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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Judge

Appellate Case No. 2022-000044
Court of Common Pleas Case No. 2020-CP-10-02726

OLIVIA M. THOMPSON, PH.D., M.P.H.,

Appellant,

v.

COLLEGE OF CHARLESTON; COLLEGE OF CHARLESTON FOUNDATION, INC.; FRANCES C. WELCH, PH.D., M.A.; GODFREY A. GIBBISON, PH.D., M.S.; AND CHRISTOPHER R. TOBIN,

Defendants,

v.

Of whom COLLEGE OF CHARLESTON AND FRANCES C. WELCH, PH.D., M.A. are Respondents.

BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court abuse its discretion by holding that a prior Form 4 Order of the Circuit Court had previously decided the matters raised in Appellant's current motions for a preliminary injunction and thus barred those motions?

II. Did the Circuit Court abuse its discretion by denying Appellant's motions for preliminary injunction when the facts and evidence demonstrate that Appellant will suffer irreparable harm if a preliminary injunction is not granted, Appellant is likely to succeed on the merits of her claims, and Appellant does not have an adequate remedy at law?

III. Did the Circuit Court abuse its discretion by basing its Orders on purported facts that are unsupported by testimony or evidence in the record and which are contrary to the actual evidence in the record?

INTRODUCTION

Appellant Olivia M. Thompson, Ph.D., M.P.H. ("Appellant") is a tenured professor at the Respondent College of Charleston ("CofC"). On July 17, 2014, due to serious retaliation and harassment that Appellant had been enduring from her department Dean, Frances C. Welch, Ph.D., M.A. ("Dr. Welch"), the CofC and Appellant entered a written contract to diffuse and resolve the situation and to eliminate further conflicts between Appellant and Dr. Welch. This contract expressly requires that Appellant be moved to another department, which was not under Dr. Welch's supervision. The contract further requires that Appellant's tenure-track faculty line, faculty office, and administrative location be moved to the CofC's Joseph P. Riley, Jr. Center for Livable Communities ("Riley Center") and that Appellant be under the supervision of Dr. Kendra Stewart.

Appellant and the CofC implemented this contract in 2014. Appellant was working under that agreement for several years without any problems or interference by Dr. Welch. However, in 2019, after the CofC elevated Dr. Welch to Interim Provost, Dr. Welch then unilaterally changed Appellant's faculty assignment without Appellant's consent and in breach of her contract. Dr. Welch unilaterally transferred Appellant back to the department under Dr. Welch's supervision. Thereafter, Dr. Welch reinitiated a campaign of retaliation and harassment against Appellant in addition to directly interfering with and fatally undermining a grant program funded by the Boeing Company that Appellant was directing. The retaliation eventually caused Boeing to withdraw its funding for the program. The Boeing-funded work had paid a significant portion of Appellant's salary. Boeing now refuses to enter grants with the CofC, which has caused substantial financial harm to Appellant and injury to her professional reputation and career.

Appellant filed this lawsuit on June 24, 2020, to enforce her rights under her contract with the CofC, to enjoin Dr. Welch from further retaliation and harassment against her, and to recover

monetary damages for Dr. Welch's interference with Appellant's Boeing-funded grant program. Notwithstanding the commencement of this lawsuit, the CofC and Dr. Welch continued to engage in retaliation against Appellant even while this litigation was ongoing and despite her counsel's repeated efforts to persuade the CofC to cease its actions until the merits of the case can be decided.

After this action was filed, the CofC and Dr. Welch have arbitrarily refused to consider Appellant for a vacant department chairperson position; unilaterally relocated Appellant's physical office away from the Riley Center to a completely different building located miles away that is in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work (including removal of asbestos ceiling tiles); unilaterally removed Appellant from her office building's website and directory without her permission; physically barred Appellant from having access to her office and had security officers physically escort her from the building when she tried to access the interior of her office; and failed to notify Appellant of and refused to consider her for a merit raise offered to other faculty members.

As a result, Appellant had no choice but to file a Motion for Preliminary Injunction in the Circuit Court on April 2, 2021. When the CofC and Dr. Welch continued to retaliate against Appellant even after this motion was filed, Appellant then had to file a Supplemental Motion for Preliminary Injunction on July 9, 2021. The purpose of the motions was to obtain an order preliminarily enjoining the CofC and Dr. Welch from breaching the terms of Appellant's contract, to stop the constant retaliation against Appellant while this litigation is pending, and to maintain or restore the status quo that existed before the events addressed in the motions had occurred.

The Circuit Court denied Appellant's motions, thereby allowing the CofC and Dr. Welch to continue their unlawful actions against Appellant unabated. For the reasons discussed herein,

Appellant respectfully submits the Circuit Court's Orders are based on erroneous findings of fact, are contrary to state law, and should be reversed.

STATEMENT OF THE CASE AND FACTS

A. Events Leading to Commencement of this Action.

Continuously since August 2011, Appellant has been employed full-time by the CofC as a faculty member, and currently is a tenured Associate Professor. (R_027 ¶11; R_112). Prior to August 16, 2014, Appellant's faculty appointment was in the CofC's School of Education, Health, and Human Performance ("EHHP"), which placed her under the direction and supervision of Dr. Welch, as the Dean of EHHP. (R_028 ¶14; R_112).

On or about July 22, 2013, Appellant learned that Dr. Welch was engaging in unlawful and improper actions to interfere with, undermine, and subvert Appellant's Boeing-funded work. (R_028 ¶14-15; R_112-13; R_220 ¶4). Dr. Welch also inappropriately inserted herself into Appellant's tenure and promotion process. (R_028 ¶16; R_112-13). Dr. Welch surreptitiously met with then-President Glenn McConnell in his office at the CofC in what proved to be an unsuccessful last-minute attempt to persuade President McConnell not to award tenure and promotion to Appellant. Id. Dr. Welch made false, misleading, and disparaging claims about Appellant in the attempt to ensure her denial of tenure and termination from the CofC. Id. Dr. Welch also attempted to terminate Appellant during the course of her third-year review conducted during the CofC's 2013-2014 academic year and to reassign Appellant's Boeing grants to other faculty in the Department of Teacher Education in EHHP. (R_027-028 ¶16-17; R_113; R_221 ¶4).

Because Appellant brought Dr. Welch's retaliation and interference to the attention of CofC's leadership, the CofC, Appellant, and Dr. Welch executed a written agreement to rectify and resolve the issues and to eliminate any further conflicts between Appellant and Dr. Welch. (R_029 ¶20, 23;

R_114; R_220 ¶4). This contract is labeled a Memorandum of Understanding ("MOU"), which the CofC's official policies define as a contract.[1] (R_029 ¶20; R_071-072; R_114). The MOU is dated July 17, 2014, and was explicitly "agree[d] to" and signed by Appellant on July 23, 2014; by President McConnell on July 21, 2014; by Dr. George Hynd (the CofC's Provost); by Dr. Jerry Hale (Dean of the CofC's School of Humanities and Social Sciences or "HSS"); and by Dr. Welch (Dean of the EHHP). (R_071-072). The CofC's highest ranking officials all signed the MOU. The MOU was expressly stated to be effective August 16, 2014. Id.

Under the MOU's express terms, the CofC "agreed to" take certain detailed actions involving Appellant and her faculty appointment, including the following:

- To transfer and move Appellant from the CofC's EHHP and place her into the CofC's HSS, which removed Appellant from under Dr. Welch's supervision and placed her under the supervision of Dr. Hale.

- To move Appellant's tenure-track faculty line, faculty office, and administrative location to the CofC's Riley Center at 176 Lockwood Boulevard, Charleston.

- To have Appellant report directly to Dr. Kendra Stewart "who will serve in the functional role as [Appellant's] department chair" and who will be responsible for "conducting [Appellant's] annual evaluations."

- "All policies and procedures relative to [Appellant's] tenure and promotion (as outlined in [the CofC's Faculty Administration Manual or "FAM"] and appropriate official communications) will need to be followed."

(R_071-072).

The MOU's purpose was to relieve Appellant of any further accountability to Dr. Welch, to

[1] The CofC's Policy Website, which includes the CofC's Faculty Administration Manual ("FAM"), specifically addresses the nature and extent of the CofC's "contracting authority … and how it may be exercised." (R_298-303; R_357). This official policy explicitly states that "[t]he term 'Contract' means all types of agreements (regardless of content or what they may be called) where there is a mutual exchange of promises or undertakings" and "[c]ontracts may include, but are not limited to: … *Memoranda of Understanding or Memoranda of Agreement* …." Id. (emphasis added).

remove Dr. Welch from having any supervision or authority over Appellant or her tenure-track, and to preclude Dr. Welch from retaliating against Appellant and interfering with her Boeing-funded grant work. (R_029-030 ¶23; R_116; R_221 ¶6). Appellant was removed from Dr. Welch's report so she could effectively administer her grants without interference from Dr. Welch and so she could secure additional grant funding from Boeing and others for the benefit of the CofC as well as Appellant. Id.

In accordance with the MOU, the CofC transferred Appellant from EHHP and placed her in HSS effective on August 16, 2014. (R_030 ¶26-27; R_116; R_221 ¶7). Appellant reported directly to Dr. Stewart, who served as her Department Chair, and Appellant's tenure-track faculty line, faculty office, and grant-related offices were moved to and administratively housed in the Riley Center, which is within the CofC's HSS, not the EHHP. Id. Appellant, along with five other full-time faculty members, taught health designated courses for either the B.A. or B.S. degree in public health. Id.

For several years thereafter, Appellant thrived and worked under the MOU without any problems or issues. Appellant applied for and secured more than $2 million in grant funds from Boeing that provided direct financial or economic benefits to both the CofC and Appellant personally. (R_027 ¶12; R_112). On March 15, 2017, President McConnell awarded Appellant tenure and promotion to the rank of Associate Professor within the Riley Center effective August 16, 2017. (R_112).

On August 28, 2018, based on Appellant's application, Boeing agreed to make a $250,000 grant for a project to be conducted by Appellant at the CofC entitled "Veterans Fellowship Program in Sustainable Food Systems" ("SFS Program"). (R_031 ¶28; R_117-118). As part of this program, the CofC agreed to develop and implement both a professional development (continuing education)

certificate program and an academic credit certificate program in Sustainable Food Systems to be administratively housed within the CofC's School of Professional Studies ("SPS"), even though Appellant's academic home would remain in HSS. Id. The grant was a tremendous benefit to both Appellant and the CofC. The mutual goal, plan, and expectation of Appellant, the CofC, and Boeing was that the SFS Program would continue for many years after the first two pilot years of the program had ended and would continue to pay for and/or fund 25% of Appellant's annual salary and benefits in those future years. (R_032-033 ¶35).

The situation, however, quickly deteriorated when Dr. Brian McGee (the CofC's Provost after Dr. Hynd) resigned and Dr. Andrew Hsu (the CofC's newly appointed President) appointed Dr. Welch as Interim Provost and Executive Vice President for Academic Affairs effective May 16, 2019. (R_033-034 ¶36-41; R_119; R_222 ¶8). Shortly thereafter, on August 29, 2019, despite Appellant's MOU and without prior consultation with Appellant or her consent, Dr. Welch unilaterally transferred Appellant from HSS back to EHHP and into EHHP's Department of Health and Human Performance ("HEHP"), which action removed Appellant from Dr. Stewart's report and again placed her under Dr. Welch's supervision, who, as announced by the CofC, would be resuming the position of Dean of EHHP effective on July 1, 2020. Id. Dr. Welch's unilateral transfer of Appellant in breach of the MOU set the stage for her to again retaliate against Appellant and to interfere with not only Appellant's Boeing-funded work and the SFS Program, but also her instructional work, promotion, and tenure-track at the CofC. Id.

As Appellant feared, Dr. Welch and the CofC did again retaliate against her and take actions to interfere with and undermine her Boeing-funded SFS Program. As detailed in Appellant's verified pleadings, these actions include:

- Behind Appellant's back, Dr. Welch and others at the CofC began disparaging

Appellant and her work to Boeing's employees, with the goal of inducing Boeing to remove Appellant as the Principal Investigator of the SFS Program. (R_037-038 ¶53-55; R_059 ¶ 131; R_124-125).

- Dr. Welch, in collaboration with others at the CofC, directed the removal of the SFS Program's in-person academic-credit and continuing education courses from the CofC's course system and the SPS's online registration page. (R_037 ¶52; R_124). These actions effectively canceled both the academic and continuing education courses of the SFS Program for the 2020 spring semester. They detrimentally impacted enrollment in the SFS Program and interfered with its administration. Id.

- Dr. Welch met with Boeing's employees on December 13, 2019, to disparage Appellant and the SFS Program to Boeing. (R_037-038 ¶53-55; R_039-040 ¶62; R_124). Appellant was not notified of or invited to take part in the meeting even though she is the SFS Program's Principal Investigator. Id. Dr. Welch gave false information to Boeing regarding the reasons that enrollment in the professional development track of the SFS Program had not hit its target. (R_124-125). Dr. Welch also falsely represented to Boeing that the curriculum for the professional development certificate that is a part of the SFS Program was never presented to the CofC's Faculty Senate for approval, and consequently was not as popular an option since it was not accredited. (R_125-126).

- Without Appellant's knowledge, Dr. Welch authorized or directed the CofC to submit a progress report to Boeing containing false and distorted information about the SFS Program with the clear purpose of impugning Appellant and her work in Boeing's eyes. (R_039-040 ¶62; R_124-125).

- On December 18, 2019, at Dr. Welch's direction or with her involvement, the CofC sent an e-mail to CofC staff (while excluding Appellant) informing them that Dr. Welch had unilaterally decided to delay the 2020 spring semester SFS Program courses to 2020 spring semester Express II. Appellant was not consulted regarding this decision. (R_038 ¶56; R_125).

- At Dr. Welch's direction or with her involvement and without Appellant's knowledge or approval, the CofC directed staff to notify students in late December of 2019 that the SFS Program would change from a 14-week program to a 7-week program. (R_038-039 ¶57-60; R_125-126). The 14-week program was supposed to commence only weeks later on January 8, 2020, but the CofC notified students on December 19, 2019 that the classes would not begin until the second half of the semester, which caused great confusion among students who were planning to enroll or were interested in enrolling. Id. Appellant was not consulted about this change and did not approve it. Appellant was excluded on the CofC's e-mail communicating the change to students, even though it substantially impacted the SFS Program of which she is the Principal Investigator. Id. These changes effectively canceled the SFS Program without any consultation with or approval of Appellant. Id.

- By cancelling the programming for the SFS Program for the first seven weeks of the 2020 spring semester and allowing it to run only during the second seven weeks, it made it impossible to teach farming and food processing courses in such a shortened period of time because of the nature of those courses, which cannot be taught in seven weeks. (R_039 ¶59; R_126). The cancellation interfered with Appellant's administration of the SFS Program as well as the contractual commitments the CofC had made to Boeing under the grant contract and which the CofC had made to two area non-profit organizations that were serving as SFS Program partners. Id.

- Under its grant contract with Boeing, the CofC had agreed to develop and implement an academic credit certificate program which it would administratively house within the SPS. (R_040-042 ¶63-68; R_127). To comply with this obligation, the CofC had to either have faculty who were qualified to teach the courses in the SFS Program or it must join a cooperative or consortium through which it could offer the courses. Id. The CofC did not have the ability to teach the courses through its own faculty, thus Appellant secured the CofC's membership in AgIDEA, which is a consortium of universities who house faculty offering agriculture/food systems courses. (R_128). However, Dr. Welch refused to execute the paperwork for the CofC to enter the consortium even though Appellant submitted it to her. Dr. Welch's actions prevented the CofC from offering academic credit courses in agriculture/food systems and prevented Appellant from being able to submit a program proposal to the CofC's Faculty Senate for approval. (R_128-129).

- Dr. Welch and others at the CofC actively thwarted Appellant's efforts to locate another school or department within the CofC to serve as the SFS Program's academic or administrative home, thereby preventing the SFS Program from being housed in a viable school or department. (R_042 ¶69; R_129).

- On or about February 28, 2020, the CofC, by and through Dr. Welch and other CofC employees, harassed two individuals who were teaching courses in the SFS Program by requiring them to be reclassified as temporary employees rather than as independent contractors, even though the individuals had previously worked as independent contractors and do not meet the criteria for classification as temporary employees. (R_042-043 ¶71; R_129-130). Although the two individuals and Appellant opposed the reclassification, the CofC withheld and refused to issue paychecks to them for work performed unless they agreed to sign forms acknowledging their reclassification as temporary employees. Id.

In late 2019 and early 2020, Appellant repeatedly requested a meeting with the CofC's current President (Dr. Hsu) to demand that Dr. Welch's retaliation against her and Dr. Welch's interference with the SFS Program immediately stop. (R_043-044 ¶72-74; R_130). Appellant

specifically warned the CofC that Dr. Welch's conduct was jeopardizing Boeing's grant funding for the SFS Program as well as Boeing's relationship with Appellant and the CofC. Id. President Hsu refused to meet with Appellant. Id. The CofC took no steps to address the retaliation and interference that was occurring. (R_130-131).

On March 17, 2020, as Appellant feared and foretold, Boeing irrevocably withdrew its grant funding for the SFS Program. (R_042 ¶70; R_44-045 ¶76-79; R_046 ¶82; R_131-132; R_222 ¶9). Boeing terminated its grants with the CofC, thereby causing monetary harm, reputational harm, loss of professional prestige and standing, and other damages to Appellant. Id. Boeing will not enter into future grants with the CofC. Id. Appellant maintains Boeing's decision was the result of Dr. Welch's and the CofC's interference with her Boeing-funded work.

B. Commencement of this Action on June 24, 2020.

On June 24, 2020, by verified Complaint, Appellant commenced this lawsuit against the Respondents. (R_024-073). The Verified Complaint alleges the following claims:

(1) Declaratory Judgment Action against Respondent CofC;
(2) Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing against Respondent CofC;
(3) South Carolina Payment of Wages Act violation against Respondents CofC and Welch;
(4) Intentional Interference with Contract against all Respondents;
(5) Intentional Interference with Prospective Economic Advantage against all Respondents;
(6) Defamation against all Respondents;
(7) Civil Conspiracy against all Respondents;
(8) Temporary, Preliminary, and Permanent Injunction against Respondents CofC and Welch;
(9) Conversion against Respondents Foundation and Tobin; and
(10) Attorney's Fees and Costs pursuant to S.C. Code Ann. § 15-77-300 against Respondent CofC.

Among other relief, the Verified Complaint seeks an order enforcing the MOU. It also seeks to restrain and enjoin Respondents CofC and Dr. Welch from breaching and disregarding the MOU's

terms and from further retaliating against and harassing her.

C. Events Subsequent to Commencement of this Action.

Since this lawsuit was filed, the CofC and Dr. Welch have continued to engage in retaliation against and harassment of Appellant, thereby causing additional financial loss and other harm to her.

1. Dr. Welch's Arbitrary Refusal to Consider Appellant for a Vacant Department Chairperson Position.

On February 5, 2021, Appellant received a group email from HEHP's chairperson (Dr. Wes Dudgeon) advising faculty that an internal candidate had expressed interest in applying for the chairperson's position that would become open for internal application because he was stepping down from the position. (R_134-135; R_146-150). Appellant sent an email to Dr. Dudgeon that same day applying for the position. Id. However, Dr. Welch notified Appellant that she had imposed a deadline of February 3, 2021 for submission of applications and she would not consider Appellant's application. Id.

Dr. Welch verbally announced her arbitrary deadline during a faculty meeting on January 26, 2021, at which she knew Appellant was not present. (R_135). Appellant was not notified before the faculty meeting that Dr. Dudgeon was resigning or that there would be a deadline for candidates to apply for the opening. Id. The meeting agenda circulated the day before the meeting did not alert faculty to the open chair position or the application deadline. (R_351-352). As a result, the February 3, 2021 deadline had already passed before Appellant was made aware of the opening or the opportunity to apply for the open chair position. (R_135).

Despite this situation, Dr. Welch nevertheless refused to consider Appellant's application for the open position based on her invocation of the arbitrary February 3rd deadline of which Appellant had not been notified. (R_135). Appellant is more experienced and has superior qualifications than

the sole individual (Dr. Kate Phile) whose application for the position was granted consideration. (R_237 ¶6); see also (R_147-148). Dr. Welch effectively thwarted Appellant from applying for and obtaining the chairperson position in an arbitrary and capricious manner. (R_135). This position would entail a significant raise in compensation for Appellant as well as 2-3 months of salary that would be counted in the calculation of her state pension benefits. Id.

On February 8, 2021, Appellant's counsel notified CofC's counsel in writing of this situation and requested his intervention in ensuring that Appellant is properly considered for this opening. (R_136; R_147-148). Despite this request, nothing changed. Id. Respondents CofC and Dr. Welch continued to refuse to allow Appellant to interview for the position or to consider her application for this opening. Id.

On February 22, 2021, Appellant was forced to file a formal grievance with the CofC's Faculty Grievance Committee involving Dr. Welch's actions in refusing to consider her for the position. (R_136). On March 1, 2021, the Faculty Grievance Committee issued a written report addressed to President Hsu and Dr. Suzanne Austin, the CofC's new Provost, determining that Appellant has a legitimate grievance because she was not provided with any advance notice of the open position or of a deadline for applying for the position, concluding that Appellant is an eligible candidate for the chairperson position, and finding that her application for the position should be considered. (R_136; R_152-156).

Despite this report, on March 10, 2021, Dr. Austin notified the Committee that she was overruling its findings and recommendation because it would not be "appropriate to exempt [Appellant] from [the CofC's] hiring practices and policies in this instance." (R_136; R_158-160). Her letter did not identify what hiring practices and policies prevented the CofC from considering Appellant's application or from which Appellant would have to be exempted to consider her

application. The CofC has since confirmed it has no policy or procedure which required that the opening in the HEHP chairperson be filled without providing other faculty members in the affected department notice of the opportunity to apply for the position.[2] The CofC nevertheless refused to consider Appellant for the open chairperson position. Id. On June 7, 2021, over two months after Appellant had filed her Motion for Preliminary Injunction on April 2, 2021, Dr. Welch announced she was selecting as the new chairperson of the HEHP the sole individual (Dr. Pfile) whose application she had granted consideration. (R_237 ¶6).

2. Dr. Welch Unilaterally Moves Appellant's Faculty Office from Riley Center to Another Older, Dilapidated Building Currently Undergoing Substantial Renovations and Asbestos Remediation.

The MOU states that Appellant's tenure-track faculty line, faculty office, and administrative location shall be situated in the CofC's Riley Center located at 176 Lockwood Boulevard. (R_071-072). On the evening of Sunday, March 21, 2021, Appellant went to her office in the Riley Center for the first time in several months. (R_137). Throughout the 2020-21 academic year, Appellant had been working remotely from her home due to the Covid-19 pandemic. Id. While in her office that evening, Appellant noticed for the first time that her office telephone had been removed without her permission or knowledge. Id.

[2] In response to a Motion to Compel filed by Appellant, Judge Young ordered the CofC to produce or identify the specific sections or excerpts in its policies "supporting the CofC's assertions (as referenced in Provost Suzanne Austin's letter dated March 10, 2021) that (i) an opening in a department chairperson position can or will be filled by an internal candidate of the CofC without providing other faculty members in the affected department notice of the opportunity to apply or interview for the open position and (ii) the deadline for applying for such an open department chairperson position will be enforced against a faculty member in the affected department regardless of whether the faculty member had been provided notice of the deadline." (R_018 ¶a). The Order further directed that "[i]f such policies or procedures do not exist, then the CofC shall supplement its discovery responses to state that no such policy or procedure exists." Id. The CofC's counsel subsequently confirmed that no such policy or procedure exists. (R_403-406).

On Monday, March 22, 2021, Appellant contacted the CofC's IT Service Desk to report her office telephone was missing and to request a replacement. (R_137). The IT Department advised her that it had been instructed to remove her telephone and disconnect her telephone number on December 18, 2020, which was over the holiday break. Id. Appellant had not been notified of this fact or asked for her permission. Id. Because Appellant had been working remotely and had set up her office telephone to forward her calls to her personal cellphone, she was unaware her office telephone had been removed and telephone number disconnected. Id.

Appellant also learned the CofC was moving her physical office from the Riley Center to a different building known as the Silcox Building. (R_137). The Silcox Building is located at 24 George Street on a different part of campus, roughly two miles away from the Riley Center. Appellant had not been notified she was being moved and had not consented to being moved. Id. Appellant further learned the CofC had already removed her from the Riley Center website and building directory without her permission. (R_137-138). Appellant also learned she had been removed from the CofC's Public Health Program website and online directory without her permission. (R_138). From an online standpoint, it appeared that Appellant was no longer a professor at the CofC. Students, faculty, and others looking for Appellant's contact information on the CofC's Riley Center and Public Health Program websites would not find her because her contact information was (and is currently) deleted. Id.

The Silcox Building is a demonstrably inferior and less desirable, safe, and healthy office location compared to Appellant's office at the Riley Center. (R_138-139; R_162-179; R_181-186). The CofC's Facilities Management Department advised Appellant that the Silcox Building office space to which she was assigned (Room 406) does not have functioning heat/air conditioning or hot or tepid water in any of the nearby restrooms. (R_138-139). Appellant submitted photographs and

other documents showing the building is in a deplorable condition and is in a state of disrepair. (R_138; R_162-179). The building is undergoing substantial construction and renovation work, including a new roof, new windows, and new HVAC air handlers and ductwork. Id. It has asbestos ceiling tiles that are damaged, dislodged, and missing allowing asbestos fibers to become airborne and inhalable. Id. The Facilities Management Department was unaware that Appellant's office was being moved to the Silcox Building and advised against anyone working in the building while the construction is ongoing due to the noise, dust, etc. (R_138-139; R_188-189).

Dr. Dudgeon had previously advised Appellant during a faculty conference call on February 19, 2021 that all faculty and staff offices are going to be moved from the Silcox Building to another building during the construction and renovation period. (R_139). However, notwithstanding the MOU, the CofC still advised Appellant that it is moving her office to the Silcox Building despite the unhealthy, unsafe, and unworkable conditions. Id.

The MOU requires that Appellant's tenure-track faculty line, faculty office, and administrative location be in the Riley Center. (R_139). The CofC has presented no legitimate academic or administrative need for the CofC to remove Appellant from the Riley Center or to relocate her to the Silcox Building. Id. The CofC presented no evidence showing it was necessary to move Appellant's physical office or that there was some academic or administrative reason for changing her physical office. Dr. Welch unilaterally moved Appellant's office to the Silcox Building because she wanted to do so. Appellant's office in the Riley Center is currently vacant.

On March 24, 2021, Appellant's counsel notified the CofC's counsel of the situation involving Appellant's office relocation and requested his intervention. (R_140; R_188-189). Despite this request, on the morning of March 29, 2021, the CofC's IT Service Desk notified Appellant that "per directions from [their] CIO and supervisors," they "are not authorized" to replace her telephone

at the Riley Center and instead her telephone will be moved to the Silcox Building. (R_140; R_191-192). Less than thirty minutes later, Dr. Dudgeon informed Appellant her office is at the Silcox Building and "should be ready to go." (R_140; R_194). Because the CofC removed Appellant's office from the Riley Center and has barred her access to her office, the Appellant, a tenured Associated Professor, currently works out of her home and meets students in cafes and on park benches when in-person meetings are required.

3. CofC Unilaterally Removes Appellant's Personal Property from Riley Center and Bars Her Access to Her Office in the Riley Center Despite Pending Motion for Preliminary Injunction.

On April 2, 2021, Appellant filed a verified Motion for Preliminary Injunction to restrain and enjoin the CofC from breaching the terms of the MOU and seeking, *inter alia*, an order preventing the CofC from removing Appellant's faculty office from the Riley Center and moving her to the Silcox Building. (R_110-194).

This motion was initially noticed for a hearing before Circuit Judge Jennifer B. McCoy for April 29, 2021. (R_341-342). However, on April 28, 2021, the day before the hearing, the CofC's counsel (Randell Stoney) requested and was granted a continuance because he "had scheduling issues arise." (R_343). Despite several requests to the Clerk's office for a new hearing date, the next available date that Appellant's motion could be rescheduled was for September 3, 2021 before Circuit Judge Diane S. Goodstein. However, on the day of that scheduled hearing, Judge Goodstein recused herself at the last moment, thus the hearing was again postponed and rescheduled for November 2, 2021 before Circuit Judge Roger M. Young, Sr. (R_354).

In the interim between the initial hearing date of April 29, 2021, and the second rescheduled hearing date of November 2, 2021, the CofC continued to defy the MOU and harassed and intimidated Appellant. (R_223 ¶11). On June 29, 2021, in the late evening, Appellant went to her

office at the Riley Center. (R_223 ¶12). While she was outside her office door examining several computers, three male officers with the CofC's Department of Public Safety ("DPS") suddenly climbed the stairway and charged at her in an aggressive and threatening manner while holding their hands on their holstered handguns as though they were about to pull their weapons and point or fire them at her. (R_225-226 ¶16-17).[3] One officer shouted at Appellant to stop and put down the computer she was examining. (R_226 ¶18). The officers acted as if Appellant was doing something illegal. Id. The officers informed Appellant that the CofC's General Counsel (Angela Mulholland) had directed them to deny Appellant access to her office in the Riley Center and to physically remove her from the building. (R_226 ¶19).

Although the MOU states that Appellant's physical office is at the Riley Center and that is where she kept her office desk, chair, computer, books, and other personal affects, the DPS Officers physically removed Appellant from the premises and did not allow her to retrieve any of her personal property or belongings from her office. (R_226 ¶20). As the three officers escorted Appellant out of the Riley Center, one of them instructed her that he needed to search her purse to check whether she had stolen anything. (R_227 ¶22). He demanded that Appellant empty the

[3] Plaintiff was examining the computers to determine if they were the same computers that had been removed from her office several months earlier. (R_224-225 ¶14, 16). In April 2021, two Mac computers that had been purchased with Boeing's grant funds were suddenly removed from the cubicle stations outside of Plaintiff's office. Id. Their removal occurred without Plaintiff's knowledge or consent. Id. When Plaintiff discovered the computers were missing, she reported them to DPS as being stolen or otherwise removed without authorization. Id. She further contacted the CofC's IT Department and requested they conduct a search for the computers using their tracking software. Id. The IT Department notified Plaintiff they performed a search for the missing computers, but they were unable to locate them. Id. Plaintiff requested the CofC to provide her with information regarding the removal of the computers, including who was involved in their removal and a copy of the security videotape of the area where the computers were positioned and copies of any reports or documents explaining the removal of the computers from her office. (R_224-225 ¶15). Appellant has learned that the CofC's general counsel (Angela Mulholland) inexplicably directed DPS not to provide or release this information to her. Id.

contents of her purse for his inspection and search. Id. The officers refused Appellant's request to call her legal counsel, thus she was forced to comply with the directive. (R_226 ¶20). Appellant was forced to endure the humiliation and intrusion of having her purse searched by one of the officers while the others physically blocked her from exiting the building. (R_227 ¶22).

After the officer searched Appellant's purse to his satisfaction, all three officers escorted Appellant out of the building to her parked vehicle. (R_227-228 ¶23; R_235). They instructed her that at the direction of the CofC's General Counsel she was no longer permitted to be in the parking lot or on the Riley Center's premises. (R_228 ¶24). The officers then stood together in a line with their hands on their holstered tasers and glared at Appellant while she drove her vehicle out of the parking lot. Id.

The CofC continues to refuse to permit Appellant access to the Riley Center or to her office located therein. The CofC has since removed Appellant's personal belongings from her office in the Riley Center by packing them in boxes and delivering them to her personal residence. Prior to the evening of June 29, 2021, the CofC had not notified Appellant that she was no longer allowed to be in the Riley Center or that she was no longer permitted to access her faculty office in the Riley Center. (R_228-229 ¶25).

On July 9, 2021, based on the events at the Riley Center, Appellant filed a verified Supplemental Motion for Preliminary Injunction to restrain and enjoin the CofC from breaching the terms of the MOU and seeking, *inter alia*, an order preventing the CofC from denying Appellant access to her faculty office in the Riley Center. (R_218-235 ¶20).

4. CofC Arbitrarily Excludes Appellant from Merit Review Offered to Other Faculty Members.

Despite Appellant's filing of her supplemental motion, the CofC continued to retaliate

against her. (R_238 ¶7). On September 22, 2021, Appellant learned that several faculty were awarded merit raises ranging between 4-15% of their annual base salary. Id. Unknown to Appellant, the CofC had instructed its Department Chairpersons to submit recommendations for faculty merit raises by July 31, 2021. (R_238 ¶8). This review was to include data taken from the faculty members' Curricula Vitae (CV) as well as an optional list of accomplishments that could be submitted by the faculty member. Id. Chairpersons were instructed to solicit CVs from their faculty as well as a list of their accomplishments to ensure they had equal data from all faculty before making their recommendations for merit raises to the Deans. Id.

Appellant's Chairperson (Dr. Phile) did not notify Appellant of this opportunity for a merit raise and made no effort to recommend Appellant for such a raise. (R_238 ¶9). Appellant's Chairperson also did not request an updated CV from her and did not ask Appellant to submit a list of accomplishments even though other Chairpersons had made such requests to their faculty members. Id. The CofC has not provided any explanation as to why Appellant was excluded from this opportunity.

Even though other faculty were offered the chance for a merit review and pay raise, Appellant was not considered for and did not receive such a raise even though she qualified for the raise. (R_238-239 ¶9-10). Appellant was deprived of the opportunity to receive an annual salary increase of up to $13,538.00. (R_239 ¶12). Appellant only learned of this missed opportunity after the fact because she happened to receive an email from another faculty member discussing the merit raises. (R_239 ¶10; R_242-244).

D. Hearing Before Judge Young on November 2, 2021 and Order Denying Preliminary Injunction Motions.

On November 2, 2021, Judge Young conducted a virtual or remote hearing on several motions filed by Appellant, including her Motion for Preliminary Injunction filed April 2, 2021 and her Supplemental Motion for Preliminary Injunction filed July 9, 2021. (R_304-340). Apparently due to time constraints, Judge Young cut short or abbreviated the hearing during the middle of counsels' arguments and directed both sides to submit proposed Orders to him containing their respective positions on the pending motions. (R_335-336). Judge Young effectively instructed the parties' counsel to argue their respective positions to him in the form of proposed Orders.

The parties complied with Judge Young's directive and submitted their respective proposed Orders to him via email on November 10, 2021. (R_355-380; R_381-392). On November 12, 2021, Judge Young adopted verbatim the proposed Order submitted by Respondents' counsel without making any changes thereto, entered same, and denied both of Appellant's motions for a preliminary injunction. (R_004-015; R_381-392).

On November 19, 2021, Appellant timely filed and served a Motion to Alter and/or Amend Judge Young's Order pursuant to Rules 54(b) and 59(e). (R_279-303). On December 16, 2021, Judge Young entered an Order Denying Appellant's Motion to Alter or Amend without a hearing or argument. (R_021-023). On January 13, 2022, Appellant timely filed and served her Notice of Intent to Appeal from Judge Young's Orders to this Court. (R_407-413).

ARGUMENTS

I. STANDARD OF REVIEW ON APPEAL.

Whether a preliminary injunction should be granted rests within the sound discretion of the trial judge. Seabrook v. Carolina Power & Light Co., 159 S.C. 1, 156 S.E. 1 (1930); MailSource,

LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). "An abuse of [that] discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Levine v. Spartanburg Reg'l Servs. Dist., Inc., 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005); MailSource, 356 S.C. at 367, 588 S.E.2d at 637-38.

"Actions for injunctive relief are equitable in nature." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." Id.; Brown v. Cty. of Berkeley, 366 S.C. 354, 359, 622 S.E.2d 533, 536 (2005); Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005). "Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies [this court] the finding is against the greater weight of the evidence." Rhett v. Gray, 401 S.C. 478, 489, 736 S.E.2d 873, 879 (Ct. App. 2012); see Town of Kingstree v. Chapman, 405 S.C. 282, 300, 747 S.E.2d 494, 503 (Ct. App. 2013).

II. THE CIRCUIT COURT ABUSED ITS DISCRETION BY HOLDING THAT A PRIOR FORM 4 ORDER OF THE CIRCUIT COURT HAD PREVIOUSLY DECIDED THE MATTERS RAISED IN APPELLANT'S MOTIONS FOR A PRELIMINARY INJUNCTION, THUS BARRING THE MOTIONS.

Judge Young's November 12, 2021 Order held that Appellant's motions seeking a preliminary injunction had already been adjudicated by a prior Form 4 Order of Circuit Judge Daniel Hall, which had been entered in this case more than a year earlier on August 13, 2020. (R_008-010). Judge Young held he may not "second-guess" or "overturn" Judge Hall's denial of a prior Motion for Preliminary Injunction. (R_009). However, Appellant never asked Judge Young to overturn Judge Hall's prior Order because Judge Hall was not presented with and did not decide the matters raised in Appellant's Motion for Preliminary Injunction filed April 2, 2021 or her Supplemental Motion for Preliminary Injunction filed July 9, 2021. Judge Hall did not previously decide the

matters raised in the current motions. Regardless, his Form 4 Order is merely an interlocutory ruling that is not binding upon the Court and can be revised before a final judgment. (R_001-003).

On June 25, 2020, the very next day after this action was filed, Appellant filed her initial Motion for Preliminary Injunction. (R_110-194). This motion sought a preliminary injunction based on the factual events that had transpired *before this lawsuit was commenced*.

On July 2, 2020, before any of the Respondents had even appeared in the case, the Clerk of Court initially put the motion on Circuit Judge Jennifer B. McCoy's roster for July 27, 2020. (R_246 n.1; R_263; R_274-276). However, on July 20, because the CofC's counsel (Randell Stoney) had advised Appellant's counsel he was still trying to sort out whether the Respondents would have the same or different counsel and the CofC was also recovering from the recent tragic shooting of the new Provost's husband in downtown Charleston a few days earlier on July 17, 2020, the matter was continued to give the Respondents time to sort things out. Id.

The Clerk of Court later put the motion on Judge Hall's roster for August 10, 2020, which was still before any of the Respondents had answered or appeared in the case. (R_263; R_278). Respondents did not formally appear in the case until August 28, 2020. (R_096-109). No party requested a hearing on the motion. No briefs were submitted to Judge Hall. Neither the CofC nor Dr. Welch responded to the motion. Judge Hall conducted no hearing on the motion and he had no contact with any of the parties' counsel concerning the motion. Instead, on August 13, 2020, he entered a Form 4 Order that simply states the motion is denied without making any findings or giving any reason for the denial. (R_001-003).

The motions that Judge Young heard on November 2, 2021 were not filed until April 2, 2021 and July 9, 2021. Judge Young erroneously construed those motions as requesting him to "second-guess" or "overturn" Judge Hall's prior Form 4 Order. The motions made no such request.

In contrast to the Motion for Preliminary Injunction filed June 25, 2020, which sought relief based on events that had occurred before this lawsuit was commenced, Appellant's motions filed April 2, 2021 and July 9, 2021 resulted from and sought relief based on factual events that occurred *many months after this lawsuit was commenced and after Judge Hall issued his August 13, 2020 Form 4 Order*. Those later events include but are not limited to:

- the CofC's disconnection of Appellant's office telephone in December 2020 and her removal from the Riley Center website and building directory without her knowledge or permission
- Dr. Welch's arbitrary refusal in February 2021 to consider Appellant's application for the HEHP Chairperson position vacated by Dr. Wes Dudgeon
- Dr. Welch's complete removal of Appellant's faculty office from the Riley Center and Dr. Welch's relocation of Appellant's office to the Silcox Building in March 2021
- the CofC's actions in physically removing Appellant from the Riley Center in April 2021 and barring her access to her faculty office and personal property in that building, and
- the CofC's actions in July 2021 in excluding Appellant from the opportunity to obtain a faculty merit pay raise while other faculty members were offered this opportunity.

Well-established law holds that "if an injunction has been refused (or has been granted and dissolved), the petitioner may be entitled to an injunction on an amended, supplemental or new application setting up new grounds that did not exist when the first application was filed." 43A C.J.S. Injunctions § 79 (2021); see also 42 AM. JUR. 2D Injunctions § 278 (2021) ("Successive applications for injunctions are not encouraged, *but when events happening after the denial of an application establish the need for injunctive relief, such relief should be granted*." (emphasis added)); Red Star Yeast & Prod. Co. v. La Budde, 83 F.2d 394, 396 (7th Cir. 1936) ("Denial of an application for a temporary injunction does not prevent another application by the same party in the same suit, if new facts warrant it.").

South Carolina has followed this rule for nearly a century. In Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928), our Supreme Court held that when a preliminary injunction "has been dissolved or refused, a second application for such relief must be founded upon facts other than those set forth in the original application, and that such new facts must not have been known to or reasonably ascertainable by the moving party at the time of the first application." Id. at 225, 143 S.E. at 798. As a result, "[o]rdinarily, a second application for injunction should only be granted in the exercise of a sound discretion, and would be denied *unless the petition set up facts which were unknown at the time of the first application.*" Id. (emphasis added). "As a general rule the second application will be denied merely on a showing that the first one was denied, *unless complainant presents new and additional matter discovered since the former hearing*." Id. (emphasis added).

Likewise, in Thayer Co. v. Binnall, 95 N.E.2d 193 (Mass. 1950), the Court held "[t]he fact that preliminary injunctions had been previously denied did not stay the hand of the trial judge to grant relief *if the acts occurring after the hearing on the first application for an injunction warranted such action*." Id. at 198. "Successive applications for injunctions are not to be encouraged, but where events happening after the denial of an application establish the need of injunctive relief, such relief should be granted." Id.

This is the situation here. Judge Young's November 12, 2021 Order disregards the fact that Appellant's Motion for Preliminary Injunction filed April 2, 2021 and her Supplemental Motion for Preliminary Injunction filed July 9, 2021 are based on factual events that took place *after* Appellant filed her first Motion for Preliminary Injunction and *after* Judge Hall entered his Form 4 Order denying that prior motion. Judge Hall could not have considered or ruled on those factual events when his Form 4 Order denied Appellant's prior motion because they had not yet occurred.

Appellant is not asking the Court to "second-guess" or "overturn" Judge Hall's prior Order. It would have been pointless to do so because Judge Hall did not consider or rule upon the matters raised in the current motions. Rather, Appellant is asking the Court to grant a preliminary injunction based on facts that occurred after Judge Hall issued his order and which he did not consider because they had not yet taken place.

Judge Young's November 12, 2021 Order effectively holds that Appellant can never obtain a preliminary injunction for the rest of this case because Judge Hall previously denied the same legal relief (albeit based on different facts). (R_008). As shown in the law cited above, the mere fact that another Judge denied a request for a preliminary injunction based on different facts does not preclude Appellant from obtaining a preliminary injunction based on new or additional facts.

Even assuming for argument's sake that Judge Hall had decided the matters raised in Appellant's motions filed on April 2, 2021 and July 9, 2021, which did not actually occur, South Carolina Rule of Civil Procedure 54(b) nevertheless permits the Court to grant a preliminary injunction despite this ruling. That rule states:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, ***any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties***.

S.C. R. CIV. PRO. 54(b) (emphasis added). Our state rule is the same as the federal rule.

"An interlocutory order is subject to reconsideration [under Rule 54(b)] at any time prior to the entry of a final judgment." Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1469 (4th Cir. 1991); McDevitt v. Wellin, 2014 WL 7146967, at *2 (D.S.C. Dec. 15, 2014) ("An interlocutory order can be 'reviewed by the district court, on motion or *sua sponte*, at any time prior to the entry of a final judgment.'" (quoting Fayetteville)). This is because a trial court retains the "inherent power to reconsider and revise any interlocutory order" at any time prior to final judgment. Regan v. City of Charleston, S.C., 40 F. Supp. 3d 698, 701 (D.S.C. 2014).

Judge Hall's Form 4 Order is not res judicata as to Appellant's later motions seeking a preliminary injunction, which are based on events that had not yet occurred when Judge Hall entered his Order. A ruling on a preliminary injunction motion is not a final determination of any factual matters in the case, but is merely an interlocutory order that is subject to modification at any point before a final judgment is entered. Roberts v. Union Cty. Bd. of Sch. Trustees, 284 S.C. 299, 301, 326 S.E.2d 163, 164 (Ct. App. 1985) (holding "it is improper for a court to make a final determination or to decide the merits of the case upon an application for a temporary injunction"); 27 S.C. JUR. Injunctions § 9 (2021) ("The court issuing a preliminary injunction retains the power to modify or dissolve the injunction at any time.").

Our appellate courts have held that "[a] temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and 'when other issues are brought to trial, they are determined without reference to the temporary injunction.'" Allegro, Inc. v. Scully, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App. 2012) (citing Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992)); see also Alston v. Limehouse, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said

orders"). Even if it were assumed that Judge Hall had made "findings" in this case, which he clearly did not, this Court would not be bound by any such findings. Helsel, 307 S.C. at 32-33, 413 S.E.2d at 826 ("We hold that the trial judge erred in concluding he was bound by the findings of the hearing judge who issued the temporary injunction.").

Our law accords with the law in other jurisdictions. Numerous state and federal courts have held that "a preliminary injunction proceeding does not fully and finally adjudicate the parties' rights, and the principles of res judicata and collateral estoppel are inapplicable to any findings made by the court during those proceedings." Pittsburgh Logistics Sys., Inc. v. LaserShip, Inc., No. 2:18-CV-1382, 2019 WL 2443035, at *4 (W.D. Pa. June 12, 2019) (quoting Porter v. Chevron Appalachia, LLC, 204 A.3d 411, 419 n.2 (Pa. Super. Ct. 2019)); see also Coinmach Corp. v. Fordham Hill Owners Corp., 770 N.Y.S.2d 310, 312 (N.Y. Sup. Ct. 2004) ("It is settled law that the grant or denial of a request for a preliminary injunction, a provisional remedy designed for the narrow purpose of maintaining the status quo, is not an adjudication on the merits and will not be given res judicata effect."); Gessler v. Madigan, 322 N.E.2d 127, 129 (Ohio Ct. App. 1974) ("The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, is not conclusive on the court on a subsequent hearing, and concludes no rights of the parties."); Softchoice Corp. v. MacKenzie, 636 F. Supp. 2d 927, 936 (D. Neb. 2009) ("[T]the doctrine of collateral estoppel requires a prior final judgment; the granting or denial of a preliminary injunction is generally not based on a final decision on the merits and is not a final judgment for the purposes of collateral estoppel."); People of Colo. ex rel. Watrous v. Dist. Ct. of U. S. for Dist. of Colo., 207 F.2d 50, 58 (10th Cir. 1953) ("The denial of the preliminary injunction was not an adjudication of the ultimate rights in controversy. It will not be conclusive on the court or the rights of the plaintiffs at a subsequent hearing.").

Judge Hall's Form 4 Order was not a final judgment. Under Rule 54(b), the Order "is subject to revision at any time" before entry of a final judgment. Judge Young erred as a matter of law in holding that Judge Hall previously decided the matters raised in Appellant's preliminary injunction motions or that Judge Hall's Form 4 Order precluded the Court from granting those motions.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR A PRELIMINARY INJUNCTION WHEN APPELLANT DEMONSTRATED IRREPARABLE HARM, A LIKELIHOOD OF SUCCESS ON THE MERITS, AND AN INADEQUATE REMEDY AT LAW.

Judge Young erred by not finding that Appellant will suffer irreparable harm if an injunction is denied, she will likely succeed on the merits, and there is an inadequate remedy at law. (R_010-014). His Order is contrary to the evidence in the record and the applicable law. Appellant's verified motions, affidavits, and exhibits demonstrated she will suffer irreparable harm if an injunction is not granted, she will likely succeed on the merits, and there is an inadequate remedy at law. A preliminary injunction is needed to maintain or restore the status quo that immediately preceded the controversy in this matter and to render complete relief to Appellant.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). A party seeking to obtain injunctive relief generally must demonstrate that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). There is no additional requirement that the trial judge must "balance the equities" before issuing an injunction. Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15, 17 (2010).

"Prohibitory preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013). The "status quo" refers to "the last uncontested status between the parties which preceded the controversy." Id at 320; Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 378 (4th Cir. 2012) ("The status quo to be preserved by a preliminary injunction, however, is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the 'last uncontested status between the parties which preceded the controversy.'").

"To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but ... [s]uch an injunction restores, rather than disturbs, the status quo ante." Aggarao, 675 F.3d at 378; George Sink, P.A. Inj. Laws. v. George Sink II L. Firm LLC, 407 F. Supp. 3d 539, 549-50 (D.S.C. 2019); 43A C.J.S. Injunctions § 27 (2021) ("The status quo that will be preserved by a preliminary injunction is the last, actual, peaceable, noncontested status that preceded the pending controversy, as it presently or formerly existed. This is the last uncontested set of facts preceding the pending controversy.").

(1) Appellant Demonstrated Irreparable Harm.

"Irreparable injury means that the injunction is reasonably necessary to protect the rights of the plaintiff pending the litigation." JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 508 (2nd ed. 1996). "Generally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994).

The element of irreparable harm is satisfied when it is difficult to calculate the amount of damages, such that an equitable remedy is necessary to make the aggrieved party whole. Bethel Methodist Episcopal Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947). When the

claim is based on a breach of contract, irreparable injury may be found in two situations: (1) where the subject matter of the contract is of such a special nature or peculiar value that damages would be inadequate; or (2) where because of some special and practical features of the contract, it is impossible to ascertain the legal measure of loss so that money damages are impracticable. A.L.K. Corp. v. Columbia Pictures & Indus., Inc., 440 F.2d 761,763 (3d Cir. 1971) (citing 4 J. Pomeroy, Treatise on Equity Jurisprudence § 1401 (5th ed. 1941)).

A preliminary injunction may be sought by submitting an affidavit or verified complaint showing, with specific facts, that the applicant will sustain immediate and irreparable injury, loss, or damage if relief is not granted. See S.C. R. CIV. PRO. 65(b). In the Circuit Court, Appellant supported her motions with her sworn affidavit, verified motions, and verified complaint. A verified pleading is the equivalent of an affidavit. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433, 437-38 (2003); Carmichael v. Oden, 2009 WL 9524614, *5 (S.C. Ct. App. 2009).

The CofC and Dr. Welch did not offer any affidavit, sworn testimony, or other evidence in opposition to the motions. They relied exclusively upon the arguments of their legal counsel at the hearing and in their memorandum opposing the motions. Of course, arguments of counsel are not evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are also not evidence."); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); McClurg v. Deaton, 395 S.C. 85, 87, 716 S.E.2d 887, 888 n.1 (2011) ("Memorandum in support of a motion is not evidence.").

Appellant's unrefuted evidence in the Circuit Court showed that she will suffer irreparable harm unless the CofC and Dr. Welch are enjoined during this litigation. Appellant showed she has been subjected to repeated retaliation, harassment, and intimidation since this action was

commenced and she will continue to be subjected to such actions unless a preliminary injunction is issued. Brandt v. Gooding, 368 S.C. 618, 629, 630 S.E.2d 259, 265 (2006) (holding that issuance of a restraining order was necessary to prevent party from harassing other parties during the litigation). In Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E.2d 470 (1950), the Supreme Court observed that "where the mischief is such, from its continuous and permanent character, that it must occasion constantly recurring grievances, which cannot be otherwise prevented, a court of equity ought to interfere by injunction to stay the wrong and protect the complainants' property and personal rights from hurt or destruction.'" Id. at 271-72, 62 S.E.2d at 477. That case aptly capsulizes the present case.

Unless an injunction is granted, Appellant will lose the benefits and protection of the MOU, which is an agreement that she entered with the CofC specifically to avoid further retaliation and harassment by Dr. Welch. Dr. Welch had to ignore and disregard the MOU's provisions to engage in her retaliatory actions against Appellant. Although the CofC has argued the MOU is not a binding contract, the CofC's own Policy Website containing its official policies includes Official Policy 2.3.1.1, which specifically addresses the nature and extent of the CofC's "contracting authority … and how it may be exercised." (R_298-303).[4] This policy explicitly states that "[t]he term 'Contract' means all types of agreements (regardless of content or what they may be called) where there is a mutual exchange of promises or undertakings" and "[c]ontracts may include, but are not limited to: … Memoranda of Understanding or Memoranda of Agreement …." Id. Indeed, the MOU itself

[4] The CofC has previously claimed that Appellant supposedly did not raise this policy to Judge Young before he issued his November 12, 2021 Order. This is false. Appellant specifically quoted from this policy and brought it to Judge Young's attention in her proposed Order that her counsel submitted to Judge Young on November 10, 2021. (R_355; R_357 n.1; R_372). As discussed above, Judge Young abbreviated the November 2, 2021 hearing and directed the parties' counsel to make their arguments to him in the form of proposed Orders submitted thereafter.

explicitly states that "[a]ll policies and procedures relative to [Appellant's] tenure and promotion (as outlined in the [CofC's] FAM and appropriate official communications) will need to be followed." (R_072).

It is also settled law that the use of mere labels such as "letter of intent" or "memorandum of understanding" is not controlling on the question of whether a binding contract exists. Burbach Broad. Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401, 406 (4th Cir. 2002). Instead, the law holds that an informal agreement is a binding contract when the parties intended to be bound by its terms. Oeland v. Kimbrell's Furniture Co., 210 S.C. 223, 227, 42 S.E.2d 228, 228-29 (1947); Aperm of S. Carolina v. Roof, 290 S.C. 442, 446-48, 351 S.E.2d 171, 173-74 (Ct. App. 1986); Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 762 (D.S.C. 1999). In this case, the MOU clearly evinces an intent by the parties to reach a mutually binding agreement.

If an injunction is not granted, Appellant will be denied her placement and tenure in the CofC's HSS, which is where the MOU required that Appellant be transferred to remove her from under Dr. Welch's supervision. Appellant will be deprived of the ability to report directly to Dr. Stewart who "will serve in the functional role as [Appellant's] department chair" and who will be responsible for "conducting [Appellant's] annual evaluations." (R_071-072). The loss of Dr. Stewart's supervision is not something that can be easily measured in monetary terms.

Unless an injunction is granted, Appellant will be deprived of her faculty office in the Riley Center, which was a stipulation specifically negotiated and agreed to in the MOU as part of her faculty appointment and employment terms. (R_071). Our courts have held that a preliminary injunction is appropriate to restrain a breach of obligations imposed by an employment contract. See, e.g., Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

The loss of a faculty office is not easily measured in monetary terms although it may have great value or benefit to the affected faculty member.

If Respondents are not enjoined, Appellant will suffer interference with her ability to perform her responsibilities as a tenured Associate Professor at the CofC, including the inability to conduct in-person meetings with students and others in her faculty office in the Riley Center and her inability to access and use the equipment and facilities that come with this office location. She will be relocated from the Riley Center to an inferior office location at the Silcox Building despite the deplorable, unhealthy, unsafe, and unworkable conditions that exist there. She will suffer injury to professional standing associated with such a demotion to an inferior office location and mental distress, embarrassment, humiliation, and indignity based on such a transfer of her faculty appointment in violation of the MOU.

If an injunction is not granted, Appellant will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Because of the discretion involved in awarding a merit increase to a particular faculty member—the increases range from 4% to 15% of the faculty member's annual salary—it will not be easy to calculate the financial loss to Appellant after the fact if she is not considered for the merit increase.

Finally, unless an injunction is granted, Appellant will be deprived of the opportunity to be considered for the HEHP Chairperson position. Appellant will be deprived of the opportunity for realizing an increase in standing, professional reputation, notoriety, prestige, experience, and good will accompanying the performance of the duties connected with the position of HEHP Chairperson. The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable. Levine, 367 S.C. at 465, 626 S.E.2d at 42 (holding that physician's loss of competency if she were unable to ply her trade as the lawsuit progressed was irreparable harm and

justified preliminary injunction restraining hospital from terminating her hospital privileges); see also IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 200 (Tex. Ct. App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

(2) Appellant Demonstrated Likelihood of Success on the Merits.

Appellant also demonstrated a likelihood of success on the merits. Appellant is "not required to prove an absolute legal right when seeking a preliminary injunction, but [she] must present *a reasonable question* as to the existence of such a right." AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505, 509 (Ct. App. 2009) (emphasis added). Courts have broadly construed this element and a litigant is required to do little more than make a *prima facie* showing. County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002); Childs v. Columbia, 87 S.C. 566, 70 S.E. 296 (1911). "Once a *prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Helsel, 307 S.C. at 29, 413 S.E.2d at 826. Appellant clearly satisfied this burden.

Appellant has shown more than a likelihood of success on the merits. Her lawsuit seeks to enforce the MOU dated July 17, 2014, which was signed by Appellant, Mr. McConnell (the CofC's then-President), Dr. Hynd (the CofC's then-Provost), Dr. Hale (Dean of the CofC's HSS), and Dr. Welch (Dean of the CofC's EHHP). The CofC's highest ranking officials all agreed to the MOU. The terms of the MOU explicitly state it was "agree[d] to" by each of those officials. (R_071). The MOU sets out in considerable detail exactly what the parties had agreed upon. It nowhere leaves anything to be resolved by future agreement. It does not state the parties contemplated executing a more formal document in the future.

The MOU's terms could not be clearer that Appellant's faculty appointment was transferred and moved to the CofC's HSS; that Appellant's tenure-track faculty line, faculty office, and administrative location are to be moved to the Riley Center; and that Appellant is to report directly to Dr. Stewart who "will serve in the functional role as [Appellant's] department chair" and who will be responsible for "conducting [Appellant's] annual evaluations." (R_071-072). Appellant has never agreed to modify or waive the terms of the contract. The CofC has offered nothing to contradict the terms of the MOU, which were specifically agreed to and signed not only by Appellant and Dr. Welch, but also by the CofC's then-President (Mr. McConnell), the CofC's then-Provost (Dr. Hynd), and the CofC's then-Dean of HSS (Dr. Hale).

Judge Young's Order cites Stevens and Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578-79, 762 S.E.2d 696, 701 (2014), for the proposition that "for a contract to be binding, material terms cannot be left for future agreement" and "an agreement which leaves open material terms is unenforceable." (R_014). Based on this case, Judge Young held that Appellant "has not presented any evidence or cited to any authority that the MOU is binding." Id. However, that case is clearly distinguishable and has no bearing on the current case.

In Stevens, the Supreme Court followed the long-settled principle that parties will not be bound by an informal document when that document's terms clearly express the parties' positive agreement not to be bound by its terms. 762 S.E.2d at 698-99; see also Oeland, 210 S.C. at 223, 42 S.E.2d at 228-29 ("It is a well-founded rule of law that a contract ... may be consummated by letters without the execution of a formal instrument and the fact that it is understood that the contract is to be reduced to a formal instrument does not invalidate such agreement *unless there be a positive agreement that it shall not be binding until formally executed*." (citing cases) (italics added)); Bugg v. Bugg, 272 S.C. 122, 125, 249 S.E.2d 505, 507 (1978) ("Where it is determined that the parties

intended not to be bound *until the written contract is executed*, no valid and enforceable obligation will be held to arise.").

The MOU at issue in Stevens, which is unlike the MOU in this case in critical respects, expressly stated that in the future the parties would "execute definitive written agreements with respect to the business terms and conditions herein contained." 762 S.E.2d at 698-99. The parties in that case had merely agreed they would work to reach an agreement in the future. Their MOU expressly contemplated they would execute a formal contract containing all material terms of their agreement once they had finalized their agreement, which never came to fruition. Unsurprisingly, because the MOU expressly left material terms for future agreement, the Court held this showed the parties did not intend to be bound by the MOU's terms.

The Stevens case obviously does not control the present case. Appellant's MOU with the CofC does not leave any material terms open or for future agreement. It nowhere states the parties still need to agree upon any terms or contemplates they will create or execute a more formal contract in the future. Unlike the situation in Stevens, the MOU in this case is a self-contained agreement which contains no language or "positive agreement" indicating the parties intended not to be bound by the agreement until a more formal document was signed. Instead, the MOU was and is the parties' final expression of their agreement. Stevens does not control the present case.[5]

[5] As noted above, the CofC's own official policies include Official Policy 2.3.1.1, which specifically addresses the nature and extent of the CofC's "contracting authority … and how it may be exercised" and states that "[t]he term 'Contract' means all types of agreements (regardless of content or what they may be called) where there is a mutual exchange of promises or undertakings" and "[c]ontracts may include, but are not limited to: … Memoranda of Understanding or Memoranda of Agreement …." (R_298-303). The MOU itself states that "[a]ll policies and procedures relative to [Plaintiff's] tenure and promotion (as outlined in the [CofC's] FAM and appropriate official communications) will need to be followed." (R_072).

The MOU, which is a binding contract, clearly states that Appellant's faculty office is to be in the Riley Center. Appellant has never agreed to modify or waive the terms of the contract. The CofC has offered nothing to contradict the terms of the MOU, which were specifically agreed to and executed by Appellant, Dr. Welch, and the CofC's President, Provost, and Dean of HSS. The obligations of the MOU should be enforced.

In addition to evidence showing the CofC breached the MOU, Appellant also presented evidence showing that the CofC and Dr. Welch arbitrarily refused to consider her for the HEHP Chairperson position based on Dr. Welch's decision to deem Appellant's application untimely even though Appellant was not notified of Dr. Welch's verbal deadline for submission of applications until after the deadline had already expired. Dr. Welch verbally announced this deadline at a meeting at which she knew Appellant was not present. Neither Dr. Welch nor the CofC notified Appellant of the deadline until after it had already expired. Appellant notified the CofC and Dr. Welch of her desire to apply for the position the very day she learned the position was going to be vacated and long before any decision would be made on filling the position.

The CofC's own Faculty Grievance Committee issued a written report determining that Appellant has a legitimate grievance because she was not provided with any advance notice of the open position or of any deadline for applying for the position, and further concluding that Appellant is an eligible candidate for the chairperson position, and that her application for the position should be considered. (R_152-156). Despite the Faculty Grievance Committee's findings, the CofC simply disregarded them. The current Provost advised Appellant by letter dated March 10., 2021 that the CofC will not consider her application because it would not be "appropriate to exempt [Appellant] from [the CofC's] hiring practices and policies in this instance." (R_136; R_158-160). Her letter did not identify what hiring practices and policies prevented the CofC from considering Appellant's

application. The CofC has since confirmed it has no policy or procedure which required that the opening in the HEHP chairperson be filled without providing other faculty members in the affected department notice of the opportunity to apply for the position. (R_403-406).

Appellant was also arbitrarily excluded from consideration for the merit pay increase while other faculty members were offered this opportunity. The CofC tendered no justification for its failure to notify Appellant of this opportunity or to consider her for the merit pay increase. Judge Young's Order failed to even address that issue.

(3) Appellant Demonstrated an Inadequate Remedy at Law.

"[W]hether there is an adequate remedy at law for a wrong, [is a] question[] that [is] not decided by narrow and artificial rules." Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939). "The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief, and the efficiency of the legal remedy in the particular circumstances." FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE p. 508. "[I]f the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff's rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power." Columbia Broadcasting Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305, 312 (1972).

Appellant demonstrated in the Circuit Court that she has no adequate remedy at law or otherwise for the harm or damage done or threatened to be done by the Respondents. Even if a judgment is entered in Appellant's favor following a trial on the merits of this action, the Court wouldn't be able to undo the actions and events that will have already transpired since this lawsuit

was filed. A jury could not *retroactively* return Appellant to the CofC's HSS, *retroactively* put her under Dr. Stewart's supervision or *retroactively* have Dr. Stewart perform Appellant's annual evaluations, or *retroactively* return Appellant to her office in the Riley Center even as part of a judgment in her favor. Awarding money damages over those issues would be difficult to calculate or award. As a result, a jury verdict would be inadequate to compensate Appellant for the loss of these benefits of the MOU.

Although the merit pay increase involves a monetary benefit, it will be difficult for a jury to determine exactly how much of a raise Appellant would have received if she had been properly considered for it given that the increases in salary range from 4% to 15% of the faculty member's annual salary. The uncertainty of fixing damages renders a potential monetary recovery an inadequate remedy. A jury likewise could not undo the fact that Appellant will have been deprived of the HEHP Chairperson position for many months before a judgment is entered after a merits trial. An award of money damages after the fact will not *retroactively* place Appellant in the HEHP Chairperson position.

In summary, Appellant respectfully requests this Court to review the record, make findings of fact in accordance with its own view of the preponderance of the evidence, and reverse the Circuit Court's Orders to hold that Appellant will suffer irreparable harm if an injunction is not granted, she will likely succeed on the merits, and there is an inadequate remedy at law. The Court should hold that a preliminary injunction is needed to maintain or restore the status quo that immediately preceded the controversy in this matter and to render complete relief to Appellant.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION BY BASING ITS ORDERS ON PURPORTED FACTS THAT ARE UNSUPPORTED BY TESTIMONY OR EVIDENCE IN THE RECORD AND WHICH ARE CONTRARY TO THE EVIDENCE IN THE RECORD.

Judge Young's November 12, 2021 Order contains several findings of fact that are unsupported by any affidavit, testimony, or other evidence anywhere in the record. These purported factual findings are based entirely on arguments made by Respondent's legal counsel at the hearing on Appellant's motions or in their memorandum opposing the motions, which are not evidence. Bowers, 304 S.C. at 68, 403 S.E.2d at 129; McManus, 171 S.C. at 89, 171 S.E. at 475; McClurg, 395 S.C. at 87, 716 S.E.2d at 888 n.1.

The Order contains the following findings of fact which are not supported by any affidavit, testimony, or other evidence in the record, but are the product of CofC's legal counsel's arguments:

- "For example, for the fall semester of 2021, [Appellant] is teaching three courses in her discipline *which are placed with similar disciplines in* the [CofC's] Department of Health and Human Performance [HEHP] within the [CofC's School of Education, Health, and Human Performance or EHHP]. Her course load *is typical for a faculty member in her Department and area of study*. The location of her assigned office with the other members of her department *is reasonable and consistent with this academic setting*." (R_011) (emphasis added).

The Order cites to nothing in the record supporting any of these assertions, including the claims that the courses which Appellant teaches were placed with similar disciplines in the HEHP, that these courses are typical for a faculty member in the HEHP, or that Appellant was reassigned to the HEHP because that is where other faculty within her same discipline are located. In fact, these assertions are factually inaccurate. The above-quoted findings in the Order are factually inaccurate and are not supported by the actual evidence in the record. The Circuit Court abused its discretion by basing its Order on such factual findings.

- "[Appellant] first contends that she is likely to succeed on her claim that she was denied the HEHP chairperson position based on Dr. Welch's arbitrary decision to deem her application

> untimely, when she was not given notice of the deadline…. *She has presented no evidence to show that she should have obtained this position*." (R_013) (emphasis added).

Appellant's verified motions and affidavit showed she was not provided any notice of the application deadline for the vacant HEHP chairperson position until three days after it had already expired. Despite this fact, the unrefuted evidence in the record showed that Dr. Welch refused to consider Appellant's application for the position even though she applied for it the same day she learned of the opening. Appellant's affidavit also states she is more qualified for the position than the lone individual (Dr. Pfile) whose application Dr. Welch would consider. (R_237 ¶6; R_148).

The CofC offered no affidavit, testimony, or evidence to contradict or rebut any of Appellant's evidence on these matters. Instead, in opposition to Appellant's motions, the CofC merely offered the arguments of its legal counsel who claimed the CofC gave Appellant proper notice of the application deadline for the chairperson position in accordance with the CofC's policies. (R_326-327). There is no evidence anywhere in the record supporting the CofC's claim (and the Circuit Court's apparent finding) that Appellant was given proper advance notice of Dr. Welch's application deadline. She was not provided any such notice.

The Circuit Court's finding that Appellant "has presented no evidence to show that she should have obtained this position" seeks to impose a requirement that no applicant could ever meet. The Circuit Court's finding fails to appreciate that Appellant's motions sought a preliminary injunction to require the CofC to accept her application as being timely and to require the CofC to consider her application on its merits, rather than to exclude her from consideration based on the CofC's invocation of an arbitrary application deadline manufactured by Dr. Welch at a faculty meeting without advance notice on the meeting agenda and of which Appellant was not even apprised before it expired. Appellant does not seek an order requiring her to be placed in the

chairperson position; instead, she seeks an order requiring the CofC to consider her application for the position on the merits. Appellant submits that if the merits of her application are considered, then she will be found the more qualified candidate. The Court's finding also disregards Appellant's sworn affidavit attesting to the fact that she was more qualified than Dr. Pfile for the chairperson position. (R_237 ¶6; R_148).

The above-quoted findings in the Circuit Court's Order are unsupported by the evidence in the record. The Circuit Court abused its discretion by basing its Order on such factual findings.

- "[Appellant] has not shown that she is likely to succeed on her claim that the MOU is an enforceable contract, *as its terms do not evidence an intent to be contractually bound to specific, enforceable obligations*." (R_014) (emphasis added).

The Order cites to no evidence anywhere in the record supporting the CofC's assertion that Appellant and the CofC did not intend for the MOU to be an enforceable contract. Such an intent is nowhere stated on the face of the MOU itself. The only evidence in the record shows the CofC and Appellant intended for the MOU to constitute a binding contract. (R_071-072; R_029-030 ¶20-23; R_114; R_220-212 ¶4-6).

The MOU was signed by Appellant, Mr. McConnell (the CofC's then-President), Dr. Hynd (the CofC's then-Provost), Dr. Hale (Dean of the CofC's HSS), and Dr. Welch (Dean of the CofC's EHHP). The CofC's highest ranking officials all agreed to it. The MOU's terms explicitly state it was "agree[d] to" by each of those officials. (R_071). The MOU sets out in detail exactly what the parties had agreed upon. It nowhere leaves anything to be resolved by future agreement. It does not state the parties contemplated a more formal document in the future.

The CofC's official policies include Official Policy 2.3.1.1, which specifically addresses the nature and extent of the CofC's "contracting authority … and how it may be exercised." (R_298-303). This policy explicitly states that "[t]he term 'Contract' means all types of agreements

(regardless of content or what they may be called) where there is a mutual exchange of promises or undertakings" and "[c]ontracts may include, but are not limited to: … Memoranda of Understanding or Memoranda of Agreement …." Id. The MOU itself explicitly states that "[a]ll policies and procedures relative to [Appellant's] tenure and promotion (as outlined in the [CofC's] FAM and appropriate official communications) will need to be followed." (R_072).

Respondents failed to submit any evidence in the Circuit Court showing that the CofC did not intend for the MOU to constitute a binding agreement. The above-quoted findings in the Circuit Court's Order are unsupported by the evidence in the record. The Circuit Court abused its discretion by basing its Order on such factual findings.

CONCLUSION

For the reasons stated, this Court should reverse the Orders of the Circuit Court, grant a preliminary injunction as requested by Appellant's motions, and remand the case for further proceedings accordingly.

Respectfully submitted,

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By:*/s/ Daniel F. Blanchard, III*

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