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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2022-000044
Court of Common Pleas 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

Of whom College of Charleston and Frances C. Welch, Ph.D.,
M.A. are the ..... Respondents

RESPONDENTS' RETURN TO PETITION FOR REHEARING

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AND NOW COME Respondents College of Charleston ("CofC") and Frances C. Welch, Ph.D., M.A. ("Dr. Welch") (collectively "Respondents"), by and through their undersigned counsel, file the following Return to Petition for Rehearing. The Court should deny Appellant Olivia M. Thompson, Ph.D., M.P.H.'s ("Dr. Thompson") Petition for Rehearing and should not reconsider its *per curiam* Unpublished Opinion No. 2023-UP-301 ("Opinion") affirming the denial of Dr. Thompson's request for a preliminary injunction.

INTRODUCTION[1]

Dr. Thompson asserts claims against CofC (her employer) and Dr. Welch that mainly focus on a July 14, 2017 Memorandum of Understanding ("MOU") that she asserts is an enforceable contract. (*See generally* R. pp. 71-72). Dr. Thompson asserts claims for: (1) declaratory judgment (CofC); (2) breach of contract/good faith and fair dealing (CofC); (3) S.C. Payment of Wages Act (CofC) and Dr. Welch; (4) intentional interference with contract (all Defendants); (5) intentional interference with prospective contract (all Defendants); (6) defamation (all Defendants); (7) civil conspiracy (all Defendants); (8) injunctive relief (CofC and Dr. Welch); (9) conversion (Foundation and Dr. Tobin, who are not involved in this appeal); and (10) attorneys' fees (CofC). (*See generally* R. pp. 24-73).

On April 2, 2021, Dr. Thompson filed her second Motion for Preliminary Injunction requesting preliminary injunctive relief:

> [A] preliminary injunction during this litigation restraining and enjoining Defendants CofC and Welch from (a) breaching, contravening, or disregarding the MOU's terms and provisions; (b) unilaterally changing or altering Plaintiff's faculty appointment, physical office location, and administrative location in contravention of the terms and provisions of the MOU (including an Order maintaining and/or restoring her tenure track faculty line, physical office, and administrative location at the Riley Center); (c) unilaterally transferring or moving Plaintiff to the EHHP in contravention of the terms and provisions of the MOU (including an Order maintaining and/or restoring her faculty appointment to the HSS); (d) unilaterally returning Plaintiff to work under Dr. Welch's supervision or

[1] In an effort to avoid repetition and surplusage, Respondents will not recite the detailed factual and procedural history. Respondents incorporate by reference, as if set forth at length herein, their Final Brief of Respondents (including all defined terms used therein).

> unilaterally removing Plaintiff's faculty appointment from Dr. Stewart's report (including an Order removing Plaintiff from under Defendant Welch's supervision and maintaining and/or restoring her assignment or faculty appointment to the supervision of Dr. Stewart who would serve in the functional role as Plaintiff's department chairperson); (e) failing to consult with Plaintiff or obtain her agreement with any change to or transfer of her faculty appointment, physical office location, and administrative location; and (f) otherwise retaliating against and harassing Plaintiff.

(*See generally* R. pp. 110-197, esp. R. pp. 140-41). On July 9, 2021, Dr. Thompson supplemented her Second Motion with a Supplemental Motion for Temporary Restraining Order and Preliminary Injunction, which focused on incidents that occurred on June 29, 2021. For purposes of this Return, those two filings are collectively referred to as the "Motion."

On November 12, 2021, Judge Roger L. Young, Sr. entered an Order denying Dr. Thompson's Motion because:

- Dr. Thompson's prior motion for an injunction precluded the requested relief:
- Dr. Thompson did not show irreparable harm without a preliminary injunction: "Although this case has been pending for over 15 months without injunctive relief, Plaintiff has not presented any evidence that she has been irreparably harmed during that time."
- Dr. Thompson did not show a likelihood of success on the merits.
- Dr. Thompson has an adequate legal remedy.

(*See generally* R. pp. 4-15). This Order is the subject of this appeal.

On August 30, 2023, this Court filed a *per curiam* Opinion affirming Judge Young's denial of Dr. Thompson's Motion because:

- "Thompson failed to demonstrate irreparable harm and an inadequate remedy at law because she is not at risk of a complete loss of her professional practice, and the injuries she alleged can be remedied by monetary damages or an order of the circuit court." (*See* Op. No. 2023-UP-301, at 3).
- "Thompson failed to demonstrate that she would succeed on the merits because she has not provided any evidence a Memorandum of Understanding (the MOU) between herself and Respondents was an enforceable contract." (*See id.*).

On September 14, 2023, Dr. Thompson filed the instant Petition for Rehearing arguing, *inter alia*, that:

(a) The Court erred in finding that Dr. Thompson had not satisfied the likelihood of success prong because the evidence supports that the MOU is a binding contract.

(b) The Court erred in finding that Dr. Thompson had not shown irreparable harm because an injunction is required to provide her what was promised in the MOU.

The Opinion correctly held that that Judge Young did not abuse his discretion in denying Dr. Thompson's Motion. Therefore, the Court should deny Dr. Thompson's Petition for Rehearing.

ARGUMENT

A. Standard of Review on a Petition for Rehearing.

A petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." *See* Rule 221(a), SCACR. "'The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.'" *Kennedy v. South Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (*quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfriss, Appellate Practice in South Carolina 309 (1999) (*citing Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933))).

B. The Opinion Correctly Concluded That Judge Young Did Not Err in Denying Dr. Thompson's Request for Preliminary Injunctive Relief.

"The decision whether to grant or deny an injunction is ordinarily left to the sound discretion of the trial court." *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002); *accord Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (trial court's ruling on motion for preliminary injunction is "reviewed for abuse of discretion."). "'An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.'" *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 510-11, 725 S.E.2d 681, 683 (2012) (citation omitted).

"A preliminary injunction should issue only if necessary to preserve the *status quo ante*." *HookPoint, LLC v. Branch Banking and Trust Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012). The requirements for a preliminary injunction are well-settled: "the applicant must establish three

elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law." *See Compton v. South Carolina Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (citation omitted). "A preliminary injunction should issue only if necessary to preserve the *status quo ante*, and only upon a showing by the moving party" of these requirements. *See Poynter Invs. v. Century Bldrs. of Piedmont*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

1. <u>The Opinion Correctly Concludes That Dr. Thompson Has Not Shown That She Is Likely to Succeed on the Merits.</u>

"In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." *Compton v. South Carolina Dep't of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). In considering the element, courts examine the merits *only* to the extent necessary to justify an order halting a party's injury and to afford orderly and deliberative due process. *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969). "The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right." *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009).

Dr. Thompson's preliminary injunction claim focuses on her claims of breaches of a July 14, 2017 MOU, which states in relevant part:

> We, the aforementioned Provost and Executive Vice President for Academic Affairs, and deans of the School of Humanities and Social Sciences (HSS) and the School of Education, Health, and Human Performance (EHHP), agree to and recommend the following stipulations regarding the change in the faculty appointment of Dr. Olivia M. Thompson. The stipulations of this Memorandum of Understanding have been reviewed and agreed upon by Dr. Thompson as indicated by her signature under the agreement considerations noted below.
>
> - It is agreed that Dr. Thompson's tenure-track faculty line, office and any grant-related offices are to be moved from EHHP to the Joseph P. Riley Jr. Center for Livable Communities (Riley Center), (a non-academic unit);

- Dr. Thompson's Boeing grant and any other sources of external funding follow her to the Riley Center where they are to be administratively located;
- The effective date of this agreement is August 16, 2014;
- All of Dr. Thompson's professional activities to date would be relevant to her continuing forward toward tenure and promotion (i.e. Dr. Thompson's tenure clock will not be changed);
- Dr. Thompson will report directly to Dr. Kendra Stewart who will serve in the functional role as her department chair;
- Dr. Stewart will be responsible for determining Dr. Thompson's budgeted time for teaching, research and service and conducting Dr. Thompson' s annual evaluations;
- Dr. Thompson's basic teaching responsibilities will be three courses a semester unless grant or contract buy-outs reduce the teaching load for appropriate grant or contract duties;
- Dr. Thompson's current teaching assignments in EHHP in the Public Health Program will continue but can be modified as appropriate with the concurrence of Dr. Stewart, Dr. Hale and others who may be impacted by any modification;
- Dr. Stewart will be responsible for coordinating Dr. Thompson's panel review as she comes up for tenure and promotion;
- Construction of the panel will follow the Faculty/Administration Manual (FAM), to the extent the FAM speaks to the constitution of such panels, and beyond that will follow practices that have been developed and used for tenure-track faculty members in nondepartmental programs, including review and final approval of the panel by the Provost and strict limitations on Dr. Thompson's participation in constitution of the proposed panel; and finally,
- All policies and procedures relative to tenure and promotion (as outlined in the FAM and appropriate official communications) will need to be followed.

(*See generally* R. pp. 71-72). Dr. Thompson argues in her Petition for Rehearing that, without a preliminary injunction, she "will be deprived of the agreed-upon benefits of her contract during the pendency of this action — *e.g.*, that her faculty appointment be in the CofC's School of Humanities and Social Sciences ("HSS"), that her faculty office be in the CofC's Joseph P. Riley, Jr. Center for Livable Communities ("Riley Center"), and that her faculty report or supervisor be Dr. Kendra Stewart." (*See* Pet. for Reh'g, at 1). For the following reasons, the Court's Opinion

correctly concluded that Dr. Thompson did not show a likelihood of success on the merits.

a. Dr. Thompson Has Not Presented Evidence That She Provided Valuable Consideration to Support the MOU.

Dr. Thompson's injunction claim first fails because she has not shown a likelihood of success on her claim that the MOU is a legally enforceable contract. Specifically, she has not shown that valuable mutual consideration supports the MOU. "[T]he essential elements of any contract . . . are: a contractual intent, an actual meeting of the minds of the parties, and valid *mutual* consideration." *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997) (emphasis added) (citation omitted). "*[A]ll* parties must be obligated under a contract in order for it to be enforceable." *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) (emphasis added); *accord Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999) ("[A] covenant not to compete entered into during the employment relationship requires *new consideration.*") (emphasis added).

"'Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (*quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)). To satisfy the consideration requirement, both parties must provide something:

> Turning now to Bright's January 27 statement to Howard and finding, as we are required to do, that Bright in fact promised Howard that he had until February 4, 1983 to either remove his goods from the camper or make the payments current, we note that there is no evidence that the Howards agreed to either pay the past due installments or to do anything in return for SCN's promise to defer payment. Consequently, we are unable to find an enforceable promise because of lack of consideration. [Citations omitted.] . . . In order to constitute consideration, there must be a benefit to the creditor--that is, something must be secured to him which he could not otherwise demand--or there must be a detriment to the debtor--that is, he must actually do or obligate himself to do something which in the absence of his agreement he would not be bound to do.

See Howard v. South Carolina Nat'l Bank, 288 S.C. 421, 425, 343 S.E.2d 41, 43 (Ct. App. 1986) (citations omitted).

The Court's Opinion correctly concludes that Dr. Thompson presents no evidence that she provided any valuable consideration to CofC under the MOU. The tenor of the MOU is that it represents promises made to Dr. Thompson that CofC would do certain things. The MOU does not impose similar obligations on Dr. Thompson. There is no benefit to CofC under the MOU beyond what Dr. Thompson was already providing to CofC as an employee. Dr. Thompson contends that the provision of the MOU states that her "basic teaching responsibilities will be three courses a semester unless grant or contract buy-outs reduce the teaching load for appropriate grant or contract duties." However, she presents no evidence that this was a promise to do anything beyond what she was already required to do as an employee of CofC. As a result, the MOU lacks the *mutual* consideration required for it to be an enforceable contract.

b. Dr. Thompson Has Not Shown a Likelihood of Success on the Merits Because It Is Undisputed That the MOU Leaves Materials Terms Open.

In addition, the Opinion correctly concluded that the MOU was not a binding contract because it is not sufficiently specific. To constitute a valid and binding contract, it is essential all parties assent to the same thing in the same sense. *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 894-95 (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." *Id.* "[F]or a contract to be binding, material terms cannot be left for future agreement," and "an agreement which leaves open material terms is unenforceable." *Stevens and Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 578-79, 762 S.E.2d 696, 701 (2014) ("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.") (citation omitted); *accord* 1 Corbin on Contracts § 4.1 ("A 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.").

As Judge Young and the Opinion conclude — and Dr. Thompson has not refuted — the MOU lacks sufficient definiteness and is unenforceable. The MOU discusses certain then-current responsibilities of CofC that could be subject to change in the future. It does not set forth any temporal duration of the rights provided thereunder. It also involved possible future tenure or promotion possibilities that would all be subject to unknown conditions and circumstances. There are no definitive time frames for CofC's alleged obligations. There are no specific future promises in the MOU that Dr. Thompson asks the Court to enforce.

c. Dr. Thompson's Reliance on CofC Policies Is Misguided.

In her Petition, Dr. Thompson asserts that "CofC's own official policies . . . specifically address[] the nature and extent of the CofC's 'contracting authority ... and how it may be exercised.'" (*See* Pet. for Reh'g, at 5-6). Specifically, she relies on language in CofC Policy Section 2.3.1.1 (Authority to Contract and Required Review of Contracts) providing that (emphasis added) "[c]ontracts *may include*, but are not limited to: ... Memoranda of Understanding or Memoranda of Agreement." (*See id.* at 6 (emphasis added)). These policies do not make the MOU an enforceable contract.

First, Dr. Thompson did not present this policy to the trial court in support of her Motion; to the contrary, she only attached it to her Motion to Alter or Amend Order Denying Motions for Preliminary Injunction after the Court denied her Motion. (*See* R. pp. 297-303). As a result, she did not properly preserve her arguments based on Section 2.3.1.1 for review. *See Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016) ("'A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.'") (citation omitted); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the

Rule 59(e) motion. The court of appeals should have refused to entertain that theory as well for the same reasons."); *McClurg v. Deaton*, 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct. App. 2008) ([A] party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment.") (citation omitted). As a result, the Court should not consider CofC Policy 2.3.1.1.

In any event, Section 2.3.1.1 is not evidence that the parties intended that the MOU be a binding contract and it does not convert the MOU into a contract. Rather, the purpose of Section 2.3.1.1 is *only* "to set forth Contract signatory authority and Contract review requirements for Contracts entered into on behalf of the College. . . . Specifically, this policy addresses who may enter Contracts on behalf of the College and describes the necessary review and approval of Contracts prior to execution." (*See* R. pp. 298-99). Section 2.3.1.1 does not create a blanket rule that every MOU CofC executes is *per se* a binding contract. Section 2.3.1.1 does not include any language that would make *this particular* MOU legally enforceable; it does not change South Carolina contract law, which requires the offer, acceptance, mutual assent, and mutual consideration for a contract. Section 2.3.1.1 states only that a contract within the policy *"may include"* a memorandum of understanding. Section 2.3.1.1 does not make any statement concerning the enforceability of this specific MOU. As a result, Dr. Thompson's reliance on Section 2.3.1.1 is misplaced.

d. Dr. Thompson Has Not Shown That She Is Likely to Succeed in Proving Breaches of the MOU.

Even if the MOU is a contract, Dr. Thompson presents no evidence that CofC failed to do what was set forth in the MOU. Under the MOU, CofC agreed only that (effective August 16, 2014):

- Dr. Thompson would be moved from EHHP to the Riley Center;
- The Boeing grant would follow Dr. Thompson to the Riley Center;
- Dr. Thompson's tenure clock would not be changed;

- Dr. Thompson would report to Dr. Kendra Stewart, who would be "responsible for determining Dr. Thompson's budgeted time for teaching, research and service and conducting Dr. Thompson' s annual evaluations";

- Dr. Thompson's teaching responsibilities would be "three courses a semester unless grant or contract buy-outs reduce the teaching load for appropriate grant or contract duties";

- "Dr. Thompson's current teaching assignments in EHHP in the Public Health Program will continue but can be modified as appropriate with the concurrence of Dr. Stewart, Dr. Hale and others who may be impacted by any modification";

- Dr. Stewart will be responsible for coordinating Dr. Thompson's panel reviews, with the panel constructed consistent with the Faculty/Administration Manual; and

- Policies and procedures for to tenure and promotion will be followed.

(*See* R. pp. 71-72). Dr. Thompson has not presented any evidence of a breach of the MOU.

i. <u>Dr. Thompson Has Not Shown That CofC Breached the MOU by Moving Her Appointment from School of Humanities and Social Sciences, Her Office From the Riley Center, or Her from the Supervision of Dr. Stewart.</u>

Dr. Thompson claims that CofC breached its contract (*i.e.,* the MOU) in the following ways: (a) not keeping her faculty appointment in CofC's HSS; (b) not maintaining her office in the Riley Center; and (c) moving her faculty report from Dr. Stewart. Dr. Thompson cannot show a likelihood of success on these contentions.

Dr. Thompson does not dispute that CofC moved her office to Riley Center, as the MOU provides; specifically, she alleges that CofC transferred her from the EHHP to the HSS effective August 16, 2014. (*See* R. p. 30 ¶ 26). She also concedes that, consistent with the MOU, she was moved to report to Dr. Stewart and had her offices moved to the Riley Center. (*See* R. p. 30 ¶ 27). Dr. Thompson does not argue that CofC failed to do anything under the MOU. Rather, she claims that (years after execution of the MOU) CofC breached its promises by moving her out of the Riley Center (and/or HSS or Dr. Stewart's report).

The premise of Dr. Thompson's argument is that the moves (to HSS, the Rile Center, and Dr. Stewart) under the MOU were to be perpetual: *i.e.,* CofC could never move her from those

locations and assignments. "[P]erpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994). In the absence of an express statement of the duration of the contract, South Carolina law is clear that parties may terminate apparently indefinite contracts:

> Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the Courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either on giving reasonable notice of his intention to the other.

See Childs v. Columbia, 87 S.C. 566, 572, 70 S.E. 296, 298 (1911); *accord State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 80, 153 S.E. 537, 564 (1929) ("This, however, would not create a contract to continue the operation of the railway indefinitely or in perpetuity without regard to whether or not reasonable compensation was afforded for the services rendered."). In other words, if the MOU was a contract, CofC had the right to terminate it at will.

Dr. Thompson presents no evidence that the MOU should be construed as a perpetual promise to keep Dr. Thompson at these locations. Its plain language does not state or imply that; the MOU does not state that these moves will remain in effect until Dr. Thompson quits or is terminated. The Court should not construe the MOU as a binding promise without end. That is inconsistent with South Carolina contract law and the parties' intent. Dr. Thompson has presented no evidence that the MOU granted her a permanent right to an office in the Riley Center (or to any other permanent rights) for as long as she chose to remain at CofC. As a result, Dr. Thompson cannot show that she is likely to succeed on the merits of this claim.

Dr. Thompson responds that "South Carolina law holds a contract which provides it will terminate upon the occurrence of a specific event is not deemed perpetual or indefinite in duration and is not terminable at will" and that "MOU was to continue in effect provided Thompson's contract was not terminated or altered in accordance with the provisions in the CofC's FAM

[Faculty Administration Manual]." (*See* Pet. for Reh'g, at 7-8). First, as set forth above, the MOU does not make promises that explicitly were to continue until the termination of Dr. Thompson's employment. Second, the FAM that Dr. Thompson relies upon was not part of the record on appeal and is not a proper consideration in this appeal.

For the foregoing reasons, the Opinion correctly affirmed Judge Young's denial of Dr. Thompson's Motion.

ii. Opportunity to Apply for the HEHP Chair Position.

Dr. Thompson contends that she is likely to succeed on her claim that she was not allowed to apply for the HEHP chairperson position in breach of the MOU. This contention is incorrect.

Initially, Dr. Thompson presents no evidence and cites no authority that the alleged denial of the chance to apply for this position violated the MOU (or any other putative contract) or was otherwise legally actionable.[2] She does not cite to any specific provision of the MOU that was violated. She does not cite to any evidence or legal authority supporting that she had a legally enforceable right to apply for the department chair position. She does not present evidence showing that CofC (or any of its agents) actively prevented her from applying for or obtaining the chair position.

To the contrary, the record shows — and Dr. Thompson does not dispute — that she had a full and fair opportunity to apply for chair position. She chose not to attend a duly-called meeting on January 26, 2021 of which she was given advance notice. (*See* R. pp. 351-53). At that meeting, an announcement was made that the current Department Chair would not seek reappointment, with Dr. Welch asking any interested person to apply within seven days (*See* R. pp. 149-50). Dr. Thompson does not dispute she was aware that this meeting was taking place. Because she was not there, she did not apply on time. (*See* R. p. 149 ("Unfortunately, you have missed the

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[2] Under the Faculty Administration Manual, "Chairs are appointed by the Provost with the approval of the President, and serve at the pleasure of the Provost. The Provost will receive recommendations for new appointments from departmental faculty and the Dean of the school to whom the Department Chair is accountable." (*See* April 2, 2021 Second Mot. Ex. C, at 3).

deadline as per Wes's email below.")). As a result of missing that deadline, Dr. Thompson filed a grievance and was given a hearing before the Grievance Committee, which gave a non-binding advisory assessment. Dr. Thompson acknowledged during her grievance hearing that she does not know her faculty peer group and has never attended or taken part in department meetings. There is no evidence to show that CofC did anything to prevent her from applying for this position. In any event, she has not presented competent evidence showing she would have obtained this position. She has not shown that she is likely to succeed on the merits of this claim. Dr. Thompson's claims concerning the HEHP department chair position is without legal basis and is premised upon sheer speculation.

For the foregoing reasons, the Court should deny Dr. Thompson's Petition for Rehearing.

2. Judge Young's Order Correctly Concluded That Dr. Thompson Did Not Show the Absence of a Sufficient Legal Remedy or Irreparable Harm Without an Injunction.

Irreparable harm and the absence of an adequate legal remedy are related requirements for a preliminary injunction. The Court's Opinion held that "[Dr.] Thompson failed to demonstrate irreparable harm and an inadequate remedy at law because she is not at risk of a complete loss of her professional practice, and the injuries she alleged can be remedied by monetary damages or an order of the circuit court." (*See* Opin., at 5). Dr. Thompson now objects that this "implies the only way Thompson could establish irreparable harm is if she proves she was at risk of completely losing her faculty appointment or professional livelihood." (*See* Pet. for Reh'g, at 10). For the reasons that follow, the Opinion correctly affirmed Judge Young because Dr. Thompson has not carried her burden of proving these elements.

Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *See Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939).

As CofC and Dr. Welch have argued throughout this appeal, Dr. Thompson's alleged injuries are not irreparable and can be remedied with money damages. The bulk of Dr. Thompson's

claims relate to the conditions of her employment. She cites no authority supporting that changes to working conditions are irreparable injuries.[3] Under Dr. Thompson's approach, nearly every employment case (discrimination, breach of contract, or otherwise) would require preliminary injunctions. She has not cited any law broadening the definition of irreparable harm so radically.

Dr. Thompson attempts to satisfy the "irreparable harm" and "adequate legal remedy" requirements by simply arguing that it will be difficult for a jury to determine the amount of damages required to compensate her. However, she does not cite authority supporting that irreparable harm is satisfied with proof that it would be difficult for a jury to calculate an appropriate damage award.

a. Placement in HSS under Dr. Stewart

Dr. Thompson first argues that she will be irreparably harmed without an injunction with no legal remedy because she will be outside of HSS and not placed under Dr. Stewart. (*See* Pet. for Reh'g, at 13). However, she cites no authority supporting that this alleged injury is "irreparable." To the contrary, like most other injuries, a jury may compensate Dr. Thompson for

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[3] Dr. Thompson's Petition for Rehearing cites numerous out of state cases for the proposition that an employee's alleged lost promotion opportunities are irreparable harm. However, all of those cases are easily distinguishable from the facts of this case. *See Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cty.*, 2021 WL 1575772, *23 (D. Md. Apr. 21, 2021) (involving allegations of constitutional violations, which are irreparable harm as a matter of law, and racial discrimination); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (involving Equal Protection claims concerning denials of drivers licenses that prevented any meaningful ability to work); *Manlove v. Volkswagen Aktiengesellschaft*, 2019 WL 2291894, at *14 (E.D. Tenn. May 17, 2019) (finding irreparable harm did ***not*** exist in discrimination action where plaintiff "presented no specific evidence to support his claims" of harm to career); *Tanner v. Federal Bureau of Prisons*, 433 F. Supp. 2d 117, 125 (D.D.C. 2006) (finding prisoner showed irreparable harm where he was totally denied access to vocational training because he was moved to a different prison); *Allied Const. Indus. v. City of Cincinnati*, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014) (finding trade association showed irreparable harm where city ordinance was preempted by ERISA and would have denied members ability to bid on municipal contracts); *35 New York City Police Officers v. City of New York*, 819 N.Y.S.2d 852 (N.Y. Sup. Ct. 2006) (this case was *reversed*, at 34 A.D. 392 (N.Y. App. Div. 2006), with the court concluding that "petitioners also failed to establish imminent and irreparable harm because none of the petitioners was guaranteed employment with the Port Authority and all were subject to additional screening").

any injury with money damages if appropriate.

b. Move from Riley Center

Dr. Thompson argues that she sustained irreparable harm from the move of her office from the Riley Center to the Silcox Building. However, the Opinion correctly concluded that the relocation of her office — even if to a "lesser" location — is not irreparable harm warranting interim injunctive relief. If it is determined that CofC breached the MOU in this regard, the Court can enter a permanent injunction and award damages for any injuries caused in the interim.

First, Dr. Thompson cites no South Carolina authority supporting that this move could possibly be an "irreparable" harm. The only authority Dr. Thompson cites is a series of out-of-state cases that stand for the proposition that changes in the workplace environment (including moving to poor conditions) can constitute "adverse employment actions" under civil rights laws. (*See* Pet. for Reh'g, at 14-16). While that may (or may not) be the case, these cases do not stand for the proposition that such actions constitute irreparable harm. To the contrary, those adverse employment actions are frequently the basis for money damages and permanent injunctive relief. There is simply no law supporting Dr. Thompson's argument in this regard. To the contrary, at least one court concluded that a move of a plaintiff's office — even to a "windowless, poorly ventilated room" — is not irreparable harm. *See Hornig v. Trustees of Columbia Univ.*, 2018 U.S. Dist. LEXIS 189268, at *19 (S.D.N.Y. Nov. 5, 2018) ("Hornig's complaint about the relocation of her office to another office in the same building borders on the frivolous. At minimum, Hornig has not demonstrated that her office's relocation qualifies as an injury at all, let alone one "that cannot be remedied if a court waits until the end of trial to resolve.").

Moreover, Dr. Thompson presents no evidence to show *how* moving her offices has impacted her career in a way that is irreparable. She presents no evidence of specific equipment and facilities CofC denied her or resulting harm. She presents no evidence to support that the move will cause her irreparable harm to her academic standing or professional career. She presents no evidence of how the Silcox Building is unsafe. She presents no evidence to support her

conclusory statement that the Silcox Building is causing her any injury to her "professional standing." She presents no evidence that she had any property interest or ownership in an office in the Riley Center. To the contrary, she merely claims that — because the MOU moved her office to the Riley Center in 2014 — she is entitled to remain there indefinitely and that any change would irreparably harm her. It is difficult to conceive of any court finding that moving an office is so damaging that the court must grant a preliminary injunction to preserve the *status quo* until the conclusion of litigation.

Therefore, for the foregoing reasons, the Opinion correctly concluded that the alleged move of Dr. Thompson's office is not "irreparable harm."

c. Denial of Opportunity for Pay Raises

Dr. Thompson next claims she established irreparable harm because CofC denied her the opportunity to apply for merit-based pay raises. Specifically, she contends that any harm in this respect is irreparable because "[b]ecause 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." (*See* Pet. for Reh'g, at 16). Dr. Thompson's arguments are misplaced.

This alleged injury, at its core, is monetary and legal. Dr. Thompson is claiming only that she should have been paid more money than she was actually paid. One can scarcely imagine a more "reparable" injury. If Dr. Thompson proves that CofC improperly denied her a pay raise, the trial court can fully compensate her for that injury after trial. Dr. Thompson does not dispute that this injury is inherently reparable with money damages.

Dr. Thompson asserts that she has shown irreparable harm because — because the salary raises ranged from 4-15% — it is difficult to calculate her damages, such that an immediate injunction is necessary to make her whole. In support, she cites *Bethel Methodist Episcopal Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947). That case is inapposite. In *Bethel Methodist*, the Court addressed an ordinance closing a street allowing access to a

predominately African-American church. The Court held that irreparable harm existed because there were *no measurable damages* (*i.e.,* any damages would be "nominal" in nature):

> Irreparable injury as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one. [Citation omitted.] This court has recently held in a related case that injunction will lie to prevent obstruction of a public street or alley if the complaining party has no adequate remedy at law.

See Bethel Methodist, 211 S.C. at 451, 45 S.E.2d at 845. In this case, if CofC wrongfully denied Dr. Thompson a pay increase, damages would compensate her for that loss. A finder of fact would be capable, with the assistance of proper evidence, of determining an appropriate measure of damages. As in nearly every case, the parties would present their evidence and arguments, and the fact finder would determine an appropriate measure of damages. The mere fact that the parties do not know with absolute certainty the percentage pay raise that Dr. Thompson actually would have obtained does not make her alleged injury "irreparable" so as to warrant a preliminary injunction.

The Court should deny Dr. Thompson's Petition for Rehearing because the alleged denial of opportunities to request a pay raises is not "irreparable harm."

d. <u>HEHP Chairperson Position</u>

Finally, Dr. Thompson argues that she will be irreparably harmed in the absence of an injunction because — more than two years ago — CofC denied her the opportunity to apply for the HEHP chair because she did not timely express her interest: "Thompson will be deprived of the opportunity to be considered for the HEHP Chairperson position and the resulting increase in standing, professional reputation, notoriety, prestige, experience, and good will that accompanies such a change in status." (*See* Pet. for Reh'g, at 17). However, Dr. Thompson's arguments are without merit, and she has not shown irreparable harm with regard to the alleged denial of the chance to apply for this position. Dr. Thompson presents no evidence to show that she has ever

been denied a specific promotion in violation of the MOU. She presents no examples of any loss of professional standing as a result or any specific risk of such a loss. She presents no evidence of a loss of career opportunities. Aside from her self-serving, generic statement that she " will be deprived of the opportunity to be considered for the HEHP Chairperson position and the resulting increase in standing, professional reputation, notoriety, prestige, experience, and good will that accompanies such a change in status" (Pet. for Reh'g, at 17), she presents no evidence at all to support her vague and speculative claim of an irreparable injury. A preliminary injunction is not required to protect the *status quo ante*, in which she was not the chair of the Department.

Dr. Thompson cites no authority that the denial of an opportunity to apply for a promotion or position threatens such irreparable harm that a preliminary injunction is necessary. To the contrary, the weight of authority suggests that the denial of a promotion does not cause irreparable harm. *See McWilliams v. Frankton-Lapel Cmty. Schs,* No. 1:20-cv-01419-JPH-TAB, 2020 U.S. Dist. LEXIS 146767, at *15 (S.D. Ind. Aug. 14, 2020) ("Loss of employment does not constitute irreparable injury under the preliminary injunction standard."); *FOP Library of Cong. Labor Comm. v. Library of Cong.*, 639 F. Supp. 2d 20, 24-25 (D.D.C. 2009) ("Even if plaintiffs prevail in all their claims -- denial of training, loss of promotion opportunities, forced retirement, placement into civilian rather than officer positions -- the Court could remedy these claims by ordering training, reinstatement, back pay, and the like. Indeed, courts consistently hold that economic loss . . . and loss of employment . . . are not irreparable.") (citations omitted); *Harder v. Vill. of Forest Park*, No. 05 C 5800, 2005 U.S. Dist. LEXIS 28068, at *6 (N.D. Ill. Nov. 14, 2005) ("[L]oss of wages, employee benefits, and promotion opportunities do not constitute irreparable harm."); *Berman v. N.Y.C. Ballet, Inc.*, 616 F. Supp. 555, 557 (S.D.N.Y. 1985) ("The same defect appears in plaintiff's assertion that loss of other employment opportunities will result from failure to make plaintiff the principal second violinist. If plaintiff prevails on the merits, any claimed loss of income from other employment opportunities can be compensated in damages.").

As one Court has held, in connection with a plaintiff's claimed entitled to a department chairpersonship:

> Given these considerations, we hold that the court did not abuse its discretion in determining that, without the preliminary injunction, Dr. Schrier would not suffer irreparable harm. The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance. . . . Dr. Schrier has presented no evidence that his removal as Chair during the time it will take to litigate this case will have an irreparable effect in the sense of making it difficult or impossible for him to resume his chairmanship or restore the status quo ante in the event he prevails. . . . Moreover, Dr. Schrier made no attempt to apprise this court of any evidence in the record showing actual or significant risk of loss of prestige, academic reputation or professional opportunities that cannot be remedied by money damages.

See Schrier v. University of Colo., 427 F.3d 1253, 1267 (10th Cir. 2005) (citations omitted). Similarly, Dr. Thompson has not presented any evidence to show that the denial of an immediate injunction concerning the HEHP chairpersonship would injure her — reputationally, academically, or with regard to her career opportunities — in a way that could not be fully and completely remedied after trial with money damages.

In support of her claim of irreparable harm concerning the HEHP chair position, Dr. Thompson argues:

> The value of this increase in professional standing is difficult to measure in monetary terms, thus its loss is irreparable. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) (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.").

(*See* Pet. for Reh'g, at 17). This argument and the cases Dr. Thompson cites miss the mark.

In *Levine v. Spartanburg Regional*, the Court affirmed the grant of an injunction enjoining a hospital from terminating the privileges of a doctor to maintain the *status quo* during litigation. In finding that the doctor had satisfied the irreparable harm element, the Court stated:

> The trial court found that Levine, as a physician with a private practice, would suffer irreparable harm if an injunction was not granted. The record supports this conclusion. Levine has built a patient referral base through her work at the Hospital. This referral base would erode and potentially disappear if Levine lost her privileges at the Hospital while the merits of her underlying action against the Hospital and Foothills are adjudicated. Levine would also lose competency in

> anesthesiology if she were unable to ply her trade as the lawsuit progressed. Such inactivity could lead to the loss of her professional practice and career, which can be an irreparable harm. Therefore, we find the trial court did not abuse its discretion in deciding Levine would suffer irreparable harm without injunctive relief.

See id., 367 S.C. at 465, 626 S.E.2d at 41-42. In this case, Dr. Thompson has presented no such evidence. She does not present any evidence that, as a result of the denial of this promotion, her career advancement opportunities will "erode and potentially disappear." In fact, she does not present any evidence of what the actual impact of this will be on her career. Unlike the denial of privileges at issue in *Levine*, Dr. Thompson has not shown that the opportunity at issue here would irreparably damage her professional career to such an extent that an injunction is immediately required.[4]

Therefore, for the foregoing reasons,[5] the Opinion correctly affirmed Judge Young's denial of Dr. Thompson's Motion because she could not show irreparable harm in connection with her allegations that she was wrongfully denied the chance to apply for the HEHP chair position.

C. <u>The Opinion Correctly Adopted Certain of Judge Young's Findings.</u>

Dr. Thompson next argues that the Opinion improperly affirmed Judge Young's findings that she presented no evidence that she would have obtained the HEHP chair position and that the

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[4] The Texas case that Dr. Thompson cites — *IAC, Ltd. v. Bell Helicopter* — also does not aid her irreparable harm argument. In *IAC*, the issue was misappropriated trade secret that was used to unfairly compete with plaintiff, resulting in a potential loss of business goodwill or other losses that could not be calculated in money terms. Again, Appellant Dr. Thompson presents no evidence that the denial of this opportunity would cause so much harm to her career that she could not be compensated at a trial on the merits.

[5] Moreover, Dr. Thompson presents no evidence that Defendants did not provide her with notice of the faculty meeting where the announcement of the position was made. She does not dispute that the announcement — with the February 3 deadline — was, in fact, made at that meeting. She presents no evidence that the Defendants did anything to conceal the opening or the deadline from her. Instead, she argues that she should be excused from complying with the deadline because she chose not to attend the meeting. Aside from her own self-serving, conclusory statements, Dr. Thompson presents no evidence that she was actually the most qualified candidate and would have been selected for this position. She presents no evidence comparing her qualifications with those of other applicants. As a result, Plaintiff's claim as to the HEHP chair position is speculative.

MOU does not evidence an intent to contractually bind the parties. The Court should deny Dr. Thompson's Petition on these issues.

First, Judge Young concluded correctly that Dr. Thompson presented *no evidence* that — if she had applied for the HEHP chair position — she would have obtained it. The only "evidence" is her self-serving, conclusory statement that "Dr. Welch has refused to consider Plaintiff's application even though Plaintiff is more experienced and has superior qualifications than the other candidate(s) who applied for the chairperson position." (*See* R. p. 135). She also gives the self-serving opinion that she was "the most qualified" candidate and that "Dr. Pfile is less experienced than me and has demonstrably inferior qualifications for the position." (*See* R. p. 237 ¶ 6). However, she has not presented evidence of her qualifications or the qualifications of any applicant(s) for the chairpersonship. She does not present competent evidence to show that, even if she had been informed of the position earlier, she would have been selected for it.

Second, as discussed above in detail, the Opinion correctly affirmed Judge Young's conclusion that there is no evidence that the parties intended the MOU to be a binding agreement. Dr. Thompson complains that "the only evidence in the record was the CofC and Thompson *did* intend for the MOU to be a binding contract." (*See* Pet. for Reh'g, at 20). However, as discussed above, Judge Youngs findings were correct, since Dr. Thompson did not carry her burden of proving that the MOU is an enforceable contract.

CONCLUSION

For the foregoing reasons, the Opinion correctly affirmed Judge Young's denial of injunctive relief. Therefore, the Court should deny Dr. Thompson's Petition for Rehearing.

September 25, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2022-000044
Court of Common Pleas 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

Of whom College of Charleston and Frances C. Welch, Ph.D.,
M.A. are the ..... Respondents

PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing of Respondents College of Charleston and Frances C. Welch, Ph.D., M.A. on the above-referenced Appellant by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2023, addressed to her attorneys of record:

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