

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Nov 28 2023

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

S.C. SUPREME COURT

South Carolina Court of Appeals Appellate Case No. 2022-000044
Opinion No. 2023-UP-301 (S.C. Court of Appeals filed August 30, 2023)
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.

APPENDIX (Volume 1 of 2)

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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 Respondents.

Appellate Case No. 2022-000044

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2023-UP-301
Submitted June 1, 2023 – Filed August 30, 2023

AFFIRMED

Daniel Francis Blanchard, III, of Rosen Hagood LLC, of
Charleston, for Appellant.

M. Dawes Cooke, Jr.; Randell Croft Stoney, Jr.; John
William Fletcher; and Allison Marie Burns; all of

PER CURIAM: Olivia M. Thompson appeals the circuit court's denial of her motions for preliminary injunctive relief. On appeal, Thompson argues the circuit court abused its discretion in (1) finding a prior Form 4 order issued by another judge was binding on the matters raised in her subsequent motions; (2) finding she failed to demonstrate irreparable harm, a likelihood of success, and an inadequate remedy at law; and (3) relying on facts that were not included in the record. We affirm.

1. We hold the circuit court abused its discretion in finding a prior Form 4 order denying Thompson's first motion for preliminary injunction decided the merits of her second and third motions for preliminary injunction. See *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) ("An order granting or denying an injunction is reviewed for abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law."). Because an order denying a motion for preliminary injunction is interlocutory, the prior Form 4 order did not preclude Thompson from filing a subsequent motion for an injunction and did not decide the merits of her second and third motions. See *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("[A]n interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989))); *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341, 878 S.E.2d 891, 895 (2022) ("[A]n order denying a motion for preliminary injunction is interlocutory . . .").

However, we hold the circuit court's error was harmless because Thompson's second and third motions did not satisfy the requirements for injunctive relief. See *Sparks v. McCraw* 112 S.C. 519, 527, 100 S.E. 161, 163 (1919) (holding a finding in the circuit court's order was unsupported by the record; however, this error was "immaterial" because even if the finding was incorrect, "it would not affect the result").

2. We hold the circuit court did not abuse its discretion in finding Thompson failed to demonstrate irreparable harm, a likelihood of success, and an inadequate remedy at law. See *Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689 ("An order granting or denying an injunction is reviewed for abuse of discretion.");

Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) ("An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff."); *id.* at 121, 603 S.E.2d at 908 ("For a preliminary injunction to be granted, the plaintiff must establish 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."); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005) ("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.'" (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939))); *id.* at 455, 626 S.E.2d at 37 ("The complete loss of a professional practice can be an irreparable harm."); *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 41-42 (Ct. App. 2005) (holding the plaintiff, an anesthesiologist, would suffer irreparable harm and the loss of her professional practice because she would lose her entire patient referral base and competency in anesthesiology had she not received a preliminary injunction permitting her to work for the defendant, a hospital). 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.

Additionally, 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.* at 465, 626 S.E.2d at 42 ("When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present 'a fair question to raise as to the existence of such a right.'" (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912))); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("[F]or a contract to be binding, material terms cannot be left for future agreement."); *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) ("[A]ll parties must be obligated under a contract in order for it to be enforceable."); *Atl. Joint Stock Land Bank of Raleigh v. Latta*, 164 S.C. 56, 60, 162 S.E. 68, 69 (1932) ("It is elementary that the consideration for a contract cannot consist of the doing of an act which the moving party was in any event required to do as a matter of law or existing contract.").

3. Thompson argues the circuit court abused its discretion by finding (1) she taught three courses "which are placed with[in] similar disciplines," (2) her course

load was "typical for a faculty member in her Department," (3) the location of her office "is reasonable and consistent with this academic setting," (4) "she ha[d] presented no evidence to show that she should have obtained [the chairperson] position," and (5) the MOU's "terms do not evidence an intent to be contractually bound." We hold the circuit court abused its discretion in making the first three findings because the record does not contain evidence that directly supports them; however, the errors were harmless because Thompson failed to satisfy the prerequisites for a preliminary injunction. *See Sparks*, 112 S.C. at 527, 100 S.E. at 163 (holding a finding in the circuit court's order was unsupported by the record; however, this error was "immaterial" because even if the finding was incorrect, "it would not affect the result"). Finally, we hold the circuit court did not abuse its discretion in making the fourth and fifth findings because they are supported by evidence in the record. *See Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 418, 323 S.E.2d 523, 529 (Ct. App. 1984) (holding the signing of an order by a judge "prepared in its entirety" by a party to the case is not condoned; however, "the findings in the order, though not the product of the trial judge's mind, are formally his"); *id.* ("Such orders and the findings therein are not to be rejected out-of-hand; they will stand if supported by the evidence.").

AFFIRMED.¹

WILLIAMS, C.J., and GEATHERS and VERDIN, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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Sep 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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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
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v.

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

PETITION FOR REHEARING

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Pursuant to SCACR 221(a), Appellant Olivia M. Thompson, Ph.D., M.P.H.'s ("Thompson") respectfully petitions this Court for a rehearing of its opinion filed on August 30, 2023.

Thompson respectfully submits the Court overlooked or disregarded uncontroverted evidence in the record making a *prima facie* showing Thompson will suffer irreparable harm, she is likely to succeed on the merits, and she lacks an adequate remedy at law if Respondents College of Charleston ("CofC") and Frances C. Welch, Ph.D., M.A. ("Dr. Welch") are not preliminary enjoined from violating the terms of the written Memorandum of Understanding ("MOU") they entered with Thompson concerning her faculty appointment at the CofC.

Thompson is likely to prevail on her claim the MOU is a binding contract because it contains all material terms which the parties had mutually promised to each other. The MOU nowhere states any terms are left for future resolution or that the parties must execute a more formal agreement before a binding contract is reached—*i.e.*, the MOU *is* the final expression of the parties' agreement.

Thompson will also suffer irreparable harm if Respondents are not enjoined from breaching the MOU during this action because a monetary award at the end of the case will not provide an adequate legal remedy. Thompson 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. It will be difficult to calculate or compensate with money the losses Thompson will suffer because of Respondents' breaches of these provisions. How will a jury calculate the amount of money to award to Thompson because she was moved to HSS, her faculty office was moved away from the Riley Center, and her faculty report was moved away from Dr. Stewart in breach of the MOU? Neither Respondents nor this Court's Opinion attempt to answer this question.

Because Thompson will not be in HSS, her faculty office will not be in the Riley Center, and her faculty report will not be Dr. Stewart during this action if a preliminary injunction is denied, and any judgment at the end of this case could not *retroactively* reinstate her to HSS, return her to the Riley Center, or make Dr. Stewart her faculty report, and it will be difficult to calculate a monetary awards to compensate for these losses, the legal remedy is inadequate and the harm to Thompson's is irreparable.

This Court also erred as a matter of law by affirming the Circuit Court's findings that Thompson supposedly "presented no evidence to show that she should have obtained [the chairperson] position" and that the MOU's "terms do not evidence an intent to be contractually bound" when those findings are unsupported by any evidence in the record. See Opinion ¶ 3.

I. The Opinion Erroneously Held that Thompson Did Not Establish a Likelihood of Success on the Merits Sufficient to Justify the Issuance of a Preliminary Injunction.

Under South Carolina law, 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). "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).

Thompson need not prove an "absolute legal right" when seeking a preliminary injunction. She merely must present a "reasonable question" or "fair 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); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). 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).

This Court’s Opinion held “Thompson failed to demonstrate irreparable harm, a likelihood of success, and an inadequate remedy at law” sufficient to justify the issuance of a preliminary injunction. See Opinion ¶ 2. Specifically, the Court said that “Thompson failed to demonstrate that she would succeed on the merits because she has not provided any evidence [the MOU] between herself and Respondents was an enforceable contract.” See Opinion ¶ 2. While the Court’s Opinion makes cryptic references to cases holding that for a contract to be binding, material terms cannot be left for future agreement, that all parties must be obligated under a contract for it to be enforceable, and that the consideration for a contract cannot consist of the doing of an act which the moving party was in any event required to do as a matter of law or existing contract, the Opinion nowhere explains how or why Thompson supposedly failed to present a “reasonable question” or “fair question” that the MOU satisfies any of these requirements. As examples, the Opinion fails to give any explanation as to what material terms the MOU purportedly left for future agreement, which parties supposedly were not obligated under the MOU, and why the MOU apparently consists of the doing of an act which Thompson was already required to do. Thompson—and anyone else reading the Opinion—is left to speculate as to the basis for the Court’s Opinion.

Importantly, the Court’s Opinion disregards the *only* evidence that was presented to the Circuit Court on these matters. In the Circuit Court, Thompson offered her sworn affidavit, her verified or sworn motions, and her verified or sworn complaint, which is equivalent to 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). In contrast, Respondents did not offer *any* affidavit, sworn

testimony, or evidence in the Circuit Court. They relied exclusively on their lawyer's arguments, which are not evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

Under South Carolina law, “[a] contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act.” Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). It is well-settled that “[m]utual promises... constitute a good consideration.” Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959). Thompson's evidence in the Circuit Court shows that she, the CofC, and Dr. Welch all executed a written MOU dated July 17, 2014, which sets forth the mutual promises they exchanged. This MOU was signed by Thompson, Glenn McConnell (the CofC's then-President), Dr. George Hynd (the CofC's then-Provost), Dr. Jerry Hale (Dean of the CofC's HSS), and Dr. Welch (Dean of the CofC's School of Education, Health, and Human Performance (“EHHP”). The MOU also explicitly state its terms were “agree[d] to” by Thompson and each of the CofC officials. (R_071). The CofC's highest ranking officials all agreed to the MOU containing detailed stipulations “regarding *the change in the faculty appointment* of Dr. Olivia M. Thompson.” (R_071-072) (emphasis added).

The MOU then sets out in considerable detail exactly what Thompson, the CofC, and Dr. Welch had mutually agreed upon. Under the MOU's express terms, Thompson, the CofC, and Dr. Welch all “agreed to” take certain detailed actions involving Thompson and her faculty appointment, including the following:

- To transfer and move Thompson from the CofC's EHHP and place her into the CofC's HSS, which removed Thompson from under Dr. Welch's supervision and placed her under the supervision of Dr. Hale.
- To move Thompson's tenure-track faculty line, faculty office, and administrative location to the CofC's Riley Center at 176 Lockwood Boulevard, Charleston.

- To have Thompson report directly to Dr. Kendra Stewart “who will serve in the functional role as [Thompson’s] department chair” and who will be responsible for “conducting [Thompson’s] annual evaluations.”
- Thompson’s “basic teaching responsibilities” will be that she teaches three courses a semester.
- “All policies and procedures relative to [Thompson’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 also includes Thompson’s express agreement “to all of the stipulations noted above in regard to [her] faculty line being transferred from the [EHHP] to the [HSS].” (R_072).

The MOU clearly memorializes a mutual exchange of promises among Thompson, the CofC, and Dr. Welch concerning the changes to be made to Thompson’s faculty appointment. The simple fact Thompson, the CofC, and Dr. Welch styled or labeled their agreement a “Memorandum of Understanding” does not control its enforceability. 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 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.

The CofC’s own official policies support this result. Those policies define the MOU as a contract. (R_298-303). The 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) (emphasis added). This official policy certainly is evidence the parties intended for the MOU to constitute a binding contract.

The MOU itself also states that “[a]ll policies and procedures relative to [Thompson’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_072). In other words, the MOU incorporates by reference the provisions of the CofC’s FAM, which impose additional obligations and requirements upon the CofC with respect to tenured faculty members like Thompson.

In this case, the MOU clearly was supported by mutual consideration. The MOU explicitly states the mutual agreement between Thompson, the CofC, and Dr. Welch, *inter alia*, that Thompson’s faculty appointment was to be changed to HSS, her faculty office was to be moved to the Riley Center, her faculty report was to be changed to Dr. Stewart, and Thompson would be required to teach three courses a semester. The MOU sets forth in considerable detail a mutually agreed upon change to the terms of Thompson’s employment.

Additionally, the MOU was not simply the doing of an act which Thompson was already required to do. To the contrary, as part of the MOU, Thompson and the CofC were agreeing to do things they were not otherwise obligated to do. Prior to the MOU, Thompson was not obligated to agree to any of these changes to her faculty appointment and assignment. Respondents has never offered any testimony or evidence to the contrary. This Court’s apparent finding that Thompson did not give any consideration for the MOU is flatly contradicted by the facts in the record.

Thompson's MOU with the CofC does not leave any material terms open or for future agreement. The MOU nowhere says any other terms will need to be resolved by future agreement or that the parties still need to agree upon any terms in the future. It nowhere states or implies the parties contemplated executing a more formal document in the future or that such a formal document was needed before a binding agreement was reached. Rather, by its terms, the MOU is a self-contained agreement containing no language indicating the parties intended not to be bound by the agreement until a more formal document was signed. The MOU was and is the parties' final expression of their agreement. The MOU is a binding contract.

While the MOU itself does not state a specific duration or a termination date, this term is supplied by the MOU's incorporation of the CofC's FAM.¹ As noted above, the MOU expressly incorporates the FAM and mandates that "[a]ll policies and procedures relative to [Thompson's] tenure and promotion (as outlined in [the FAM] and appropriate official communications) will need to be followed." (R_072). Thompson is a tenured faculty member of the CofC. Section VII.C.1 of the FAM governs the conditions under which a tenured faculty member's contract or faculty appointment can be altered or terminated. Thompson's verified Complaint specifically alleges the CofC did not follow the FAM when Dr. Welch unilaterally transferred Thompson's faculty appointment on August 29, 2019, in breach of the MOU. (R_034 ¶41; R_047-049 ¶92, 97-99).

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. Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 392, 503 S.E.2d 184, 188 (Ct. App. 1998). A future specific event, and not just a calendar date, will qualify as a termination date. Id. at

392, 503 S.E.2d at 187-88; see also Premier Holdings, LLC v. Barefoot Resort Golf Club II, LLC, No. 2008-UP-336, 2008 WL 9843982, at *2 (S.C. Ct. App. July 2, 2008) (“[T]he requirement of a specific duration for the enforcement of a contract is not limited solely to a calendar date, but may be provided upon the occurrence of a specific event.”).

In Prestwick Golf, this Court held that an agreement involving golf tee-time schedules was not perpetual in duration when the evidence showed the agreement would end once the membership of the club reached 550 memberships, if and whenever that occurred. 331 S.C. at 392, 503 S.E.2d at 187. The Court held that “[j]ust because the rights of the parties were keyed to membership levels rather than calendar time does not mean that the schedule should be considered an indefinite period.” Id. at 392, 503 S.E.2d at 187-88. Similarly, in Premier Holdings, the owner of the Barefoot golf course entered an agreement giving the plaintiff control of tee times for the golf course. In a subsequent breach of contract case brought by the plaintiff, the owner argued the agreement “was not an enforceable contract because it lacked material terms, specifically, a contract duration.” 2008 WL 9843982 at *1. This Court rejected this argument and held “the duration of the contract was ‘for as long as’ [the plaintiff] continued doing business at Barefoot.” Id.; Dobyns v. S.C. Dep't of Parks, Recreation & Tourism, 325 S.C. 97, 100, 480 S.E.2d 81, 83 (1997) (tenants’ right to renew lease was not perpetual when it was agreed they could renew their leases so long as they live).

In the present case, the 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. The FAM, which is part of Thompson’s contract with the CofC as a tenured professor, includes specific provisions governing the termination or alteration of her contract. Under the FAM, Thompson’s contract with

¹ The FAM is considered part of Thompson’s Complaint because it is incorporated therein by reference. See S.C. R. CIV. PRO. 10(c); Carolina First Corp. v. Whittle, 343 S.C. 176, 190 n.7, 539

the CofC continues until either she retires or she is terminated for “adequate cause.” The FAM mandates that termination of a tenured faculty member for cause shall be preceded by written notification of the proposed dismissal. By setting forth the circumstances governing the termination of Thompson’s contract as a tenured faculty member—either Thompson’s retirement or her termination for adequate cause—the FAM establishes a specific event on which Thompson’s faculty appointment and tenure as a professor will terminate, such that the MOU is not deemed to be indefinite or perpetual in duration and is not terminable at will.

Thompson has never agreed to modify or waive the terms of the MOU. The CofC has offered nothing to contradict the terms of the MOU, which were specifically agreed to and executed by Thompson, Dr. Welch, and the CofC’s President, Provost, and Dean of HSS. This Court’s Opinion is erroneous to the extent it can be construed as a finding that the MOU is not a binding agreement. It must be kept in mind that Thompson is not required to prove an “absolute legal right” to obtain a preliminary injunction, but must only present a “reasonable question” or “fair question” as to the existence of such a right.” AJG Holdings, 382 S.C. at 43, 674 S.E.2d at 509; Peek, 367 S.C. at 456, 626 S.E.2d at 37. Thompson met this burden. The Court erred by holding that Thompson did not make a sufficient showing of likelihood of success on the merits to justify the issuance of a preliminary injunction enforcing the obligations imposed by the MOU.

II. The Opinion Erroneously Held that Thompson Did Not Establish Irreparable Harm or an Inadequate Remedy at Law Sufficient to Justify the Issuance of a Preliminary Injunction.

“[T]he issues of irreparable harm and adequacy of remedies at law are inextricably intertwined.” ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc., 694 F.3d 1312, 1337 (Fed. Cir. 2012); see MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 569 (E.D. Va. 2007)

S.E.2d 402, 410 n.7 (Ct. App. 2000).

(“The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin.”). “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).

“[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. In Columbia Broadcasting Sys., Inc. v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305 (1972), the South Carolina Supreme Court stated:

[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.

258 S.C. at 478, 189 S.E.2d at 312 (quoting Kirk).

This Court’s Opinion held that “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 Opinion ¶ 2. The Court 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.

It is unnecessary for Thompson to show she is at risk of a complete loss of her livelihood to warrant injunctive relief enforcing her contract with the CofC. Notably, our state supreme court held a preliminary injunction was appropriate to restrain an employee's breach of obligations imposed by an employment contract even though the employer made no showing or claim that it would fail or go out of business in the absence of an injunction. See, e.g., Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983) (covenant not to compete). Instead, the rationale supporting decisions like Rental Unif. Serv. is that it would be too difficult to attempt to calculate the losses resulting from the employee's breach of the employment contract after-the-fact, thus the legal remedy of a monetary award is considered inadequate and the harm irreparable. Accordingly, the Court issues an injunction to prevent the harm before it occurs. The same reasoning applies with equal force here.

Numerous other courts have specifically held that an employee's *potential* loss of employment opportunities short of the employee's complete loss of their livelihood or profession constitute irreparable harm. See Hisp. Nat'l L. Enft Ass'n NCR v. Prince George's Cty., No. CV TDC-18-3821, 2021 WL 1575772, *23 (D. Md. Apr. 21, 2021); Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014); Manlove v. Volkswagen Aktiengesellschaft, No. 1:18-CV-145, 2019 WL 2291894, at *14 (E.D. Tenn. May 17, 2019); Tanner v. Fed. Bureau of Prisons, 433 F. Supp. 2d 117, 125 (D.D.C. 2006); Allied Const. Indus. v. City of Cincinnati, No. 1-14-CV-450, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014); 35 New York City Police Officers v. City of New York, 819 N.Y.S.2d 852 (N.Y. Sup. Ct. 2006).

In Johnson v. City of Memphis, 444 F. App'x 856 (6th Cir. 2011), for instance, in specifically rejecting the claim that any injury the employees could "suffer in the absence of the injunction can be compensated by money damages," the court held that "[w]ithout the preliminary injunction, lost

work experience and the opportunity to compete for promotions would be actual and imminent for” the employees and that “[b]ack pay could remedy [the employees’] injuries due to lost income alone, but the loss of experience and chances to compete for promotions are not easily valued.” Id. at 860; see also; Howe v. City of Akron, 723 F.3d 651, 662 (6th Cir. 2013) (delays in promotions would cause irreparable harm to employees because, “without promotions, Plaintiffs will be unable to gain experience and unable to seek the next rank during the following round of testing”).

Thompson demonstrated several different forms of irreparable harm she will suffer if an injunction is not granted. First, she showed that she will be deprived of the contractual benefits and protection of the MOU which she negotiated with the CofC. The MOU is a binding contract between Thompson and the CofC. Under its terms, the CofC agreed to transfer Thompson from the EHHP and place her in the HSS. (R_030 ¶26-27; R_116; R_221 ¶5). The MOU mandates that Thompson will report directly to Dr. Stewart, who will serve as her Department Chairperson, and that Thompson’s faculty office and grant-related offices will be moved to the CofC’s Riley Center. The MOU’s purpose was to remove Dr. Welch from having any supervision or authority over Thompson or her tenure-track given Dr. Welch’s prior history of retaliating against Thompson and to prevent Dr. Welch from retaliating against Thompson and interfering with her grant work in the future. (R_029-030 ¶23; R_220 ¶4).

If an injunction is not granted, Thompson will be denied the benefits and protections of this contract and she will be forced to again endure further retaliation, harassment, and intimidation by Dr. Welch. 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). Thompson will be denied her placement and tenure in the CofC’s HSS, which is where the MOU required that Thompson be transferred to remove her from under Dr. Welch’s supervision.

Thompson 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 [Thompson’s] annual evaluations.” (R_071-072).

Rather than having her placement and tenure under Dr. Stewart’s supervision, Thompson will have to endure placement and supervision under Dr. Welch, the very same person who has been retaliating against, harassing, and intimidating her for years. The deprivation of Dr. Stewart’s supervision and the forced placement under Dr. Welch’s supervision is not something that can be easily measured in monetary terms. Neither this Court’s Opinion nor the Respondents’ brief have ever attempt to explain how this harm can be remedied by a monetary award or how such a monetary award could be measured or calculated.

Second, unless an injunction is granted, Thompson will be deprived of her faculty office in the Riley Center, she will be removed from the Riley Center website and building directory, and she will be relocated to the Silcox Building. The Silcox Building is located at 24 George Street on a different campus, roughly two miles away from the Riley Center located at 176 Lockwood Boulevard. Thompson documented the glaring differences in the quality and conditions of the offices at the Riley Center and the Silcox Building in her verified motion and with photographs. (R_138; R_162-179; R_181-186). The Riley Center is a new state-of-art office facility in impeccable condition. In stark contrast, the Silcox Building is an old building in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work, including a new roof, new windows, and new HVAC air handlers and ductwork. (R_137-139). The Silcox Building has asbestos ceiling tiles that are damaged, dislodged, and missing allowing asbestos fibers to become airborne and inhalable. Id. The office in the Silcox Building that Thompson was told to occupy does not have functioning heat/air conditioning or hot or tepid water in any of the nearby

restrooms. Id. The CofC's Facilities Management Department informed Thompson that no one should be working in the building because of the unsafe and unworkable conditions caused by the construction, noise, dust, etc. (R_138-139; R_188).

If Respondents are not enjoined, Thompson 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 (which is where she was to be assigned under the MOU) 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.

Thompson seeks an injunction in part because the CofC is disregarding the MOU's requirement that Thompson's faculty office and grant-related offices be placed in the Riley Center and because Dr. Welch is unilaterally moving Thompson's office to a different building miles away that is dilapidated and has unsafe, unhealthy, and unworkable conditions. Court have held that an unlawful employment action "does not require loss of money or benefits but rather may consist of changes in location, duties, perks, or other basic aspects of the job" and that "[a]ssigning an employee to an undesirable schedule can be more than a 'trivial' or minor change in the employee's working conditions." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 788 (3d Cir. 1998). In Collins v. State of Ill., 830 F.2d 692 (7th Cir. 1987), the Court ruled that "adverse job action is not limited solely to loss or reduction of pay or monetary benefits," but "can encompass other forms of

adversity” including “an employer’s moving an employee’s office to an undesirable location” and “transferring an employee to an isolated corner of the workplace.” Id. at 703 (citing cases).

In May v. Trustees of California State Univ., No. H024624, 2005 WL 459556 (Cal. Ct. App. Feb. 28, 2005), in a factual situation similar to the present case, the Court held a university had unlawfully retaliated against a professor when the university’s president ordered the professor’s office be moved out of a “high-tech building of classrooms and offices” and relocated to an “isolated building” with “no drinking water,” “no operational office equipment,” and which “was not refurbished” and “lacked proper ventilation.” Id. at *1-2, 13; see also Pellei v. International Planned Parenthood Federation, No. 96 Civ. 7014, 1999 WL 787753 at *12-13 (S.D.N.Y.1999) (employee’s reassignment to a “small, poorly lit, isolated cubicle” constituted unlawful retaliation); Langley v. Merck & Co., 186 F. App’x 258, 261 n.3 (3rd Cir. 2006) (moving a person’s office to an undesirable location could, under certain circumstances, constitute an adverse employment action); Lorenzo v. St. Luke’s-Roosevelt Hosp. Ctr., 837 F. Supp. 2d 53, 69 (E.D.N.Y. 2011) (relocation of employee “from a private office to an open cubicle setup” was adverse employment action); Neal v. Daily’s Juice, No. CIV.A. 07-1497, 2009 WL 331591, at *3-5 (W.D. Pa. Feb. 10, 2009) (employer’s actions in relocating employee to facilities with “deplorable working conditions,” including moving employee’s office to “the back of a tractor-trailer” with “no light except for sunlight” and that “leaked water and had no heat” and to an office “the equivalent of a broom closet,” constituted unlawful employment discrimination).

This Court’s Opinion assumes that any harm Thompson will suffer from the relocation of her office can be remedied at trial with an award of monetary damages. Yet, the Court’s Opinion does not explain how a jury would calculate such a monetary award for the loss of this intangible job benefit. The loss of a faculty office is not easily measured in monetary terms although it can have

great value or benefit to the affected faculty member. Courts have recognized that “[a] private office is a valuable commodity.” Lorenzo, 837 F. Supp. 2d at 69. But the loss of an office is not a loss of money. Although a jury could order that Thompson be returned to her office at the Riley Center, they could not do so retroactively. Their verdict would only operate prospectively. The Court’s Opinion nowhere explains how the jury could measure in monetary terms the harm to Thompson caused by her removal from the Riley Center and her forced relocation to the Silcox Building. It is precisely because such intangible job losses are not easily remedied by a monetary award that irreparable harm will occur. Arizona Dream, 757 F.3d at 1068 (“Because intangible injuries generally lack an adequate legal remedy, ‘intangible injuries [may] qualify as irreparable harm.’”).

Third, if Respondents are not enjoined, Thompson 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 Thompson after the fact if she is not considered for the merit increase.

This Court’s Opinion again surmises this injury can easily be remedied by money damages even though the Opinion never addresses the important issue of the difficulty in calculating such damages. Merit pay increases are not the same for each employee. Faculty members who qualify for merit pay receive an increase in pay ranging from 4% to 15% of their annual salary. (R_238 ¶7). The Court nowhere explains how any fact-finder can ascertain whether Thompson’s merit pay increase should be set at 4%, 15%, or some other percentage. Additionally, the loss of the merit pay increase will have a cascading effect because such increases are incremental each year and are based on a percentage of the employee’s prior year’s salary. The loss of a pay increase for this year reduces the pay increase that Thompson can receive next year, which in turn reduces the pay increase that

Thompson can receive each successive year. The uncertainty of fixing damages renders a potential monetary recovery an inadequate remedy.

Finally, unless an injunction is granted, 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. 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, 463, 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.").

This Court's Opinion again overlooks or disregards the intangible enhancement to status and importance to professional advancement that the Chairperson position would confer on Thompson. In Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir.1996), while holding that a tenured professor's loss of an unofficial "in-house title" and her membership on university committees constituted an adverse employment action, even though her duties, rank, or salary had not changed, the Court noted that the title "would communicate to others both within the State Colleges and Universities system and outside it what kind of responsibilities had been entrusted to her" and that committee work "is often a prelude to an administrative career." Id. at 916; see also Goodwin v. Circuit Court of St. Louis County, Mo., 729 F.2d 541, 547 (8th Cir. 1984) (employee's transfer, with the same pay, from one position to another was adverse because the new position was less

prestigious); de la Cruz v. New York City Human Resources Admin., 82 F.3d 16, 21 (2d Cir.1996) (employee's transfer without any cut in pay constituted adverse employment action because it moved him from an "elite" division of employer, which provided prestige and opportunity for advancement, to a less prestigious unit).

Even if a jury orders that Thompson should be placed in the Chairperson position down the road after a trial on the merits is held, such a ruling would do nothing to compensate Thompson for the loss of the position during the period spanning from June 2021 (when the position was set to be filled) until the date of the Court's judgment (which is yet unknown but is already twenty-seven months later as of the filing of this Petition). During this period, Thompson will be deprived of the increase in standing, professional reputation, notoriety, prestige, experience, and good will associated with the HEHP Chairperson position. This delay in promotion and the loss of the enhanced status it entails is difficult to measure in monetary terms, thus its loss is irreparable. Levine, 367 S.C. at 463, 626 S.E.2d at 42 (loss of competency that would result from being denied position during pendency of litigation was irreparable harm); Brinkley v. Bd. of Comm'rs of Franklin Cty., Ohio, No. 2:12-CV-00469, 2013 WL 394158, at *7 & n.9 (S.D. Ohio Jan. 29, 2013); Hisp. Nat'l, 2021 WL 1575772 at *23; 35 New York City Police Officers, 819 N.Y.S.2d at *3.

Thompson demonstrated she has no adequate remedy at law for the harm or damage done or threatened to be done by the Respondents. Even if a judgment is entered in Thompson's favor following a trial on the merits, the Court wouldn't be able to undo the actions that will have already transpired since this lawsuit was filed. A jury could not *retroactively* return Thompson 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 Thompson 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 Thompson for the loss of these benefits of the MOU.

The Court erred in holding that money damages will adequately compensate Thompson for the harm the Respondents have caused and will continue to cause to her. Many of the injuries suffered or to be suffered by Thompson cannot readily be remedied by a monetary judgment after waiting for a trial on the merits. The Court erred by holding that Thompson did not make a sufficient showing of irreparable harm or an inadequate remedy at law to justify the issuance of a preliminary injunction enforcing the obligations imposed by the MOU.

III. The Opinion Erroneously Affirmed the Circuit Court’s Factual Findings That Are Unsupported by Evidence in the Record.

“An abuse of discretion occurs when the [trial court’s] ruling is based on an error of law or a factual conclusion without evidentiary support.” Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); see Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010) (“An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law.”).

This Court’s Opinion upheld the Circuit Court’s findings that Thompson purportedly “has presented no evidence to show that she should have obtained [the HEHP Chairperson] position” for which Dr. Welch refused to even consider her application (R_013), and the MOU “do[es] not evidence an intent to be contractually bound to specific, enforceable obligations” (R_014). See Opinion ¶ 3. This Court’s Opinion states in conclusory fashion that these findings “are supported by evidence in the record,” yet the Opinion nowhere cites to any actual evidence anywhere in the record which actually supports those findings. Id. Thompson is again left to guess as to what evidence supposedly supports the Circuit Court’s findings.

Thompson respectfully submits these factual findings are unsupported by any affidavit, testimony, or other evidence in the record. Instead, these purported factual findings are derived entirely from arguments made by Respondent's legal counsel, which are not evidence. In their appellate brief, Respondents themselves did not even attempt to cite any evidence in the record supporting these purported facts. They merely argued the inclusion of these findings in the Circuit Judge's Order was harmless. See Resp' Brief p.42.

With respect to the Circuit Judge's findings as to Thompson's qualifications for the HEHP Chairperson position, Thompson's own affidavit states she is more qualified for the position than the only other person (Dr. Pfile) whose application Dr. Welch would consider. (R_237 ¶6; R_148). Respondents offered nothing to contradict this affidavit. The absence of contradictory evidence is not evidence.

With respect to the Circuit Judge's finding that Thompson and the CofC did not intend for the MOU to be an enforceable contract, the only evidence in the record was that the CofC and Thompson *did* intend for the MOU to be a binding contract. (R_071-072; R_029-030 ¶20-23; R_114; R_220-212 ¶4-6). As the MOU's terms make explicit, Thompson, Dr. Welch, and the CofC's highest ranking officials all "agree[d] to" its terms. (R_071). Nothing in the MOU says that those parties intended for the document to be non-binding or unenforceable. Nothing in the MOU states it will not be binding until a more formal document is executed. The CofC's own official policies define the MOU as a contract. (R_298-303). There is no evidence in the record (or in the MOU itself) showing the parties did not intend to be contractually bound by its terms.

This Court erred by affirming the findings in the Circuit Court's Order that are unsupported by evidence in the record. These findings should be stricken from the Order.

CONCLUSION

For the forgoing reasons, Thompson respectfully submits the Court has overlooked or disregarded uncontroverted evidence in the record. The Court further erred as a matter of law by affirming the Circuit Court's factual findings which are unsupported by evidence in the record. Thompson respectfully submits the Court's Opinion is erroneous, a rehearing should be granted, and the Circuit Court's Orders should be reversed.

Respectfully submitted,

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September 14, 2023.

RECEIVED

Sep 14 2023

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.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondents by mailing copies to their attorneys of record on September 14, 2023, by United States first-class mail, with sufficient postage affixed thereto, and addressed as follows:

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The South Carolina Court of Appeals

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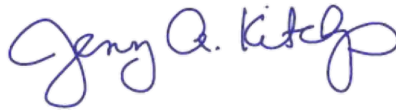
Re: Olivia M. Thompson v. College of Charleston
Appellate Case No. 2022-000044

Dear Counsel:

This will acknowledge receipt of the petition for rehearing.

By copy of this letter, opposing counsel is requested to file a return no later than ten (10) days from the date of this letter.

Very truly yours,

A handwritten signature in blue ink, reading "Jerry A. Kitch". The signature is written in a cursive style with a large, stylized "J" and "K".

CLERK

RECEIVED

Sep 25 2023

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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*Counsel for Respondents College of Charleston
and Frances C. Welch, Ph.D., M.A.*

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.

INTRODUCTION¹

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. The Opinion Correctly Concludes That Dr. Thompson Has Not Shown That She Is Likely to Succeed on the Merits.

"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. **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.**

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 Riley 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

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

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. Enft 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. HEHP Chairperson Position

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. The Opinion Correctly Adopted Certain of Judge Young's Findings.

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

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.

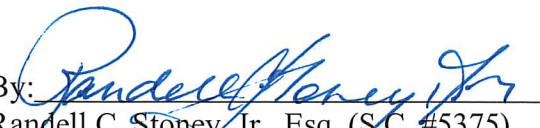
Second, as discussed above in detail, the Opinion correctly affirmed Judge Young's conclusion that there is no evidence that the parties intended the MOU to be a binding agreement. Dr. Thompson complains that "the only evidence in the record was the CofC and Thompson *did* intend for the MOU to be a binding contract." (*See Pet. for Reh'g, at 20*). However, as discussed above, Judge Young's 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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RECEIVED

Sep 25 2023

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

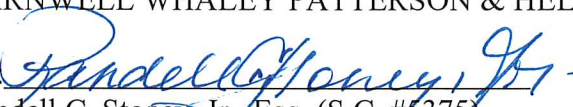
PROOF OF SERVICE

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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The South Carolina Court of Appeals

Olivia M. Thompson, Ph.D., M.P.H, Appellant,

v.

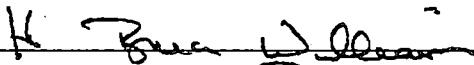
College of Charleston; College of Charleston Foundation,
Inc.; Frances C. Welch, Ph.D., M.A.; Godfrey A.
Gibbison, Ph.D., M.S.; and Christopher R. Tobin,
Defendants,

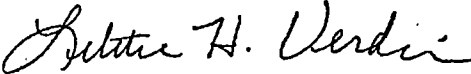
Of Whom College of Charleston and Frances C. Welch,
Ph.D., M.A. are Respondents.

Appellate Case No. 2022-000044

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
Nov 02 2023

cc:

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The Honorable Roger M. Young, Sr.

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Jun 14 2022

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.

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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]he 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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RECEIVED

Jun 14 2022

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.

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I certify that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Sr., Circuit Court Judge

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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

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STATEMENT OF ISSUES ON APPEAL

- A. Did Judge Young correctly deny Appellant's second motion for preliminary injunctive relief, where Judge Hall had previously denies preliminary injunctive relief?

SUGGESTED ANSWER: *Yes.*

- B. Did Judge Young correctly conclude that Appellant failed to carry her heavy burden of showing irreparable harm in the absence of a preliminary injunction?

SUGGESTED ANSWER: *Yes.*

- C. Did Judge Young correctly conclude that Appellant failed to carry her heavy burden of showing that she is likely to succeed on the merits of her claims?

SUGGESTED ANSWER: *Yes.*

- D. Did Judge Young correctly conclude that Appellant failed to carry her heavy burden of showing the absence of an adequate legal remedy?

SUGGESTED ANSWER: *Yes.*

- E. Did Just Young correctly recite relevant facts based on the record?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Factual Background

The allegations of Appellant's Complaint (as to which Respondents reserve all rights and which Respondents do not hereby admit) are as follows:

1. The Memorandum of Understanding

Appellant-Plaintiff Olivia M. Thompson, Ph.D., M.P.H. ("Appellant," "Plaintiff" or "Dr. Thompson") alleges that Respondent-Defendant College of Charleston ("CofC") employed her, initially as an untenured Assistant Professor and then as a tenured Associate Professor. (*See* R. p. 27 ¶ 11). She alleges that, prior to August 16, 2014, her faculty appointment was in CofC's School of Education, Health, and Human Performance ("EHHP"), under the direction and supervision of Respondent-Defendant Dean Dr. Frances C. Welch, Ph.D., M.A. ("Dr. Welch"). (*See* R. p. 28 ¶ 14). She additionally claims that Dr. Welch engaged in misconduct toward her, including efforts to terminate her and reassign grants that she had obtained. (*See* R. p. 28 ¶¶ 15-16). CofC and Dr. Welch are sometimes referred to herein as the "Respondents."

Dr. Thompson asserts that, as a result of Dr. Welch's actions, she and CofC executed a July 14, 2017 Memorandum of Understanding ("MOU"), which she contends is an enforceable contract. (*See generally* R. pp. 71-72). The MOU states:

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 id.*). Dr. Thompson certified that "I have read and agree to all of the stipulations noted above in regard to my faculty line being transferred from the School of Education, Health, and Human Performance to the School of Humanities and Social Sciences." (*See id.*).

Dr. Thompson alleges that, pursuant to the MOU, CofC transferred her from EHHP to the School of Humanities and Social Sciences ("HSS") effective August 16, 2014. (*See R. p. 30 ¶ 26*). Further, consistent with the MOU, she reported to Dr. Stewart, her Department Chair, and had her offices moved from EHHP to the Riley Center. (*See R. p. 30 ¶ 27*).

2. The Boeing Grant

Dr. Thompson alleges that, on or about May 14, 2018, she created a written application to Boeing seeking a grant of \$250,000.00, with the grant funds to be used to fund a project entitled “Veterans Fellowship Program in Sustainable Food Systems” (“SFS Program”). (*See* R. p. 31 ¶ 28). Dr. Thompson was the Principal Investigator of the SFS Program. (*See id.*). On or about August 28, 2018, Boeing accepted the application and agreed to make a grant of \$250,000.00 to Defendants College of Charleston Foundation (“Foundation”) for the purposes in the application; the Foundation agreed to administer the grant funds for the SFS Program, and CofC agreed to the SFS Program. (*See* R. p. 31 ¶ 29). A portion of the Boeing grant funds were to be used to pay and/or fund a portion of Dr. Thompson’s salary and benefits. (*See* R. p. 31 ¶ 30). The Foundation administratively holds the grant funds for the SFS Program in a designated account for disbursement in accordance with the Boeing grant. (*See* R. pp. 31-32 ¶ 31).

Dr. Thompson alleges that 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 Dr. Thompson’s academic home would remain in the CofC’s HSS. (*See* R. p. 32 ¶ 32). The Boeing grant provides that monies that the operation of the SFS Program generates are to go back to program expenses. (*See* R. p. 32 ¶ 33). The Boeing grant contemplates that the SFS Program would become self-sustaining and continue after Boeing’s grant funds were spent or used: “After Year 2, The College of Charleston will ‘tuition share’ thereby paying 100% of Dr. Garrison’s FTE and awarding Dr. Thompson a summer stipend to allow her to continue to direct and evaluate the certificate program.” (*See* R. p. 32 ¶ 33).

3. Alleged Breaches of the MOU¹

On or about July 1, 2019 — approximately 5 years after the MOU — Dr. Welch became CofC's Interim Provost and Executive Vice President for Academic Affairs. (*See* R. p. 33 ¶ 38). Dr. Thompson avers that — contrary to the MOU — Dr. Welch moved her back to the EHHP and into EHHP's Department of Health and Human Performance ("Department of HHP" or "HEHP"), contrary to the MOU. (*See* R. p. 33 ¶ 39). She asserts that CofC removed her from Dr. Stewart's supervision and that Dr. Welch returned to the EHHP to be her supervisor. (*See id.*). Dr. Thompson claims that she did not agree or consent to this action or to her placement at EHHP and was not consulted in advance, setting the stage for Dr. Welch to again retaliate against her and interfere with Dr. Thompson's Boeing-funded work and the SFS Program, but also her instructional work, promotion, and tenure-track at the CofC. (*See* R. p. 34 ¶ 40). Dr. Welch did not consult with the Dean of EHHP (Dr. Courtney Howard) or the Chair of the Department of HHP (Dr. Wes Dudgeon). (*See* R. p. 34 ¶ 41). Appellant Dr. Thompson claims that she repeatedly demanded that CofC honor the MOU and confirm her continued assignment to HSS (or transfer her back to HSS); she claims that CofC refused to do so. (*See* R. p. 34 ¶ 42).

Appellant Dr. Thompson also alleges that Defendant Dr. Welch (with the participation of others) retaliated against her and undermined her Boeing-funded work and the SFS Program. (*See* R. p.36 ¶ 50). For example, she claims that Defendants Drs. Welch, Gibbison, and Tobin disrupted Dr. Thompson's administration of her Boeing grant and the SFS Program, with the objective of having Dr. Thompson removed as Principal Investigator. (*See* R. p. 36 ¶ 51).

She also asserts that Dr. Welch removed the SFS Program's in-person academic-credit and continuing education courses from CofC's course system and SPS's online registration page. (*See* R. p. 37 ¶ 52). She contends Respondent Dr. Welch and others met with Boeing on December 13,

¹ Plaintiff also claims that Defendants Foundation and Dr. Christopher R. Tobin ("Dr. Tobin") have "misappropriated and diverted a portion of Boeing's grant funds intended for the SFS Program as well as monies that had been generated from the sale of textbooks developed by Dr. Thompson with the use of previously awarded Boeing grant funds, which funds were to be used to support the Farm-to-School programming." (*See id.* ¶ 43).

2019 to discuss the SFS Program and provided incorrect information regarding low enrollment figures in the professional development track of the SFS Program. (*See R. pp. 37-38 ¶¶ 53-54*). Dr. Thompson claims that the purpose of this meeting was to impugn her work in Boeing's eyes. (*See R. p. 38 ¶ 55*).

In late December of 2019, CofC students were allegedly notified that the SFS Program would change to a 7-week program, instead of a 14-week program. (*See R. pp. 38-39 ¶ 57*). Dr. Thompson claims that this caused confusion among students who were planning to enroll or were interested in enrolling in those courses and that she was not included that change. (*See id.*). She claims that these actions interfered with the SFS Program. (*See R. p. 39 ¶ 59*). Dr. Thompson alleges that this change breached the Boeing grant as well as contractual commitments between CofC and two SFS Program partners. (*See R. p. 39 ¶ 60*).

Dr. Thompson alleges that, as part of its commitments regarding the SFS Program, CofC agreed to implement an academic credit certificate program within SPS. (*See R. p. 40 ¶ 63*). She further avers that, to do so, CofC had to have qualified faculty teach courses in the SFS Program or join a consortium through which it could offer the courses with qualified adjunct professors. (*See R. p. 40 ¶ 64*). Dr. Thompson alleges that she secured CofC's membership in AgIDEA, a consortium of universities offering agriculture/food systems courses. (*See R. p. 41 ¶ 65*). She claims that, for CofC to join AgIDEA, Dr. Welch needed to authorize CofC entering into a memorandum of understanding. (*See R. p. 41 ¶ 66*). Dr. Thompson claims that Dr. Welch "refused to execute the agreement with AgIDEA in retaliation against" her. (*See id.*). Appellant Dr. Thompson claims that Dr. Welch's retaliation against her "poisoned the work environment at the CofC and has caused significant reputational harm and financial damage to Dr. Thompson, including harm to her relationship with Boeing." (*See R. p. 42 ¶ 70*).

Appellant Dr. Thompson alleges that, on March 17, 2020, Boeing notified her that it was withdrawing its grant funding. (*See R. p. 44 ¶ 76*).

4. Alleged Events After Commencement of This Lawsuit

In her Brief, Dr. Thompson refers to several events allegedly occurring after she filed this lawsuit.

a. Alleged Relocation to Silcox Building

Dr. Thompson asserts that on March 21, 2021, she went to her office in the Riley Center for the first time in several months due to COVID. (*See R. p. 137*). She claims that she observed that her office telephone had been removed without her permission. (*See id.*). The next day, she allegedly contacted CofC's IT Service Desk to request a replacement phone and was told that Dr. Kendra Stewart instructed the IT Department to disconnect her office phone in December of 2020. (*See id.*).

Dr. Thompson asserts that Dr. Wes Dudgeon indicated that CofC would move her office from the Riley Center to the Silcox Building. (*See id.*). CofC also allegedly removed Dr. Thompson from the Riley Center website and building directory. (*See R. p. 137-38*). She was also allegedly removed from the College's online Public Health Program faculty directory. (*See R. p. 138*). She claims that this makes it appear that she is no longer a professor at CofC. (*See id.*).

Appellant Dr. Thompson asserts that she contacted CofC's Facilities Management Department about the move from Riley Center to the Silcox Building. (*See id.*). She claims that the Silcox Building is in a deplorable condition and disrepair. (*See id.*). She was allegedly advised that the Silcox Building would be undergoing renovation work. (*See id.*). She additionally claims that the Silcox Building has damaged asbestos tiles, with inhalable fibers. (*See id.*). Dr. Thompson asserts that she will be unable to work from her Silcox Building office location during renovations. (*See R. p. 139*). She claims that the Silcox Building is a demonstrably inferior and less desirable location for her office. (*See id.*).

She claims that this violates the MOU, which "expressly requires that Plaintiff's tenure-track faculty line, physical office, and administrative location be in the Riley Center." (*See id.*). She additionally asserts that she was moved to the Silcox Building "as further and continued

retaliation and harassment against her for her complaints against Dr. Welch, her commencement of this present lawsuit, and her filing of a grievance with the Faculty Grievance Committee." (*See id.*). She further claims that, on June 29, 2021, after an interaction with CofC Public Safety Officers at the Riley Center, she was informed that "she was no longer permitted to be in the parking lot or otherwise on the Riley Center's premises." (*See* R. p. 228 ¶ 24).

b. Chairperson Position

Dr. Thompson alleges that, on February 5, 2021, she learned that the HEHP chairperson position had become open for internal application, because Dr. Wes Dudgeon was stepping down. (*See* R. pp. 134-35). She contends that she sent an email to Dr. Dudgeon requesting to be considered for the vacant chairperson position, but was told that Dr. Welch imposed a February 3, 2021 deadline to express interest in the position. (*See id.*, at 26). Appellant asserted that Dr. Welch announced this deadline at a January 26, 2021 faculty meeting, which she did not attend. (*See id.*). Appellant Dr. Thompson claims that the February 3, 2021 deadline had already passed before she actually learned of the opening and that Dr. Welch informed her that she could not apply because she missed the deadline. (*See id.*). Dr. Thompson claims that she "is more experienced and has superior qualifications than the other candidate(s) who applied for the chairperson position." (*See id.*).

On February 22, 2021, Appellant Dr. Thompson filed a grievance with CofC's Faculty Grievance Committee involving Dr. Welch's refusal to consider her for the open chairperson position. (*See* R. p. 136). On March 1, 2021, the Faculty Grievance Committee issued a letter addressed to President Andrew T. Hsu and Provost Suzanne Austin stating:

The grievant's ultimate goal in submitting this grievance to the committee is to make the President and the Provost aware of her interest to apply and to be considered for the position of Chair of HEHP, even though review is currently in progress, because she was not made aware of the Chair position opening due to failure to post an agenda or minutes for the faculty meeting in which the position was announced. . . .

The committee resolved that this is a legitimate grievance, and that the grievant is an eligible candidate for the position of Chair of HEHP and should be allowed to

express interest in and be considered for the position, given that the search is still in progress. President Hsu and Provost Austin would therefore be made aware of her interest in the position. We agreed that the lack of an agenda and minutes from the faculty meeting where the announcement was made, or a subsequent communication to eligible tenured faculty to announce the position so they can express interest, does not promote transparency in the selection process. Allowing the grievant to be considered for the position is reasonable and does not impose undue pressure or distress on the selection process.

(See R. pp. 154-55). Appellant Dr. Thompson alleges that, despite the Faculty Grievance Committee's report, on March 10, 2021, Provost Austin notified Dr. Yiorgos Vassilandonakis, Co-Chair of the Faculty Grievance Committee, that:

Upon review, I find the meeting procedures and the protocol followed are reasonable; notice which included a general agenda, was sent to all prospective participants. The format and content of the meeting as to those matters covered, including Dr. Wes Dudgeon's announcing his intention to leave the chairmanship at the end of his five-year term, were routine and proper. The time period for submitting an application for the chair position was reasonable; all aspects have been vetted and confirmed as proper by Vice President of Human Resources Ed Pope of the College of Charleston. Therefore, I do not find it appropriate to exempt Dr. Thompson from our hiring practices and policies in this instance.

(See R. pp. 158-60). Provost Austin advised that CofC would not consider Dr. Thompson for the open chairperson position. (See R. p. 136).

B. Procedural History

1. Dr. Thompson's Complaint and First Request for a Preliminary Injunction

In her Complaint, Dr. Thompson alleges causes of action for: (1) declaratory judgment against CofC; (2) breach of contract/covenant of good faith and fair dealing against CofC; (3) S.C. Payment of Wages Act against CofC and Dr. Welch; (4) intentional interference with contract against all Defendants; (5) intentional interference with prospective business relations against all Defendants; (6) defamation against all Defendants; (7) civil conspiracy against all Defendants; (8) injunctive relief against CofC and Dr. Welch; (9) conversion against Defendants Foundation and Dr. Tobin (who are not involved in this appeal); and (10) attorneys' fees and costs against CofC under S.C. Code § 15-77-300. (See generally R. pp. 24-73).

In the injunction count of her Complaint, Dr. Thompson seeks a temporary, preliminary and permanent:

- a. restraining and enjoining Defendants CofC and Welch from unilaterally changing Plaintiff's faculty appointment;
- b. restraining and enjoining Defendants CofC and Welch from unilaterally transferring or moving Plaintiff back to the CofC's EHHP;
- c. restraining and enjoining Defendants CofC and Welch *pendente lite* from unilaterally returning Plaintiff to work under Defendant Welch's supervision;
- d. restraining and enjoining Defendants CofC and Welch from unilaterally removing Plaintiff's faculty appointment from Dr. Stewart's report;
- e. restraining and enjoining Defendants CofC and Welch from failing to consult with Plaintiff or obtain her agreement with the transfer of her faculty appointment;
- f. restraining and enjoining Defendants CofC and Welch from failing to consult with the Dean of affected school or its Department Chair and/or to obtain their review or approval of the transfer of Plaintiff's faculty appointment before it is made;
- g. restraining and enjoining Defendants CofC and Welch from breaching or disregarding the terms and provisions of the MOU dated July 17, 2014;
- h. requiring Defendants CofC and Welch to immediately return or restore Plaintiff's faculty appointment to HSS;
- i. requiring Defendants CofC and Welch to immediately remove Plaintiff from under Defendant Welch's supervision;
- j. requiring Defendants CofC and Welch to immediately return or restore Plaintiff's faculty appointment to Dr. Stewart's report.

(See R. pp. 64-65 ¶ 147). Appellant Dr. Thompson's Complaint — including her request for preliminary and permanent injunctive relief — focused on her claim that Defendants breached the MOU, which she contends is an enforceable contract.

The day after Dr. Thompson filed her Summons and Complaint (June 24, 2020), she filed a Motion for a Preliminary Injunction ("First Motion"), seeking relief identical to the injunction requested in the Complaint. (See R. pp. 74-75). In her First Motion:

Plaintiff seeks a preliminary injunction maintaining the status quo that existed before Defendants CofC and Welch engaged in the contested matters involving Plaintiff's MOU dated July 17, 2014 and her faculty appointment. Plaintiffs (sic) seeks a preliminary injunction during this litigation restraining and enjoining Defendants CofC and Welch from unilaterally changing Plaintiff's faculty appointment, transferring or moving Plaintiff back to the CofC's EHHP, returning Plaintiff to work under Defendant Welch's supervision, removing Plaintiff's faculty appointment from Dr. Stewart's report, failing to consult with Plaintiff or obtain her agreement with the transfer of her faculty appointment, failing to consult with the Dean of affected school or its Department Chair and/or to obtain their review or approval of the transfer of Plaintiff's faculty appointment before it is made, and breaching or disregarding the terms and provisions of the MOU.

(See R. pp. 93-94). As to her allegations of "irreparable harm," Dr. Thompson stated that "[u]nless an injunction is granted, Plaintiff will lose the benefits of the MOU and Plaintiff will again be subjected to the supervision of Defendant Welch and will be accountable to her, will be subject to Defendant Welch's decisions relating to performance reviews, compensation, grants, and tenure-track, will be subjected to Defendant Welch's retaliation and unlawful and improper conduct." (See R. p. 94).

Factually, the First Motion claimed that the MOU was intended to "relieve Plaintiff of any further accountability to Defendant Welch, to remove Defendant Welch from having any supervisory role over Plaintiff or her tenure-track, and to preclude Defendant Welch from retaliating against Plaintiff and further adversely interfering with and affecting Plaintiff's Boeing-funded work." (See R. p. 77). She noted that, in accordance with the MOU, she was transferred from CofC's EHHP and placed in the HSS, effective August 16, 2014; she reported to Dr. Stewart (her serving Department Chair) and her tenure-track faculty line, office, and grant-related offices were moved to the Riley Center. (See R. p. 78). Notwithstanding this, Dr. Thompson asserts that Respondents have violated the MOU in various ways:

- Dr. Welch unilaterally moved Dr. Thompson from HSS back to EHHP and into EHHP's Department of Health and Human Performance (see R. p. 81). Dr. Thompson was removed from Dr. Stewart's report and returned to Dr. Welch's supervision (see *id.*).²

² Dr. Thompson claims that she "did not agree or consent to this unilateral action or to her placement at EHHP and was not even consulted before this decision was made, which set the stage for Defendant Welch to again have the opportunity to retaliate against Plaintiff and to

- Dr. Welch, Gibbison, and Tobin engaged in activities to disrupt and disparage Dr. Thompson administration of her Boeing grant and to interfere with the SFS Program. (*See R. p. 84*).
- Defendants directed the removal of SFS Program's in-person academic-credit and continuing education courses from CofC's course system and online registration. (*See id.*).
- Defendants had a secret meeting, wherein they "intentionally provided false and misleading information to Boeing regarding the reasons that enrollment in the professional development track of the SFS Program was lower than the target." (*See R. pp. 84-85*).
- Defendants informed "CofC students that the SFS Program would change to a 7-week program, instead of a 14-week program." (*See R. p. 86*).
- Defendants failed to properly enter into and contract with the AgIDEA consortium, which was necessary because CofC did not have the ability to teach the SFS courses with its own faculty. (*See R. p. 87-88*).
- Defendants harassed two individuals who were teaching courses in the SFS Program by characterizing them as temporary employees, rather than independent contractors. (*See R. p. 89*).

On August 13, 2020, Judge Daniel D. Hall denied the preliminary injunction requested in Dr. Thompson's First Motion "[a]fter careful consideration" (the "First Order"). (*See R. pp. 1-3*). Dr. Thompson did *not* file a Rule 59(e) Motion to Alter or Amend the First Order. She did not file an appeal from the First Order.

2. **Dr. Thompson's Second Motion for Preliminary Injunction and Supplement to Second Motion**

On April 2, 2021, Dr. Thompson filed a second Motion for Preliminary Injunction ("Second Motion"), which relied on the MOU and made averments similar to the First Motion. (*See generally R. pp. 110-197*). In her Second Motion, Dr. Thompson requested a preliminary injunction:

- a. restraining and enjoining Defendants CofC and Welch *pendente lite* from breaching, contravening, or disregarding the terms and provisions of the written Memorandum of Understanding dated July 17, 2014 (hereinafter "MOU") that was executed and agreed to by Plaintiff and Defendants CofC

adversely interfere with and affect not only Plaintiff's Boeing-funded work and the SFS Program, but also her instructional work, promotion, and tenure-track at the CofC." (*See id.*, at 8).

and Welch. A true and correct copy of the MOU is attached hereto as “Exhibit A” and is incorporated herein by reference;

- b. restraining and enjoining Defendants CofC and Welch *pendente lite* from unilaterally changing or altering Plaintiff’s faculty appointment, physical office location, and administrative location in contravention of the terms and provisions of the MOU. Plaintiff seeks an Order *pendente lite* maintaining and/or restoring her tenure-track faculty line, physical office, and administrative location at the Joseph P. Riley, Jr. Center for Livable Communities (hereinafter “Riley Center”) in accordance with the terms and provisions of the MOU;
- c. restraining and enjoining Defendants CofC and Welch *pendente lite* from unilaterally transferring or moving Plaintiff to the CofC’s School of Education, Health, and Human Performance (hereinafter “EHHP”) in contravention of the terms and provisions of the MOU. Plaintiff seeks an Order *pendente lite* maintaining and/or restoring her faculty appointment to the CofC’s School of Humanities and Social Sciences (hereinafter “HSS”) in accordance with the terms and provisions of the MOU;
- d. restraining and enjoining Defendants CofC and Welch *pendente lite* from unilaterally returning Plaintiff to work under Defendant Welch’s supervision and unilaterally removing Plaintiff’s faculty appointment from Dr. Kendra Stewart’s report in contravention of the terms and provisions of the MOU. Plaintiff seeks an Order *pendente lite* removing Plaintiff from under Defendant Welch’s supervision and maintaining and/or restoring her assignment or faculty appointment to the supervision of Dr. Kendra Stewart (who serves or served in the functional role as Plaintiff’s department chairperson) in accordance with the terms and provisions of the MOU;
- e. restraining and enjoining Defendants CofC and Welch from 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. restraining and enjoining Defendants CofC and Welch *pendente lite* from otherwise retaliating against and harassing Plaintiff.

(See R. pp. 110-11). Dr. Thompson further characterized her request for a preliminary injunction as follows:

[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 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 R. pp. 140-41).³

On July 9, 2021, Dr. Thompson supplemented her Second Motion with her Supplemental Motion for Temporary Restraining Order and Preliminary Injunction ("Supplement to Second Motion"), seeking an injunction precluding CofC:

- a. from breaching, contravening, or disregarding the terms and provisions of that written Memorandum of Understanding dated July 17, 2014 (hereinafter "MOU") that was executed and agreed to by Plaintiff and Defendants CofC and Frances C. Welch, Ph.D., M.A. (hereinafter "Dr. Welch") and others;
- b. from at any time and in any manner whatsoever denying Plaintiff access to or the use of, or otherwise preventing Plaintiff from having access to or the use of, Plaintiff's Faculty Office located in the CofC's Joseph P. Riley, Jr. Center for Livable Communities ("Riley Center") at 176 Lockwood Boulevard, Charleston, South Carolina, as appropriate for a full-time tenured Associate Professor of Defendant CofC; and in furtherance thereof, ordering Defendant CofC to immediately provide Plaintiff with a fully functional key card to the exterior door on the first floor of the Riley Center

³ In the alternative, Dr. Thompson requested that:

[I]f Plaintiff's MOU agreement with Defendants is not honored, then Plaintiff seeks a preliminary injunction during this litigation restraining and enjoining Defendants CofC and Welch from denying Plaintiff the opportunity to interview and apply for the position of Chairperson of the CofC's EHHP that is vacant or will become vacant upon the resignation of the current Chairperson (Dr. Wes Dudgeon) and restraining and enjoining Defendants CofC and Welch from disqualifying or refusing to consider Plaintiff's application for this position

(See *id.*, at 2).

for Plaintiff to use for purposes of accessing and using Plaintiff's Faculty Office;

- c. from at any time and in any manner whatsoever denying Plaintiff access to and the use of, or otherwise preventing Plaintiff from having access to or the use of, any other facilities of Defendant CofC of whatever kind and wherever located as appropriate for a full-time tenured Associate Professor of Defendant CofC, including without limitation, all classrooms and all other instructional areas available to Instructional Faculty of the CofC for purposes of performing her responsibilities as an employee of the CofC; and in furtherance thereof, ordering Defendant CofC to immediately provide to Plaintiff a fully functional key card or other type of key as necessary for opening the exterior and interior doors of all such facilities for Plaintiff to so access and use; and
- d. from at any time and in any manner whatsoever engaging in any retaliation against or harassment or intimidation of Plaintiff for her bringing this civil action against Defendant CofC or otherwise lawfully exercising her legal rights.

(*See R. pp. 218-19*). Dr. Thompson's Supplement to Second Motion "incorporates by reference and reasserts all the facts stated in" Dr. Thompson's Second Motion "as if reiterated herein verbatim." (*See R. p. 223*). She further asserted that "[d]espite the commencement of this lawsuit and the filing of Plaintiff's [Second] Motion for Preliminary Injunction, Defendant CofC has continued to engage in harassment, retaliation, and intimidation against Plaintiff." (*See id.*).

The Supplement to Second Motion recounted and focused on incidents that allegedly occurred on June 29, 2021. On that day, Public Safety allowed Dr. Thompson to enter the Riley Center. She observed that "two Mac computers that had been purchased with grant funds from one of Plaintiff's Boeing grants were suddenly removed from the cubicle stations located outside of Plaintiff's Faculty Office where they had been positioned for her use." (*See R. pp. 224-25*). Subsequently, Public Safety officers "charged at her in an aggressive 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." (*See R. p. 225*). The Supplement to Second Motion alleged that this incident "directly breached, contravened, and repudiated the terms and provisions of the written MOU and is intentionally and purposefully interfering with Plaintiff's ability to timely and properly perform her responsibilities as an employee of the CofC." (*See R. p. 230*).

3. Judge Young's Denial of the Second Motion and the Supplement to Second Motion

After a hearing on the Second Motion and Supplement to Second Motion — and the parties' submission of proposed orders — Judge Roger L. Young, Sr. entered a detailed Order Denying Plaintiff's Motion for Preliminary Injunction ("Second Order") dated November 12, 2021. (*See generally* R. pp. 4-15). In its Second Order, the trial court denied Dr. Thompson's Second Motion and Supplement to Second Motion. The trial court based its ruling in the Second Order on the following grounds:

- Judge Hall's First Order precluded the granting of the relief requested in Dr. Thompson's Subject Injunction Motion: "While Plaintiff changes the wording somewhat, she seeks essentially the same relief in her Second Motions that she sought in her First Motion. The primary relief sought in both motions is an injunction precluding CofC from breaching the MOU or changing Plaintiff's location or assignment." (*See* R. pp. 8-9).
- Dr. Thompson has not shown that she will suffer irreparable harm in the absence of a preliminary injunction: "The Court concludes that Plaintiff has not carried her heavy burden of showing that these injuries are so severe that they warrant the rare relief of a preliminary injunction. She has offered no evidence that she is in danger of sustaining any harm from which she cannot recover if the Court denies the Second Motions. 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." (*See* R. p. 11).
- Dr. Thompson has not shown a likelihood of success on the merits.
- Dr. Thompson has an adequate legal remedy available, which precludes the granting of preliminary injunctive relief: "Any harm to Plaintiff from CofC's actions can be remedied by an award of legal relief to compensate her for her injuries." (*See* R. p.14).

On November 19, 2021, Dr. Thompson filed a Motion to Alter or Amend Order Denying Motions for Preliminary Injunction ("Motion to Alter or Amend"). (*See generally* R. pp. 279-303). On December 16, 2021, Judge Young denied Dr. Thompson's Motion to Alter or Amend. (*See generally* R. pp. 21-23). On January 13, 2022, Dr. Thompson filed the instant Notice of Appeal from Judge Young's Second Order and the Order Denying Plaintiff's Motion to Alter or Amend. (*See generally* R. pp. 407-13).

For the reasons that follow, Judge Young did not err in denying Dr. Thompson's Second Motion and Supplement to Second Motion. As a result, the Court should affirm the decision of the trial court denying preliminary injunctive relief in this matter.

ARGUMENT

A. Standard of Review

"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) (stating that 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) (quoting *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005)). "Upon review of an action in equity, this Court may make factual findings based on its own view of the preponderance of the evidence." *Scratch Golf Co. v. Dunes W. Residential Golf Props.*, 361 S.C. 117, 120-21, 603 S.E.2d 905, 907 (2004) (citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)).

For the reasons that follow, Judge Young did not abuse his discretion in entering the Order and denying Dr. Thompson's request for a preliminary injunction.

B. Judge Young Correctly Concluded That Judge Hall's Prior Order Precluded the Request for Preliminary Injunctive Relief in Dr. Thompson's Duplicative Second Motion and Supplement to Second Motion.

Judge Young first based his denial of preliminary injunction on the ground that Judge Hall's denial of the First Motion barred a subsequent request for a preliminary injunction: "[w]hile Plaintiff changes the wording somewhat, she seeks essentially the same relief in her Second Motions that she sought in her First Motion." (*See R. p. 8*). Dr. Thompson argues in this appeal that Judge Young erred in concluding that the First Order, which denied Dr. Thompson's First Motion for preliminary injunctive relief, foreclosed the subsequent granting of a preliminary injunction. Specifically, she argues that "Judge Young erroneously construed Plaintiff's motions

as asking it to 'second-guess' or 'overturn' Judge Hall's prior Order." (See Br. of Appellant, at 23). For the reasons that follow, Judge Young's reasoning was sound and correct.

1. Judge Young Correctly Held That the Denial of Dr. Thompson's First Motion Foreclosed Her Subsequent Requests for Preliminary Injunctive Relief

"There is a long standing rule in this State that one judge of the same court cannot overrule another." *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020) (quoting *Charleston Cty. Dep't of Soc. Servs. v. Father (in the Interest of Two Minors)*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) ("[A] successor judge may not substitute his own judgment for that of the trial judge.")); accord *Dorchester Cty. Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 457, 477 S.E.2d 476, 483 (Ct. App. 1996) (same); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Under this rule, Judge Young properly exercised his discretion and concluded that he should not second-guess Judge Hall's First Order, which denied Dr. Thompson's First Motion for a preliminary injunction.

The Second Motion and Supplement to Second Motion were really just extensions of Dr. Thompson's First Motion. Much like her First Motion, the Second Motion and Supplement to Second Motion are built upon the premise that Respondents engaged in conduct that violated the terms of her MOU with CofC. This is merely a continuation of the contentions that Dr. Thompson previously made — and Judge Hall rejected — in her First Motion. For example, Dr. Thompson's April 2, 2021 Second Motion states that "notwithstanding the pendency of this lawsuit, Defendants *have continued* to breach, contravene, and disregard the clear terms and provisions of the written MOU." (See R. p. 111 (emphasis added)). She further claims that Respondents "*continued* to retaliate against, harass, and cause financial harm to Plaintiff while this litigation has been ongoing." (See R. pp. 11-12 (emphasis added)). In fact, Dr. Thompson's April 2, 2021 Second Motion dedicates *almost 25 pages* (of a total length of 33 pages) to cataloging Respondents' alleged misconduct that occurred *prior to the commencement of this lawsuit (and before the First Order)*.

Similarly, Dr. Thompson's Supplement to Second Motion states that "notwithstanding the pendency of this action *and the filing of Plaintiff's previous Motion for Preliminary Injunction, Defendant CofC has continued* to engage in retaliatory conduct, harassment, and intimidation towards Plaintiff." (See R. p. 219 (emphasis added); accord R. p. 223 ("Defendant CofC *has continued* to engage in harassment, retaliation, and intimidation against Plaintiff.") (emphasis added)). She further argues in the Supplement to Second Motion that "Plaintiff's verified Complaint seeks an order enforcing the terms and provisions of the written *MOU*. The verified Complaint also specifically seeks to restrain and enjoin Defendant CofC and others from *breaching, contravening, or disregarding the MOU's terms and provisions.*" (See R. p. 220 (emphasis added)). The remainder of the Supplement to Second Motion is dedicated to assertions that CofC wrongfully removed Dr. Thompson from the Riley Center. Likewise, Dr. Thompson's Affidavit offered in support of her Second Motion and Supplement to Second Motion states that "[t]he primary purpose of the motions has been to obtain an Order" restraining CofC "from breaching the terms of a written contract [the MOU]" and to stop alleged retaliation. (See R. p. 236 ¶ 2).

In other words, Dr. Thompson's Second Motion and Supplement to Second Motion focused on the same allegations of breaches of the MOU, albeit with some different allegations with regard to specific conduct. The Second Motion and Supplement to Second Motion were extensions of the same arguments underlying Dr. Thompson's First Motion — with the same legal and factual underpinnings (*i.e.*, alleged conduct in violation of the MOU). In particular, Dr. Thompson contends that CofC violated her rights by breaching the MOU. She has not presented any evidence or cited to any authority supporting that her current arguments about CofC's *continuation* of its alleged prior breaches of the MOU would somehow take the Second Motion and Supplement to Second Motion outside of the scope of the First Order. Dr. Thompson has not set forth any reason why Judge Young erred in deferring to Judge Hall's prior denial of injunctive relief.

The specific relief Dr. Thompson requested in her First Motion and Second Motion and Supplement to Second Motion is set forth at length, *supra*. While Dr. Thompson changes the

wording somewhat, she seeks essentially the same relief in her Second Motion and Supplement to Second Motion that she sought in her First Motion. The primary relief sought in both motions is an injunction precluding CofC from breaching the MOU or changing Dr. Thompson's location or assignment. However, Judge Hall already denied her request for a preliminary injunction "[a]fter careful consideration."

Dr. Thompson argues that the trial court should have disregarded Judge Hall's First Order because he did not receive memoranda and did not conduct a hearing. However, Dr. Thompson never filed a motion for reconsideration, a motion to alter or amend or any other motion asking Judge Hall to revisit his First Order. As a result, the trial court properly respected Judge Hall's First Order denying Dr. Thompson's initial request for preliminary injunctive relief.

In support of her argument that Judge Young erred in deferring to the First Order, Dr. Thompson argues that the Second Motion and Supplement to Second Motion focused on the following conduct occurring after she filed this lawsuit and after Judge Hall's August 13, 2020 First Order (*i.e.*, conduct allegedly occurring between December, 2020 and July, 2021):

- 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.

(See R. pp. 110-42). These points can be boiled down to three separate items: (a) displacement of Dr. Thompson from the Riley Center; (b) the refusal to consider Dr. Thompson for the HEHP chair position; and (c) excluding Dr. Thompson from consideration for a merit pay raise. Dr. Thompson argues that her reliance on these allegations of this conduct occurring after commencement of the lawsuit protects her from the preclusive effect of the First Order. However, upon closer analysis, it is apparent that Dr. Thompson's alleged "new" conduct did not prevent Judge Young from deferring to Judge Hall's First Order.

Dr. Thompson first argues that her Second Motion and Supplement to Second Motion alleges "new" conduct, consisting of allegations that Respondents disconnected her Riley Center phone and took her off the Riley Center website, completely removed Dr. Thompson's office from the Riley Center, and "physically remov[ed] Plaintiff from the Riley Center in April 2021 and barr[ed] her access to her faculty office and personal property in that building." This is the same sort of conduct for which the trial court refused to grant an injunction in Judge Hall's First order. For example, Dr. Thompson's Complaint alleges that, under the MOU, her offices were to move to the Riley Center. (See R. p. 30 ¶ 25). She further asserted in her First Motion that "MOU specifically mandate[s] that . . . Plaintiff's tenure-track faculty line, office, and any grant-related offices are to be *moved from EHHP to the Riley Center*, where they would be administratively housed or located." (See R. p. 78 (emphasis added)). She further alleges that her offices were moved from EHHP to the Riley Center consistent with the MOU. (See *id.*). She expressly requested a preliminary injunction "restraining and enjoining Defendants CofC and Welch from unilaterally transferring or *moving Plaintiff back to the CofC's EHHP.*" (See R. p. 74 (emphasis added)). Thus, the First Motion sought — and Judge Hall denied — an injunction preventing Respondents from removing her from Riley Center. This is the same relief requested in the Second Motion and Supplement to Second Motion. Although the later motions contain certain additional factual allegations, they still requested the same relief — an injunction precluding Respondents from removing Dr. Thompson from her assignment at Riley Center.

Dr. Thompson next argues that her Second Motion and Supplement to Second Motion raised novel issues because she asserted that — after the First Order — CofC did not properly notify her a department chair opening (February, 2021) and excluded her from opportunities to obtain a merit pay raise (July, 2021). (*See* R. pp. 111-12). As discussed below, Dr. Thompson cannot show irreparable harm in connection with this request for injunctive relief. Furthermore, Dr. Thompson did not amend her Complaint to allege a claim concerning such alleged conduct.

Dr. Thompson finally argues that her Second Motion and Supplement to Second Motion raised new conduct concerning her alleged exclusion from consideration for a merit pay raise. Once again, as discussed below, this putative ground for a preliminary injunction — if Judge Hall's First Order does not foreclose it — is without merit because Dr. Thompson cannot show irreparable harm or a likelihood of success on the merits.

For the foregoing reasons, Judge Young correctly denied Dr. Thompson's Second Motion and Supplement to Second Motion, in light of Judge Hall's First Order.

2. The Cases That Dr. Thompson Cites Are Inapposite

In her Brief of Appellant, Dr. Thompson argues that the trial court's denial of her First Motion did not prevent her from asking the trial court for injunctive relief a second time:

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-CY-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]he 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.").

(See Appellant's Br. at 27-28). However, these cases are inapposite. The trial court did not prevent — and is not preventing — Dr. Thompson from litigating the merits of any substantive factual or legal issues addressed in Judge Hall's order. Respondents are not arguing that Judge Hall's order has final preclusive effect on the merits with regard to any final remedies that may be available to Dr. Thompson. Rather, Judge Young merely respected a prior judge's decision that this case does not call for the extraordinary remedy of preliminary, interim injunctive relief to maintain the *status quo* during litigation. The cases that Dr. Thompson cites do not warrant a trial court revisiting a denied request for a *preliminary* injunction.

For the foregoing reasons, the Court should affirm Judge Young's denial of preliminary injunctive relief.

3. Dr. Thompson's Reliance on Rule 54(b) Is Misplaced.

Dr. Thompson further argues that, even if Judge Hall's First Injunction Order addressed the issues raised in the Second Motion and Supplement to Second Motion, the Court may ignore or change that Order under South Carolina Rule of Civil Procedure 54(b):

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.*

See S.C.R. Civ. P. 54(b) (emphasis added). For the following reasons, Rule 54(b) does not provide a proper basis for this Court to reverse Judge Young's denial of a Dr. Thompson's second request for a preliminary injunction.

Initially, Rule 54(b) does not apply here, because the Judge Hall's First Order was not an order adjudicating "the claims or the rights and liabilities" of any parties. It is not a final decision as to any specific cause of action. It does not dismiss claims against any of the Defendants. Rather, it is an order concerning an interim *remedy* of a party. Appellant Dr. Thompson has not cited to any authority supporting the use of Rule 54(b) to overturn one judge's prior denial of an injunction. *See Premier Health Care Servs. v. Schneiderman*, Appellate Case No. 18795, 2001 Ohio App. LEXIS 5170, at *11 (Ct. App. Aug. 21, 2001) ("A preliminary injunction is a remedy; it is not a cause of action or a claim for relief. Therefore, an order granting or denying a preliminary injunction is not subject to the requirements of Civ. R. 54(B).").

Moreover, applying the federal⁴ counterpart to Rule 54(b), the Fourth Circuit has noted that a court's ability to revise an order under Rule 54(b) is not without boundaries:

[T]he discretion Rule 54(b) provides is not limitless. For instance, courts have cabined revision pursuant to Rule 54(b) by treating interlocutory rulings as law of the case. [Citations omitted.] The law-of-the-case doctrine provides that in the interest of finality, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." [Citations omitted.] Thus, a court may revise an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) "a subsequent trial produc[ing] substantially different evidence"; (2) a change in applicable law; or (3) clear error causing "manifest injustice." [Citations omitted.] This standard closely resembles the standard applicable to motions to reconsider final orders pursuant to Rule 59(e), but it departs from such standard by accounting for potentially different evidence discovered during litigation as opposed to the discovery of "new evidence not available at trial."

See Carlson v. Boston Science Corp., 856 F.3d 320, 325 (4th Cir. 2017). "[A] motion to reconsider an interlocutory order should not be used to rehash arguments the court has already considered merely because the movant is displeased with the outcome." *South Carolina v. United States*, 232 F. Supp. 3d 785, 793 (D.S.C. 2017). As one federal judge recent stated in the context of Rule

⁴ "Rules 54(b)-(d) are substantially the Federal Rule" and "represent the flexibility of the Rules procedure." *See* S.C.R. Civ. P. 54, Note; *see also* Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.").

54(b): "Although I have broad discretion to reconsider a previous ruling under Rule 54(b), reconsideration is an extraordinary remedy that should be used sparingly." *See Morris-Shea Bridge Co. v. Cajun Indus., LLC*, No. 3:20-cv-00342, 2021 U.S. Dist. LEXIS 92899, at *2 (S.D. Tex. May 17, 2021) (citation and internal quotation marks omitted).

As set forth above, at their heart, Appellant Dr. Thompson's Second Motion and Supplement to Second Motion seek to rehash the same issues she originally set forth in her First Motion — which Judge Hall denied in the First Order. Specifically, she again asserts that she is entitled to a preliminary injunction for alleged violations of the MOU. Judge Hall has already rejected that argument, and Judge Young properly exercised his discretion to respect the prior order of a coordinate judge.

Therefore, notwithstanding Rule 54(b), the Court should affirm Judge Young's Second Order, which denied Dr. Thompson's Second Motion and Supplement to Second Motion.

C. The Order Correctly Determined That Dr. Thompson Has Not Carried Her Heavy Burden of Showing Entitlement to Preliminary Injunctive Relief.

"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 preliminary injunctive relief are well-settled:

An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Accordingly, 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. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

Compton v. South Carolina Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). "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).

For the following reasons, the trial court correctly concluded that Dr. Thompson did not carry her burden of proving the elements for the issuance of a preliminary injunction.

1. The Second Order Correctly Concluded That Dr. Thompson Has Not Shown That She Will Suffer Irreparable Harm Without an Injunction.

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).

Dr. Thompson claims that she will suffer irreparable harm in that she will be subjected to retaliation and deprivation of her rights under the MOU. In particular, she argues:

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. . . .

Appellant will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Because . . . 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, . . . 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.

(*See Appellant's Br.*, at 33-34).

However, Dr. Thompson has not cited to any authority supporting that any of those alleged harms are truly "irreparable." She has made no showing with specific evidence to support that she cannot be made whole with relief — particularly, money damages — granted at the conclusion of this case, if appropriate. Exercising its discretion, the trial court properly concluded that Dr. Thompson did not carry her heavy burden of showing that her injuries are so severe that they

call for the extraordinarily rare relief of a preliminary injunction. She offered no evidence that she is in danger of sustaining any irreparable harm if the trial court denied the Second Motion and Supplement to Second Motion. As argued in more detail in the following sections, because Dr. Thompson has not carried her burden of showing irreparable harm, the Court should affirm Judge Young's Second Order, which denied injunctive relief.

a. Move from Riley Center

Appellant Dr. Thompson first argues that the trial court erred in denying her Second Motion and Supplement to Second Motion for preliminary injunction because she sustained irreparable harm from the move of her office from the Riley Center to the allegedly deficient Silcox Building. In her brief, Appellant Dr. Thompson argues that she has shown irreparable harm because "[t]he 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." (*See* Appellant's Br., at 33). She further asserts that, without a preliminary injunction, she:

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.

(*See id.*). However, the alleged relocation of Appellant Dr. Thompson's office — even if to a "lesser" location — is not an irreparable harm warranting the extreme remedy of interim injunctive relief. To the contrary, any harm from the movement of Dr. Thompson's office can be remedied upon the final trial of this matter on the merits.

Dr. Thompson presents no evidence to show *how* moving her offices has impacted her career. She presents no evidence of specific equipment and facilities to which CofC denied he access or the resulting harm she suffered. 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 to her office 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.

To the contrary, at least one court considering the issue has concluded that a move of a plaintiff's office — even to a "windowless, poorly ventilated room" — is not irreparable harm:

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." [(Citation omitted.)] Courts within this District have concluded that, moving an "office to a windowless, poorly ventilated room does not constitute an adverse employment action" [(citation omitted)], and Hornig has not provided any basis for the Court to conclude that she cannot return to her prior office after trial, if she succeeds.

See Hornig v. Trustees of Columbia Univ., 2018 U.S. Dist. LEXIS 189268, at *19 (S.D.N.Y. Nov. 5, 2018). Likewise, in this case, there has been no showing that the moving of Appellant Dr. Thompson's office cannot be effectively remedied after a trial on the merits.

Therefore, for the foregoing reasons, the trial court properly denied Dr. Thompson's Second Motion and Supplement to Second Motion, because the alleged move of Appellant Dr. Thompson's office from Riley Center is not "irreparable harm."

b. Denial of Opportunity for Pay Raises

Dr. Thompson next claims that Judge Young should have found she had 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, "[a]lthough 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." (See Appellant's Br., at 39). For the following reasons, Dr. Thompson's arguments are misplaced.

This alleged injury, at its very core, is monetary and legal. Appellant 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. Appellant Dr. Thompson cites no evidence supporting that the denial of an interim injunction granting her a 4-15% pay raise would cause irreparable harm that money damages would not remedy.

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, on the other hand, if CofC wrongfully denied Appellant Dr. Thompson a pay increase, damages would compensate her for that loss. A finder of fact would be capable of determining an appropriate measure of damages. As in nearly every case, the parties could present their evidence and make their arguments, and the

fact finder could 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.

For the foregoing reasons, the trial court properly denied summary judgment because the alleged denial of an opportunity to request a pay raise is not "irreparable harm."

c. HEHP Chairperson Position

Finally, Dr. Thompson argues that she will be irreparably harmed in the absence of an injunction because — well over a year ago — CofC denied her the opportunity to apply for the HEHP chair because she did not timely express her interest:

[On April 5, 2021,] Plaintiff also received a group email from HEHP's current chairperson (Dr. Wes Dudgeon) advising faculty that an internal candidate had expressed interest in applying for the HEHP chairperson's position that had just become open for internal application (as he was stepping down from this position because he would soon complete his 5-year term).

As soon as Plaintiff learned of this opening on February 5, 2021, she immediately sent an email to Dr. Dudgeon requesting to be considered for the chairperson position that will become vacant upon his resignation, only to be notified that Dr. Welch had imposed a deadline of February 3, 2021 for anyone to notify her of their interest in the position. Plaintiff is informed that Dr. Welch announced this arbitrary deadline during a faculty meeting that occurred on January 26, 2021 at which she knew Plaintiff was not present. Plaintiff was not notified before the January 26 faculty meeting that Dr. Dudgeon was resigning his position or that Dr. Welch would impose any deadline for candidates to apply for the vacant chairperson position caused by his resignation. As a result, the February 3rd deadline had already passed before Plaintiff was even made aware of the opening or the opportunity to apply for the position.

Despite this situation, Dr. Welch informed Plaintiff she will not consider her for the opening based on her invocation of the arbitrary February 3rd deadline of which Plaintiff had not been notified.

(See Appellant's Br., at 25-26). 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.

Appellant Dr. Thompson presents no evidence to show how the denial of this opportunity

has actually impacted her. She presents no examples of any loss of professional standing. 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 for realizing an increase in standing, professional reputation, notoriety, prestige, experience, and good will accompanying the performance of the duties connected with the position" (*see* Appellant's Br., at 33), she presents no evidence at all.

Appellant Dr. Thompson has not cited to any authority to support 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 entitlement 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 Appellant's Br.*, at 33-34). This argument — and the cases that Dr. Thompson cites in support — misses 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.⁵

Therefore, for all of the foregoing reasons,⁶ the trial court properly denied Dr. Thompson's second motion for a preliminary injunction 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.

2. Dr. Thompson Has Not Shown That She Is Likely to Succeed on the Merits.

"In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must

⁵ The Texas case that Dr. Thompson cites — *IAC, Ltd. v. Bell Helicopter* — does not aid her irreparable harm argument. In *IAC*, the issue was misappropriated trade secret information that was used to unfairly compete with the 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.

⁶ 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 did not attend the meeting. Aside from her own self-serving, conclusory statements, Dr. Thompson presents no evidence that she was the most qualified candidate and would have been selected for this position had she applied. She presents no evidence comparing her qualifications with those of other applicants for the position (and does not identify any of those applicants). As a result, Plaintiff's claim as to the HEHP chair position is little more than speculation and conjecture.

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). For the reasons that follow, the trial court correctly held that Dr. Thompson did not show a likelihood of success on the merits.

Initially, Dr. Thompson has not presented any evidence or cited to any authority to support her contention that the MOU is a legally enforceable contract.

First, the MOU is not enforceable because valuable mutual consideration does not support it. "[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); *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."). The MOU does not impose any duties on Dr. Thompson or require her to give any consideration to CofC, beyond what she was already providing as an employee. As a result, the MOU is lacking the consideration required for it to be an enforceable contract. Dr. Thompson's reliance on the MOU in her Second Motion and Supplement to Second Motion was misplaced. The trial court properly denied Dr. Thompson's second motion for preliminary injunction.

Moreover, regardless of the parties' intent, an agreement which leaves open material terms is unenforceable under South Carolina law. 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.* "Thus, for 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) (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.”); *see Stevens*, 409 S.C. at 579, 762 S.E.2d at 701 (“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.”) (*quoting* 1 Corbin on Contracts § 2.8).

Contrary to Appellant Dr. Thompson's assertions, she has not refuted that the MOU is lacking in definiteness and is not an enforceable agreement. The MOU discusses certain then-current responsibilities of CofC that could be subject to change; it also involved possible future tenure or promotion possibilities that would all be subject to various conditions. There are no definitive time frames for CofC's alleged obligations under the MOU. Instead, the MOU is merely a recitation of certain things that CofC would (and did) do in connection with Dr. Thompson's employment. There are no specific future obligations under the MOU that Dr. Thompson asks the Court to enforce.

Dr. Thompson asserts that "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."" (*See Appellant's Br.*, at 31). Specifically, she relies on language in Section 2.3.1.1 providing that (emphasis added) "[c]ontracts *may include*, but are not limited to: ... Memoranda of Understanding or Memoranda of Agreement." (*See id.* at 31-32). Dr. Thompson did not present this document to the trial court in its consideration of the Second Motion and Supplement to Second Motion. As a result, this argument has not properly been preserved for appellate review. Nevertheless, Section 2.3.1.1 *only* substantively addresses what contracts require certain levels of approval authority. Nothing in Section 2.3.1.1 makes this particular MOU a legally enforceable contract or changes the law of contracts in South Carolina. Moreover, Section 2.3.1.1 states only that the definition of a contract *within that policy "may*

include" memoranda of understanding. Section 2.3.1.1 does not make any statement concerning the substantive enforceability of this specific MOU.

In addition to the foregoing, as set forth below, even if the MOU could be a binding contract, Appellant Dr. Thompson has presented no evidence that she is likely to succeed on the merits of her claims that Respondents violated that contract.

a. **Dr. Thompson Has Not Shown That She Is Likely to Succeed on the Merits of Her Claim That CofC Breached the MOU by Moving Her Office From the Riley Center.**

Dr. Thompson argues that she is likely to succeed on the merits of her claim that CofC breached the MOU by, *inter alia*, moving her office from the Riley Center: "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" (*See* Appellant's Br., at 35). For the reasons that follow, this argument is without merit.

Dr. Thompson does not present any evidence that CofC failed to do what was set forth in the MOU. Under the MOU (assuming it is a binding contract in first instance), 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 does not dispute that CofC actually moved her office to Riley Center. In fact, 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 reported to Dr. Stewart, her Department Chair, and had her offices moved from EHHP 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 later) CofC breached the MOU by moving her out of the Riley Center.

The premise of Appellant Dr. Thompson's argument is that the move of her office to the Riley Center under the MOU was perpetual: *i.e.*, CofC could never subsequently move her out of the Riley Center (or out of Dr. Stewart's supervision). Notably, the MOU does not have any specific term and does not set any time period for the alleged undertakings thereunder. "Historically, perpetual 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 even apparently-indefinite contracts are terminable by either party:

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. A contract resulting in an obligation so onerous as this could not be thus implied.").

Even assuming that the MOU is a contract, Appellant Dr. Thompson presents no evidence that the MOU should be construed as a perpetual promise to keep her office at the Riley Center forever. The language of the MOU certainly does not state or imply that to be the case. The Court should not construe the MOU as a binding promise without any end. That is inconsistent with South Carolina contract law and the intent of the parties. Dr. Thompson has certainly not presented any evidence to support that the MOU grants her a permanent right to an office in the Riley Center (or to any other permanent rights). As a result, Dr. Thompson cannot show that she is likely to succeed on the merits of this claim.

Therefore, the trial court properly denied Dr. Thompson's second motion for preliminary injunctive relief because she cannot show that CofC breached the MOU by moving her office.

b. Dr. Thompson Has Not Shown That She Is Likely to Succeed on the Merits of Her Claim That CofC Illegally or Improperly Denied Her the Opportunity to Apply for the HEHP Chair Position.

Dr. Thompson also contends that she is likely to succeed on her claim that she was not allowed to apply for the HEHP chairperson position: "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." (*See* Appellant's Br., at 37). For the reasons that follow, her contention is incorrect; as a result, the Court should affirm the trial court's denial of Dr. Thompson's Second Motion and Supplement to Second Motion.

Initially, Appellant Dr. Thompson presents no evidence and cites to 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.⁷ She does not cite to any specific provision of the MOU that was violated. She does not assert a claim that her civil rights were violated because she is a member of a protected class. 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.

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 where the announcement was made that the current Department Chair would not seek reappointment. The evidence shows that, at that meeting, Dr. Welch asked anyone interested in being considered for the chairmanship to apply within seven days. Dr. Thompson was aware that this meeting was taking place. Because she was not at this meeting, Dr. Thompson did not know about the deadline and did not apply on time. As a result of her 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. She has presented no evidence to show that she should 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 affirm the trial court's denial of Dr. Thompson's second motion for a preliminary injunction, because she 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 intention to be contractually bound to specific, enforceable obligations.

⁷ 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).

3. **The Court Should Affirm Judge Young's Denial of a Preliminary Injunction Because Dr. Thompson Has Not Proven the Absence of an Adequate Legal Remedy**

Dr. Thompson argues that she does not have an adequate legal remedy because money damages would be uncertain and difficult to calculate and inadequate to compensate her. She also asserts in a conclusory fashion that money damages are insufficient because they cannot "retroactively" compensate her for not having an office in the Riley Center or not being considered for the chairpersonship position. The Court should not alter or amend the Second Order, because Dr. Thompson's arguments are without merit.

In this section of her Motion to Alter or Amend, Dr. Thompson focuses on three elements of "damage": (a) having her office moved from the Riley Center; (b) not being considered for a pay increase of 4%-15%; (c) not being considered for the HEHP chairpersonship position. However, she presents no evidence or support, aside from the *ipse dixit* of her counsel, for her contention that money damages would not adequately compensate her for her claimed injuries. Dr. Thompson has not shown that she does not have an adequate legal remedy. To the contrary (as discussed above in the irreparable harm sections), she has an adequate legal remedy in the form of a jury trial for money damages. Legal damages can remedy any claimed harm to Dr. Thompson from CofC's actions and compensate for her injuries.

Therefore, the Court should affirm the trial court's denial of Dr. Thompson's second request for preliminary injunctive relief.

C. **The Court's Order Correctly Recites the Relevant Facts Based on the Record.**

Dr. Thompson next argues that the trial court's "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 . . . counsel at the hearing on Appellant's motions." (*See* Appellant's Br., at 40). Specifically, Dr. Thompson challenges the following statements in Judge Young's Second Order. The challenged statements are in **bold**, followed by Respondents' response to Dr. Thompson's contentions. For the reasons set forth below, Judge Young did not engage in any reversible error with regard to these alleged statements.

1. **For example, for the fall semester of 2021, Plaintiff 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.*" (See R. p. 11 (emphasis added)).**

The Second Order includes this language in its discussion of the requirement of "irreparable harm." Dr. Thompson argues that "[t]he Order cites to nothing in the record supporting any of these assertions." (See Appellant's Br., at 40). Characterizing them as the "above-quoted *findings*," Dr. Thompson asserts that the trial court erred in basing its Second Order on those statements. (See *id.* (emphasis added)). For the reasons that follow, the Court should not reverse the Second Order.

First, these statements in the Second Order are not controlling with regard to the Court's denial of injunctive relief. To the contrary, as the movant, Dr. Thompson alone carried the burden of proving irreparable harm. She did not do so. Irrespective of the inclusion of these comments in the Order, the result is the same: Dr. Thompson has not proven that the Court should grant a preliminary injunction. Irrespective of whether record evidence supports the above-referenced statements, the Second Order correctly concludes that "[a]lthough this case has been pending for over 15 months without injunctive relief, Appellant Dr. Thompson has not presented any evidence that she has been irreparably harmed during that time." (See R. p. 11). The Court's Second Order states, correctly, that:

Plaintiff claims that she will suffer irreparable harm in that she will be subjected to retaliation and deprivation of her rights under the MOU. She also claims that she will be deprived of the opportunity to apply for the vacated HEHP chairperson position. She additionally alleges that the move of her office will harm her ability to perform her work, will damage her reputation, and will cause emotional distress. However, Plaintiff has not cited to any authority supporting that any of those alleged harms are truly "irreparable." The Court concludes that Plaintiff has not carried her heavy burden of showing that these injuries are so severe that they warrant the rare relief of a preliminary injunction. *She has offered no evidence that she is in danger of sustaining any harm from which she cannot recover if the Court denies the Second Motions.*

(*See id.* (emphasis added)).

Moreover, these statements — whether from the statements of counsel or record evidence — are not "findings." These statements will have no binding impact on the Court in the future. Dr. Thompson will be free to present evidence contesting these statements at the proper time. The Second Order is merely a denial of interim injunctive relief; it is not a judgment based on an evidentiary trial.

For the foregoing reasons, the Court should not amend or alter the Second Order in connection with the above-referenced statements.

2. **“Plaintiff 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.” (See R. p. 13 (emphasis added)).**

The above-quoted statement is taken from the Second Order's discussion of the "likelihood of success on the merits" element. It is not clear what Dr. Thompson believes that the Second Order misstates. The Second Order correctly says that Dr. Thompson claims that she did not promptly apply for the HEHP chairpersonship because "she was not given notice of the deadline." This is what Dr. Thompson herself argued in her Second Motion, Supplement to Second Motion, and Motion to Alter or Amend. *The Second Order does not say that Dr. Thompson was actually given notice of the deadline.* In fact, the language of the Second Order suggests that the Court recognized that Dr. Thompson presented evidence that she did not receive actual notice of the meeting. In any event, the Second Order is not based on whether Dr. Thompson received actual notice of the open chairpersonship position.

The Second Order also correctly says that Dr. Thompson presented *no evidence* that — if she had applied for the position — she would have obtained it. The only evidence she proffers is her conclusory statement in her sworn Second Motion 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. She presents no evidence, aside from inadmissible, self-serving conclusory opinions, that she is likely to succeed on a claim that she would have obtained this position.

Therefore, the trial court did not err with regard to its findings regarding whether Dr. Thompson would have been appointed Department chair, if she would have timely expressed interest in the position.

3. **“Plaintiff 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.”** (*See R. p. 14 (emphasis added)*).

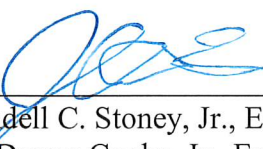
The above referenced language is contained in the trial court's Second Order's discussion of the "likelihood of success on the merits" element of preliminary injunctive relief. With regard to this language, Dr. Thompson complains that the Second Order "cites to no evidence anywhere in the record supporting the CofC's assertion that Appellant and the CofC did not intend for the MOU to be an enforceable contract" and that "[t]he only evidence in the record shows the CofC and Appellant did intend for the MOU to constitute a binding contract." (*See Appellant's Br., at 42*). However, contrary to Dr. Thompson's present arguments, the trial court's inclusion of the above-quoted language was not improper and does not require reversal, as Dr. Thompson did not carry her burden of proving that the MOU is an enforceable contract (as discussed above).

CONCLUSION

Therefore, for all of the foregoing reasons, Judge Young properly and correctly ruled in his Second Order that Dr. Thompson is not entitled to a preliminary injunction in this matter. Therefore, the Court should affirm Judge Young's Second Order.

June 15, 2022

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Jun 15 2022

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

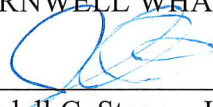
PROOF OF SERVICE

I certify that I have served the Final Brief 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 June 15, 2022, addressed to her attorneys of record:

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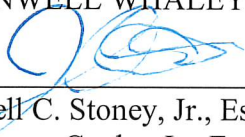
College of Charleston; College of Charleston Foundation, Inc.;
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Of whom College of Charleston and Frances C. Welch, Ph.D.,
M.A. are the Respondents

RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b),
SCACR.

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Jun 14 2022

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.

REPLY BRIEF OF APPELLANT

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Appellant Olivia M. Thompson, Ph.D., M.P.H.’s (“Appellant”) respectfully submits this Reply Brief in support of her appeal in this matter.

ARGUMENTS

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY HOLDING THAT A PRIOR FORM 4 ORDER OF THE CIRCUIT COURT PRECLUDED IT FROM GRANTING APPELLANT’S MOTIONS FOR A PRELIMINARY INJUNCTION.

Citing our state’s rule that “one circuit judge may not overrule another,” Respondents College of Charleston (“CofC”) and Frances C. Welch, Ph.D., M.A. (“Dr. Welch”) argue that Circuit Judge Daniel Hall’s Form 4 Order filed August 13, 2020—which denied without explanation or hearing Appellant’s initial Motion for Preliminary Injunction filed June 25, 2020—barred Circuit Judge Roger Young from granting Appellant’s subsequent Motion for Preliminary Injunction filed April 2, 2021 and Supplemental Motion for Preliminary Injunction filed July 9, 2021 even though those subsequent motions and Appellant’s affidavit addressed new factual events occurring *after* Judge Hall’s Form 4 Order. See Resp’ Brief p.18-26. Respondents claim that Appellant’s subsequent motions necessarily required Judge Young to “second-guess” or “overturn” Judge Hall’s Form 4 Order denying Appellant’s prior motion. Id. p. 6.

The critical flaw with Respondents’ argument is that Appellant’s subsequent motions did not ask or require Judge Young to review, overrule, or second-guess any ruling that Judge Hall made in his prior Form 4 Order. Judge Hall was never presented with and did not decide the factual matters forming the basis for Appellant’s subsequent motions and affidavit that were before Judge Young.¹

¹ Judge Hall filed his Form 4 Order at the outset of this case before any of the Defendants had even appeared and without conducting a hearing or having any communications with Appellant or her counsel about the motion. (R_001-003). His Order states in conclusory terms: “After careful consideration, the Plaintiff’s Motion for Temporary Injunction is DENIED.” Id. The Order gives no explanation or reason for the denial of the motion.

On June 24, 2020, Appellant filed her verified Complaint seeking enforcement of a written Memorandum of Understanding (“MOU”) dated July 17, 2014 that Appellant had entered with Glenn McConnell (the CofC’s then-President), Dr. George Hynd (the CofC’s then-Provost), Dr. Jerry Hale (Dean of the CofC’s School of Humanities and Social Sciences or “HSS”), and Dr. Welch (Dean of the CofC’s School of Education, Health, and Human Performance or “EHHP”). (R_024-073). Under the MOU’s terms, the CofC agreed to transfer Appellant from the EHHP and put her in the HSS. (R_030 ¶26-27; R_116; R_221 ¶5). The MOU mandates that Appellant will report directly to Dr. Kendra Stewart, who will serve as her Department Chairperson, and that Appellant’s faculty office and grant-related offices will be moved to the CofC’s Riley Center. The MOU’s purpose was to remove Dr. Welch from having any supervision or authority over Appellant or her tenure-track and to prevent Dr. Welch from retaliating against Appellant and interfering with her Boeing-funded grant work. (R_029-030 ¶23; R_220 ¶4).

Appellant’s initial Motion for Preliminary Injunction filed June 25, 2020 sought injunctive relief based on events that had occurred after the MOU and *before this lawsuit was commenced on June 24, 2020*. (R_074-095). On August 29, 2019, despite the MOU and without prior consultation with Appellant or her consent, Dr. Welch unilaterally transferred Appellant’s faculty assignment from the CofC’s HSS back to the EHHP, which action removed Appellant from Dr. Stewart’s report and again placed her under Dr. Welch’s supervision. (R_033-034 ¶36-41). Dr. Welch then engaged in numerous acts of retaliation against Appellant that interfered with and undermined her Boeing-funded grant work. (R_037-040 ¶52-60, 62-71; R_059 ¶131). These actions ultimately caused Boeing to terminate its grants with the CofC and withdraw its funding for Appellant’s work on March 17, 2020. (R_042 ¶70; R_044-045 ¶76-79; R_046 ¶82; R_222 ¶9). Appellant’s initial motion addressed Dr. Welch’s pre-suit actions breaching the terms of the MOU and requested a preliminary

injunction based on those actions. (R_074-095). As noted above, Judge Hall denied this motion without any explanation or a hearing via Form 4 Order filed August 13, 2020. (R_001-003).²

In contrast to Appellant’s initial motion that Judge Hall denied, Appellant’s Motion for Preliminary Injunction filed April 2, 2021, Supplemental Motion for Preliminary Injunction filed July 9, 2021, and Affidavit filed October 2, 2021 sought injunctive relief based on new and different events that took place *many months after Judge Hall issued his August 13, 2020 Form 4 Order*. (R_110-194, 218-244). Although Respondents attempt to downplay this key fact, Appellant’s subsequent motions and affidavit give a detailed account of numerous factual events *spanning from December 2020 through July 2021 that Judge Hall never considered or confronted*. Id.

In December 2020, without Appellant’s knowledge, the Respondents physically disconnected Appellant’s office telephone and removed her from the Riley Center website and building directory, thus making it appear to students and others that she is no longer a professor at the CofC. In February 2021, Dr. Welch arbitrarily refused to accept Appellant’s application and consider her for the open Chairperson position for the Department of Health and Human Performance (“HEHP”) that had been vacated earlier that same month, invoking an informal application deadline of which Appellant had not been notified and that had not been posted to the faculty. In March 2021, Dr. Welch unilaterally removed Appellant’s faculty office from the Riley Center—where she had been

² Respondents criticize Appellant for not immediately appealing Judge Hall’s Form 4 Order. However, this does not mean that Appellant agrees with the Order or has abandoned her right to appeal. Appellant was not required to immediately appeal this intermediate order to preserve her right of review on appeal of a final judgment—*i.e.*, she could wait to appeal at the conclusion of the case. S.C. CODE ANN. §§ 18-1-130, 14-3-330(1); *see Link v. Sch. Dist. of Pickens Cty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990); *Gunnells v. Raybestos-Manhattan, Inc.*, 261 S.C. 106, 111, 198 S.E.2d 535, 536 (1973). In the beginning of this case, Appellant did not feel it necessary to immediately appeal Judge Hall’s Form 4 Order. She later appealed Judge Young’s Order that denied her subsequent motions for a preliminary injunction because the circumstances have changed since Judge Hall entered his Form 4 Order.

located since August 2014 under the MOU—and physically relocated her office two miles away to the Silcox Building, which is a much older building in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work (including removal of asbestos ceiling tiles). In June 2021, the CofC had security officers physically escort Appellant out of the Riley Center with hands on their holsters and ordered her not to return to her faculty office at the Riley Center.³ In July 2021, the CofC excluded Appellant from the opportunity to obtain a faculty merit pay raise for which she qualified while offering this opportunity to other faculty.

Respondents' brief nowhere explains how Judge Hall could have considered and ruled upon these events when they had not yet taken place by the time of his August 13, 2020 Form 4 Order. Respondents' position defies common sense. Judge Hall did not previously decide the matters raised in Appellant's subsequent motions because he could not have done so. Judge Hall's Form 4 Order did not preclude Judge Young from deciding Appellant's subsequent motions and affidavit that involved different matters which Judge Hall had not considered. Narruhn v. Alea London Ltd., 404 S.C. 337, 340–41, 745 S.E.2d 90, 92 (2013) (circuit judge's ruling on a separate matter does not run afoul of the general rule prohibiting one circuit court judge from overruling another).

In Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013), our state Supreme Court found that the rule holding that one judge of the same court cannot overrule another judge is inapplicable when the prior judge had not “specifically ruled on the issue” decided

³ Respondents' brief conflates Dr. Welch's actions on August 29, 2019 in transferring Appellant's faculty assignment from the CofC's HSS back to the EHHP, which involved an administrative reassignment of Appellant, with Respondents' subsequent actions in December 2020 through June 2021 in physically disconnecting Appellant's office telephone, deleting her from the Riley Center website and building directory, removing Appellant's faculty office from the Riley Center and moving her office to the Silcox Building, and debarring Appellant from accessing the Riley Center, which involved a physical relocation of Appellant and her office. See Resp' Brief p.22.

by the subsequent judge. Id. at 573, 743 S.E.2d at 785; see also Andrick Dev. Corp. v. Maccaro, 280 S.C. 103, 105-06, 311 S.E.2d 95, 97 (Ct. App. 1984) (rule that one circuit judge cannot grant relief which has been previously sought from and denied by another circuit judge was not violated when the case did not involve submission of the same issue based on the same facts to a second judge after the first judge had ruled). Simply stated, in the present case, Judge Hall did not rule on whether a preliminary injunction should be issued against the Respondents based on the factual events presented in Appellant's subsequent motions and affidavit. It follows that his Form 4 Order did not bar Judge Young from considering this evidence and ruling upon that question.

Respondents' brief claims that Appellant's subsequent motions and affidavit "were really just extensions of" her prior motion even while Respondents begrudgingly concede that the subsequent motions and affidavit contain "some different allegations with regard to specific conduct" and focus on "conduct occurring after [Appellant] filed this lawsuit and after Judge Hall's August 13, 2020 First Order." See Resp' Brief p.18-26. Respondents claim the subsequent motions and affidavit were merely "extensions" of the initial motion because the later filings assert that Respondents did not cease their retaliation against Appellant after Judge Hall's Form 4 Order, but "continued" their retaliation against Appellant unabated even while this suit has been ongoing.

Respondents take the stance that one Circuit Judge cannot enjoin a defendant from engaging in acts of retaliation against a plaintiff if the defendant's actions "continue" the "same sort of conduct" for which another Circuit Judge had previously denied a preliminary injunction. Respondents fail to cite any legal support whatsoever for their position. Courts have rejected it. See Mason v. Cecil, No. 19-CV-01375-SPM, 2021 WL 1338060, at *5 (S.D. Ill. Apr. 9, 2021) ("Although the Motion for Preliminary Injunction currently before the Court reasserts allegations raised in the first motion for preliminary injunction, Mason has alleged new instances of retaliatory

conduct that have occurred since the Court held an evidentiary hearing and denied the first motion on August 24, 2020.... Accordingly, the Motion to Strike is denied, and the Court will consider the Motion for Preliminary Injunction.”).

The facts addressed in Appellant’s subsequent motions are not the same as those facts addressed in her initial motion. As discussed in Appellant’s opening brief, South Carolina follows the rule that if a preliminary injunction has been refused, the movant may nevertheless obtain such relief on an amended, supplemental, or new application based on facts that occurred after the first application was refused. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796, 798 (1928); see 43A C.J.S. Injunctions § 79 (2021); 42 AM. JUR. 2D Injunctions § 278 (2021); Red Star Yeast & Prod. Co. v. La Budde, 83 F.2d 394, 396 (7th Cir. 1936); Thayer Co. v. Binnall, 95 N.E.2d 193, 198 (Mass. 1950). Respondents’ brief nowhere disputes or responds to any of these cases or authorities, which are on point with the present case.

Moreover, it bears emphasizing that an interlocutory order granting or denying an injunction is not the law of the case or *res judicata* as between the parties to the action. G-H Ins. Agency, Inc. v. Travelers Ins. Companies, 270 S.C. 147, 172, 241 S.E.2d 534, 546 (1978); Heath v. Coll. of Charleston, No. 217CV01792PMDJDA, 2018 WL 3353063, at *6 (D.S.C. June 15, 2018) (court’s decisions at the preliminary injunction phase do not constitute law of the case); 18B E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.5 (Apr. 2022) (“Preliminary or tentative rulings do not establish law of the case. The most frequent illustrations are provided by preliminary injunction orders.” (footnotes omitted)). “[O]rdinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.” Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989).

In Sellers v. Nicholls, 432 S.C. 101, 851 S.E.2d 54 (Ct. App. 2020), which the Respondents cite in their brief, despite citing the “long-standing rule in this State that one judge of the same court cannot overrule another,” this Court still held that a family judge was not bound by the prior order of another family judge denying a party’s request for a trial continuance because it was an interlocutory order not affecting the merits of the case. Id. at 115-16, 851 S.E.2d at 61 (“[T]he substantial issue addressed in the order was counsel’s disqualification, and the prospective denial of a motion for a continuance was therefore an interlocutory order. As such, this order could not prevent the family court from considering Mother’s motion to continue. Therefore, the family court erred by determining it was bound by such order and abused its discretion by failing to exercise any discretion in ruling upon Mother’s motion for a continuance.”).⁴

Finally, Respondents argue that Appellant’s motions should be denied because she “did not amend her Complaint to allege a claim concerning” the conduct raised in her motions and affidavit. See Resp’ Brief p.23. However, it was unnecessary for Appellant to amend her Complaint when the

⁴ Although the Sellers Court did not cite to South Carolina Rule of Civil Procedure 54(b), its holding is consistent with that rule’s provisions stating that “any order or other form of decision, however designated, which adjudicates fewer than all the claims ... 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). Federal courts applying Rule 54(b) hold that an interlocutory order can be reconsidered at any time prior to a final judgment. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13 n.14 (1983) (“[A]s Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown”). Courts have specifically applied Rule 54(b) to requests for reconsideration of an order granting or denying preliminary injunctive relief. Dunlap v. Presidential Advisory Comm’n on Election Integrity, 319 F. Supp. 3d 70, 84 (D.D.C. 2018); Providence Title Co. v. Truly Title, Inc., No. 4:21-CV-147-SDJ, 2021 WL 5003273, at *3 (E.D. Tex. Oct. 28, 2021); J.O.P. v. U.S. Dep’t of Homeland Sec., 338 F.R.D. 33, 60 (D. Md. 2020). “Under Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.” Six Dimensions, Inc. v. Perficient, Inc., 969 F.3d 219, 227 (5th Cir. 2020) (citation omitted); see Cobell v. Jewell, 802 F.3d 12, 25 (D.C. Cir. 2015); Greene v. Union Mutual Life Ins. Co. of America, 764 F.2d 19, 22 (1st Cir.1985).

new matters addressed in her subsequent motions and affidavit are related to the claims stated in her Complaint. “The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint.” Omega World Travel, Inc. v. Trans World Airlines, 111 F.3d 14, 16 (4th Cir. 1997). Thus, “a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party’s motion and the conduct asserted in the complaint.” Id. (citing Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994)).

For instance, in Hisp. Nat’l L. Enft Ass’n NCR v. Prince George’s Cty., No. CV TDC-18-3821, 2021 WL 1575772 (D. Md. Apr. 21, 2021), police officers sued the county for unlawful discrimination allegedly perpetrated pursuant to a long-standing county pattern and practice of discrimination against Black and Hispanic officers, including through the denial of promotions and desirable assignments based on race and color. During the litigation, the plaintiffs moved for a preliminary injunction to enjoin the county from administering certain promotion tests. The county opposed the motion and argued “the requested injunctive relief is based on ‘wholly new claims and factual allegations’ that were not pleaded in the operative complaint in this case.” Id. at *11. In rejecting this argument, the Court held that “the requirement of a ‘relationship’ between the conduct asserted in the Complaint and the injury claimed in the Motion” was met when the Complaint alleged a pattern and practice of discrimination, including discrimination in the promotions process, and the plaintiffs’ motion sought to enjoin promotions testing that was discriminatory. Id. at *12.

In this case, Appellant’s subsequent motions and affidavit assert that Respondents have repeatedly and continuously harassed, intimidated, and retaliated against her in violation of the MOU. (R_111-112) (“[N]otwithstanding the pendency of this lawsuit, Defendants have continued to

breach, contravene, and disregard the clear terms and provisions of the written MOU dated July 17, 2014 that was executed by Plaintiff and Defendants CofC and Welch. Defendants have also continued to retaliate against, harass, and cause financial harm to Plaintiff while this litigation has been ongoing.”); (R_219) (“[N]otwithstanding the pendency of this action and the filing of Plaintiff’s previous Motion for Preliminary Injunction, Defendant CofC has continued to engage in retaliatory conduct, harassment, and intimidation towards Plaintiff even while this litigation has been ongoing.”); (R_236 ¶3) (“Notwithstanding the pendency of this action and the filing of the motions mentioned above, Defendant CofC and its employees and agents unfortunately have continued to engage in retaliatory conduct, harassment, and intimidation towards me even while this litigation has been ongoing.”).

These motions and affidavit are related to the claims set forth in the Complaint, which allege that Respondents violated the MOU and retaliated against Appellant. (R_033-046 ¶¶36-85). Appellant’s subsequent motions and affidavit detail particular factual events occurring *after* this lawsuit was commenced and *after* Judge Hall’s August 13, 2020 Form 4 Order was filed, which show that Respondents’ retaliation against Appellant has continued and is ongoing despite this litigation. There is a “relationship between the claims in the underlying complaint and the preliminary injunction” motions, which is all that is needed for the motions to be granted. Brakeall v. Stanwick-Klemik, No. 4:17-CV-04101-LLP, 2019 WL 3713721, at *2 (D.S.D. Aug. 7, 2019).

Judge Young’s November 12, 2021 Order disregarded the fact that Appellant’s subsequent motions and affidavit requested 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. Judge Young erred as a matter of law by holding that Judge Hall’s Form 4 Order precluded him from granting Appellant’s subsequent motions.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE 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).

Appellant demonstrated several different forms of irreparable harm she will suffer if an injunction is not granted. First, Appellant will be deprived of the contractual benefits and protection of the MOU that she negotiated with the CofC. The point of the MOU was to transfer Appellant away from Dr. Welch’s supervision to ensure that Appellant would not have to endure further retaliation, harassment, and intimidation by Dr. Welch, which had precipitated the CofC’s administration’s involvement. Under the MOU’s 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, grant-related offices, and administrative location to the CofC’s Riley Center at 176 Lockwood Boulevard, Charleston.
- To have Appellant 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.”
- “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).

If an injunction is not granted, Appellant will be denied these benefits and protections and she will be forced to again endure further retaliation, harassment, and intimidation by Dr. Welch. 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). Rather than having her placement and tenure under Dr. Stewart's supervision, Appellant will have to endure placement and supervision under Dr. Welch, the very same person who has been retaliating against, harassing, and intimidating her for years. The deprivation of Dr. Stewart's supervision and the forced placement under Dr. Welch's supervision is not something that can be easily measured in monetary terms. Respondents' brief nowhere explains how this harm can be remedied by a monetary award or how such a monetary award could be measured or calculated.

Second, unless an injunction is granted, Appellant will be deprived of her faculty office in the Riley Center, she will be removed from the Riley Center website and building directory, and she will be relocated to the Silcox Building. The Silcox Building is located at 24 George Street on a different campus, roughly two miles away from the Riley Center located at 176 Lockwood Boulevard. Appellant documented the glaring differences in the quality and conditions of the offices at the Riley Center and the Silcox Building in her verified motion and with photographs. (R_138; R_162-179; R_181-186). The Riley Center is a new state-of-art office facility in impeccable condition. In stark contrast, the Silcox Building is an old building in a deplorable condition, is in a state of disrepair, and is undergoing substantial construction and renovation work, including a new roof, new windows, and new HVAC air handlers and ductwork. (R_137-139). The Silcox Building has asbestos ceiling tiles that are damaged, dislodged, and missing allowing asbestos fibers to become airborne and inhalable. Id. The office in the Silcox Building that Appellant was told to occupy does not have functioning heat/air conditioning or hot or tepid water in any of the nearby restrooms. Id. The

CofC's Facilities Management Department informed Appellant that no one should be working in the building because of the unsafe and unworkable conditions caused by the construction, noise, dust, etc. (R_138-139; R_188).

Respondents' brief first attempts to trivialize Appellant's forced relocation to the Silcox Building. They cite to an unpublished federal district court decision in which the judge held that an employer's relocation of an employee's office in the same office building was not irreparable harm for purposes of the federal employment discrimination laws. See Resp' Brief p.29 (citing Hornig v. Trustees of Columbia Univ. in City of New York, No. 17 CIV. 3602 (ER), 2018 WL 5800801 (S.D.N.Y. Nov. 5, 2018)). In Hornig, the federal judge initially said the plaintiff's "complaint about the relocation of her office in the same building borders on the frivolous" and she "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'" Id. at *6 (internal citation omitted).⁵

Of course, in the present case, Appellant does not seek an injunction simply because Dr. Welch moved her faculty office down the hallway. Instead, she seeks relief because Dr. Welch disregarded the MOU's requirement that Appellant's faculty office and grant-related offices be placed in the Riley Center and Dr. Welch unilaterally moved Appellant's office to a different building miles away that is dilapidated and has unsafe, unhealthy, and unworkable conditions.

Other Courts have rejected Respondents' cavalier attitude concerning an employer's retaliatory and forced relocation of an employee's physical office. In Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998), the Court observed that an unlawful employment action

⁵ In Hornig, the same judge later retreated from his earlier views and ruled the employer's relocation of the employee's office could be a material change in the terms and conditions of the employee's employment constituting unlawful retaliation. Hornig v. Trustees of Columbia Univ. in City of New York, No. 17 CIV. 3602 (ER), 2022 WL 976267, at *17 & n.30 (S.D.N.Y. Mar. 31, 2022).

“does not require loss of money or benefits but rather may consist of changes in location, duties, perks, or other basic aspects of the job” and that “[a]ssigning an employee to an undesirable schedule can be more than a ‘trivial’ or minor change in the employee’s working conditions.” Id. at 788. In Collins v. State of Ill., 830 F.2d 692 (7th Cir. 1987), the Court ruled that “adverse job action is not limited solely to loss or reduction of pay or monetary benefits,” but “can encompass other forms of adversity” including “an employer’s moving an employee’s office to an undesirable location” and “transferring an employee to an isolated corner of the workplace.” Id. at 703 (citing cases).

In May v. Trustees of California State Univ., No. H024624, 2005 WL 459556 (Cal. Ct. App. Feb. 28, 2005), in a factual situation similar to the present case, the Court held a university had unlawfully harassed and retaliated against a professor in violation of the federal discrimination statutes when the university’s president ordered that the professor’s office be moved out of a “high-tech building of classrooms and offices” and relocated to an “isolated building” with “no drinking water,” “no operational office equipment,” and which “was not refurbished” and “lacked proper ventilation.” Id. at *1-2, 13; see also Pellei v. International Planned Parenthood Federation, No. 96 Civ. 7014, 1999 WL 787753 at *12-13 (S.D.N.Y.1999) (employee’s reassignment to a “small, poorly lit, isolated cubicle” constituted unlawful retaliation); Langley v. Merck & Co., 186 F. App’x 258, 261 n.3 (3rd Cir. 2006) (moving a person’s office to an undesirable location could, under certain circumstances, constitute an adverse employment action); Lorenzo v. St. Luke’s-Roosevelt Hosp. Ctr., 837 F. Supp. 2d 53, 69 (E.D.N.Y. 2011) (relocation of employee “from a private office to an open cubicle setup” was adverse employment action); Neal v. Daily’s Juice, No. CIV.A. 07-1497, 2009 WL 331591, at *3-5 (W.D. Pa. Feb. 10, 2009) (employer’s actions in relocating employee to facilities with “deplorable working conditions,” including moving employee’s office to “the back of

a tractor-trailer” with “no light except for sunlight” and that “leaked water and had no heat” and to an office “the equivalent of a broom closet,” constituted unlawful employment discrimination).

Respondents next assert that “any harm from the movement of [Appellant’s] office can be remedied upon the final trial of this matter on the merits.” See Resp’ Brief p.28-29. Yet, they do not explain how a jury would calculate such a monetary award for the loss of this intangible job benefit. Courts have recognized that “[a] private office is a valuable commodity.” Lorenzo, 837 F. Supp. 2d at 69. But the loss of an office is not a loss of money. Although a jury could order that Appellant be returned to her office at the Riley Center, they could not do so retroactively. Their verdict would only operate prospectively. Respondents fail to explain how the jury could measure in monetary terms the harm to Appellant caused by her removal from the Riley Center and her forced relocation to the Silcox Building. It is precisely because such intangible job losses are not easily remedied by a monetary award that irreparable harm will occur. Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014) (“Because intangible injuries generally lack an adequate legal remedy, ‘intangible injuries [may] qualify as irreparable harm.’”).

While Respondents cite to the rulings of some courts—none from South Carolina—holding that loss of employment or denial of a promotion is not irreparable injury, numerous other courts have reached contrary decisions and have specifically held that loss of opportunity to pursue a chosen profession, loss of employment opportunities, lost work experience, and loss of meaningful opportunity to compete for promotions or jobs *do* constitute irreparable harm. See Hisp. Nat’l, 2021 WL 1575772 *23 (delays in promotions cause irreparable harm because they affect the employees’ “professional and leadership opportunities, as well as their long-term career trajectories,” “because in addition to lost income, plaintiffs also face ‘the loss of experience and chances to compete for promotions,’ harms which ‘are not easily valued’”); Arizona Dream, 757 F.3d at 1068 (loss of

opportunity to pursue a chosen profession is irreparable harm); Johnson v. City of Memphis, 444 F. App'x 856, 860 (6th Cir. 2011) (“Without the preliminary injunction, lost work experience and the opportunity to compete for promotions would be actual and imminent for [the Plaintiffs]. Back pay could remedy Plaintiffs’ injuries due to lost income alone, but the loss of experience and chances to compete for promotions are not easily valued.”); Howe v. City of Akron, 723 F.3d 651, 662 (6th Cir. 2013) (promotion delays would cause irreparable harm because, “without promotions, Plaintiffs will be unable to gain experience and unable to seek the next rank during the following round of testing”); Manlove v. Volkswagen Aktiengesellschaft, No. 1:18-CV-145, 2019 WL 2291894, at *14 (E.D. Tenn. May 17, 2019) (“lost work experience and the opportunity to compete for promotions” constitute irreparable harm); Tanner v. Fed. Bureau of Prisons, 433 F. Supp. 2d 117, 125 (D.D.C. 2006) (“The loss of specific job opportunities, training and competitive advantages can constitute irreparable harm.”); Allied Const. Indus. v. City of Cincinnati, No. 1-14-CV-450, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014) (“ACI has identified, however, several injuries for which money damages are inadequate. In the absence of a preliminary injunction, ACI members could lose work as well as the opportunity to meaningfully compete for contracts. Those harms are not quantifiable.”); 35 New York City Police Officers v. City of New York, 819 N.Y.S.2d 852 (N.Y. Sup. Ct. 2006) (“[T]here is a loss of employment opportunities and other intangible benefits (in this case the chance to work under ‘less onerous conditions’) which warrants the granting of injunctive relief.”).

Third, if Respondents are not enjoined, Appellant will also be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members. Respondents again resort to the statement that this damage can be remedied by money damages even while they never address the question of how such damages would be calculated. Merit pay increases are not the same for

each employee. Faculty members who qualify for merit pay receive an increase in pay ranging from 4% to 15% of their annual salary. (R_238 ¶7). Respondents nowhere explain how a fact-finder can ascertain whether Appellant's merit pay increase should be set at 4%, 15%, or some other percentage. Additionally, the loss of the merit pay increase will have a cascading effect because such increases are incremental each year and are based on a percentage of the employee's prior year's salary. The loss of a pay increase for this year reduces the pay increase that Appellant can receive next year, which in turn reduces the pay increase that Appellant can receive each successive year.

Finally, unless an injunction is granted, Appellant 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. Respondents again misprize the intangible enhancement to status and importance to professional advancement that the Chairperson position would confer on Appellant. In Bryson v. Chicago State Univ., 96 F.3d 912 (7th Cir.1996), while holding that a tenured professor's loss of an unofficial "in-house title" and her membership on university committees constituted an adverse employment action, even though her duties, rank, or salary had not changed, the Court noted that the title "would communicate to others both within the State Colleges and Universities system and outside it what kind of responsibilities had been entrusted to her" and that committee work "is often a prelude to an administrative career." Id. at 916; see also Goodwin v. Circuit Court of St. Louis County, Mo., 729 F.2d 541, 547 (8th Cir. 1984) (employee's transfer, with the same pay, from one position to another was adverse because the new position was less prestigious); de la Cruz v. New York City Human Resources Admin., 82 F.3d 16, 21 (2d Cir.1996) (employee's transfer without any cut in pay constituted adverse employment action because it moved him from an "elite" division of employer, which provided prestige and opportunity for advancement, to a less prestigious unit).

As with the other items discussed above, Respondents essentially argue a jury could order Appellant to be placed in the Chairperson position down the road after a trial on the merits is held. However, such a ruling would do nothing to compensate Appellant for the loss of the Chairperson position during the period spanning from June 2021 (when the position was set to be filled) until the date of the Court's judgment (which is yet unknown but is already ten months later as of this brief). During this period, Appellant will be deprived of the increase in standing, professional reputation, notoriety, prestige, experience, and good will associated with the HEHP Chairperson position. This delay in promotion and the loss of the enhanced status it entails is difficult to measure in monetary terms, thus its loss is irreparable. Brinkley v. Bd. of Comm'rs of Franklin Cty., Ohio, No. 2:12-CV-00469, 2013 WL 394158, at *7 & n.9 (S.D. Ohio Jan. 29, 2013) ("With regard to Plaintiff's first contention of irreparable injury, it is uncontested that Plaintiff has lost employment opportunities including chances for promotion, open assignments, and training. From this information, it is natural to infer that it is likely Plaintiff will continue to lose such opportunities if she does not receive immediate relief.... [T]he loss of training and work experience, opportunities for advancement, and opportunities to compete for promotion are more difficult to value."); Hisp. Nat'l, 2021 WL 1575772 at *23 ("Although some aspects of delayed promotions could be remedied with back pay and retroactive promotions, such remedies would be incomplete.... Particularly when eligibility for promotion to the next level requires a certain amount of time in service at the preceding rank, discriminatory promotion processes create a cascading effect that cause [employees] to fall further and further behind in career advancement in a manner that constitutes irreparable harm."); 35 New York City Police Officers, 819 N.Y.S.2d at *3 (In holding that policy which prevented police officers from pursuing employment caused irreparable harm, Court noted that "if petitioners lose the opportunity to be selected for this police class, for a variety of reasons, they may not have that

opportunity again. This harm is irreparable because it cannot be adequately compensated by monetary damages.”).

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS.

Appellant need not prove an “absolute legal right” when seeking a preliminary injunction, but she must present a “reasonable question” or “fair 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); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). 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).

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) all agreed to the MOU that sets forth detailed stipulations “regarding the change in the faculty appointment of Dr. Olivia M. Thompson.” (R_071-072). The CofC’s policies define the MOU as a contract. (R_298-303) (“The 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 ...”).⁶

⁶ Respondents falsely claim that Appellant “did not present [Policy 2.3.1.1] to the trial court in its consideration of” her motions. See Resp’ Brief p.36. To the contrary, Appellant specifically quoted from this policy and raised it to Judge Young in the proposed Order that her counsel submitted to him on November 10, 2021. (R_355; R_357 n.1; R_372). Judge Young had cut short the November 2, 2021 hearing and directed counsel to submit their arguments to him in the form of proposed Orders. (R_335-336). Appellant’s counsel raised Policy 2.3.1.1 in his proposed Order. Appellant’s counsel also again raised this policy in Appellant’s Motion to Alter or Amend Judge Young’s November 12, 2021 Order filed pursuant to Rules 54(b) and 59(e). (R_288; R_298-303).

The MOU sets out in considerable detail the parties' mutual exchange of promises they made "regarding the change in the faculty appointment of Dr. Olivia M. Thompson." (R_071-072). These mutually agreed upon changes include that Appellant's faculty appointment was transferred and moved to the CofC's HSS; Appellant's tenure-track faculty line, faculty office, grant-related offices, and administrative location were moved to the Riley Center; Appellant was 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;" and Appellant's "basic teaching responsibilities" will be that she teaches three courses a semester. Id. The MOU also includes Appellant's express agreement "to all of the stipulations noted above in regard to [her] faculty line being transferred from the [EHHP] to the [HSS]." (R_072).

Respondents now assert "the MOU is not enforceable because valuable mutual consideration does not support it." See Resp' Brief p.35. The CofC argues the MOU purportedly does not impose any duties on Appellant or "require her to give any consideration to the CofC." Id. "A contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act." Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). It is well-settled that "[m]utual promises... constitute a good consideration." Evatt v. Campbell, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959).

A cursory review of the MOU's terms refutes the Respondents' position. Among other things, the MOU includes the mutual agreement of Appellant, the CofC, and Dr. Welch that Appellant's tenure-track faculty line is being transferred from the EHHP to the HSS and that her faculty office and grant-related offices are to be physically moved to the Riley Center. Under the MOU, Appellant also agreed that her Boeing grant and any other sources of external funding would be moved to the Riley Center. Appellant further agreed in the MOU that Dr. Stewart would become

her supervisor, serve as her department chair, would conduct her annual evaluations, and would be responsible for determining her budgeted time for teaching, research, and service. Appellant also agreed that her “basic teaching responsibilities” will be that she teaches three courses a semester. Prior to the MOU, Appellant was not obligated to agree to any of these changes. Respondents’ assertion that Appellant did not give any consideration for the MOU is simply belied by the facts.

Respondents also claim the MOU is unenforceable because it supposedly “does not have any specific term” and has no “duration.” See Resp’ Brief p.38. However, South Carolina law holds that a contract which provides it will terminate upon the occurrence of a specific event is not deemed perpetual in duration and is not terminable at will. Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 392, 503 S.E.2d 184, 188 (Ct. App. 1998). A future specific event, and not just a calendar date, will qualify as a termination date. Id. at 392, 503 S.E.2d at 187-88; see also Premier Holdings, LLC v. Barefoot Resort Golf Club II, LLC, No. 2008-UP-336, 2008 WL 9843982, at *2 (S.C. Ct. App. July 2, 2008) (“[T]he requirement of a specific duration for the enforcement of a contract is not limited solely to a calendar date, but may be provided upon the occurrence of a specific event.”).

In Prestwick Golf, this Court held that an agreement involving golf tee-time schedules was not perpetual in duration when the evidence showed the agreement would end once the membership of the club reached 550 memberships, if and whenever that occurred. 331 S.C. at 392, 503 S.E.2d at 187. The Court held that “[j]ust because the rights of the parties were keyed to membership levels rather than calendar time does not mean that the schedule should be considered an indefinite period.” Id. at 392, 503 S.E.2d at 187-88. Similarly, in Premier Holdings, the owner of the Barefoot golf course entered an agreement giving the plaintiff control of tee times for the golf course. In a subsequent breach of contract case brought by the plaintiff, the owner argued the agreement “was

not an enforceable contract because it lacked material terms, specifically, a contract duration.” 2008 WL 9843982 at *1. This Court rejected this argument and held “the duration of the contract was ‘for as long as’ [the plaintiff] continued doing business at Barefoot.” Id.; Dobyns v. S.C. Dep’t of Parks, Recreation & Tourism, 325 S.C. 97, 100, 480 S.E.2d 81, 83 (1997) (tenants’ right to renew lease was not perpetual when it was agreed they could renew their leases so long as they live).

In the present case, the MOU was intended to continue in effect for so long as Appellant’s tenure as a professor was not terminated due to her retirement or for adequate cause or she was promoted in accordance with the CofC’s official policies and procedures. The MOU specifically incorporates by reference the CofC’s Faculty Administration Manual (“FAM”) and mandates that “[a]ll policies and procedures relative to [Appellant’s] tenure and promotion (as outlined in [FAM] and appropriate official communications) will need to be followed.” (R_072). Appellant’s Complaint alleges the CofC did not follow the FAM when Dr. Welch unilaterally transferred Appellant’s faculty appointment on August 29, 2019. (R_034 ¶41; R_047-049 ¶92, 97-99).⁷

The FAM, which is part of Appellant’s contract with the CofC as a tenured professor, includes specific provisions governing termination of her contract. Under the FAM, Appellant’s contract with the CofC continues until either she retires or the CofC terminates her tenure for “adequate cause.” The FAM mandates that termination of a tenured faculty member for cause shall be preceded by written notification of the proposed dismissal. By setting forth the circumstances governing the termination of Appellant’s contract as a tenured faculty member—either Appellant’s

⁷ The FAM is considered part of the Complaint because it is incorporated therein by reference. See S.C. R. CIV. PRO. 10(c); Carolina First Corp. v. Whittle, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000). The FAM is publicly accessible on the CofC’s website at <https://academicaffairs.cofc.edu/fam.pdf>. Section VII.C.1 of the FAM governs the conditions under which a tenured faculty member’s contract can be terminated.

retirement or her termination for adequate cause—the FAM establishes a specific event on which Appellant’s faculty appointment and tenure as a professor will terminate, such that the MOU is not deemed to be perpetual in duration and is not terminable at will.

Additionally, even the case relied upon by Respondents in their brief holds that when the parties enter a “perpetual contract,” the rule is that “the contract may be terminated by either, *on giving reasonable notice of his intention to the other*,” and the termination may not be “done arbitrarily, maliciously or in bad faith.” Carolina Cable Network v. Alert Cable TV, Inc., 316 S.C. 98, 102, 447 S.E.2d 199, 201 (1994) (emphasis added); see Gen. Info. Servs., Inc. v. LP Software, Inc., No. C.A.3:08-324-CMC, 2009 WL 1743900, at *10 (D.S.C. June 18, 2009) (“The contract contained no termination clause. In the absence of express agreement, South Carolina law requires that a party provide reasonable notice of its intention to terminate a contract.... Even then, the merits of any such termination would be measured by the standards of good faith and fair dealing.”). “Although the reasonableness of notice of termination is dependent on the facts of each case and the nature and circumstances of the contract involved, lack of notice is unreasonable under any set of circumstances.” Gen. Info. Servs., 2009 WL 1743900 at *10.

As the record in this case shows, Respondents never gave Appellant any notice, much less reasonable notice, of their intention to terminate the MOU and Appellant has alleged facts showing that Respondents acted arbitrarily, unfairly, and in bad faith. (R_048-049 ¶¶96-99). Respondents are incorrect that the MOU is unenforceable. As discussed above, Appellant is not required to prove an “absolute legal right” to obtain a preliminary injunction, but is merely required to present a “reasonable question” or “fair question” as to the existence of such a right.” AJG Holdings, 382 S.C. at 43, 674 S.E.2d at 509; Peek, 367 S.C. at 456, 626 S.E.2d at 37. Appellant satisfied this burden.

Judge Young erred by holding that Appellant did not satisfy the requirement of showing a likelihood of success on the merits.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT DID NOT DEMONSTRATE AN INADEQUATE REMEDY AT LAW.

“[T]he issues of irreparable harm and adequacy of remedies at law are inextricably intertwined.” ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc., 694 F.3d 1312, 1337 (Fed. Cir. 2012); see MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 569 (E.D. Va. 2007) (“The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin.”). “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.

Appellant’s brief does nothing more than state in conclusory fashion that Appellant “has an adequate legal remedy in the form of a jury trial for money damages” and that “[l]egal damages can remedy any claimed harm to [Appellant] from CofC’s actions and compensate for her injuries.” See Resp’ Brief p.41. Respondents do not articulate how a jury could measure or quantify money damages for the items of harm described above (e.g., deprivation of protections of MOU, removal of Appellant from HSS, loss of Dr. Stewart as supervisor, loss of a faculty office in Riley Center, removal from the Riley Center website and building directory, loss of opportunity to serve in Chairperson position, exclusion from consideration for discretionary merit pay increase).

For the same reasons detailed in Section II above discussing the irreparable harm element, Respondents are incorrect that money damages will adequately compensate Appellant for the harm they have caused and will cause to her.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION BY BASING ITS ORDERS ON PURPORTED FACTS THAT ARE UNSUPPORTED BY TESTIMONY OR EVIDENCE IN THE RECORD.

Appellant's opening brief shows that 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.⁸ Instead, these purported factual findings are derived entirely from arguments made by Respondent's legal counsel, which are not evidence.

Respondents' brief does not attempt to cite any evidence in the record supporting these purported facts. Respondents merely claim the inclusion of these findings in Judge Young's Order was harmless or immaterial to his decision. See Resp' Brief p.42. Respondents essentially argue they can make baseless factual representations to the Judge to persuade him to rule in their favor, insert those findings in the proposed Order they drafted for the Judge, and then claim after-the-fact that those factual representations were immaterial to the Judge's rationale or decision.

Respondents' counsel drafted the Order that Judge Young signed verbatim. (R_381-392; see R_004-015). Although this practice is rather frequent in our state trial courts, this Court "does not condone that practice." Bankers Tr. of S.C. v. Bruce, 283 S.C. 408, 418, 323 S.E.2d 523, 529 (Ct. App. 1984). Other Courts have also rebuked the practice. Anderson v. City of Bessemer City, 470 U.S. 564, 571-72 (1985); Chicopee Mfg. Corp. v. Kendall Co., 288 F.2d 719, 724-25 (4th Cir. 1961); Hamm v. Comm'r, Alabama Dep't of Corr., 620 F. App'x 752, 757 n.3 (11th Cir. 2015).

⁸ The Order makes findings that Dr. Welch's unilateral transfer of Appellant's faculty assignment to the CofC's EHHP and Dr. Welch's forced relocation of Appellant's faculty office to the Silcox Building "placed [Appellant] with similar disciplines," was "typical for a faculty member in her Department and area of study," "assigned [her] office with the other members of her department," and was "consistent with this academic setting." (R_011). The Order also finds that the MOU "do[es] not evidence an intent to be contractually bound to specific, enforceable obligations." (R_014). The Order further finds that Appellant "has presented no evidence to show that she should have obtained [the HEHP Chairperson] position" for which Dr. Welch refused to consider her

The findings in the Order “though not the product of the trial judge’s mind, are formally his.” Bankers Tr., 283 S.C. at 418, 323 S.E.2d at 529. Thus Judge Young presumptively included these “findings” in his Order because he read them, agreed with them, and found them to be material to his decision denying Appellant’s motions. His wholesale adoption of the findings that Respondents’ counsel drafted for him, including findings that are unsupported by evidence, suggests he failed to independently determine the facts of the case. Howard v. City of Durham, No. 1:17CV477, 2021 WL 5086379, at *2 (M.D.N.C. Nov. 2, 2021). At a minimum, these findings should be overturned.

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,

ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III

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ATTORNEYS FOR APPELLANT

June 14, 2022.

application. (R_013). These findings are unsupported by any evidence in the record.

ROSEN | HAGOOD

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Sep 15 2022

SC Court of Appeals

DANIEL F. BLANCHARD III
Email: dblanchard@rosenhagood.com
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September 15, 2022

FOR ELECTRONIC FILING:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Olivia M. Thompson, Ph.D, M.P.H. v. College of Charleston et al.
Appellate Case No. 2022-000044

Dear Ms. Kitchings:

On June 14, 2022, we filed the final Brief of Appellant and Reply Brief of Appellant in the above matter. Pages 21-28 of the Brief of Appellant argue that the Circuit Judge erred by holding that a prior order of a different Circuit Judge which denied a prior motion for preliminary injunction made by Appellant was the law of the case and barred the latter Circuit Judge from granting Appellant's subsequent motion for preliminary injunction. We argued that an order denying a preliminary injunction is not binding as the law of the case or res judicata as between the parties to the action because it does not finally determine the matter, but is merely an interlocutory order that may be reconsidered and is subject to modification at any point before a final judgment is entered. These same issues are also discussed at pages 1-9 in the Reply Brief of Appellant.

Since we filed those briefs, the South Carolina Supreme Court recently issued its decision in S.C. Pub. Int. Found. v. Wilson, Opinion No. 28112, Appellate Case No. 2021-000343, 2022 WL 4231250, at *2-3 (S.C. Sept. 14, 2022). In that case, the Supreme Court rejected the position that one Circuit Judge's order denying a motion for preliminary injunction constituted the law of the case, thus it did not operate to preclude another Circuit Judge from rendering a contrary ruling in subsequent proceedings in the same matter.

Pursuant to SCACR 208(b)(7), we are hereby providing notice of this supplemental citation. We respectfully submit the case is pertinent to the issues addressed in the sections of the Brief of Appellant and Reply Brief of Appellant cited above.

9/15/2022
Page 2 of 2

With best regards, I am

Sincerely,

/s/ Daniel F. Blanchard, III

Daniel F. Blanchard, III

DFB/db

cc: Randell C. Stoney, Jr., Esquire
 M. Dawes Cooke, Jr., Esquire
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September 16, 2022

FOR ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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Sep 16 2022

SC Court of Appeals

Re: Olivia M. Thompson, Ph.D., M.P.H. v College of Charleston, et al.
Appellate Case No.: 2022-000044

Dear Ms. Kitchings:

I am writing on behalf of Respondents in this matter in response to the letter from Daniel F. Blanchard, III, Esq., counsel for Appellant, dated September 15, 2022. In that letter, Mr. Blanchard draws the Court's attention to the South Carolina Supreme Court's recent decision in *South Carolina Pub. Interest Found'n v. Wilson*, No. 28112, 2022 S.C. LEXIS 108 (Sep. 14, 2022).

In his letter, Mr. Blanchard asserts that Appellant contends that the trial court "erred by holding that a prior order of a different Circuit Judge which denied a prior motion for preliminary injunction made by Appellant was the law of the case and barred the latter Circuit Judge from granting Appellant's subsequent motion for preliminary injunction." Appellant now contends that the Supreme Court's decision in *Wilson* "rejected the position that one Circuit Judge's order denying a motion for preliminary injunction constituted the law of the case, thus it did not operate to preclude another Circuit Judge from rendering a contrary ruling in subsequent proceedings in the same matter."

Respondents respectfully posit that the Supreme Court's decision in *Wilson* is not pertinent to the issues in this appeal. As set forth in pages 18-26 of Respondent's Final Brief, the trial court's denial of Appellant's first request for a preliminary injunction required the denial of Appellant's *second* motion for preliminary injunction:

Much like her First Motion, the Second Motion and Supplement to Second Motion are built upon the premise that Respondents engaged in conduct that violated the terms of her

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MOU with CofC. This is merely a continuation of the contentions that Dr. Thompson previously made — and Judge Hall rejected — in her First Motion.

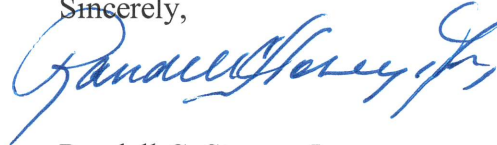
(*See Resps.*’ Final Br., at 19).

However, the issue in *Wilson* was not whether the denial of a preliminary injunction precluded a second effort to obtain an injunction. Instead, the Court considered the impact of an order denying preliminary injunctive relief for lack of standing. The Supreme Court held only that a ruling on standing contained in the denial of a preliminary injunction was not a final determination of the substantive question of standing:

[W]hen a circuit court finds that a party lacks standing and includes that finding in an order, the order determines a substantial right. In this regard, Judge Lee's order does more than "merely decide[]" some point or matter essential to the progress of the cause, collateral to the issues in the case[.]" [Citation omitted.] However, because an order denying a motion for preliminary injunction is interlocutory, see S.C. Code Ann. § 14-3-330(4) (2017), Judge Lee's order did not finally determine a substantial right of Appellants. [Citations omitted.] Therefore, we decline to invoke the law of the case doctrine.

See Wilson, 2022 S.C. LEXIS 108, at *6 (emphasis in original). Respondents do not argue in this appeal that the order denying the first request for a preliminary injunction finally determined a substantial right of the parties (such as standing). Rather, that order determined only that Appellant was not entitled to injunctive relief. Therefore, the Supreme Court’s opinion in *Wilson* is not applicable to or pertinent in this appeal, which only involves whether Appellant was entitled to interim relief.

Sincerely,



Randell C. Stoney, Jr.

RCSjr/kgs

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Oct 03 2022

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

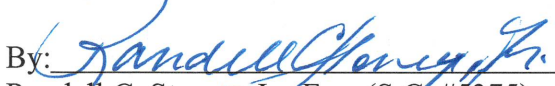
PROOF OF SERVICE

I hereby certify that I served a copy of Respondents' correspondence with the Court dated September 16, 2022 on the above-referenced Appellant, and all other parties, by email, addressed to their attorneys of record as follows:

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Foundation and Christopher R. Tobin*

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