this fall." After the phone call I found that surprising because he had sent me a teaching contract several months before, which is an indication that he, in fact, did know I was returning.

Q Correct. And he told that after you had written to him saying, "I have sought be secured other employment."

A He told me -- I don't see -- I'm not sure I understand the question.

Q Now, you had never contacted South Carolina State about the concerns that you had testified to regarding the financial condition of the University, or your position at SC State prior to August 16th, did you?

A I would not even think about doing that. I don't write emails about my stream of consciousness to my employer.

Q So the entire time from January through August 16, 2012 when you wrote Dr. Okafor an email saying you sought and obtained other employment, you never inquired of the University about your concerns over a contract, or the financial condition of South Carolina State, correct?
A I let them know on the 16th that I was concerned that I hadn't gotten a contract.
Q That's right. So from January to August 16th you never raised a concern with South Carolina State, correct?
A I didn't have a concern about any contract prior to 16th, because 16th was the drop dead date.
Q Really? Because I thought you had a concern and you spoke to Julie Martin about it and that's when she arranged for you to get the job at Virginia Tech.
A My stream of consciousness about them not being able to offer a contract was actually realized on the August 26th date. So my stream of consciousness speaking with a colleague or friend about it, absolutely I did do.
Q So you didn't call anyone at South Carolina State about a concern, you didn't send an email to anybody at South Carolina State about the concern prior to August 16th, correct?
A As I said I wouldn't have -- the concern wouldn't have been raised until the drop dead date. So at that date, the drop dead date, I absolutely sent an email.

Q But you sent the email saying you had obtained other employment. You didn't say, "I'm concerned, let's --"
A I did say I'm concerned.
Q -- "send me my contract."
A I said I'm concerned, I said I'm actually distressed. In fact, that was mild, I was more than distressed.
Q Okay. But Dr. Okafor -- you did receive an email on April 9th about your teaching assignments, correct?
A That is correct.
Q And you said that's evidence that they were intending to give me a job, correct?
A That seemed positive in my mind.
Q And, in fact, you wrote back that same day to Dr. Okafor with the concern, "I'm not sure I'm the best person to teach the class," correct?
A I would have to look at the full email to see what exactly I said.
Q Plaintiff's Exhibit 5.
A I said, "Hi, Dr. Okafor. I had a quick question/concern about one of the courses appearing on my fall schedule, Plane Surveying. I have no experience in the course, not even the instruments, however I have loads of experience elsewhere. I do have experience with the codes and contracts course, and even Engineering Econ. I can teach the waste water course. Can you make a change in the

schedule?"
Q And you wrote that back, what, the same day you got the initial email with your course schedule.
A Yes.
Q Okay. And then two days later, April 11th, Dr. Okafor writes back to you, correct?
A Correct.
Q And on this email, the first one came from Janice Guinyard. Who is she?
A She would have been the administrative support person for the department.
Q Okay. And she, in fact, concludes her email to you saying, "Looking forward to seeing you in August;" is that correct?
A Correct.
Q And Dr. Okafor concludes his email saying, "If you have any further questions please let me know. Thanks." Isn't that's correct?
A That's correct.
Q And you didn't let him know any questions you had until August 16, 2012.
A Well, this email is about my courses. I had no other questions about any courses. I still don't have questions about the courses.
Q That says, "Let me know if you have any other questions

or concerns."
A You're asking me about the email, so I'm looking at this saying in my mind I read it as the context of the email for the courses, so I didn't have any other questions.
Q All right. In fact, it wasn't until after Dr. Okafor had again rewritten you sending you the course schedule on August 13th that you even responded at all back to him saying, "I sought and obtained other employment," correct?
A That's not correct.
Q It's not? You responded to him before you received the notice of the faculty meeting on August 13th?
A That's not what you just said. You asked if on the 13th I received a course schedule, I didn't.
Q Oh, I'm sorry. On August 13th you received the notice of faculty meeting.
A I don't recall receiving that email.
Q It was sent to you twice, even though it was sent to you twice?
A That's correct, yeah. My grandmother had passed away within days of that email, so I was not -- I was not even looking at emails during that time.
Q Well, how did you get the Virginia Tech. offers then?
A They were calling.
Q Well, you said you had seen documents, draft documents.
A They were calling saying they were sending.

Q So, in fact, as soon as you -- okay. So you had not seen any draft documents of the Virginia Tech. offer until you got the final version.
A I'm saying in looking at -- as you reviewed my deposition with me and my sort of trying to recall when did I see things, then it seems apparent to me that I remembered there were signatures on that document, that it was most likely that I probably saw an earlier version. But I'm just trying to, you know -- I was answering your question at that time, so --
Q So it must have been sent by fax or some other thing in the email?
A I don't recall how it was sent.
Q But you did send it on the 16th email to Dr. Okafor.
A I did send an email to Dr. Okafor on the 16th.
Q And you got his email the very next day, correct?
A I don't recall.
Q Do you have 7 in front of you by chance?
A I don't. Yes, I do. Yes, I do. So yes, I sent him an email on the 16th and he wrote back on the 17th.
Q So you got that email that he sent on the 17th?
A I don't know when I got it. I didn't respond, and it looks like the next thing is the 23rd. But at some point I must have gotten this email, I don't know when though.
Q In fact, you didn't respond until after Ms. Darby had

sent you an email saying, "Call me."
A I didn't respond to --
Q To Dr. Okafor's letter on the 17th.
A I don't recall.
Q On the 23rd, the day you signed the contract with Virginia Tech., do you recall getting an email from Dr. Ihekweazu?
A I would prefer to see the document. I don't remember the date exactly.
Q I show you Exhibit 8. Dr. Ihekweazu writes you on August 23, 2012 shortly after 1:00 in the afternoon, correct?
A Yes.
Q Okay. Do you recall getting that email from Dr. Ihekweazu?
A I do.
Q Why don't you read what Dr. Ihekweazu wrote to you.
A He says, "Hello, Denise. I've been informed that you have not reported to SC State since the beginning of the semester. According to our teaching schedule you were assigned three courses. I need you to return to SC State while the University addresses your concern about your letter of employment. Any delay in your returning to classes will not bode well with our students. Please do not forget that you owe an obligation to the University and we

need your services."
Q And on that same day you signed the agreement with Virginia Tech., correct?
A That's correct.
Q And in March of 2013, within about six months of being at Virginia Tech., you received another employment offer from them, didn't you?
A Say that again.
Q In March 2013, about six months after starting there, you received another employment offer from Virginia Tech., correct?
A That's correct.
Q I show you this document. Is this your signature at the bottom of this document that's been marked as Exhibit 12?
A Yes.
Q Okay. And it's dated February 25, 2013? I'm sorry, you tell me when it's dated.
A It's March.
Q Okay. And is this your tenure track employment offer contract from Virginia Tech.?
A It is the offer letter, yes.
Q Which you signed --
A I did.
Q -- on March 25th of 2013, correct?

A That's correct.
Q And this says tenure track employment carries a salary of $82,500, correct?
A Correct.
Q Okay. But that wasn't all. In fact, additionally it had $11,000 for relocation and moving expenses, correct?
A Correct.
Q $15,000 towards purchase of computers and software, correct?
A That's correct.
Q $15,000 for University approved expenses, correct?
A That's correct.
Q Three months of summer salary and fringe benefits to be used by August 9th of 2015. So that would be 25 percent of $82,500 as additional salary? No?
A You're quicker on your math than I am.
Q But that would mean you would be a 12 month employee instead of -- no?
A No.
Q What would that mean three summer months salary and fringe benefits?
A So at a research intensive institution the standard package that is offered to a faculty includes all of the things to get that person started, including some time that they will provide funding for summer salary so that you

don't have to seek that funding on your own, so as you get yourself started along that path.
Q So they paid you three additional months worth of salary.
A They agreed to pay me three months of salary over the probationary period towards tenure.
Q Okay. And then one semester course release in the awful 2013?
A That is correct.
Q And a two course -- two course release in the fall of 2013?
A Beyond that -- now my recollection is fading. So if you would let me see I'm happy.
Q I'm not sure that means too much. And also additional allocation of $5,000 to support mentors travel to conference or prospect sponsors with new hire, correct?
A That is correct.
Q And a Provost Assistant Professor Mentoring Project allocation of $1,500 subject to Provost approval for project.
A That is correct.
Q So this is 82,500, plus an additional 40 some thousand dollars, correct?
A I haven't done the math on the package piece of it.
Q But that seems -- this page where it's listing other

terms of this employment it has got DRS, is that your initials?
A They are.
Q That accurately lists out other benefits that were provide in addition to the $82,500?
A Correct.
Q Okay. And then the following year in 2014, did you receive an additional salary increase of $7,500?
MR. ORMOND: I don't think any of that is relevant.
THE COURT: Yeah, I'm not sure where we're going with that. Did you want to move 12 in?
MR. REAGLE: I would move 12 into evidence, yes.
THE COURT: Any objection?
MR. ORMOND: No objection, Judge.
THE COURT: Plaintiff's 12 is in evidence without objection.
Q And one of the things -- your proposal to SC State in 2008 indicated is that you would publish articles and that would be a benefit to State, correct?
A Can you show me the phrase?
Q Okay. I think you wrote to Dr. Ihekweazu, Offering scholarly work it in my specialties," correct?
A Scholarly works is a broad term, so it's --
Q You, in fact, have done that with Julie Martin, haven't you?

A Authored scholarly works? Yes. It's part of Ph.D program, you write with your mentor, that's standard.
Q You are now listed on those articles as a Virginia Tech. professor, correct?
A I'm sorry.
Q You are listed on those articles as a Virginia Tech. professor.
A If they were published after I was hired at Virginia Tech., yes.
Q You don't know -- as you sit here today you don't know whether you are published as a Virginia Tech. professor or not?
A You're asking two to three things at one time. Have I published with Julie? Yes. If I published after a certain date where I was employed at Virginia Tech., yes, that would note my affiliation with Virginia Tech.
Q Okay. So for examples, developing effective engineer -- to support undergraduate first generation college students. Denise R. Simmons S and Julie P. Martin. You wrote that; is that correct?
A I would like to see what --
MR. REAGLE: We mark that for identification.
Q And can you identify that, please?
THE COURT: That's 13, correct?
MR. REAGLE: Exhibit 13.

A This is a manuscript that I published in 2014.
Q Correct. And that issue is being a professor with Virginia Tech.?
A Yes, because I was in 2014.
Q So is offering scholarly works such as you there is not a benefit that South Carolina State ending up getting from its investment if your professional development, correct?
A No, because they didn't employ me. The benefit goes to your employer, so --
Q Did you believe the University was investing over 300,000 for you to go to another institution to teach?
A I don't know that I had a thought one way or another. I'm not sure I understand the question.
Q Have you attempted to repay any of the funds that were disbursed on your behalf since you received your Ph.D?
A Have I attempted?
Q Yes.
A No.
Q And the 2008 agreement that you signed said that you would either remain in service to South Carolina State or repay the funds to disbursed by South Carolina State on your behalf, correct?
A That is correct. They didn't provide the mechanism for the employment so that -- it prevented me from doing that piece of it.

Q And you never questioned your status as a faculty member while you were on faculty leave getting your Ph.D, did you?
A I don't understand the question.
Q Did you question, ever write to anybody at South Carolina State or call them and say, "I'm not sure if I'm still a faculty member at State?"
A No.
Q Now, you had testified you did some other traveling in the summer of 2012 in addition to the field station. What other traveling did you do?
A I don't recall. Can you show me?
Q No. I would rather you answer the question from Mr. Ormond. You said you were at the field station and you did other traveling and traveled regularly in the summers.
A Traveled in the summer of 2012 would have been associated with the field station. So I typically will go -- if a student -- if a funder is needing to meet about some matter then I will go and travel related to that.
Q And also you accepted the position with Virginia Tech. in August of 2012 because you didn't want the grant, that collaborative grant that you had worked on between Clemson and Virginia Tech. to go dormant; isn't that correct?
A That's false. It wouldn't have gone dormant.
Q Okay. Let's look at your deposition, page 60, please.

And you remember that was sworn testimony, correct?
A I do.
Q Okay. Just like today, you're under oath, right?
A Correct.
Q So page 60, and we've already read a little bit of this but I think we need to go back over it. Because line 18 you were asked, "Okay. You indicated that you talked to Julie Martin and told her that you were not employed at South Carolina State; is that correct?" Answer, "Correct." Question, "And she indicated that you were funding -- there was funding for a post-doc. Can you tell me then how you came to be employed by Virginia Tech.?" Answer, "Yes. So this particular project I had helped write the grant for and the grant was a collaborative grant between Clemson and Virginia Tech. And I guess, you know, sort of back tracking I think she was well aware of the news in the state as I was about what was happening at South Carolina State earlier prior to that year with the arrests that had occurred and the financial pressure that was going. And so she was like, 'Are you still going back to Clemson -- I mean back to SC State?' Oh yeah, I'm going back. And so I think when I called I think there was -- I was the only one probably sure of that perhaps. I don't know. But I was definitely sure about it. But with this funding being available, she was going to NSF, could not really run the project herself at

the same time. So she started a position at NSF, the funder for the grant at the same time in the fall. And so the project would have gone dormant had I not been available as post-doc., and because the collaborative person was at Virginia Tech. I was going to Virginia Tech." That's your testimony, correct?

A It is.

MR. REAGLE: Thank you.

THE COURT: Is that it?

MR. REAGLE: That's it, Your Honor.

(A lunch break was taken.)

(Resuming the testimony of Dr. Simmons.)

REDIRECT EXAMINATION

BY MR. ORMOND:

Q Ms. Simmons, Mr. Reagle asked you about whether or not you had gotten a RA or a TA or other forms assistance at Clemson University, and I believe you answered that you didn't.

A Correct.

Q When I asked that with you, were we discussing options that you had prior to going into a Ph.D program?

A Yes.

Q And I guess my question to you was were there many other options for you to fund a Ph.D program other than Title III?

A Many and numerous.
Q And we talked about RA and TA and fellowships and so on and so forth.
A Correct.
Q But you didn't request such assistance from Clemson because you had a Title III.
A Right.
Q Now, if you take a quick look at Defendant's 6 again. Do you recall that you asked Dr. Okafor to speak about your employment?
A Yes.
Q And then there was a call from Dr. Okafor?
A Correct.
Q Okay. Did you tell Dr. Okafor that what you needed was an employment contract during that conversation?
A Yes. Because I'd referenced it here that we needed to speak regarding a employment contract.
Q Do you recall it on the phone call whether you asked him that you needed a contract?
A Yes.
Q And then Dr. Ihekweazu wrote you an email, do you recall that?
A I do you recall an email exchange with him.
Q Okay. That's on Plaintiff's 8. Can you tell me the time you were able to respond? Was the date of August 23rd,

can you tell me the time you responded to Dr. Ihekweazu?
A It says -- I responded the time? 9:05 p.m.
Q Now, had you already signed the interim post-doc. agreement?
A I don't recall what time on the 23rd I signed the post-doc. agreement.
Q Do you recall if it was the last day that you had the ability to sign it?
A Absolutely.
Q Now, I think we spoke earlier, in February of 2012 you got a letter from South Carolina State University and an attorney representing them?
A It wouldn't have been February of 2012.
Q Was it early 2012? I'm sorry, 2013, my fault.
A It would have been right around in that time, that's right.
Q And a month or so later you were offered a job at Virginia Tech.
A Correct.
Q And then you went ahead and took that job.
A I did. At that time I knew I -- if they're bringing an action against me, I already saw that I was terminated back in September, so the lawyer or legal proceedings didn't leave me thought that they were going to hire me, so --
Q When did you first discuss this interim post-doc.

position with Dr. Julie Martin?
A I don't really recall.
Q Can you tell me what month it was in 2012?
A Most -- so first discussing it as an option or possibility probably would have been some time in July or August.
Q Okay. Had you received an employment contract with South Carolina State University, would you be working there?
A Absolutely.
MR. ORMOND: That's all I have, Your Honor.
THE COURT: Anything on recross?
MR. REAGLE: No, Your Honor.

SCSU’s Dismissal of Fraud Claim

THE COURT: And I'm hoping you didn't bring water because you thought you would be here that long.

Okay. Put your left-hand on the Bible and raise your right-hand, and the Clerk's gonna swear you in.

THE WITNESS: I affirm though.

THE COURT: Oh, you affirm?

THE WITNESS: Yes.

THE COURT: Okay.

(WHEREUPON, the testimony of Doctor Larry Luke was transcribed previously and provided by another reporter.)

THE COURT: Plaintiff ready to call its next witness?

MR. REAGLE: We would close our case, Your Honor.

THE COURT: All right.

All right. Ladies and gentlemen. We've now heard the Plaintiff's case in this matter. We're gonna take a -- perhaps a short break while I take up some matters with the attorneys. Remember, when you go back in there, you cannot talk about any of the testimony you've heard, okay, and we'll get you back out here as soon as we can.

Okay. Thank y'all.

(WHEREUPON, the following takes place outside the presence of the jury.)

THE COURT: All right. Anything, anything from the Plaintiff?

(WHEREUPON, there was no audible response.)

THE COURT: Anything from the defense?

MR. REAGLE: Not from the Plaintiff, Your Honor.

THE COURT: Okay.

MR. ORMOND: Your Honor, the Plaintiff has alleged a pure fraud cause of action. I don't believe that there's been evidence of any -- certainly most of the nine elements of fraud that's required in this, in this case.

MS. BLACKBURN: And, Your Honor, the Plaintiff will withdraw that claim.

THE COURT: Okay. So fraud's withdrawn.

MR. ORMOND: They also alleged a breach of contract accompanied by a fraudulent act. In that cause of action you've got to at least provide some evidence that there was a fraudulent act accompanying the breach, and I suppose the breach they're saying was she didn't go back. I don't believe -- there's no evidence to support such a cause of action.

THE COURT: Well, who -- where did she go under the straight breach of contract?

MS. BLACKBURN: Your Honor, I, I do believe that there is at least an inference for the jury, or more than one inference, for the jury regarding the fraudulent act claim.

THE COURT: All right. Just, you know, I -- tell me how you're looking at it. I mean I, I can tell from --.

MR. REAGLE: I say, I say -- and I just -- this is from

Hardy v. Penn Mutual Life Insurance Company, you know, that a fraudulent act is a -- does not need to be a, a overt or a positive or affirmative act. It can be a fraudulent omission to speak or act when one has a duty to act or speak.

I think, after receiving over $300,000 in support and a four year leave where we had to pay $20,000 a year for adjunct faculty, for someone to get a degree, to come back and benefit the University, and then does not even tell us that she's sought and obtained other employment doesn't -- I just -- she has any concerns about not getting a contract at all, and leaves students sitting in their chairs on the first day of class, that that constitutes on omission with it rising to fraudulent intent, and I believe she never told us that she was intending to go to Virginia Tech perhaps.

I think the inference can be made because she was afraid we might call them and say do you know that we have a contract with this teacher, that we just put her through faculty developmentally, spent $300,000 on her, you know, we don't think you should properly be hiring someone who has a commitment to us. I think that constitutes at least enough for a jury to conclude that she breached the contract with fraudulent intent.

THE COURT: Okay. All right.

MR. ORMOND: They have to have some evidence of

fraudulent intent, Your Honor. There's been no provided evidence of that.

THE COURT: And I, I understand, Mr. Ormond, what you're doing. I think what bothers me about the whole thing -- well, there's a lot that bothers me on both sides about the whole thing, but, at this point, I'm, I'm not inclined to grant your request to dismiss the breach of contract with fraudulent intent. I'll note your objection to my ruling so that will be preserved on the record.

Okay?

MR. ORMOND: Okay.

THE COURT: Anything else?

MR. ORMOND: No, Your Honor.

THE COURT: Okay. All right. All right. We're gonna take a, a short break, and just out of curiosity, about how many witnesses are you gonna have?

Two?

MR. ORMOND: Two, Your Honor.

THE COURT: Okay. All right. You think we can finish by lunchtime?

MR. ORMOND: Well, are you gonna stop at 1:00?

THE COURT: Huh?

MR. ORMOND: 1:00.

THE COURT: All right. We'll go to a late lunch.

Okay.

SCSU'S Closing Arguments

(WHEREUPON, Plaintiff's Exhibit No. 11 was received into evidence at this time.)

THE COURT: All right. I thank y'all for going through the charge, first of all. I had -- I made those copies.

MR. REAGLE: Can I get the---

THE COURT: And I got together -- and y'all gave me three others --

MR. REAGLE: Yeah.

THE COURT: -- which I agree.

Okay?

MR. REAGLE: Thank you, Your Honor.

THE COURT: Y'all ready?

MR. REAGLE: Yes, Your Honor.

THE COURT: You ready?

(WHEREUPON, there was no audible response.)

THE COURT: All right. Bring them in.

THE BAILIFF: Yes, Your Honor.

(WHEREUPON, the following takes place within the presence of the jury.)

THE COURT: All right. We're now getting ready to go to the final part of this. We had the closing arguments of the attorneys. I've got -- they have completed the closings. I'm gonna give you the charges, and then we'll go forward from there.

Okay. All right. Mr. Reagle.

MR. REAGLE: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. REAGLE: I start out by thanking you, the jury. I appreciate you paying attention for the past couple of days, hanging in there with us.

Certainly want to thank the Court and the Court personnel who've all assisted us over the past couple of days. I want to recognize Mercedes Fabers who is at South Carolina State University, our client, and Mercedes Fabers, their general counsel, Kim Blackburn, Doctor Luke, of course. We're very honored and proud of the opportunity to represent South Carolina State in this important matter.

I also want to -- I feel like I should recognize Mrs. Swagard, whose also been with us for the past couple of days, and remained here. She also needs meritorious recognition.

Our work here now, final closing arguments, to review the evidence and submit our arguments to you, the jurors, jurors, and you are the finders of fact, and the ultimate deciders in this case. I -- you know, a really unique opportunity and responsibility that you have as jurors.

It's the only compulsory service that we still have in this country, and maybe it's cause they pay you so little to do it. Maybe cause it's such hard work to have to script you into doing it. But we appreciate it, and it's a very

important service that you do, and your job is -- there's been a lot of talk about engineering, and engineers over the past couple of days, and that's kind of fitting in this case.

It is -- your job is to use your common sense, apply the laws instructed by the Court, and to add up the facts, to weigh the facts, to ultimately decide what they add up to, what -- what's, you know, the right conclusion, what's the verdict in this matter.

So, we're gonna ask you to, to do that.

What do these facts add up to?

Well, South Carolina State submits to you that, when you add up the facts, that Denise Simmons, you'll find, that they clearly showed Denise Simmons intentionally and wrongfully breached her contractural obligations to South Carolina State. South Carolina State is here in Court today to ask nothing more than Denise Simmons be required to honor her word, that she live up to and honor her promises that she made to S.C. State in 2008. And although South Carolina State is very proud of Doctor Simmons' accomplishments, they're proud of, of their sponsorship of her to get her PhD and what she's achieved, at the same time they're not apologetic for coming into Court and asking you to ask or require Doctor Simmons to honor her word. That's ultimately what this case is all about is promises made and promises

kept.

Now, you'll be instructed on contract law. I'm, I'm just gonna give you the real skinny, and certainly the judge is -- gives you the authoritative version of it. But fundamental components are you have to have an offer and an acceptance, and then there has to be mutual consideration. Each side gives something in consideration of what the other is, is promising to do.

Now, we've cut through the red herrings and some of the smoke that's been released in this, in this courtroom by the defense I would assert. The facts are straightforward and clear. So, let's review the facts, and I want to start with the offer.

The offer that came from Doctor Simmons, and it -- you know, she states, you know, my entire objective for pursuing a PhD degree has always been to bring my experience back to South Carolina State with the goal of exposing South Carolina State University students to my areas of specialty, authoring scholarly works in my specialities, returning to school -- 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 South Carolina State University in order to accomplish this objective. My expected graduation date from the PhD program is December, 2011. 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.

So, she's offering to go to Clemson, get her degree, return to South Carolina State, and provide these services to South Carolina State. These were important. You've heard testimony from Doctor Luke, Doctor Ihekweazu about how valuable it was to have the PhD engineers, and that they could mentor and recruit students, and help the University with accreditation. That's what she was offering to do. In exchange, the University was giving her professional leave, and I just need the time and financial support. So, we were offering time and financial support. That's the contract in a nutshell.

Now, there's another part of that contract, that contract, and this is all in Exhibit 1, and you will get a chance, when you go back to the jury room, to have all those exhibits with you and review them. These quotes are all pulled out of Exhibit 1, which was identified as the professional leave and, and grant agreement. But this is from part of that document, been drafted by Ms. Simmons, faculty development project plan, major goals and objectives. Again, my entire objection -- objective for pursuing the PhD program has always been to bring my experience back to South Carolina State with the goal of

exposing South Carolina State students to my areas of specialty by authoring scholarly works on sustainable development in engineering education, recruiting students to attend the University, and enhancing the academic and research capabilities of the University.

Those are, in part, what Doctor Simmons is offering in exchange for the financial support and the leave. It's also, as you heard from Doctor Luke and Doctor Ihekweazu, and Doctor Okafor, this is part of the benefit of the bargain that South Carolina State expected to receive for its investment in Doctor Simmons. And, finally, at the conclusion of Exhibit 1 is this document, and I know you've all been hearing me over and over, this is the actual cutout from, from that document, and this is the faculty administration, administration compliance statement, and you see it's signed by Denise S. Grant, now Simmons, and it says I, Denise S. Grant, agree that I will remain in the active service of South Carolina State University upon completion of this agreement for a period equivalent to the amount of time for which financial assistance was received.

For the purposes of this agreement, a summer session as well as each conference, workshop, seminar, and center for which assistance was provided as outlined in the professional improvement plan, and part of which is the document we just looked at, is considered to be the

equivalent of a semester. Failure on my part to carry out the above agreement will result in a lump sum repayment of the entire amount expended by South Carolina State University on my behalf.

So, this is pretty clear, and it's also clear that South Carolina State lived up to its end of the bargain. It provided the financial support. It provided her with the professional leave in order to pursue her major goals and objectives, and her -- and the other -- in the letter deductory (phonetic), help pursue her entire goal of getting her PhD and returning to State. So, this is the signed document by Doctor, by Doctor Denise Simmons stating she will either remain in the service of South Carolina State University after she gets her PhD or she will make a lump sum repayment to the University.

Now, all of the testimony has been she did neither of those. 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. So, there's also no question that State performed its obligations under the 2008 contract. Doctor Simmons, in fact, admitted she received the financial support that South Carolina State had agreed

to provide.

It provided the financial support. It provided the professional leave. And, as part of that, it also maintained her tenure track position, maintained her salary, and, ultimately, gave her the teaching load that is expected and offered to, to professors, and that's part of what Doctor Simmons wanted to do is come back and teach. So, she is, you heard her testimony, she says well, implied in here is that we will give her a specific form of contract, and it doesn't say that in there. No where in the agreement is there a requirement that -- for her to remain in the service of South Carolina State, that she have a specific form of contract.

She was continued as a tenure track employee. She knew that. That was what all the witnesses testified to. She knew her status was preserved on professional leave. Her salary was maintained, her base salary was maintained, and, in April of 2012, she was sent a course load notice indicating that she was a full-time employee so that what will probably be termed the material terms of the employment relationship that Doctor Simmons was required to maintain were clear, were offered by State. That's how much you're gonna make, you know, what's your position gonna be, and what are you gonna do.

She got the course load. No notification back in

April. But the P4 you saw indicated what her position was and what her pay was, and the testimony was, because this was leave, and that's what leave is, you go away and you come back where you left off, was the same as it had been in 2008, tenure track, $55,000 a year as, as her base salary.

The State was entitled to expect Denise Simmons to return to, to the University for at least four years to teach. She was also clear -- the State was also clearly ready, willing, and able to continue to employ Dennis Simmons for that period of time. She was, once again, assigned courses to teach full-time -- it's full-time faculty, and let me identify that document for you. I will show it to you that I'd like to make sure you're aware of the number. It's part of Exhibit 5. April 9 she was sent this form identifying her as full-time faculty, and listing the courses, and not just the courses. They listed the course numbers, times, the rules, and this is very specific. Nobody could reasonably look at this and think they did not have a teaching assignment employment to South Carolina State for the Fall 2008 semester.

With the P4, she was -- at least maintained her salary of $55,000, what it was before the temporary adjustment in 2018, and that document looks like this. It's Exhibit 10. This is the P4. And, interestingly, you've heard talk of a P13, and that's what was used for the employment of Denise

Simmons at the PO Station. She didn't have a formal signed contract like this to the field station either. That didn't bother her. She didn't need one to be employed at State. To continue in the service of South Carolina State, you didn't need one of these. She knew that. She'd been operating the field station the whole time under a form similar to this. This is a P4. Then it was called a P13.

So, State was clearly ready, willing, and able to continue to employ Denise Simmons for the period of four years. It was obviously, all the testimony, anxious to do so through professional leave. The State had maintained Denise Simmons' tenure track position and salary.

These were well understood continuing conditions of Denise Simmons employment with South Carolina State in August of 2008 when she went on professional leave, and how did she also know that she had her continuing employment at South Carolina State?

In addition to her course schedule, Doctor, Doctor Ihekweazu, who was the Dean of the University, wrote to her when it got to his attention that she had not returned, and that she had indicated that she had sought and obtained other employment. Doctor Ihekweazu wrote I have been informed that you have not reported to South Carolina State since the beginning of this semester. According to our teaching schedule, you were assigned three courses. I need

you to return to South Carolina State where the University addresses your concerns about your letter of employment.

So, he was going to address her concerns. This wasn't something where we said we're not giving you a contract. We're not employing you, stop that, and go away. She was clearly being told look, we're gonna address your concerns. You've got a job here. We need you here teaching our kids as you promised, and what did she do?

This is the same day, August 23rd, that same day. She signs the contract with Virginia Tech. She can't credibly assert that she did that and didn't understand that she would have employment, opportunity to continue to remain in the service of South Carolina State under terms that were, at a minimum, known to her of salary, tenure, and work assignments.

Accordingly, the terms of the 2008 agreement were understood, and this agreement, the other documents we looked at, State fulfilled its obligations under the agreement, and State is -- was lawfully entitled to expect Denise Simmons to honor her agreement and continue in the service of South Carolina State. This is what the facts add up to. However, in August, 2008, Denise Simmons -- in August, 2012, sorry, Denise Simmons sought and secured employment at Virginia Tech and did not honor her end of the bargain. Denise Simmons had two choices under the 2008

agreement. Continue to work for South Carolina State or repay to State the money State had paid on her behalf.

She didn't do either. She didn't even inquire of what, you know, what would be the amount that I would need to pay back if I wanted to go back elsewhere. In other words, she failed to perform her obligations under the contract, and, thereby, breaching the contract.

Now, what has been Denise Simmons response to this?

Essentially, it's State didn't send me an assignment letter over the Summer of 2012. So, I thought I was not employed there in the Fall semester. This excuse just doesn't add up in light of the facts.

What are those facts?

A lot, a lot of lawyers are gonna be analytical. So, we like to do number points and things.

So, one. The 2008 contract didn't require a specific professional agreement or assignment letter. There's no required form of document for continuing Denise Simmons' employment in this agreement.

Two. All the elements of her employment with South, South Carolina State stayed in place while she was on professional leave, tenure track, salary. She was provided her courses.

Four. Her four years while she was at State came with -- while she was at -- while, while State was paying

her tuition and financial support, Denise Simmons had no problem calling or writing to State to make sure State had everything it needed to process her payments, and that she had employment during that time. So, she had no problem if it came to, you know, turn to Ms. Darby and Ms. Pyles, talk about to the structure of those grant payments. They give you two-thirds up front, and one-third when you submitted things showing you completed what you're suppose to do, and that was -- Doctor Simmons testified would happen regularly throughout the year. She had no problem in, in calling Ms. Darby, writing to Ms. Darby, making sure that the documentation was in place that she needed to get paid.

But when it came to wondering would I have a contract with South Carolina State in the Fall of 2012, when she's looking at employment with Virginia Tech, she didn't write us at all. There's no letter whatsoever, no phone, no communication prior to August 16th when she said I've sought and secured other employment. Nothing saying I'm worried I don't have a contract. Nothing.

Now, think about this. This is repeatedly. I mean you've heard 10, 20 times this -- my entire goal is to return to South Carolina State, and, you know, bring my experience back to benefit the students. If that's your entire goal, that's been your goal for the past four years, the goal in getting a PhD, then you're not even gonna bother

to write a letter saying yes, I want to come back, I haven't got my contract, I'm concerned. It just doesn't add up that that was, in fact, a real concern that she had.

You know, I say how do we know this. And if you look at Exhibit -- well, I'll finally get it. You know, for example, this is Exhibit 4, and it's a letter Denise Simmons wrote July 7th, 2010. You know, she just wrote to Ms. Darby. Hello, Ms. Darby. Thanks for your call yesterday. I've attached my own I10 contract. Let me know if you need anything else, and then she -- funny thing. I do not have my contract for 2010/11 time. Can you send me a scanned copy via email. That's all it would of taken for, for the -- in the Summer of 2012. Yet she wouldn't even do that.

She knew how to write Ms. Darby. She was comfortable with writing Ms. Darby. She did it continually throughout the year, and she never raised a concern. It wasn't she who initiated the call to Ms. Darby on August 23rd. It was Ms. Darby on behalf of South Carolina State saying we need to get your contract worked out, and I need -- as I recall Ms. Darby's testimony, she said something to the effect of look, if you come here, we'll get it worked out. But Doctor Simmons wouldn't even step foot on South Carolina State campus in August of 2012. She couldn't even come in to talk to the provost, the vice-president, Doctor Ihekweazu, you

know, who wrote those letters of support for her grant application, and that he was a fan of hers. And he's not someone she could of been intimidated by or scared by or feel she couldn't talk to if she had concerns about her contract.

She didn't do any of that, and if you look at, we'll get to it in a second, sort of this stream of those emails, she never once initiated contact with South Carolina State from April through when she left and through the letter -- letters in August -- August 23rd. She never once initiated the contact regarding her teaching or her employment.

Simmons said, Number 4, Simmons had routinely not signed or received her annual professional agreements from State until mid August. She knew that time was not of the essence with regard to these pro forma documents.

Now, you look at them. They're Exhibit 3 and look through them. Their 2008 contract is August 14, '08, and then that's when both Denise Grant and the President signed it. So, these are documents that were sent out in June. The President isn't signing these until August 14. August 15, 2017, and that's the one where it says signed contract been received on August, 2007, and that was even though the contract said in bold, you know, it expires on August 10th, 2006, and, you know, this one isn't even

dated. The signature's not dated by the President, but this is August 16th, 2006, that she signed it, and these, these were not the make or break of whether she had the opportunity to continue her service at South Carolina State under known terms and conditions of employment.

Five. She had no contract for the field station employment like these, and that never seemed to bother her. She knew. She didn't get work. She'd get paid. There's a P13 in the system. Never -- that was never an issue of I need to get a formal contract document before I can even begin my work there.

Number 6, and let's look at the emails themselves now from 2008. Now, I'm gonna agree with a little timeline because it gets kind of confusing on these email streams. I hope this won't collapse.

So, the first email, Plaintiff's Exhibit 5, starts with on the stream at the bottom of Janice Guinard who's administrator in the department that Denise Simmons worked in it. It's to Denise Simmons, and it attaches the teaching schedule. So, April 9th, I hope this -- it's kind of a weird surface. This was the teaching schedule.

Now, because she had an actual concern about her teaching schedule, she responded within five hours I think after the time. It was sent to her at 2:43 on April 9th, and then at 5:58, it's a little over three hours later, she

responds to Doctor Okafor raising her concerns. This is just about a single course. If she actually had a concern about the contract, whether she actually had employment that was the fulfillment of her entire goal, she wouldn't of waited four months to respond and, and just let this time -- the clock tick out as, as she would have it, and she only waited three hours just on a course schedule change. But then -- so, April 9th we have the teaching schedule is sent, and then Doctor Simmons to Okafor about the teaching schedule.

Now, April 11th, Doctor Okafor responds and says that she needs to get up with Doctors Ihekweazu and Chen about changing her schedule if she wants to do that, and Okafor -- Doctor Okafor timely responded to her concern, but there's no mention here about boy, I'm worried about the arrest I've heard at South Carolina State or the financial problems I've heard there. It's simply a note about changing a course, and Doctor Okafor concludes this email with the statement if you have any further questions, please let me know, thanks, and Doctor Simmons never responds to this email on April 11th.

She doesn't respond in April. She has no questions to call them about. She doesn't respond in May. There's no questions for her to be talking about. She doesn't respond in June. No questions for her to talk to him about.

Doesn't respond in July. Still no questions and doesn't respond in August, in fact.

The next email is actually again from Janice Guinard, administrative assistant, and this is Exhibit 6, of August 13th. So, there's no indication and State has no notice that there's concerns about Ms. -- Doctor Simmons not getting a contract. There's no, no red flags raised. No yellow flags raised. As far as -- you know, they're concerned. Look, we sent her the class schedule. She'll show up and teach. That's what the expectation was.

The -- August 13th, Janice Guinard sends out the memorandum. Faculty and staff departmental meeting, Fall 2012. Please do everything possible to attend this meeting and that's for August, August 16th. It's important enough -- Doctor Okafor just redistributes it again to make sure that it gets sent out. Denise Simmons is listed on this day, the one, the one sent out by Janice Guinard, and the one sent out by Doctor Okafor.

So, nothing -- there's no communication or concerns raised this entire time from April until August 13th, and, again, it's not Denise Simmons raising the concern. It's Doctor Okafor and the school.

So, then, in response, we get Exhibit 6. They have the faculty meeting on the 16th, and then the evening of the 16th, Doctor Simmons writes I left you a phone message.

My cell phone number is not changed. Same as, as is on -- oh, I'm sorry. I hope you had a productive summer. I have not received an employment contract today. So then is the first Doctor Okafor or anybody at State is aware of that. I have not received an employment contract to date. I have not otherwise heard from you or your office. But that's not true. She had gotten her class schedule, and she had been sent twice the notice of the faculty meeting. I'm a bit distressed, but have sought and secured employment.

So, instead of just writing Ms. Darby, funny thing, I haven't got my contract, she goes and applies and gets a whole other job?

I mean that -- is that -- that doesn't add up, but that's what she did. So, she doesn't contact State at all about her concerns about employment, but instead has sought and secured employment elsewhere, and that comes in an email dated August 16th at 4:53PM after the faculty meeting.

So, I have sought and secured employment, and all this summer she's at the field station in Aiken not too far away, and never bothers to even come up on to campus to, to, again, talk to any of the nice people that you've heard that have supported her application for professional leave.

So, August 16th was the first the State hears that she has sought and received other employment. So then, again, there's no -- Doctor Okafor responds to that on

August 17th. So now all he's been told is she has sought and secured other employment, and that I have not received an employment contract to date, and have not otherwise heard from your office. But he writes back thanks for your email. I hope your summer went well. Based on your email, there's no viable number to call you, and her email lists a phone number that's in, in Orangeburg where Doctor Simmons is not, and that's -- you know, she still -- even though she's saying she doesn't know she has a job, she's still got a South Carolina State email account that she's back using. South Carolina State phone number that she's using.

So, hope your summer went well. Based on your email, there's no viable number to call you at. Since the summer, there's a, since -- the number there is a school number and you have not been here for a while. I had also contacted you for our semester departmental meeting or didn't you get the email. If possible, call me so we can discuss. By the way, a lot of people have not yet received their contracts. So that should not discourage you.

So, he's telling her the fact you haven't got a contract doesn't mean you're not employed, but wants her to call and wants to, you know, engage her. I mean it's -- but he's -- says no contract should not discourage, and, again, that's part of the record. Doctor Okafor is the chair of the department, but he doesn't have the authority to issue

contracts. Salary discussions would start with him, but he said I don't need -- I asked him well, are you sure she's got a contract. He said no, that's not my job. I just -- I don't issue contracts, but no contract should not discourage you.

Now, the next contact with Denise, and, again, it's not Denise Simmons following up on this. Ms. Pyles, not Ms. Pyles, Ms. Darby called or sent her an email or called her the day before I believe her testimony was, and then sent her an email. Exhibit 3. That was sent out on the morning of August 23rd, 2012, saying good morning, Doctor Simmons. Please give me a call today. Thanks so much and have a good one.

Okay. This is when the next contact that we had, and then there's the call to Darby. Darby says come on in, we'll get your contract worked out. But after -- I think this is an important bit of time. After October -- August 17th, while Doctor Simmons says she was considering the offer from Virginia Tech, she doesn't respond at all to Doctor Okafor saying don't be discouraged about the cont -- not having a contract, and she doesn't reach out to anybody. She doesn't -- again, doesn't call Ms. Pyles or Darby and ask where is my contract.

So, August 23rd, this starts off with a call from Pyles or an email from Pyles. I'm sorry. I'm sorry.

Darby. And then, after the email to Darby, she does call Darby, and that's when we get a -- follow-up email exchanges on the 23rd, and chronology -- I guess the chronology there.

Okay. So, 11/12 then -- dated August 23rd, the next line is, and Ms. Simmons -- Doctor Simmons writes, getting back to, to Doctor Okafor who doesn't have the authority to issue contracts, and says hi Doctor Okafor. I left you a phone message. My cell phone number has not changed. Ms. Darby and I spoke this morning. She has a time related issue and needs to be -- needs to be resolved today, and she needs to hear from you. We need to speak regarding this employment.

But she doesn't say since Ms. Darby has a time related issue. She doesn't say I've got an offer from Virginia Tech I got to decide on today, and, you know, I'll be in. If we can really sort this out, that would be great. It's just very cryptic. It doesn't say who she's got an offer from. It doesn't even say that she's still contemplating employment at another institution. It just say Darby has a time related issue and we need to talk or we need to speak regarding employment.

The next email is from Simmons to Okafor, and this is soft of when she says oh, I was surprised with the phone call with him about his tone that he said and questioned

whether I'd be coming, coming back at all. Well, of course he would because she told him, on August 16th, that she already sought and secured other employment, and hadn't shown up on campus that whole time. And Okafor testified he had this time, when she said she sought and secured other employment, effectively then it referred it over to Doctor Ihekweazu.

So, then, on the 23rd, Doctor Ihekweazu writes, at 1:15, and that's where he says I need you to return to South Carolina State while the University addresses your concerns about your letter of employment. So far from, you know, repudiating her employment or saying she didn't have a job, he says come and we will work it out. You do have a job here. I think that's the substance of his testimony, and certainly the substance of his letter here, and Simmons replies at 9:05PM that by saying I think you've been misinformed. But at that time she'd already signed the, the contract with Virginia Tech, according to her testimony, and the ship had sailed at that point.

She also doesn't identify -- she, she doesn't write back the evening of August 23rd saying look, I'm going to Virginia Tech. I've got an offer there. It's a one year interim position. You know, I'd like you to consider extending my professional leave for another year without pay so I can take care of that. You know, there's nothing --

there's -- you know, it's a -- it's sort of like a, you know, a person who's trying to avoid a date and set up two weeks early, and sort of saying oh, I didn't hear from you, so I, you know, I made other plans. Not -- just no information about what she's doing, what her plans are, what the options are moving forward. Simply 9:05, I believe you've not been accurately informed. I have received, so far, one email last week from Doctor Okafor and phone calls today from Doctor Okafor.

She'd also spoken to Darby, and she says Darby -- Deborah Darby has also called leaving a message yesterday. We spoke early AM today. Please let me know if I've missed something. It's no content to what her concerns are, even her intent to go and take other employment, or where it is or what the options might be. This is not a substantive response to an email where you've got kids sitting in classrooms at the beginning of a school year, and when she is suppose to be returning to fulfill her end of the bargain of what is essentially an eight year agreement after State has provided its financial support and professional leave for four years.

So, it's -- the other things we know is, in this timeline, she -- there's another timeline I think. Let me get back to these.

Okay. So these emails themselves are from 2008 show

her evasiveness add up to one thing. She did not want to return to teaching at State. I don't think anywhere in here does she say I really want to return to State. I've got a concern. How can we work it out. Instead it's August 16th, first time we really hear from her on this. I sought and secured other employment.

What further corroborates this or supports this view of the evidence, if this is what the facts add up to, is Denise Simmons' own several year history with Virginia Tech.

Now, in 2010, on her own CV, she writes -- and this is her CV. This is her words. Page 4 of 7, Exhibit 11, and she attended, in 2010, Virginia Tech future faculty development program participant, and this was a program that was paid for by Virginia Tech. Doctor Simmons didn't have to pay to go. This was paid for by Virginia Tech. Virginia Tech all expense paid workshop, and the workshop program is part of a comprehensive strategic faculty recruitment at Virginia Tech. That's 2010.

What else do we know?

She was at -- working on collaborative grant, and her words, not mine. That's what was in her deposition, a collaborative grant between Clemson and Virginia Tech. She worked on that, and Julie Martin's testimony was that went over several years from -- before 2012 dating back to 2009 or '08 when she was working on this collaborative grant

process -- grant with Virginia Tech.

Third. March or Spring of 2012, right?

She's suppose to be getting -- finishing up her PhD getting ready to come back to State. She'd gotten this class schedule notice. She applies for a visiting professorship job at Virginia Tech. When you add up the facts, it just is not consistent with an entire goal of returning to South Carolina State, going to a strategic faculty recruitment program at Virginia Tech one year, working on this collaborative grant, and then applying for a assistant professor, a visiting professorship just months before you're suppose to return to South Carolina State at Virginia Tech, and then, coincidentally, that's where she ends up working.

So then in the Fall, August, she gets a job at Virginia Tech. That's where she goes to work without even telling us that's where she was going. None of this correspondence -- there's not any correspondents. You don't see any of it in the record from this -- Doctor Simmons indicating where she's telling state I'm going to Virginia Tech. Here's my, here's my phone number there, my address, my email if you need to reach me. And so she's trying to skip out of town without even telling anybody where she was going so we couldn't try and find, find her and question her -- so -- and learn what the details were about why she left and what,

what her expectations were.

And then, after accepting the assistant, the interim -- the research assistant job in August, you know, I think they tried to make a point of oh, well, you know there was a pay cut there, but it wasn't much of a pay cut. I mean it was mid-forties versus mid-fifties, which is just, you know, obviously a significant amount of money, but it's not the -- I think what Julie Martin testified to of half or a third of what professors make. That wasn't at all -- you know, she, she would of made 55,000, at least $55,719 at State. The Virgina Tech agreement -- I'll find it shortly. Oh, I think that's a defense exhibit. Thank you. I apologize for the delay. Virginia Tech agreement, which, by the way, was issued August 15th of 2012, provided for a salary of 48,000.

But then Plaintiff's 12 is the Virginia Tech contract where she became a tenured track professor, and was making in excess of her base salary of $82,500 with at least an over $40,000 in additional add-ons. So, you know, again, you, you wouldn't -- you-all need to add it up. That's your job to weigh the evidence, but I submit, when you go to a faculty recruitment conference as part of Virginia Tech, you work on grants for Virginia Tech, you apply as assistant professor, you then apply again for a research assistant job, which you get, and then, six months later, you get a

job that's worth twice what you would of been paid at South Carolina State, there is some strong motivation there, and add to that notion of she -- Denise says that it's her entire goal or major objective to return to State, but couldn't even be bothered to write a little email, like she'd done in the past, which says funny things about that.

Another point that I think has -- further corroborates State's position is she took Virginia Tech's word over Doctor Ihekweazu's word that employment would be honored. The contract she signed with Virginia Tech was signed, you know, on August 23rd, 2012.

Okay. Says on there that it expires August 22nd, 2012. I think we heard testimony about that. So, she wasn't signing this in a timely manner according to the express terms of this document. It had expired. Somebody at South Carolina -- at, at Virginia Tech had said it's okay. We'll accept it as long as it's signed by August 23rd. That seems to be the, the gist of it.

Same day, Doctor Ihekweazu said come to State. We'll work out your concerns in your employment agreement, but, for whatever reason, she didn't believe Doctor Ihekweazu, but rather Virginia Tech because that's where she wanted to go. That's where her relationships were. She had no reason not to think Doctor Ihekweazu couldn't make the -- ensure that she ended up getting the contract document that she

felt so urgently she needed, but she took Virginia Tech's word, Stephanie Adams, over Doctor Ihekweazu, and I think that shows it wasn't -- really what her intent was that she wasn't gonna honor her agreements to South Carolina State. Really didn't have any intentions of doing that.

There's no question, on October 23rd, that Denise Simmons had employment at State. I think Doctor Ihekweazu clearly told her so, that Doctor Luke had said look, unless you're affirmatively fired, you've got employment at State if you're a tenured track faculty. It's not, you know, common place, but it's not -- it happens from time to time that people don't get their, their assignment letters until after they've started working, but they're in the payroll system. They got the P4. They get paid.

So, there's no question, on October 23rd, 2012, that Denise Simmons had employment at State. The facts add up to only one thing. Denise Simmons did not want to return to State, and, instead, wanted to work at Virginia Tech. She also wanted to avoid her, her contractural obligations to State, and she didn't tell anyone at State where she was going.

Three things are -- really give the lie I think to Denise Simmons' story here are, and ask yourselves, if working at State was really still, as she said in 2008 and as she testified here today, that it still was in 2012, her

entire goal, her passion, and she really had concerns about her employment, wouldn't she just have called or sent Darby an email?

It just doesn't add up that she didn't do that if that was really her concern.

Two. She had -- and, and this, this is a long point. So, bear with me on it. But she had no way of knowing, because she hadn't contacted Darby, whether an assignment letter had been issued to her. Denise Simmons conveniently now assumes that, because she didn't receive an assignment letter, she must have been terminated by State or wasn't being offered employment. But on August 16th of 2012, when she wrote to Doctor Okafor that she had, you know, no contract, no -- and that she had sought and obtained other employment, she had no way of knowing, and, in fact, we still don't actually know why an assignment letter wasn't received by Denise Simmons.

It -- for all she knows, it could of been placed in the mail. She testified she didn't even know how it was submitted or customarily sent to her. Could of been in an email. You know, it could of been lost in spam. She could of had a crisis where, just like she missed -- said he missed the emails on August 13th, she could of missed the email with her contract. It could of gotten eaten in Ms. Darby's printer. It could of fallen off Ms. Darby's desk,

between her desk and the wall. But, again, it could of got lost in the mail. Could of got stapled to somebody else's contract and sent to them. The bottom line is she didn't know. She was just assuming, because it was convenient for her, that she was not being offered an assignment letter.

The point is that there is -- the point is there is a host of more reasonable assumptions to make under all the circumstances of Denise Simmons' professional leave then to jump to the assumption that State had not offered her a, you know, continued employment. In fact, that's the least logical assumption under the circumstances, and particularly in light of Denise Simmons 2008 professional leave agreement, and the amount of money State had paid to ensure that they would have a PhD level female, African-American teacher coming back to mentor their students, to help recruit students, to provide all those services she indicated would be provided.

But it is, it is the most convenient assumption for Denise Simmons to make in order to avoid her promise to State. It's easy to assume oh, man, I'll just say they -- I didn't get my contract. I assume they didn't give me one. And Denise Simmons never wrote to State saying, you know, I have a one year position. Could you just extend professional leave a year. When -- all we've really heard from Denise Simmons is State never communicated with me.

State never communicated with me.

Well, she wasn't communicating with State, and, in fact, we look at we were initiating all of these correspondents. We were trying to communicate with her. She was sort of giving us the stiff arm back.

And, finally, I think it's the -- you know, what gives the lie to Mr. Simmons' -- Doctor Simmons' story is Doctor Okafor testified that when he spoke to her on the -- I think date was -- seemed to be some consensus eventually around August 23rd on the phone, and Doctor Okafor testified she never mentioned a contract. She just mentioned, you know, she wanted to change her courses, and he was saying well, you need -- like you said, back on August 11, you need to talk to these two other professors that maybe they could switch a course with you.

She, she never -- I think the fact that that evidence shows, from April 9th or April 11, when she heard that from Doctor Okafor, until August 23rd, she had not contacted and there's no evidence that she contacted either of those professors to try and reschedule her course.

If she'd really been planning to come back to State anywhere in that period of time, wouldn't you think that she would have followed through with that some time in April?

I mean she, she wrote back within three hours to Doctor Okafor trying to reschedule that course. I would of

thought, you know, she would of called those professors the next day, but April goes by. She doesn't call. May goes by, June, July, August. No evidence she ever called those two professors to try to reschedule those courses, and that's -- you know, Doctor Okafor was still trying to suggest to her you got to contact those guys. I can't just change those courses for you.

I think that shows she never had the intent by coming back or there would of been testimony that yeah, I called those guys and they changed those courses or there wasn't a repeating concern that Doctor Okafor had to keep addressing with Ms. -- with Doctor Simmons.

The fact just don't add up to support Denise Simmons' story. What the facts do add up to is showing Denise Simmons intentionally, wrongfully breached her contract with State.

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.

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. And, again, I think I would reiterate they are proud of that. They are, in fact, proud of Denise Simmons and her accomplishments, but they believe she should be held to her word, and they are entitled to that. That is the, the bargain they struck of promises made. Should be promises kept when both sides have made, you know, stated that they will perform certain actions and reliances on, on those promises.

State gave her professional leave for four years and paid over $300,000. I mean this is seven -- $312,000.

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. 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

Jury Instructions

that she'd still be tenured track.

I submit those are the, you know, material terms of the agreement, that South Carolina State fulfilled them honorably, four years, paid what it was required to pay, did what it said it would do under the contract.

Now, when it came time for Doctor Simmons to return the promise, live up to her words, she didn't, and I respectfully ask for a verdict in favor of South Carolina State for $368,176.

Thank you very much.

THE COURT: Thank you, Mr. Reagle.

Mr. Ormond, you want to take break?

MR. ORMOND: Do we have any time limits?

THE COURT: Huh?

MR. REAGLE: I'm sorry I---

MR. ORMOND: I understand.

THE COURT: You want to take a break before you start?

MR. ORMOND: No, Your Honor.

THE COURT: You ready?

Okay. Thank you, sir.

MR. ORMOND: Thank you, ladies and gentlemen of the jury. Appreciate your time and I know this has been a long ordeal for all of us. I'm not gonna take the kind of time that Mr. Reagle took. I promise. First of all, cause you wouldn't like me if I did, and I'm not gonna take a break

only do you pass back everything we've paid, but we want your salary that we did not have to pay you because we, we didn't give you a contract, and you didn't come to work. They didn't hire somebody then. As a matter of fact, they didn't hire somebody until the next year. '14, two years without someone. Maybe they didn't have the money to hire somebody else.

Testimony was clear. South Carolina State then -- the enrollment was down. When enrollment's down, you don't have as much money. It's not a fortunate thing. It's too bad, but it's true. Same with the engineering school.

Common sense should dictate that all they had to do was send her a contract. That's it. And it's simple. And they didn't do it. And that's not disputed in this case.

They didn't send her an appointment letter. They didn't send her a contract. Either would of done. It's undisputed that they didn't do it and they never did it.

Thank you for your time.

THE COURT: All right. Thank you.

All right, ladies and gentlemen. Final little bit.

Y'all comfortable enough for just a few more minutes?

Okay. All right. Just want to make sure, okay, because I got to go through this. It's not, it's not as bad -- quite as bad as it looks.

Okay. Madam Forelady, and ladies and gentlemen of the

jury, you've heard the evidence and arguments in this case, and now I'm gonna explain the law.

South Carolina State University, the Plaintiff, claims that they've been injured by the actions of Denise Simmons, the Defendant. In bringing the lawsuit, the Plaintiff claims that the Defendant should compensate them for their damages. The Defendant has denied those claims.

You and I have different duties to perform. As the trial judge, it is my responsibility to preside over the trial of the case, and to rule on the admissibility of evidence offered during the trial. You're to consider only the evidence before you, including testimony presented from the witness stand, and any exhibits that have been made a part of the record in this case.

It is my duty to charge you the law applicable in this case. It is your duty, as jurors, to accept and apply the law as I now state it to you. If you think you have an idea as to what the law is or what the law ought to be, and it does not agree with what I tell you the law is, you must forget that idea because you are sworn to accept the law and apply the law exactly as I now state it to you.

In every case, you, the jury, are the sole judge -- sole and exclusive judge of the facts. A trial judge cannot comment on or make any statement about the facts. Since you are the sole judges of the facts, do not think, by anything

I have said during the trial or that I now say in these instructions, that I have an opinion about the facts in this case. The law does not allow me to have an opinion.

The burden of proof in this case is by a preponderance of the evidence. A preponderance of the evidence simply means the greater weight of the evidence. It is evidence which, as a whole, shows that the facts sought to be proved is more likely true than not true. This can be illustrated by imagining a set of scales. We talked about that at the very first.

When the case begins, the scales are even. After all of the evidence has been presented, if the scales remain even or if they tip even slightly in favor of the Defendant, then the Plaintiff has failed to meet their burden of proof, and would not be entitled to recovery in this case. On the other hand, if the scales tip even slightly in favor of the Plaintiff, the Plaintiff will admit their burden of proof, and you should return a verdict for the Plaintiff. The preponderance of the evidence is not determined by the number of witnesses. Instead, it must be determined by the greater weight of all the evidence.

They're two types of evidence generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact such as an eye witness.

It is evidence which immediately establish the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. It is proof that does not actually establish the fact in question, but that asserts or describes something else for which you may either reasonably infer the truth of the fact or at least reasonably infer an increase in the probability that the fact is true.

For circumstantial evidence to be sufficient to warrant the finding of fact, the circumstances must lead to that fact with reasonable certainty. The facts and circumstances should be considered in light of ordinary experience.

To determine the facts in this case, you will necessarily have to evaluate the credibility, which simply means the believability of each witness. Some of the things you may consider as you decide whether or not to believe a witnesses testimony about a particular matter include what was the manner and appearance of the witness who testified. Was he or she straightforward or hesitant in answering. Was the testimony of a witness consistent or inconsistent. How did the witness come to know the facts that he or she

testified to. What was his ability to know these facts. Is there some reason a witness would want to give testimony which would help or hurt one side or the other. In other words, was the witness biased or prejudiced and was the testimony of a witness strengthened or weakened by other testimony of an -- by other testimony or evidence.

Throughout this process you have one objective. That is to seek the truth regardless of its source.

In this case, the Plaintiff claims the Defendant breached the contract that existed between the parties. In order to recover for a breach of contract, a plaintiff must prove the claim by preponderance or greater weight of the evidence.

The first thing that the Plaintiff must prove by preponderance or greater weight of the evidence is that the parties entered into a binding contract. A contract is an agreement entered into by two or more parties in which each party agrees to perform or not perform certain acts. It may be shown by words, written or oral, or by conduct. However, a, a contract is more than the mere exchange of promises. For the agreement to be considered a contract, the parties must have intended to enter into a contract, and must have reached a mutual understanding of the terms of that contract. This is sometimes called a meeting of the minds.

The parties must intend to be mutually bound by the

agreement. To make a contract, there must be an offer and acceptance. An offer is a proposal which is definite and certain in its terms. The offer must be communicated to the other party. The mere intention to do an act is not an offer. In addition, preliminary negotiations are not offers. An offer may be withdrawn at anytime before it is accepted.

If you find that an offer was made, you must next decide whether the offer was accepted. An offer can be only -- can only be accepted by the person to whom it was made. The acceptance must be communicated to the person who made the offer. Unless the offer specifically states that the acceptance must be made at a certain time or place, or in a certain way, an offer may be accepted in any way which lets the person making the offer know that the offer was accepted.

An acceptance does, does not have to be expressed. It may be inferred from the acts or conduct of the parties accepting the offer. However, there must be some expression of the intent to accept the offer either by words, signing, or some act communicated to the person making the offer or that person's agent. If you find that -- if you find that the offer was rejected or was not accepted, then there was no contract, and you must return a verdict for the Defendant.

In addition, each party to the contract must give some valuable consideration to the other. This means that there must be something that benefits each party.

Consideration may be some right, interest, or benefit given to a party. It may also be the failure to do an act, a loss, or responsibility which is undertaken by a party. Consideration may be money, an act, a service, or a promise to do something or not to do something in the future. Mutual promises may constitute consideration.

For example, if I buy a loaf of bread from a grocery store, the consideration the grocery store gives to me is the bread. The consideration I give to the grocery store is the money I give for the bread.

In making your decision as to whether a valid contract exists, you should only be concerned with whether there was any consideration. Not the value of the consideration. You should not weigh the value of the consideration given by one party against the other party's consideration -- the value of the other party's consideration. You are to de -- to decide only whether there was consideration to support the agreement. Not whether the agreement was a good one.

Next the Plaintiff must show, by a preponderance or greater weight of the evidence, that the Defendant unjustifiably breached the contract. The word breach means the failure without legal excuse to perform any promise that

forms the whole or part of the contract. This includes the refusal of a party to recognize the existence of a contract, or the doing of something inconsistent with the existence of the contract. A party breaches a contract when that party does not perform as agreed under the contract by failing to carry out a term, a promise, or a condition of the contract.

The Defendant contends that the Plaintiff prevented her from performing the requirements of the contract. When two parties make a contract, each one is required to allow the other to perform their part of the contract without interference. Each party must reasonably avoid any action which would affectively prevent the other party from doing what was agreed on in the contract. If you find the Plaintiff prevented the Defendant from performing the requirements of the contract, you should return a verdict for the Defendant.

The Defendant claims the Plaintiff failed to perform their duties under the contract, and that, therefore, the Defendant was justified in refusing to perform her duties under the contract. In order to recover damages from the Defendant for a breach of contract, the Plaintiff must show that they did the acts they promised to do under the contract. If you find that the Plaintiff failed to perform their duties under the contract, you should return a verdict for the Defendant.

The Defendant claims that even if there was a breach of contract, the Plaintiff waived the right to enforce a contract by actions taken after the alleged breach of contract. When a person waives their right, it means that the person intentionally and voluntarily gives up that right with knowledge of all the relevant facts.

Once a breach of contract occurs, the Plaintiff must enforce their rights under the contract or lose them. If you find that the Plaintiff acted in a manner which made the Defendant believe that the Plaintiff gave up the right to prosecute the breach of contract, you should return a verdict for the Defendant.

The Defendant claims the parties waived performance of the contract. Parties to a contract may agree to waive performance requirements and to suspend the contract. In that case, neither party is required to perform what is required under the contract. When a person waives their right, it means that the person intentionally and voluntarily gives up that right with knowledge of all the relevant facts. If you find that the Defendant has shown -- that the Defendant has shown, by a preponderance or greater weight of the evidence, that the parties intended to give up their rights under the contract, after they knew all of the relevant facts, then you should return a verdict for the defendant.

In interpreting contracts, you must determine the intention of the parties and put those intentions into effect. In doing this, you must consider only the outward expressions of the parties. You cannot consider any undisclosed or secret intentions of the parties. Contracts should be literally construed to carry out the intentions of the parties. It is the substance of the agreement, not the form, which must control the construction of the contract. When you are interpreting a contract, you are not limited to the literal meaning of any term of the contract if you decide that the literal meaning with the -- would defeat the party's true intentions.

The contract is to be considered by looking at its subject matter, nature, and purpose. When you have determined a general purpose of the contract, you should look at the language of the contract in light of its purpose. When the contract is in writing, you must determine the intention of the parties primarily from the content of the written document itself. The intention of the parties must be determined from the entire agreement, and not from any particular clause or provision. When the written contract is clear, its meaning must be determined by the contents of the document alone.

If the circumstances warrant, terms, terms which may -- terms which do not contradict the written language of the

contract may be implied in order to carry out the intentions of the parties. If a term of the contract could be given two meanings, and one of these meanings would make the contract unusual and extraordinary, while the other would make the contract reasonable and fair, you must construe the term to make the contract reasonable and fair.

A party to a contract has a duty to read it and learn its contents before signing it. A party can not complain of misrepresentation in the contents of a contract if the truth could have been discovered by reading the contract unless the party is ignorant and unweary. Education, business experience, and intelligent -- intelligence are all considered in determining whether a party may be considered ignorant and unweary so as to excuse a failure to read the contract.

Where a term of a contract can be given more than one meaning, you should use the meaning least favorable to the party who prepared the contract. Where the language of the contract has more than one meaning, you may consider the circumstances surrounding the making of the contract to help you determine the real intention of the parties. However, you may not use these circumstances to give the contract a meaning which is not apparent on its face.

Where two clauses of a contract are in conflict, you should accept the one which is stated first and reject the

one stated second if you find that the first clause is in conformity with the rest of the contract. Every contract is subject to all of the State law which can be applied to the contract. In other words, the law becomes a part of the contract whether the contract states so or not. This is because everyone is presumed to know the law.

Where a contract affixes no time for performance, it is understood that the contract will be performed in a reasonable time. If there is a time specified for performance of the contract, it must be performed within the time specified. However, the fact that a contract contains a provision for performance by a certain time does not mean that it must be performed within that time period unless the parties intended for time to be of the essence. An intention to make time of the essence, essence must be clear.

In deciding whether time is of the evidence -- essence in a contract, you should consider the contract itself along with the action of the parties, and the circumstances, conditions, and purposes of the parties with regard to the contract. Where time is not originally of the essence in a contract, it may be made so by one party giving notice to the other party that the party will insist on performance by a certain date. However, the time allowed by the notice must be recent. Whether the time for performance is

reasonable is a question for you to decide based on the circumstances of this particular case. The Plaintiff can not recover for breach of contract for the Defendant's failure to timely perform the contract if the reason for the delay was a failure of the Plaintiff to fully perform their duties under contract.

There exists in every contract an unspoken but legally enforceable promise of good faith and fair dealings. Noncontradictory terms and conditions may be, may be implied in a contract when the circumstances warrant it to effectuate and manifest intention of the parties. A contract includes not only what is expressly stated, but also what is necessary -- necessarily to be implied from the language used and external facts such as the surrounding circumstances. Terms which may clearly be implied from a consideration of the entire contract are as much a part as though plainly written on its face.

In the absence of an expressed provision therefore, the law will imply an agreement by the parties to a contract to do and perform those things that, according to reason and justice, they should do in order to carry out the purpose for which the contract was made. A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Thus, for a contract to be binding, material

terms cannot be left for future agreement.

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.

The Court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think they have made a contract. They must have expressed their intention in a manner that is capable of being understood.

The Plaintiff claims that a breach of contract in this case was accompanied by a fraudulent act by the Defendant. To establish a breach of contract accompanied by a fraudulent act, the Plaintiff must first show that the Defendant breached the contract. Next the Plaintiff must show that the Defendant had fraudulent intent as to the breach of contract. Fraudulent intent relating to the making of the contract is not sufficient. A fraudulent intent is usually proven by examining the circumstances surrounding the breach of contract.

Finally, the Plaintiff must prove that there was a fraudulent act accompanying the breach of contract. A

fraudulent act is any act characterized by dishonesty in fact, unfair dealings, or the unlawful taking of another person's property intentionally. The fraudulent act may be prior to, at the same time as, or after the breach of contract. However, it must be connected for the breach of contract itself. The fraudulent act cannot be too remote in time or character from the breach of contract.

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. The Plaintiff must prove damages by the preponderance or greater weight of the evidence. This does not mean that the Plaintiff must prove damages to a material certainty or produce evidence of the exact amount of damages suffered. However, the amount of damages cannot be left to guesswork or speculation. Instead, the evidence presented by the Plaintiff must be enough to allow you to determine the amount of damages with reasonable certainty and accuracy.

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. The Plaintiff may not recover damages for breach of contract unless the Plaintiff

shows that they have performed their part of the contract or at least was able, ready, and willing to perform at the appropriate time.

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.

The Plaintiff has the duty to minimize the damages caused by the Defendant's breach of contract. The test is whether the Plaintiff has done what an ordinarily prudent person would have done under the like circumstances. If the Plaintiff has used reasonable care to reduce the losses, the Plaintiff may recover the full amount. If the Plaintiff has not done so, then you would reduce the damages accordingly.

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.

Where a person has received a benefit from another, that fact alone does not make unjust enrichment. The receipt of the benefit is unjust enrichment only if the circumstances of its receipt or, or retention are such that, as between the parties, it is unjust for the recipient to retain the benefits without paying for them. The right of restitution does not depend on the fault or wrong on the part of the recipient, but it depends on the principles of justice -- of the principles of justice, and equity, and good conscious.

I have declared the law to you through these instructions to help guide you to a law -- a just and lawful

verdict. Whether some of these instructions apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case, including damages, must not be taken as indicating an opinion of this Court as to what you should find to be the facts or as to which party is entitled to your verdict.

Your verdict must represent the considered judgment of each juror. In order to return a verdict in this case, it is necessary that each one of you agree. Your verdict must be unanimous. All 12 of you must agree on this verdict. Your verdict cannot be based on sympathy, passion, prejudice, emotion, or any other consideration not in evidence in this case.

Remember, at all times, you are not partisans favoring one party over another. You are the judges of the facts. Your sole interest is to seek the truth from the evidence that has been presented to you in this case.

Now, Madam Forelady, I finally get to stand up and I'm really happy about that. The second thing I get to do is I get to show you the verdict form.

Okay. The verdict form is pretty simple.

Okay. You're the one that's responsible for filling it out.

Okay. All right. This just tells you where we are. This tells you what circuit we're in. We're in the First

Circuit. This is the name of the case, South Carolina State, Plaintiff. Denise Simmons is the Defendant. I think I told y'all earlier this was the case number. This case was filed in 2015.

This is a verdict. The verdict form reads -- is to speak the truth. Y'all have heard the facts. Now y'all are gonna tell us what's the truth.

This says we, the jury, by unanimous, by unanimous consent, you either find for the Plaintiff or for the Defendant. If you find for the Plaintiff, it's a blank here for an amount of damages.

Understand?

THE FORELADY: Yes, sir.

THE COURT: Okay. Now, once you have made your decision, unanimous decision, you will sign it and you will date it. You'll notice I left the date blank. I'm hoping it's gonna be today, but it can be tomorrow if it takes so long.

Okay. Okay. All right.

THE FORELADY: All right.

THE COURT: Okay. Now, I'm not giving you this now. The reason I'm not giving you this now is y'all had to endure me reading all these charges, right?

I know that was exciting.

It's like a good book, wasn't it?

Okay. Well, sometimes when I read those charges I make mistakes, I leave things out, and these attorneys who have been paying attention, holding their breath, making sure I do the right thing, they are gonna tell me, after you leave, whether I left something out. If I left something out or I misspoke, they're gonna correct me. Then I'll bring you back out here -- and I see that happy smile.

Okay. Then I'll bring you back out here, and I'll correct my charge on the law.

Okay. Now, if, after you leave, they tell me I did okay or it's good enough for government work, and tell me we can go ahead and give the -- give you the verdict form, I'll send the verdict form back with Misty, along with all the evidence that's been in this case, and you can begin your deliberations at that time. Until you are told to begin your deliberations, you cannot go back there and start talking about this case. I know you're anxious. I know you're ready. I know you've listened. I know you've heard everything. But until you get the word to begin your deliberations, you may not do so, and you're in charge of that.

Okay. All right. I'll let y'all go back into the jury room, and, and we'll see whether we're ready to get started or not.

(WHEREUPON, the following takes place outside the

presence of the jury.)

THE COURT: All right. All right. Anything from the Plaintiff regarding the charges?

MR. REAGLE: Good enough for government work, Your Honor.

THE COURT: Okay. Thank you.

Mr. Ormond.

MR. ORMOND: Nothing, Your Honor.

THE COURT: Okay. If y'all wouldn't mind, please make sure we've got all the exhibits straight.

THE BAILIFF: The alternate.

THE COURT: Okay. Well, you can actually tell her she can leave.

THE BAILIFF: Okay.

THE COURT: Cause they, they don't have any problems with that.

THE BAILIFF: I will tell her, Your Honor. Thank you, sir.

(Pause.)

THE COURT: All right. Anything from the Plaintiffs while we --?

MR. REAGLE: No, thank you, Your Honor. We appreciate it.

THE COURT: Anything from the defense?

MR. ORMOND: No, Your Honor.

Plaintiff's Trial Exhibit No. 1

DENISE S. GRANT, PE, PMP
3409 NORTHSHORE ROAD • COLUMBIA, SOUTH CAROLINA 29206 • MOBILE PHONE 803 - 606 - 8900
E-MAIL DGRANT@SCSU.EDU

Dr. Stanley Ihekweazu
Chair, Civil & Mechanical Engineering Technology
South Carolina State University
Orangeburg, South Carolina 29117

PLAINTIFF'S EXHIBIT
#5 SIMMONS
2/27/09 mk
PENGAD 800-631-6989

June 12, 2008

Dr. Ihekweazu:

I am writing to present a proposal for professional leave and request support while I am away. I have been accepted into Clemson University to pursue a PhD in Civil Engineering. Please find my letter of acceptance attached. Starting July 1, 2008, I will enroll in two courses and in fall 2008, I will enroll as a fulltime, in-resident student. It is expected that I will complete the program by December 2011. This proposal will outline a brief overview of my performance while employed at South Carolina State University (SCSU) and my proposed role at SCSU while I am away.

Brief overview of my performance while employed at SCSU. Outside of my assigned course load, I have advised students, functioned as an academic program coordinator for one year in the Civil Engineering Technology (CET) department, served on the JE Clyburn UTC Scholarship Selection Committee, hosted several shadow visits from local high school students, and directed the Summer Transportation Institute for the SCSU host site. I currently serve as the CET coordinator of the TAC of ABET Continuous Improvement Committee (CIC), as the co-chair of the SACS 2010 Physical Resources Committee, and as the Interim Director of the Environmental Sciences Field Station. I have written two grant proposals for external funding and am actively writing other grant proposals. I serve as a volunteer tutor for Communities in Schools.

I have a long-range plan to develop a project management course or courses to be considered for inclusion into the CET curriculum. The course or courses could be beneficial to EET, MET and IET students. I also plan to develop at least one environmental engineering course to be considered for inclusion into the CET curriculum.

In terms of professional development, I am a registered Professional Engineer; a member of my professional society, ASCE; a registered Project Management Professional; an American Association of Blacks in Energy (AABE) member; a US Green Building Council member; and an Emerging Green Builders Council member. The SC chapter of AABE is currently seeking to form its first student chapter and has selected SCSU as the location of that chapter. I am currently serving as a liaison between SCSU and SC AABE and will be named as a student chapter advisor when the chapter is formed.

My current niches are in project management and sustainable construction. The focus of my research has been the study of environmental metrics used to evaluate guidelines for green building practices and the development of hands-on tools that can assist civil engineers, construction professionals and those who manage LEED™ projects. Information and tools that will help guide their decisions and implementation of LEED-NC™ have been developed. I have already presented my research at two workshops and one conference. At Clemson University, I

will pursue a cross disciplinary degree in civil engineering (environmental sustainability) and in engineering and science education. The benefit of such a program is that I will increase my competency in civil engineering, in how to teach engineering, and in how engineering students learn. Coursework in assessment methods will also complement my role as CIC coordinator.

My role at SCSU during professional leave. While I am away on professional leave, I desire and seek your support to continue as the Interim Director of the Field Station. I anticipate serving in this role during the entire duration of my professional leave; however, I will serve as long as you desire me to do.

Dr. Ihekweazu, my entire objective for pursuing the PhD degree has always been to bring my experience back to SCSU with the goal of exposing SCSU students to my areas of specialty, authoring 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. My expected graduation date from the PhD degree program is December 2011. 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.

If you have any questions regarding this proposal and request for support, please contact me on my mobile phone, 803-606-8900.

Sincerely,

Denise S. Grant

Denise S. Grant, PE, PMP, LEED-AP
Asst Professor and ABET Continuous Improvement Coordinator
Interim Director, Environmental Sciences Field Station
South Carolina State University

Attachment

CLEMSON
UNIVERSITY

March 5, 2008

Ms. Denise Grant
3409 Northshore Road
Columbia, SC 29206

Dear Ms. Grant:

Congratulations! It is my pleasure to offer you admission to the Clemson University Graduate School in the Doctor of Philosophy degree program in civil engineering. We receive many applications from qualified individuals for a limited number of positions and you are among a select group of highly qualified applicants to whom the Clemson faculty are extending an admission offer.

If there are financial terms associated with this offer (including, but not limited to, an assistantship or fellowship), they will be provided in a separate letter from the program to which you have been admitted. We are very much interested in learning whether you plan to accept our offer of admission, so please contact the graduate program coordinator in the program to which you were admitted to advise him or her of your decision to accept or decline our offer as soon as possible. The program will want to know of your intent so they can plan for your arrival. In addition, please visit http://www.grad.clemson.edu/Deanswelcomeletter2.php. This website contains pertinent information to assist you as you make preparations to arrive at Clemson.

We encourage you to communicate directly with faculty and staff in the program regarding specific questions about this offer or about the program. In particular, some programs have additional admission/graduation requirements beyond those imposed by the Graduate School, and you need to be aware of these requirements. Contact information for graduate programs is provided on the Clemson Graduate School website at the following URL: http://www.grad.clemson.edu/programs/ProgramContacts.php.

Again, congratulations on your admission. We look forward to welcoming you as a member of Clemson's community of scholars.

Sincerely yours,

J. Bruce Rafert

J. Bruce Rafert
Dean of the Graduate School

A10/C31C
cc: Dr. Ronald Andrus

GRADUATE SCHOOL
E-106 Martin Hall Box 345713 Clemson, SC 29634-5713
864.656.3195 FAX 864.656.5338

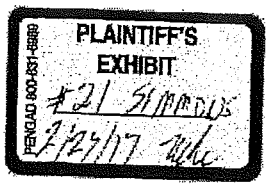
FACULTY DEVELOPMENT PROGRAM COVER SHEET

TO: Vice President for Academic Affairs Office
Administration Building – Room 202
South Carolina State University
Orangeburg, South Carolina 29117

FROM: Denise S. Grant
Faculty, Civil & Mechanical Engineering Techology Department

DATE: June 12, 2008

RE: Faculty Development Program Submission



SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period July 1 - Aug 6, 2008
TUITION AND FEES

COURSE(S)	CREDITS	COST
ED F 778: Educational Research I	3	
CES 850 Special Topics in Engring & Science Educ	3	$600.00

COST OF BOOKS (Estimate) $900.00

LIVING EXPENSES
ROOM $0.00
Board $0.00

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0.00

STIPEND $5000.00

TOTAL EXPENSES $ $6,500

I request $ 6,500 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

6/10/2008
Date

SIMMONS 000020

R.351

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Aug 6-Dec 31, 2008

TUITION AND FEES

COURSE(S)	CREDITS	COST
CES 861 001 PRACTICUM E & S ED	3	
ED F 878 001 EDUC RESEARCH II	3	
EX ST 801 001 STATISTICAL METHODS	4	$4480.00 Total Tuition

COST OF BOOKS (Estimate) $0

LIVING EXPENSES
ROOM $0
Board $0

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0

STIPEND $9000

TOTAL EXPENSES $ 13,480

I request $ 13,480 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

6/10/2008
Date

SIMMONS 000021

R.352

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Jan 1 - May 10, 2009
TUITION AND FEES

COURSE(S)	CREDITS	COST
ED F 879 Qualitative Research in Education	3	
ED F 901 Mixed Methods Research in Education	3	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate) $800.00

LIVING EXPENSES
ROOM $0
Board $0

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0

STIPEND $ 9000

TOTAL EXPENSES $ 14,280.00

I request $ 14,280.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000022

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period May 11 - June 30, 2009

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0.00
Board $0.00

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0.00

STIPEND $5000.00

TOTAL EXPENSES $ 5,900.00

I request $ 5,900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000023

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period July 1 - Aug 6, 2009
TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0.00
Board $0.00

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5
plane fare) $0.00

STIPEND $5000.00

TOTAL EXPENSES $ 5,900.00

I request $ 5,900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000924

R.355

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Aug 6-Dec 31, 2009.

TUITION AND FEES

COURSE(S)	CREDITS	COST
ED F 808.001 ED TESTS AND MEASURE	3	
CES 871 Engineering and Science Education Research Methods	3	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate)	$400
LIVING EXPENSES	
ROOM	$0
Board	$0
TRANSPORTATION	
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare)	$0
STIPEND	$9000
TOTAL EXPENSES	$ 13,880

I request $ 13,880 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000025

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Jan 1 - May 10, 2010

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	6	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0
Board $0

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0

STIPEND $9000

TOTAL EXPENSES $ 13,780.00

I request $ 13,780.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000026

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period May 11 - June 30, 2010

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0.00
Board $0.00

TRANSPORTATION
Round trip site (estimate miles, if Vehicle _____ _____ x 30.5 plane fare) $0.00

STIPEND $5000.00

TOTAL EXPENSES $ 5,900.00

I request $ 5,900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS.000027

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND
UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period July 1 - Aug 6, 2010

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate)	$300.00
LIVING EXPENSES	
ROOM	$0.00
Board	$0.00
TRANSPORTATION	
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare)	$0.00
STIPEND	$5000.00
TOTAL EXPENSES	$ 5,900.00

I request $ 5,900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000028

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Aug 10 - Dec 31, 2010

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	6	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate)	$300.00
LIVING EXPENSES	
ROOM	$0
Board	$0
TRANSPORTATION	
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare)	$0
STIPEND	$ 9000
TOTAL EXPENSES	$ 13,780.00

I request $ 13,780.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS:000029

R.360

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring, Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Jan 1 - May 10, 2011

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	6	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate)	$300.00
LIVING EXPENSES	
ROOM	$0
Board	$0
TRANSPORTATION	
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare)	$0
STIPEND	$9000
TOTAL EXPENSES	$ 13,780.00

I request $ 13,780.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000030

R.361

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period May 11 - June 30, 2011

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate)	$300.00
LIVING EXPENSES	
ROOM	$0.00
Board	$0.00
TRANSPORTATION	
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare)	$0.00
STIPEND	$5000.00
TOTAL EXPENSES	$ 5,900.00

I request $ 5,900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000031

R.362

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period July 1 - Aug 8, 2011
TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	3	$600.00

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0.00
Board $0.00

TRANSPORTATION
Round trip site (estimate miles, if Vehicle ____ _____ x 30.5 plane fare) $0.00

STIPEND $5000.00

TOTAL EXPENSES $ 5900.00

I request $ 5900.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000032

R.363

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina

TITLE III SUPPORTED PIP PROGRAMS
STRENGTHENING HISTORICALLY BLACK COLLEGE AND UNIVERSITY PROGRAMS

---REQUEST FOR SUPPORT---

Name Denise S. Grant SS# 248473833

Area of Employment at SCSU Tenured Track Faculty, Civil & Mech Engring. Tech Department
Campus Address PO Box 8143
Mailing Address 3409 Northshore Road, Columbia, SC 29206
Expenses for pursuing course work at Clemson University
Leading to the PhD in Civil Engineering for the period Aug 10 - Dec 31, 2011

TUITION AND FEES

COURSE(S)	CREDITS	COST
CE 899/CES 899 Research	6	
		$4480.00 Total Tuition

COST OF BOOKS (Estimate) $300.00

LIVING EXPENSES
ROOM $0
Board $0

TRANSPORTATION
Round trip site (estimate miles, if
Vehicle ____ _____ x 30.5
plane fare) $0

STIPEND $ 9000

TOTAL EXPENSES $ 13,780.00

I request $ 13,780.00 to pursue the course(s) listed above for the period indicated. I realize that official from the institution indicating a grade of "C" or better must be received by the Provost and Vice President for Academic Affairs before the final disbursement is authorized. The amounts will be used to pursue the course(s) indicated. Any changes must be approved in advance.

Denise S Grant
Signature of Requester

8/12/2008
Date

SIMMONS 000033

Name Denise S. Grant	SS# 248-47-3833
School/Area College of Science, Math and Engineering Technology	DEPT. Civil & Mech Engring
Office Address PO Box 8143	
Mailing Address 3409 Northshore Road, Columbia, SC 29206	
Present area of concentration/assignment	
Civil Engineering - Project Management	
Proposed area of concentration/assignment upon completion of PIP Civil Engineering - Sustainable Construction and Engineering & Science Education	

Summary

I have gained over fourteen years of engineering experience working with public utility companies, a project management consulting company, and a software company. A registered Professional Engineer in TN and a Project Management Professional, I rank teaching as my most rewarding experience. In fall 2004, I joined the civil engineering technology (CET) department at South Carolina State University (SCSU) as a full time, untenured, assistant professor in a tenured track position. I believe excellence in teaching is an attitude, a partnership with students and the University, and is composed of those techniques necessary to instruct each student which includes remaining current in one's field and engaging oneself and students in research.

I am writing to present a proposal for professional leave and to request support while I am away. I have been accepted into Clemson University (CU) to pursue a PhD in Civil Engineering. Please find my letter of acceptance attached. Starting July 1, 2008, I will enroll in two courses and in fall 2008, I will enroll as a fulltime, in-resident student. It is expected that I will complete the program by December 2011. This proposal will describe my rationale, major goals or objectives, methodology, previous support including results, impact on development of application, and relevance and impact on departmental, school or university goals. The professional development plan I outline will allow me to strengthen and broaden scholarships, expand my expertise, pursue new and innovative ideas to improve the quality of instruction, and stimulate exploration of new areas to increase my visibility in the scholarly community.

FACULTY DEVELOPMENT PROJECT/PLAN

Description

Rationale:

I have gained admission to the civil engineering department at Clemson University (CU) to pursue a PhD with a research focus in sustainable construction and engineering and science education. My planned program of study will combine my teaching experience with my work experience in engineering and in project and construction management.

I believe that only an intensive study and comprehensive research work in my field of interest would put me on the right track to achieve my ultimate professional ambitions: to be an effective teacher and to continue to contribute to the body of knowledge in engineering and science education and construction engineering and management. One of my professional goals is to be an effective instructor on the university level. I have been a "teacher" for over twenty years, serving mostly voluntary and part-time roles. My professional development plan (PDP) will provide me formal training and equip me to achieve my ultimate professional objectives.

Major goals or objectives

My entire objective for pursuing the PhD degree has always been to bring my experience back to South Carolina State University (SCSU) with the goal of exposing SCSU students to my areas of specialty, authoring scholarly works on sustainable development and engineering education, recruiting students to attend the University and enhancing the academic and research capabilities of the University.

I am extremely interested in increasing the involvement of minorities in science and engineering related careers and have worked toward this end. In the summer of 2005, I served as

the project director of the Summer Transportation Institute (STI) at SCSU. This program exposes secondary school students with an expressed interest in transportation careers to further information about this field through career speakers, engineering experiments, field trips, and interactive lectures. The program also endeavors to provide the students with mathematics, science, and technological enrichment, which will enable them to pursue a career in transportation. I currently serve as the interim director of the Environmental Sciences Field Station which is aimed at recruiting and retaining women and minorities in environmental science and engineering and natural resources-related fields of study.

I plan to continue my involvement in all of these activities and programs in an effort to encourage minorities to pursue science and engineering-related degrees and become involved in research. In the past, I have engaged a group of Eisenhower Fellows to assist in the planning of these programs. My PDP includes coursework and research in engineering education and it will allow me to pursue new and innovative ideas to improve the quality of instruction and introduce me to effective ways to engage and retain women and minorities in science, technology, engineering and math (STEM) related disciplines.

Methodology

The focus of my research has been the study of environmental metrics used to evaluate guidelines for green building practices and the development of hands-on tools that can assist civil engineers, construction professionals and those who manage LEED™ projects. Information and tools that will help guide their decisions and implementation of LEED-NC™ have been developed. I have already presented my research at two workshops and one conference. At CU, I will pursue a cross disciplinary degree in civil engineering (sustainable construction) and in engineering and science education. The benefit of such a program is that I will increase my

competency in civil engineering, in how to teach engineering, and in how engineering students learn. Coursework in assessment methods will also complement my role as the Technology Accreditation Commission (TAC) of ABET Continuous Improvement Committee (CIC) coordinator and allow me to better understand how to support the University in future SACS accreditation visits.

Sustainable construction is a new topic that is currently being debated among public and private entities. I have begun research in sustainable/green construction with the thought of advancing knowledge in construction process improvement for campus building projects. My interest within the research focus of engineering and science education is broad. I am interested in studying how to improve student learning and application of knowledge; how to introduce current topics, such as sustainability, into curriculums; and how to attract and retain women and minorities in STEM fields of study. Besides being of great interest to me, these are topics in need of further research. Further study and discussion with my committee, which has begun, will help me define my interests and lead me to a well-defined research project.

I have chosen CU due primarily to the reputation of the program, the regard I hold for the department and its faculty, and the opportunity to conduct research in engineering and science education as well as sustainable construction. I have maintained relationships with several members of the CU faculty and staff for nearly twenty years. Under the guidance of my committee, I know that I can receive a quality education that will prepare me for my stated professional endeavors. My PDP will allow me to increase my visibility in the scholarly community

Previous support and support from other sources

I have not received any previous support; therefore, I have no results to share. I am currently seeking salary support for the duration of my professional development leave.

Impact on development of application

My PDP will equip me to expose SCSU students to my area of research; to author scholarly works; and to enhance the academic and research capabilities of the University. Once I complete the PhD program and return to SCSU, I plan to conduct research with SCSU faculty as well as faculty from other educational institutions. Through collaborating with other faculty, I hope to gain support for research, learn new teaching strategies, and develop mentoring relationships.

In terms of mentoring students, I want students to see me as a source of information and guidance on how to discern truth and understanding and how to think critically. I want to be able to engage both undergraduate and graduate students as active collaborators with me in research and scholarship. Finally, I would like every student to be able to find a professor who is a true mentor and role model who can also offer meaningful guidance about general questions and life skills unrelated to a particular course or research project, but necessary for them to be successful in any undertaking. I endeavor to be such a professor.

Relevance and impact on departmental, school or university goals

Currently, the CET program at SCSU is seeking to form a partnership with in-state institutions offering EAC of ABET degree programs. CU is one such institution. It is thought that my presence on CU's campus may be timely as we seek to formalize an agreement that, if approved, would allow SCSU students to matriculate to CU and earn an earn a ABET

Engineering Accreditation Commission (EAC) degree. The impact of such an opportunity on SCSU's engineering technology departments is huge as it will enhance the marketability of our degree programs to current and future students and it will improve the earning potential of the graduates from such a program. In addition, there is no one on faculty in CET with a niche in project management or sustainable construction. My PDP will allow me to strengthen and broaden scholarships and expand my expertise. I am also interested in being involved with recruitment and retention initiatives that would increase the number of students in CET and other STEM-related disciplines.

I predict my chances of success for completing the PhD program are high due to my experience conducting research and my own ambition. I have an idea of the discipline and fortitude required to write a dissertation. I have also the benefit of wisdom received through life's experiences. By selecting a topic that intrigues me, I will improve my chances for success. I will succeed because I am prepared and determined to succeed. I am apprehensive about my ability to pay for the educational fees associated with earning the PhD as a fulltime student living in Clemson while still sustaining myself and assisting my spouse in the support of our household in Columbia. I need to be able to attend Clemson as a full time student in order to make the most of my PhD experience and to expand my breath and depth of experience and knowledge. Financial support will allow me to make the most of this full experience and enable me to achieve my goals while easing my monetary concerns. I appreciate your time to review my PDP and ask for your consideration the requested support.

SPECIFIC ACTIVITIES TO BE PURSUED (i.e., COURSES TO BE TAKEN, SEMINARS CONFERENCES, etc.) WITH TITLE III FINANCIAL SUPPORT

PROFESSIONAL IMPROVED ACTIVITY	DATE	LOCATION
Enroll in courses required by PhD program. Summer session II.	7/1/2008	Clemson University
Enroll in courses required by PhD program. Fall semester.	8/15/2008	Clemson University
Enroll in courses required by PhD program. Spring semester.	1/4/2009	Clemson University
Enroll in courses required by PhD program. Summer session I.	5/28/2009	Clemson University
Enroll in courses required by PhD program. Summer session II.	7/1/2009	Clemson University
Enroll in courses required by PhD program. Fall semester.	8/15/2009	Clemson University
Enroll in courses required by PhD program. Spring semester.	1/4/2010	Clemson University
Enroll in courses required by PhD program. Summer session I.	5/28/2010	Clemson University
Enroll in courses required by PhD program. Summer session II.	7/1/2010	Clemson University
Enroll in courses required by PhD program. Fall semester.	8/15/2010	Clemson University
Enroll in courses required by PhD program. Spring semester.	1/4/2011	Clemson University
Enroll in courses required by PhD program. Summer session I.	5/28/2011	Clemson University
Enroll in courses required by PhD program. Summer session II.	7/1/2011	Clemson University
Enroll in courses required by PhD program. Fall semester.	8/15/2011	Clemson University

DENISE S. GRANT, PE, PMP, LEED-AP

3409 NORTHSHORE ROAD • COLUMBIA, SOUTH CAROLINA 2920 • HOME PHONE 803 - 606 - 8900
E-MAIL DGRANT@SCSU.EDU

EDUCATION

CLEMSON UNIVERSITY — Clemson, SC

Bachelor of Science Degree in Civil Engineering, December 1990

Master of Science Degree in Civil Engineering, December 1995

Thesis: Engineering and Construction Project Management Guidelines; GPA: 3.5

CURRENT JOB AND JOB RELATED RESPONSIBILITIES

SOUTH CAROLINA STATE UNIVERSITY — Orangeburg, SC

Assistant Professor

Interim Director, Environmental Sciences Field Station at Savannah River Site

August 2004 – Present

- Instruct undergraduate and graduate level engineering courses.
- Serve as civil engineering technology academic program coordinator
- Nominated to serve as College of Science, Mathematics and Engineering Technology's Continuous Improvement Coordinator responsible for:
  1. Develop/implement assessment for ABET activities
  2. Assist with the development of the colleges' assessment results and plans
  3. Ensure assessment results and plans are aligned with ABET criteria and university's planning and assessment process
  4. Provide input and a rating of the results to each department at the appropriate meetings
  5. Represent the College on the College wide assessment committee
  6. Submit assessment report to ABET and university offices as needed
  7. Ensure the College is incompliance with all accreditation follow-up reports
  8. Assist with the planning of accreditation visits
  9. Serve as the official contact for ABET accreditation

BRIEF CAREER SUMMARY

UNIVERSITY OF PHOENIX — Virtual & Columbia Campus

Faculty Practitioner & Management Area Chair

January 2003 – Present

- Instruct junior and senior level project management and operations courses.

INDUS INTERNATIONAL (formerly SGT, EUC division) — Columbia, SC

Senior Functional Consultant

January 2003 – March 2004

- Use of client interfacing, analytical and communication skills to support implementation of billing software.
- Developed and delivered end user training for a client's customer accounting department. Developed test scripts for client.

MIDLANDS TECHNICAL COLLEGE — Columbia, SC
Adjunct Professor
January 2002 – May 2002

- Instruct senior level environmental engineering course. Course covers a study of the sources, treatment, regulations, collection and distribution of water and wastewater; water and sewer pipe hydraulics; water and groundwater quality; estimation of runoff; and load design of buried pipes.

PROJECT MANAGEMENT CONSULTANTS, LLC — Columbia, SC
Consultant and Trainer
October 2001 – December 2002

- Provide project management and performance appraisal consulting and training. Most recent client: Georgia Transmission Company.

MEMPHIS LIGHT, GAS, AND WATER DIVISION — Memphis, TN
Energy Engineer, *October 2000 – August 2001*

SCANA CORPORATION — Florence, SC and Columbia, SC

SOUTH CAROLINA PIPELINE
Project Engineer, April 2000 – August 2000

SOUTH CAROLINA ELECTRIC AND GAS
System Engineer, January 1996 – March 2000

VOORHEES COLLEGE MANAGEMENT INSTITUTE — Denmark, SC
Adjunct Professor
Fall 1997 – Spring 1999

- Facilitate courses in degree program for adult students pursuing a bachelor of arts degree in Organizational Behavior
- Courses include: Group & Organizational Behavior, Career and Life Assessment, and Business Ethics

DUKE ENERGY — Charlotte, NC
Associate Design Engineer, Power Generation Group
January 1991 – August 1994

CLASSES TAUGHT AT SOUTH CAROLINA STATE UNIVERSITY

- ET 250: Technical Communications
- ET 255: Engineering Economics
- CET 412: Construction Codes & Contracts
- CET 415: Fluid Mechanics
- CET 459: Senior Project Proposal
- CET 460: Senior Project
- TRP 530: Urban Transportation Planning
- TRP 640: Transportation and Land Use Planning

INSTRUCTIONAL INNOVATIONS AT SOUTH CAROLINA STATE UNIVERSITY

- Incorporated formal project management concepts into ET 250, CET 459 & 460 and TRP 640 courses.
- Incorporated additional measures into ET 250 course.
- Used industry professionals in senior project course.
- Introduced diagnostic tests in ET 255 and CET 415.
- Proposed new professional land surveyor's program with colleagues.
- Incorporated rubrics into ET 250 course.

PROFESSIONAL REGISTRATION, WRITING AND SPECIAL ACHIEVEMENTS

- Registered Professional Engineer (TN #106991)
- Registered Project Management Professional (#383095)
- Engineer In Training (SC #12605)
- LEED Accredited Professional

MEMBERSHIP IN PROFESSIONAL ORGANIZATIONS

- American Association of Blacks in Energy
- Project Management Institute
- US Green Building Council
- American Society of Civil Engineers

SERVICE TO SOUTH CAROLINA STATE UNIVERSITY

- SCSU and UTC Scholarship Selection Committee
- SACS 2010 Physical Resources Committee, Co-Chair
- Convocation Committee
- Continuous Improvement Committee, CET Coordinator

COMMUNITY SERVICE

- Volunteer tutor
- Hosted several shadowing experiences for local high school students

MEMORANDUM OF AGREEMENT
BETWEEN
SOUTH CROLINA STATE UNIVERSITY

AND

DENISE S. GRANT

A. Reporting Requirements

1. Official grade reports must be submitted for all courses taken prior to reimbursement.

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.

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.

B. Receipt of Assistance Requirements

1. For all courses pursued, a satisfactory grade must be obtained in order to receive reimbursement.

2. Any changes or modifications in the Professional Improvement Plan must have the approval of all individuals who originally signed the Plan.

3. Failure to complete the Plan as agreed to without justifiable cause may result in mandatory repayment of all funds received.

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 this agreement and/or mandatory repayment of all funds received.

C. Faculty/Administrator Compliance Statement

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.

Denise S Grant
Signature

Witness

Notary Public

Signature, SCSU Authorized Official

SIGNATURE/APPROVALS*

Faculty/Administrator Date 6/10/2008

I, DENISE S. GRANT, certify that if this proposal is approved, funds will only be used to pursue the specific activities outlined above in keeping with Title III and South Carolina State University policies and procedures. Further, as well as the memorandum of agreement.

Chairperson Date _____

I, _____, certify that I have reviewed the proposed Professional Improvement Plan for the faculty/administrator named above and upon successfully completion of this Plan, this individual will be able to perform duties in the proposed area of concentration. An additional letter of support may be attached.

Dean Date _____

I, _____, concur with the Plan as proposed and recommended by the chairperson for the faculty/administrator indicated above.

_____ _____
Additional Approval (if necessary) Date

_____ _____
Provost & Vice President for Academic Affairs Date

_____ _____
President Date

_____ _____
Title III Coordinator Date

*NOTE: Approval by chair and dean indicates interest in the unit in the project, availability of requisite internal resources, prior negotiation of cost sharing or released time, and appropriateness of the budget. A proposal involving services, consultation, media services, computer support or physical space beyond the confines of the department or school requires approval of the relevant director.

SOUTH CAROLINA STATE UNIVERSITY
Orangeburg, South Carolina 29117

MEMORANDUM OF UNDERSTANDING

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.

Denise S. Mauldin
Name

6/10/2008
Date

MEMORANDUM OF AGREEMENT
BETWEEN
SOUTH CROLINA STATE UNIVERSITY

AND

DENISE S. GRANT

A. Reporting Requirements

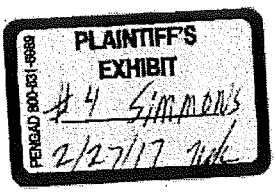
1. Official grade reports must be submitted for all courses taken prior to reimbursement.

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.

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.

B. Receipt of Assistance Requirements

1. For all courses pursued, a satisfactory grade must be obtained in order to receive reimbursement.



2. Any changes or modifications in the Professional Improvement Plan must have the approval of all individuals who originally signed the Plan.

3. Failure to complete the Plan as agreed to without justifiable cause may result in mandatory repayment of all funds received.

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 this agreement and/or mandatory repayment of all funds received.

C. Faculty/Administrator Compliance Statement

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.

Denise S Grant
Signature

Witness

Notary Public

Ruth O Teal
Signature, SCSU Authorized Official

SIGNATURE/APPROVALS*

Faculty/Administrator Date 6/10/2008

I, DENISE S. GRANT, certify that if this proposal is approved, funds will only be used to pursue the specific activities outlined above in keeping with Title III and South Carolina State University policies and procedures. Further, as well as the memorandum of agreement.

Chairperson Date 8/12/2008

I, Stanley N. Ihekweazu, certify that I have reviewed the proposed Professional Improvement Plan for the faculty/administrator named above and upon successfully completion of this Plan, this individual will be able to perform duties in the proposed area of concentration. An additional letter of support may be attached.

Dean Date 8/12/2008

I, Kenneth D. Lewis/, concur with the Plan as proposed and recommended by the chairperson for the faculty/administrator indicated above.

Additional Approval (if necessary) Date 8-13-08

Provost & Vice President for Academic Affairs Date 08-14-08

President Date 8-14-08

Title III Coordinator Date 8/14/08

*NOTE: Approval by chair and dean indicates interest in the unit in the project, availability of requisite internal resources, prior negotiation of cost sharing or released time, and appropriateness of the budget. A proposal involving services, consultation, media services, computer support or physical space beyond the confines of the department or school requires approval of the relevant director.

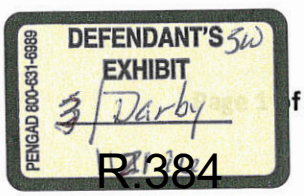
Plaintiff's Trial Exhibit No. 3

Subject: Please Call Me
Date: Thursday, August 23, 2012 10:07:19 AM ET
From: Darby, Debra A.
To: Simmons, Denise R
CC: Echols, Erica L

Good morning Dr. Simmons,
Please give me a call today.

Thanks much and have a good one!!!
Darby

Debra A. Darby
Administrative Coordinator
Office of the Vice President for Academic Affairs
South Carolina State University
Post Office Box 7307
Ko W.G. Donma Administration Bulding, Suite 210
Orangeburg, South Carolina 29117
Phone: 803-536-7180
Fax: 803-533-3775



Plaintiff's Trial Exhibit No. 5

Subject: RE: Fall 2012 Teacher Schedule and Textbook Form
Date: Wednesday, April 11, 2012 10:37:38 AM ET
From: Okafor, Kenneth C
To: Simmons, Denise R

Ms. Simmons,

How are you doing? I hope fine. I saw your email and I wanted to call you but could not reach you on your campus phone (number provided). Regarding your question, it may not be possible to exchange that course for another since the courses were share between you and two other professors (Drs. Eliadorani and Chen) in the program. Unless you can arrange privately with one of them to make the exchange. If you have any further questions, please let me know. Thanks.

From: Simmons, Denise R
Sent: Monday, April 09, 2012 5:58 PM
To: Okafor, Kenneth C
Subject: FW: Fall 2012 Teacher Schedule and Textbook Form

Hi Dr. Okafor. I had a quick question/concern about one course appearing on my fall schedule: plane surveying. I have no experience in the course ... not even the instruments. However, I have loads of experience elsewhere. I do have experience with the codes and contracts course and even engineering econ. I can teach the waste water course. Can you make a change in the schedule?
Regards,
Denise

Denise R. Simmons, PE, PMP, LEED-AP
Assistant Professor, Civil Engineering Technology
Interim Director
Environmental Sciences Field Station
SC State University
PO Box 8143
300 College Street, NE
Orangeburg, SC 29117-0001
803-536-8859
Visit our Website: http://www.cnrt.scsu.edu/fieldstation/index.html
Join us on Facebook: Environmental Sciences Field Station
Follow us on Twitter: @SRESFS

From: "Guinyard, Janice" <jguinyard@scsu.edu>
Date: Mon, 9 Apr 2012 14:43:18 -0400
To: "Denise R. Simmons" <dgrant@scsu.edu>
Subject: RE: Fall 2012 Teacher Schedule and Textbook Form

Good Afternoon Dr. Simmons,

I hope you and your family are doing well these days ☺. I asked Erica about you frequently. Attached is your Fall schedule, please review, print and sign and return to me along with your Textbook Request Forms. If you have any questions regarding your schedule, feel free to contact Dr. Kenneth Okafor (536-

4758) or Dr. Stanley Ihekweazu (536-8860). Looking forward to seeing you in the August.

Thank you,

Janice Guinyard, Administrative Specialist II
Department of Civil and Mechanical Engineering Technology
South Carolina State University
300 College Street
Orangeburg, SC 29117
803 536-7117
803 516-4516-Fax

TEACHER SCHEDULE

Semester Fall 2012 **Date** 4/6/12 **Full-Time** X **Adjunct** _____

Name of Instructor Dr. Denise Simmons **SS#** 9000
Title

Course No.	Title	Time	Day	Room	Credit Hours	Class Hours	Converted Hours	Course Type[1]	Previous Enrollment
CET 311-01	Plane Surveying	3:30pm-5:00pm	TR	LL 101	3	3	3	LEC	
CET 459-01	Senior Project Proposal	6:00pm-6:50pm	MW	HC 108	3	3	3	LEC	
ET 250-01	Technical Communications	9:30am-10:50am	TR	HC 208	3	3	3	LEC	
Subtotal					9	9	9		

Overload ____ **Dual Employment** ___ {NOTE: The University is not obligated to pay overload or dual employment until approved by the Vice President for Finance and Management Information Systems.}

Subtotal

Release Time: Credit Hours/Percentage: 25% If external funding, include grant number _____

Responsibilities: **Project Director – Environmental Sciences Field Station**

Total:

Reviewed by:

Instructor Date

Approved by:

Chairperson Date

Dean Date

Dean, School of Graduate Studies (If graduate courses) Date

Associate Vice President Date

Office Location HC 201B

Office Phone 64631 e-mail: dchen@scsu.edu

Office Hours

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday

NOTE: ALL SCSU courses taught by a faculty member, regardless of the teaching methodology, location, or funding source, must be included on this form.

1 One of these Course Types: PR- Practicum, LB- Lab, LC- Lecture, AP– Applied Performance, D- Dissertation, I- Internship, PT– Practice Teaching, CL- Clinical, S– Seminar, TH- Thesis

Plaintiff's Trial Exhibit No. 7

PO Box 8143
300 College Street, NE
Orangeburg, SC 29117-0001
803-536-8859
Visit our Website: http://www.cnrt.scsu.edu/fieldstation/index.html
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Follow us on Twitter: @SRESFS

From: <Simmons>, "Denise R. Simmons" <dgrant@scsu.edu>
Date: Thursday, August 23, 2012 11:12 AM
To: "Okafor, Kenneth C" <kokafor@scsu.edu>
Subject: Re: From Dr. Denise R Simmons

Hi Dr. Okafor. I left you a phone message. My cell phone number has not changed (same as is on record with the department): 803-606-8900. Ms Darby and I spoke this morning. She has a time related issue that needs to be resolved today and she needs to hear from you. We need to speak regarding employment.

Regards,
Denise

Denise R. Simmons, PhD, PE, PMP, LEED-AP
Assistant Professor, Civil Engineering Technology
Interim Director
Environmental Sciences Field Station
SC State University
PO Box 8143
300 College Street, NE
Orangeburg, SC 29117-0001
803-536-8859
Visit our Website: http://www.cnrt.scsu.edu/fieldstation/index.html
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Follow us on Twitter: @SRESFS

From: <Okafor>, Kenneth C <kokafor@scsu.edu>
Date: Friday, August 17, 2012 1:52 PM
To: "Denise R. Simmons" <dgrant@scsu.edu>
Subject: RE: From Dr. Denise R Simmons

Dr. Simmons,

Thanks for your email. I hope your Summer went well. Based on your email, there is no viable number to call you at, since the number there is a school number and you have not been here for a while. I had also contacted you for our Semester Departmental meeting. Or did you not get the email? If possible, can call me at 803-474-3634 so we can discuss. By the way, a lot of people have not yet received their "contracts" so that should not discourage you. Thanks.

From: Simmons, Denise R
Sent: Thursday, August 16, 2012 4:53 PM
To: Okafor, Kenneth C
Subject: From Dr. Denise R Simmons

Dr. Okafor:

I hope that you had a productive summer. 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. Please call me if you'd like to discuss the matter further.

Regards,
Denise

Denise R. Simmons, PhD, PE, PMP, LEED-AP
Assistant Professor, Civil Engineering Technology
Interim Director
Environmental Sciences Field Station
SC State University
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Plaintiff's Trial Exhibit No. 8

Subject: Re: RETURN TO SCSU
Date: Thursday, August 23, 2012 9:05:40 PM ET
From: Simmons, Denise R
To: Ihekweazu, Stanley N.
CC: Okafor, Kenneth C, Guinyard, Janice
Priority: High

Hello Dr Stanley:
I believed you have not been accurately informed. I have received so far one email last week from Dr Okafor and phone calls today from Dr Okafor. I have responded to both. Debra Darby has also called leaving a message yesterday and we spoke early AM today. Please let me know if I have missed something else.

Regards,
Denise

Denise R. Simmons, PhD, PE, PMP, LEED-AP
Assistant Professor, Civil Engineering Technology
Interim Director
Environmental Sciences Field Station
SC State University
PO Box 8143
300 College Street, NE
Orangeburg, SC 29117-0001
803-536-8859
Visit our Website: http://www.cnrt.scsu.edu/fieldstation/index.html
Join us on Facebook: Environmental Sciences Field Station
Follow us on Twitter: @SRESFS

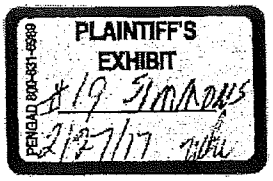
From: <Ihekweazu>, "Stanley N." <sihekwea@scsu.edu>
Date: Thursday, August 23, 2012 1:36 PM
To: "Denise R. Simmons" <dgrant@scsu.edu>
Cc: "Okafor, Kenneth C" <kokafor@scsu.edu>, "Guinyard, Janice" <jguinyard@scsu.edu>
Subject: RETURN TO SCSU

Hello Denise:

I have been informed that you have not reported to SC State since the beginning of the semester. According to our teaching schedule, you were assigned three courses. I need you to return to SC State while the University addresses your concerns about your letter of employment. Any delay in your returning to classes will not bode well with our students. Please do not forget that you owe an obligation to the University and we need your services.

Thank you.

Stanley N. Ihekweazu



Plaintiff's Trial Exhibit No. 9

South Carolina State University
COLLEGE OF SCIENCE, MATHEMATICS AND ENGINEERING TECHNOLOGY
300 COLLEGE STREET, N.E.
ORANGEBURG, SOUTH CAROLINA 29117
(803) 536-7117/8392
(803) 516-4516 (FAX)

DEPARTMENT OF
CIVIL AND MECHANICAL
ENGINEERING TECHNOLOGY
AND
NUCLEAR ENGINEERING

June 18, 2008

Dr. Rita Teal, Vice President
Academic Affairs
South Carolina State University
Orangeburg, SC 29117

RE: Study Leave for Mrs. Denise S. Grant

Dear Dr. Teal:

I am writing to indicate that the Department of Civil and Mechanical Engineering Technology fully supports Ms. Grant's application for study leave to obtain her PhD in Civil Engineering with financial support from the University up to 80% of her current salary.

64% LL.

Mrs. Grant has made significant contribution to the Department since joining us a few years ago. I believe that approval of her application will enable her to concentrate on achieving this very important milestone in her career.

While the Department is in full support of Mrs. Grant's application, I am also requesting that the University provide additional funding to enable the Department to hire an adjunct faculty to teach Mrs. Grant's scheduled courses for Fall 2008 and beyond.

Sincerely,

Stanley N. Ihekweazu, Chairman
Civil and Mechanical Engineering Technology
and Nuclear Engineering

RECEIVED
JUL 28 2008
Office of Faculty and Programs

Plaintiff’s Trial Exhibit No. 10

SOUTH CAROLINA STATE UNIVERSITY

Personnel Action Request Form

New Hire ☐	Promotion ☐	Reclassification ☐	Performance ☐	Special Pay ☐
Transfer ☐	Additional Duties ☐	Temporary Salary Adjustment ☒	Retention ☐	Salary Decrease ☐

LAST NAME	Grant	FIRST NAME	Denise	MI	
EMPLOYEE ID	248-47-3833	DEPARTMENT	Civil and Mechanical Engineering		
POSITION TITLE	Assistant Professor of Engineering Technology			POSITION NUMBER	
CLASS CODE		SLOT		PAY BAND	
INDEX NUMBER					
SALARY MINIMUM		SALARY MIDPOINT		SALARY MAXIMUM	
CURRENT SALARY		REQUESTED SALARY			
% REQUESTED SALARY ABOVE MINIMUM		% REQUESTED SALARY ABOVE CURRENT SALARY			
STATE SERVICE		SCSU SERVICE		JOB SERVICE	

JUSTIFICATION *(attach additional sheet if necessary)*

Ms. Grant will be on sabbatical leave for the 08-09 academic year with a temporary salary ~~adjustment~~ of $44,575. under the Faculty Development Program partially funded by Title III in 2010-11 (Her base salary is $55,719.00)

The salary will be split between two accounts:

5730 – Civil and Mechanical Eng.	$33,432 (or 75% of revised salary)
5840 – Field Station	$11,143 (or 25% of revised salary)
Total Salary	$44,575

ADMINISTRATIVE APPROVAL SIGNATURES

DEPARTMENT HEAD	George Luke	DATE	9-16-08
VICE PRESIDENT/DIVISION HEAD	Rita J. Teal	DATE	09/17/08
PRESIDENT	Dwight E. Cooper	DATE	9/23/08

BUDGET OFFICE ACTION

BUDGET ANALYST SIGNATURE		DATE	
BUDGET DIRECTOR SIGNATURE		DATE	
FORWARDED TO HUMAN RESOURCES		DATE	

OFFICE OF HUMAN RESOURCE MANAGEMENT ACTION

SCSU AVERAGE SALARY FOR CLASS		STATE AVERAGE FOR CLASS	
SCSU AVERAGE JOB SERVICE		STATE AVERAGE JOB SERVICE	
SCSU AVERAGE STATE SERVICE		STATE AVERAGE STATE SERVICE	

COMMENTS

APPROVAL: _____ APPROVED SALARY: EFFECTIVE DATE:

SCSU HUMAN RESOURCES SIGNATURE		DATE	
STATE HUMAN RESOURCES SIGNATURE		DATE	

Form P-4 (Rev. 07/06)

SCSU v Simmons / SC State 0224

Plaintiff's Trial Exhibit No. 11

DENISE R. SIMMONS, PhD, PE, PMP, LEED-AP

EDUCATION:

Ph.D. Civil Engineering, 2012 – Clemson University, Clemson, SC
Dissertation title: First Generation College Students In Engineering: A Grounded Theory Study Of Family Influence On Academic Decision Making
Graduate certificate in engineering education, 2010 – Clemson University, Clemson, SC
PhD-level coursework in Environmental Engineering – 24 hours; University of South Carolina, Columbia, SC (2005-2007). *Focus: sustainability in the built environment*
M.S. Civil Engineering, 1995 – Clemson University, Clemson, SC
Thesis title: Development of Engineering & Construction Project Management Guidelines
B.S. Civil Engineering, 1990 – Clemson University, Clemson, SC

PROFESSIONAL EXPERIENCE:

2012-Present:	Postdoctoral Associate, Virginia Tech, Department of Engineering Education, NSF Collaborative Proposal: Developing Engineer of 2020 Traits: How do Non-curricular Activities Impact African American Students?
2008-2012:	Graduate Research Assistant, Clemson University, Department of Engineering and Science Education
2007-2012:	Director, Savannah River Environmental Sciences Field Station, SC State University, Orangeburg, SC
2004-2008:	Assistant Professor, Civil Engineering Technology, SC State,
2004-2005:	Academic Program Coordinator for Civil Engineering Technology, SC State
2003-2008:	Faculty Practitioner, University of Phoenix Virtual Campus
2003-2004:	Sr. Functional Consultant, Indus International, Columbia, SC
2001-2002:	Consultant & Trainer, Project Management Consultants, LLC, Clemson, SC
2001-2001:	Adjunct Professor, Department of Civil Engineering Tech, Midlands Technical College, Columbia, SC
2000-2001:	Energy Engineer, Memphis Light, Gas & Water, Memphis, TN
1997- 1999:	Adjunct Professor, Management Institute Voorhees College, Denmark, SC
1996-2000:	Project Engineer, SCANA Corp, Columbia, SC
1994-1995:	Graduate Researcher, developed Project Management Plan for Georgia Pacific
1991-1994:	Assoc Design Civil Engineer, Power Generation Group, Charlotte, NC

LEADERSHIP:

Engineering Outreach

The Savannah River Environmental Sciences Field Station (SRESFS) is managed by South Carolina State University and is aimed at recruiting and retaining underrepresented groups in environmental science and engineering and in natural resources-related fields of study. The SRESFS, a consortium of 29 colleges and universities, two federal agencies and one private corporation, is the first and only field station in the country devoted entirely to providing career, research and educational experiences in environmental science, natural resources and engineering to underrepresented groups in STEM majors.

As the SRESFS director and chairperson of the advisory board (2007-2012), I was responsible for leading and collaborating with the 35 member advisory board; developing program controls and procedures; hiring, training and managing of full time and temporary staff, and adjunct faculty; developing and achieving annual objectives; recruiting and selecting students to participate in funded programs; tracking of former participates; procuring of all goods and services; communicating with all internal and external stakeholders; preparing and distributing all reports; and assessment of all funded programs. SCSU recognized my achievements as director of SRESFS by awarding me the Dean's Award for Outstanding Service (2009) and the She-Ro Award (2010), a university level recognition.

Partnership on state and national K-12 engineering efforts

In 2005, I directed the thirteenth annual Summer Transportation Institute (STI) that is aimed at work force development by increasing both the number and diversity of students pursuing transportation-related fields of study and careers. STI started at South Carolina State University and is now a national program with nearly 50 host sites across the United States. South Carolina State sponsored a 4-week residential program for sixteen rising 10th and 11th graders. Each week focused on a different mode of transportation and included presenters, activities, field trips and projects related to the mode. Besides highlighting careers, each week also focused on issues such as safety, use of technology, discussion of innovations, and forecasting of employment needs.

In 2011, I worked with a team of researchers to write a national high school STEM research and outreach proposal entitled "CYPRESS: Combining Youth, Passion, and Resources for Environmental Science Studies". The proposal was funded. I supported the project by providing input on curriculum, assessment, performance measures, employee selection, report development and program management.

SCHOLARSHIP

Publications

Refereed Journal Articles:

Martin, J. M., **Simmons, D. R.**, & Yu, S. L. (accepted for publication: April 2013). The Role of Social Capital in the Experiences of Hispanic Women Majoring in Engineering. Journal of Engineering Education.

Martin, J. M., **Simmons, D. R.**, & Yu, S. L. (under review). Family Roles in Engineering Students' Academic and Career Choices: Does Parental Education Attainment Matter?

Simmons, D. R., & Martin, J. M. (in preparation). Kin and fictive kin influence on academic decision-making of engineering students

Refereed Conference Papers:

Simmons, D. R. and Trenor, J. M. 2011. Implications of Black Greek Letter Membership on the Development of the Engineer of 2020. Proceedings of the 41st Annual FIE Conference, Rapid City, SD.

Simmons, D. R. 2011. Articulations of a Novice Qualitative Researcher. The Seventh International Congress of Qualitative Inquiry.

Trenor, J. M., **Simmons, D. R.**, & Archer, E. 2010. The roles of African American Greek organizations in engineering students' educational experiences in a

Predominantly White Institution. Proceedings of the 40th Annual FIE Conference, Washington, DC.

Grant, D. S. and Trenor, J. M. (2010, June). Use of the Critical Incident Technique for Qualitative Research in Engineering Education: An Example from a Grounded Theory Study. American Society for Engineering Education, 2010. Louisville, KY.

Trenor, J.M. and **Grant, Denise S.** (2009) Work in progress—A research-based tool kit for communicating unique messages about engineering to first generation college students. Proceedings of the 2009 Frontiers in Education Conference, San Antonio, TX.

Trenor, J. M., Yu, S. L., **Grant, D. S.**, and Hibah, S. (2009, June). *Participation in a Research Experience for Teachers Program: Impact on Perceptions and Efficacy to Teach Engineering.* American Society for Engineering Education, 2009. Austin, TX: 16.

Klotz, L. and **Grant, D.S.** (2009, April). *A Balanced View of Sustainability in Civil Engineering and Construction.* Symposium conducted at the 2009 Construction Research Congress of the American Society of Civil Engineers, Seattle, Washington.

Grant, Denise and Haselbach, Liv. (2007, May). *Building Green: A Case Study at The University of South Carolina.* Symposium conducted at the 2007 Construction Research Congress of the American Society of Civil Engineers, Grand Bahama Island, Bahamas.

Grant, Denise and Haselbach, Liv. (2006, May). *Sustainable Construction at the University of South Carolina for the USC Research Foundation.* USCRF Award 15520-KA06.

Book Chapter:

Bowser, G., Roberts, N., **Simmons, D.**, & Perales, K. (2012). The color of climate: Ecology, Environment, Climate Change, and Women of Color—Exploring Environmental Leadership From the Perspective of Women of Color in Science, in D. Rigling Gallagher (Ed). *Environmental Leadership.* Thousand Oaks: Sage.

Presentations:

- 2012 Annual Conference of the American Society for Engineering Education. Poster presentation: *Graduate Students: Influential Agents of Social Capital for Engineering Undergraduate Researchers.* San Antonio, TX.

Reviewer, Invited Speaker Or Panelist:

- Invited speaker, October 2011, Broader Impacts Workshop presented to Global Women Scholars Network in Sustainability
- Invited speaker, October 2011, "Building Tomorrow's Talent in Science and Engineering" presented at UNC-Charlotte
- Invited speaker, April 2011, Strategies to broaden participation in STEM. Communicating Science: Tools and Solutions, La Selva Biological Station in Costa Rica. Recruiting & Retaining Underrepresented Minorities in Ecology
- Workshop presenter, Leading Transformation through Sustaining and Enhancing Effective Team Performance, WEPAN 2011 National Conference, Seattle, WA

- Workshop presenter, Planning Strategically: How to Intentional Cultivate Tomorrow's Talent. WEPAN/NAMEPA National Conference. April 2010, Baltimore, MD
- Reviewer, ASEE National Conference Paper 2009
- Invited Speaker, January 2009. Experiences with PEER: Perspectives from my undergraduate years. Best Practices in Black Student Achievement VIII, Clemson, SC
- Reviewer, ASEE Frontiers in Education, April 2009
- Moderator, April 2009 ASCE- 2009 CRC, Seattle, WA
- Reviewer, Environmental Engineering: Fundamentals, Sustainability, Design, 1st edition, by Mihelcic et al, Wiley Publishing, June 2009
- Moderator, October 2009 Frontiers in Education Conference San Antonio, TX
- Invited speaker, October 2008, Department of Energy Office of Environmental Management HBCU Technology Day at Spelman, Atlanta, GA
- Reviewer, ASCE Construction Research Congress (CRC) 2007

Engineering Education Professional Development

- 2012 Graduate Engineering Education Consortium for Students (GEECS) Symposium Fellow

  GEECS is an annual event, where accepted participants attend a research-based symposium and the National Science Foundation (NSF) Engineering Education Awardees Conference. The multi-day event provides an opportunity for graduate students in the field of engineering education research to share current work-in-progress, get feedback on work, and collaborate with other graduate students. Benefits of partnering with the NSF Engineering Education Awardees Conference for GEECS include the opportunity to learn about and network within the field of engineering education with experts.
- 2010 Virginia Tech Future Faculty Development Program Participant

  The Virginia Tech Future Faculty Development Program is an exciting and rewarding two-day event for a small group of doctoral students and post doctoral scholars interested in pursuing academic careers. The program brings together doctoral candidates and post doctoral scholars to Virginia Tech for an all expense paid workshop. As part of the experience, participants are hosted by a Virginia Tech department to tour research facilities, meet with current faculty to gain a greater awareness of research and teaching opportunities, and discuss their career prospects and academic work. The program is part of comprehensive strategic faculty recruitment at Virginia Tech.
- March 2009 NSF Workshop *Creating Engineering Education Opportunities: Why & How?* Arlington, VA
- October 2008 Frontiers in Education Conference Saratoga Springs, NY
- October 2007 ABET Workshops: *Faculty Workshop on Assessing Program Outcomes & ABET Annual Meeting* Incline Village, NV
- March 2006 NSF Workshop *Advancement and Retention of Underrepresented and Minority Engineering Educators*, Arlington, VA

Funding

As the SRESFS director, I was responsible for writing programmatic-focused grants to support operations, my summer salary and travel. From 2007-2012, I raised $2,287,793 in support (not including non-federal cash matching support and in-kind services).

1. Department of Energy/Environmental Management in cooperation with the US Forestry Service ($981,000, multi-year award: 2008–2011; $120,000 in 2012)
2. Wal-Mart Foundation State Giving Program ($150,000, 2009)
3. USDA/Natural Resources Conservation Service, South Carolina Program ($125,000 in 2009 #69-4639-9-9022; $74,999 in 2010; $74,999 in 2011, #69-4639-11-0016; $74,999 in 2012)
4. USDA Capacity Building Grant (Preparing for Readiness in the Environmental Professions, $150,000 in 2010). U. S. Department of Agriculture National Institute of Food and Agriculture (NIFA) Award Number 2010-38821-21509
5. Department of Energy/Environmental Management ($536,796, multi-year award: 2010–2012). DOE Award # DE-EM0000594

As a doctoral student, I co-authored funded NSF proposals supporting engineering education research.

ENGINEERING ACADEMIC ACTIVITIES:

Academic advising

From 2004 to 2008, I was employed as a fulltime, tenure-track, teaching faculty at South Carolina State University, where I advised at least 22 students each semester.

Classroom instruction

Classes Taught at SC State University:

- ET 250: Technical Communications
- ET 255: Engineering Economics
- CET 412: Construction Codes & Contracts
- CET 415: Fluid Mechanics
- CET 459: Senior Project Proposal
- CET 460: Senior Project
- TRP 530: Urban Transportation Planning
- TRP 640: Transportation and Land Use Planning

Instructional Innovations at South Carolina State University:

- Incorporated formal project management concepts into ET 250, CET 459 & 460 and TRP 640 courses as a way to foster leadership, management and communication skills, ingenuity, efficiency and cost savings.
- Developed and implemented several rubrics into ET 250 course so that students were aware of the purpose of the assignments that they were being asked to complete and as a way to provide specific feedback to each student.
- Used industry professionals, many of which were alumni of the institution, in the senior project course (CET 460) as advisors to the students throughout the course as a way to incorporate another perspective.
- Introduced diagnostic tests in ET 255 and CET 415 to measure student math readiness and address early any deficiencies in preparation. I met with students determined to be at risk in their skills to discuss the results of the diagnostic test, encouraged them, informed them of on campus help available and referred them to the student success center.

Online and adjunct instruction

UNIVERSITY OF PHOENIX Online Learning & Columbia Campus
Faculty Practitioner January 2003 – 2008

- Instruct junior and senior level project management and operations courses.

MIDLANDS TECHNICAL COLLEGE Columbia, SC
Adjunct Professor January 2002 – May 2002

- Instruct senior level environmental engineering course. Course covers a study of the sources, treatment, regulations, collection and distribution of water and wastewater; water and sewer pipe hydraulics; water and groundwater quality; estimation of runoff; and load design of buried pipes.

VOORHEES COLLEGE MANAGEMENT INSTITUTE Denmark, SC
Adjunct Professor Fall 1997 – Spring 1999

- Facilitate courses in degree program for adult students pursuing a bachelor of arts degree in Organizational Behavior
- Courses include: Group & Organizational Behavior, Career and Life Assessment, and Business Ethics

Teaching Professional Development

- 2009 Clemson University Office of Teaching Effectiveness and Innovation (OTEI) Training:
  - Workshop: Academic Writing: The Process of Crafting Scholarly Prose
  - Workshop: Contract Grading: Melding Learning with Assessment
  - Workshop: Learning Styles: Multiple Models, Multiple Teaching Methods
  - Workshop: Maximizing Student Learning and Participation in Discussions
  - Workshop: Writing Objective Test Items That Assess Thinking Skills
- October 2007 ABET Workshops: *Faculty Workshop on Assessing Program Outcomes & ABET Annual Meeting* Incline Village, NV
- October 2006 Southeastern Alliance for Grad. Education and the Professoriate (SEAGEP) Conference, Clemson, SC
- October 2005 – 2011, Institute on Teaching and Mentoring (various cities)

College and university committees

(1) SC State (University-level) and UTC Scholarship Selection Committee
(2) SACS 2010 Physical Resources Committee, Co-Chair (University-level)
(3) ABET Continuous Improvement Committee (College-level)
(4) Convocation Committee (University-level)
(5) Clemson-SCSU Civil Engineering Joint Program (Department-level)
(6) Professional Land Surveying – New Program Development Committee (Department-level)
(7) Energy & Environment Program – New Development Committee (College-level)
(8) Faculty Research Recognition Committee (University-level)

OTHER:

Professional registrations: Registered Professional Engineer (PE) (TN #106991), Project Management Professional (PMP) (383095), Leadership in Energy & Environmental Design Accredited Professional (LEED-AP)

Membership in professional & honor societies

- American Society of Engineering Education
- Women in Engineering ProActive Network
- American Association of Blacks in Energy
- Project Management Institute
- American Society of Civil Engineers
- Chi Epsilon, Civil Engineering Honor Society

Fellowships & awards

- 2007 Sloan Fellow
- 2008-2011 South East Alliance for Graduate Education and the Professoriate (SEAGEP) Fellow
- 2009 Dean's Award for Outstanding Service, SC State University
- 2009 Award Recognizing Dedicated Service to NSF/HBCU-UP/RISC Summer Research Internship Program
- 2010 SC State She-Ro award in recognition for leadership of the SRESFS
- 2011 NSF Study Abroad Fellowship to study the energy industry in Santiago, Chile

Plaintiff's Trial Exhibit No. 12

VirginiaTech
College of Architecture
and Urban Studies

Office of the Dean
202 Cowgill Hall (0205)
Blacksburg, Virginia 24061
540/231-6416 Fax: 540/231-6332
E-mail: davisa@vt.edu
www.caus.vt.edu

March 14, 2013

Denise R. Simmons
3409 Northshore Road
Columbia, SC 29206

Dear Dr. Simmons;

I am pleased to offer you employment in the Myers Lawson School of Construction in the College of Architecture and Urban Studies at Virginia Tech. Your rank and working title is Assistant Professor, position number 113371, with an effective date of August 10, 2013. Continuation of this appointment is subject to the availability of funds, the need for services and satisfactory performance. University policy requires that a conviction check be conducted for all non-student hires. You completed this requirement on August 17, 2012 and do not need to complete another form at this time. A copy of your job description is attached. Please refer to the attached "Terms of Faculty Offer" for additional details of the contract. If you have any questions about your responsibilities, you should contact Dr. Brian Kleiner, School Director.

This is a full-time, regular, academic-year, tenure-track appointment and carries a salary of $82,500. It will be paid in semi-monthly payments on the first and sixteenth of the month. Employees are required to have their pay deposited electronically in their bank account and this can be accomplished by visiting http://www.bursar.vt.edu/payroll. A variety of benefits are included in this offer. Please contact Human Resources directly by telephone at 540-231-9331 or by referring to their website at www.hr.vt.edu for a clarification of benefits and orientation.

The Southern Association of Colleges and Schools accreditation process requires the University to employ teaching faculty that have at least the minimal academic credentials for the level they are teaching. Generally, the earned doctorate or terminal degree in the field is required. Please provide an official transcript from the institution where you earned your highest degree. Since it may take some time for your home institution to provide this documentation, we recommend that you make the request as soon as possible. Your university should send these directly to Christy Porterfield at the address above.

The Hokie Passport ID Card is the official identification card for Virginia Tech and used to access meal plans, buildings, the Hokie Passport Account; and serve as a bus pass and proof of identification for classrooms and university functions. Obtain the card at Hokie Passport Services located at 100 Student Services Building on the Virginia Tech Campus. Questions and comments can be emailed to hokiepassport@vt.edu or call 540-231-5121.

If you wish to park on campus, you must register your vehicle with the Virginia Tech Parking Services Department. A fee is required to park on campus. Information can be found at www.facilities.vt.edu/tcs/parking. If you have questions, please contact the Parking Services Department at (540) 231-3200.

(continued)

We encourage all employees to subscribe to Virginia Tech's Emergency Notification System in the event of a campus emergency. The VT Alert System uses several information delivery methods to warn employees, students, and visitors of important communications from a variety of sources. Please visit the VT Alert website at http://www.alerts.vt.edu for more information and to subscribe.

As a salaried employee of Virginia Tech, you will be a member of a Retirement program and other benefits. In order to be paid, you must attend a full day orientation/benefits enrollment session that will include a description of your benefits and information concerning the university facilities, policies and procedures, and you will sign the necessary forms to process your pay. You will be contacted as soon as possible after your employment effective date to schedule your orientation.

<u>You Will Be Required To Bring To Orientation</u>:

1. A copy of your social security card
2. A copy of your visa (if applicable)
3. Birth dates of your beneficiaries
4. Spouse's social security number
5. Spouse's date of birth
6. Social security number and date of birth of legal dependent(s)
7. A blank or canceled check; unless you already have your pay deposited electronically from Virginia Tech
8. Your vehicle registration, license plate number, make and model (if you want a parking permit)

The terms and conditions of faculty employment are found in the Faculty Handbook, which is subject to change at any time by the Board of Visitors. The Handbook is available at the following website: http://www.provost.vt.edu. All employees are expected to ensure that business activities are conducted properly and in compliance with various federal and state laws. A list of all policies in effect is located on the university's website at http://www.policies.vt.edu. Many important procedures are located on the websites of the Controller's Office, Purchasing Office, Office of Sponsored Programs, and Human Resources Office and will be updated as policies change. Please refer to these for issues not addressed in the Faculty Handbook.

If the terms of this offer are agreeable, please indicate your acceptance by signing and returning this document and enclosed paperwork as soon as possible to Christy Porterfield at the above address. If you have questions regarding hiring paperwork, contact Christy at 540-231-9936 or christyp@vt.edu.

Thank you for the commitment of your time and energy to the School and we look forward to working with you.

Sincerely,

A. J. Davis, FAIA, LEED AP
Reynolds Metals Professor and
Dean

I accept the terms of this agreement as stated above.

Signature

3/25/2013
Date

cc: Brian Kleiner, Marty Simpson, Christy Porterfield

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST CIRCUIT
		CA# 2015-CP-38 - 0553
South Carolina State University,	)	
	)	
Plaintiff	)	
vs.	)	**AFFIDAVIT**
	)	
Denise Simmons,	)	
	)	
Defendant,	)	
	)	

I do hereby state the following, under oath, and to the best of my independent knowledge and recollection:

1. My name is Denise Rutledge Simmons. I reside in the State of Virginia. I am the Defendant in the action above.

2. I obtained a bachelors and masters degrees in engineering and worked in private industry for many years prior to taking a position as an instructor at South Carolina State University (SCSU) in or around 2005.

3. In 2008, I decided to take steps to earn my terminal degree, a PhD in engineering. I spoke with my then Dean and others at SCSU and I was offered a Title III grant to pursue this degree at Clemson University.

4. I submitted and signed several documents for this purpose including: a. A Clemson nomination form b. summary of my goals, c. Memorandum of Understanding and d. Memorandum of Agreement. (Attached) There were other documents associated with this process.

5. Prior to leaving for Clemson, it was understood by SCSU that I would continue in the employ of South Carolina State University as the Director of the Environmental Sciences Field Station in Aiken. Some of my support package – from my understanding, came from Field Station Grants. I also served on an accreditation committee during this period (late 2008 through early 2012) I was nominated for an award (University level) while away.

6. I took the courses designated in the package and worked hard both on the course work for my doctorate and my continued Field Station position with SCSU. The Field Station was pretty much full time in the summers and I retained an apartment in Aiken during that time. There were also duties during the academic year including Grant work and

recruiting and other items which did take some time.

7. I continued with my duties for SCSU and my doctorate program through the years 2008 (Fall) through Spring of 2012) I earned my PhD in late Spring of 2012. I continued by position as SCSU Field Study Director that summer. (e. Employment data request form)

8. In or about late November of 2011, I informed SCSU (academic affairs was the Department in which this process was conducted) that I would be graduating the following Spring. That Spring (2012) I initiated the process of having my transcripts sent to SCSU from Clemson.

9. I recall in or about February of 2012, I did see news stories about SCSU which were concerning to me as an employee and a citizen. Also, during this time I did speak with a friend who worked with SCSU in administration and she relayed some information to me that was also quite concerning. However, I felt that the University and the State would likely work it out and continued with my goal to return as a professor of engineering at SCSU. I had maintained my long time home in the Columbia area and would live there again when I returned to SCSU.

10. I did receive an e-mail in April of 2012 (f. e-mail) indicating that I was on the initial teaching schedule for Fall 2012. I felt better at that time that SCSU would be able and in a financial position to contract with me as a professor.

11. I completed my PhD in May of 2012. Subsequent to that, I continued working as the Field Study Director and was in Aiken most of the time. My position was known to my assistant (who worked in the Department) and most every other professor in the SCSU Department. (g. memorandum of July 17) I waited in June and in July for a contract.

12. During the time I was an instructor with SCSU I had always received an employment contract or at least a draft or letter by June or July prior to the upcoming academic year and it was sent to me by, at the latest early August, and I would then sign it. I was told by more than one person in the Academic Affairs Department, including Ms. Darby to my recollection, when I started in or about 2005 that if I did not get a written and signed employment contract the University was under no obligation to hire or pay me. (h. prior faculty agreements)

13. During the early Summer of 2012 I worked for SCSU in Aiken. I continued with the process of having my transcripts sent to SCSU from Clemson demonstrating the PhD was obtained. (i. E-mails related to transcripts) There was a new Department head, Dr. Okafor, who was responsible, from my understanding, to contact me and negotiate my contract. I did not hear from him in June or July. Also, my grandmother was very ill during this time and I was required to go to Charleston to be with her and take care of things related to her condition with the Family. However, I always had my cell phone and all faculty and academic affairs had this number. I was not at the SCSU campus as the Summer Field operation was in Aiken and required travel. A call to my university

office would go un-answered.

14. By late July - early August, I was concerned that Dr. Okafor had not contacted me and discussed and negotiated a contract. I had been sent no letter of re-appointment. The contract would have my salary, benefits, tenure track status and term of employment. I did assume, based on the earlier news releases which were continuing from my recollection during this time, that the University may be cutting faculty, or did not have funds in place. To my recollection, in late July or early August (2012), because I needed a job I told my faculty adviser and mentor at Clemson, Julie Martin, that I was worried about a job, and SCSU may not be able or going to employ me. She looked for me and was able to find a non permanent job ("post Doc") with a program shared by Clemson and Virginia Tech. We (Dr. Martin and I) discussed that I still hoped a contract from SCSU would come but in early August I tentatively accepted this position in case a contract did not come from SCSU. It is well known in academia that if you don't get a contract by early August, you are not going to likely get one that academic year.

15. By mid August, although I was very busy with the family issues with my grandmother who passed shortly after that, I was becoming sure I would not get a contract. During discovery I saw a document which was a multiperson e-mail on the 13th (August) about a faculty meeting. It appears that I was on that e-mail but I can not recall getting it and I certainly had no letter of appointment or contract. I had indicated to Julie Martin on the 13th or 14th of August that I may be available to be hired for the post doc position with the Virginia Tech - Clemson project. It was less money than I would make by far as a professor and taking it would, in essence, disallow a year of teaching toward potential tenure at any College or University. However, it included medical benefits which was critically important to me since I underwent major surgery in November 2011 and anticipated the need for follow up care. I could not afford to allow a lapse or lose my health insurance coverage.

16. On the 16th of August, I e-mailed Dr. Okafor and relayed the fact that I had been required to take another position, that I was distressed about the situation and had not received a contract, letter or even a call at that date. I recall getting a response that I should not worry about a contract and I had no number to reach me which is, of course, not the case. Only a few days from the start of classes, I had no other choice but to obtain a position. (j. Aug. 16 e-mail) However, Julie Martin and I had discussed that the final date to formally accept the post doc position was August 23rd. If I had gotten a letter of contract or a contract itself, I could have still declined the informal acceptance and gone to SCSU.

17. On the 23rd of August, (classes had started) - that morning - I received a call (left on voice mail) and an e-mail from Debra Darby. (k. Aug 23rd Darby e-mail) She is with Academic Affairs and is the last in the process of hiring and contracting with faculty from what administrators have told me at SCSU. I did call her that day - I recall that morning. (Aug. 23rd.)

18. Debra Darby asked me point blank if I had gotten a contract from Dr. Okafor. I told her I

had not. She (Darby) said that was supposed to be the process and Dr. Okafor was to negotiate it months ago and the contract should have been offered early summer. She also told me that she had been leaving messages for Dr. Okafor and he had not yet returned them. I told her - other than a couple of e-mails - he had not contacted me.

19. Later that morning, from my recollection, I called Dr. Okafor and left a message to call. I also e-mailed Dr. Okafor (l. Aug 23rd Okafor e-mail) I left my number I had - had for many years prior and which was on record with the University.

20. Dr. Okafor did call me that day. He did not offer a contract or discuss salary or anything of substance during the call. I asked him why he had not called or contacted me about the contract and he mentioned again he did not have a good number. I told him to send me a contract and I would try to get out of my current obligation. He was very curt saying I had not been in contact with him; he seemed to not want me there and he said nothing about a contract. He said I should drive down to SCSU and meet face to face. He also said he did not know I was returning to SCSU that semester. I found this odd since he had sent me a teaching schedule in the spring. I was given no information or an obligation from SCSU. That day, 23rd, I had to either accept the post doc offer or tell them I would not be able to formally accept. This would have burned some bridges possibly, but if I would have been sent a reasonable contract or specific offer I would have done so and returned to SCSU.

21. I formally signed the post doc offer on the 23rd (m. Va. Tech. signed faculty agreement) That afternoon (although I did not get to it until evening) Dr. Ihekweazu (Dean), for the first time in months, contacted me by e-mail. (n. Ihekweazu e-mail Aug 23 e-mails.) I had already signed the VA tech agreement on the last possible day and had told Ms. Darby that fact. Dr. Ihekweazu had clearly been misinformed as to the events of the past months and I responded when I got it. (n. 23rd E-mails)

22. I did get messages from Okafor either by e-mail into September. Although it would have been difficult, if I would have been given a specific offer or contract I would have made all attempts to get back to SCSU either as soon as possible that semester or the next and broken the post doc agreement.

23. I received nothing from that point forward. No offers, no letters, no contracts for the Spring or the next academic year. In or about February or March of 2013, to my recollection, I received a letter or message from an attorney stating I breached the agreement. I was never given an appointment letter, an employment letter or contract. I was never told what my term would be, my status, my salary or benefits. South Carolina State University did not hire or re-appoint me as faculty for the academic year of 2012-2013. I learned from a document that I had been terminated in my position as Field Director.

24. From the beginning, I had every intention of returning to SCSU. I left industry with the specific intention to eventually teach at SCSU. I initiated the process of returning in late

2011. I had transcripts forwarded and followed all the procedures. 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.

25. South Carolina State University, during the time I was completing my terminal degree at Clemson, forward to me tuition funds and a stipend. This was part of the Title III grant that we requested. South Carolina State University paid me for the continuing work I did in the summers and, part time during the academic year, for being the Director of the Environmental Sciences Field Station in Aiken. The amount requested by SCSU (Plaintiff) in the complaint and motion appears to include actual wages for my employment during the approximately four years at Clemson. It is not a correct measure of expended funds.

Denise Simmons, PhD.

Sworn to and subscribed
before me this 28 day of
April, 2017

Notary Public for
State of Virginia
Commission expires: May 31, 2020 // Seal:

ROBEL KASSAHUN
NOTARY PUBLIC 7701323
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES MAY 31, 2020

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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App. Case No. 2020-0006713

South Carolina State University, Respondent,

v.

Denise Simmons, Appellant.

RECEIVED
Dec 03 2020
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted, December 1, 2020

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