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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2023-001841
S.C. Court of Appeals Opinion No. 2023-UP-301 (filed August 30, 2023)
Court of Common Pleas Case No. 2020-CP-10-02726

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

Petitioner,

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 IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Olivia M. Thompson, Ph.D., M.P.H. ("Petitioner") respectfully submits this reply in support of her Petition for a Writ of Certiorari.

A. The Petition Involves Novel Issues Under South Carolina Law.

This appeal concerns at least two novel issues under current state law. First, it involves what standard an employee must satisfy to establish irreparable harm to preliminarily enjoin her employer from breaching the terms of an employment contract. Specifically, must the employee prove she is at risk of completely losing her job, livelihood, or career or is it adequate to show a potential loss of employment opportunities or job benefits short of a complete loss of job, livelihood, or career? Our precedents show *businesses* established irreparable harm for which money damages were inadequate simply by alleging the breach of a contractual covenant not to compete even where there was no proof the businesses would entirely fail or go out of business absent a preliminary injunction. See Standard Reg. Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983). Petitioner argues this court should reject a double standard and should reach the same conclusion when an *employee* shows a potential loss of employment opportunities or job benefits short of a complete loss of job, livelihood, or career arising from an employer's breach of contract.

Second, it concerns whether a money judgment in favor of an employee is an adequate legal remedy when the injury involves the loss of intangible job benefits that are difficult to quantify or ascertain and which cannot be retroactively awarded.

Petitioner is unaware of any state court decision resolving either of these important questions of law. Nevertheless, at various points in the Return filed by Respondents College of Charleston and Frances C. Welch, Ph.D., M.A. (collectively the "Respondents"), they claim "[t]his appeal does not present novel issues" and "there is no novel issue requiring this Court's

decision." See Return pp.4, 7. Yet, in their 25-page discourse on these allegedly settled legal questions, *Respondents fail to cite a single decision from any court anywhere in this state deciding the questions discussed above*.

Rather than citing case law showing these are settled questions under state law, Respondents say that Petitioner relies upon "various federal court decisions" from other jurisdictions which they claim are distinguishable on their facts or which they argue are "inapposite" because most involve "discrimination or other civil rights claims" rather than employment contract claims. See Return pp.4-7. It is peculiar that Respondents deny this appeal raises novel issues under South Carolina law while at the same arguing Petitioner cannot cite to any South Carolina case on point.

By noting Petitioner cites to federal cases from other jurisdictions to find law on these subject matters and by Respondents doing the same, the Return proves the point that this appeal involves novel and unresolved issues under our state law. Our state courts have not yet decided the important legal questions presented in this appeal. Petitioner respectfully asks this Court to provide clarity and guidance on these important and unsettled questions under our state law.

B. Respondents Did Not Appeal the Court of Appeals's Holding that a Prior Form 4 Order Did Not Bar Petitioner's Preliminary Injunction Motions, Which Holding is Now the Law of the Case.

Respondents' Return inexplicably devotes over three pages of argument attempting to show Circuit Judge Roger M. Young, Sr. correctly held he was legally barred from granting Petitioner's preliminary injunction motions filed on April 2 and July 9, 2021, because Circuit Judge Daniel Hall had entered a Form 4 order on August 13, 2020, which denied without hearing a prior preliminary injunction motion that Petitioner had filed on June 25, 2020, before any of the defendants had even appeared in the case. See Return pp.21-24. This was a principal argument

that Respondents advanced in the Circuit Court to oppose Petitioner's motions.

Respondents' Return altogether ignores the fact the Court of Appeals *reversed* Judge Young's orders to the extent they accepted Respondents' argument that Judge Hall's prior Form 4 order legally barred Judge Young from granting the relief requested in the Petitioner's later preliminary injunction motions. (App. 1-4). The Court of Appeals specifically found Judge Young "abused [his] discretion in finding a prior Form 4 order denying [Petitioner's] first motion for preliminary injunction decided the merits of her second and third motions for preliminary injunction." (App. 2-3). Respondents' Return ignores this fact.

Respondents did not appeal the Court of Appeals's reversal of Judge Young's rulings involving Judge Hall's Form 4 order. They instead attempt to reargue these issues in their Return to Petitioner's Petition, which is improper. See Hook v. S.C. Dep't of Health & Env't Control, 439 S.C. 52, 73, 885 S.E.2d 442, 453 (Ct. App. 2023) (holding respondent's arguments on appeal that portions of administrative law court's order should be reversed were not properly before the appellate court because respondent did not file a notice of appeal, but simply made his arguments for reversal in his brief); Com. Credit Loans, Inc. v. Riddle, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (finding the court did not need to address an issue raised by respondent as a ground for error in its respondent's brief when respondent did not file an appeal). These issues are not properly before this Court.

Because Respondents did not appeal the Court of Appeals's reversal of Judge Young's rulings involving the prior Form 4 order, those rulings are the law of the case. Walker v. Hannon, 191 S.C. 14, 3 S.E.2d 243, 244 (1939). "[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). In any event, for the reasons argued by Petitioner in the Court of Appeals, that Court

properly reversed Judge Young's finding that Judge Hall's prior Form 4 order barred him from granting the relief sought by the Petitioner. See App._84-91, 170-78, 195-96.

C. Petitioner Properly Preserved Her Arguments for Appellate Review.

Respondents make the new claim for the first time in their Return that Petitioner supposedly failed to preserve her argument that losses of employment opportunities short of the complete loss of an employee's job, livelihood, or career can establish irreparable harm and inadequacy of a legal remedy for purposes of injunctive relief. See Return p.5. Respondents make this claim because Petitioner's Reply Brief of Appellant is where she first cited to several federal cases supporting her arguments on this issue. Id.

Importantly, the federal cases cited in Petitioner's Reply Brief did not change the arguments which Petitioner made in the Circuit Court. Those cases simply reinforced them. Our appellate courts are "'mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner' and thus [do] not apply preservation rules in a manner that 'elevat[es] form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.'" Moses v. State, No. 2020-000093, 2024 WL 24948, at *2 (S.C. Ct. App. Jan. 3, 2024) (citation omitted). As such, our courts have never required parties to cite a particular case to preserve an argument for review; instead, the issue preservation rules "are designed to give the trial court a fair opportunity to rule on the issues." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006).

Error preservation rules do not require a party to use the exact name of a legal doctrine or cite a particular case to preserve an issue for appellate review. State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010); see State v. Phillips, 416 S.C. 184, 194–95, 785 S.E.2d 448, 453 (2016) ("Phillips has consistently argued the denial of her motion for directed verdict was in

error. Requesting that the Court consider [a particular case] in its analysis is not a distinct argument, but merely adds nuance to the inquiry engaged in by the appellate court."). "Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Brannon, 388 S.C. at 502, 697 S.E.2d at 595-96.

It cannot be seriously disputed that Petitioner gave Judge Young a fair opportunity to rule on her argument that her loss of employment benefits of the kinds described in her Petition constitutes irreparable harm for which the legal remedy of money damages would be inadequate. This is the same argument Petitioner made to the Circuit Court and to the Court of Appeals and which she now addresses to this Court. Petitioner's citation to the federal cases in her Reply Brief of Appellant did not change her arguments in the Circuit Court; rather, they added nuance to that inquiry. The federal case law were further support for the very same arguments Petitioner made throughout the duration of this case.

What Respondents also conspicuously fail to mention in their Return is that Petitioner's Reply Brief raised these federal cases in response to new or expanded arguments which Respondents themselves made for the first time on appeal in their Brief of Respondents. See App._142-49. In that appellate brief, Respondents made several new or expanded arguments, including claims that an employee's loss of opportunity to apply for a promotion, denial of a promotion, loss of work experience and training, loss of a physical office or relocation to a "lesser" location, and loss of similar employment opportunities supposedly cannot constitute irreparable harm as a matter of law. See App._142-49. In trying to justify these new arguments, Respondents cited for the first time to several federal court decisions. See App._144, 147. Respondents had not previously raised or cited any of those cases in the Circuit Court.

In responding to these new or expanded appellate arguments from Respondents,

Petitioner's Reply Brief of Appellant in turn cited to numerous federal cases showing that other courts have held these types of employment losses—loss of opportunity to apply for a promotion, denial of a promotion, loss of work experience and training, and loss of employment opportunities—can constitute irreparable harm. Respondents apparently maintain they can raise new arguments and case citations on appeal, but Petitioner cannot do the same in countering these new arguments or citations. Respondents do not cite any legal support for this radical reworking of our appellate rules. Petitioner is unaware of any such support.

D. Petitioner Established Irreparable Harm and an Inadequate Remedy at Law.

The verified pleadings, affidavit, exhibits, and evidence filed by Petitioner in the Circuit Court, which Respondents did not controvert in any respect, show Petitioner will be forced to continue to endure harassment and retaliation from Welch; will lose the enhancement in professional standing, reputation, notoriety, prestige, experience, and good will accompanying the promotion to the department chairperson position for which Welch has arbitrarily refused to consider her; her faculty appointment will be changed; she will be deprived of her faculty office in the Riley Center; she will be forced to relocate to the Silcox Building; she will continue to suffer severe emotional and mental distress, embarrassment, humiliation, and indignity; and she will be denied the opportunity to apply for and obtain the merit pay increase awarded to other faculty members if a preliminary injunction is not granted.

Respondents again make the bare claim these losses are not irreparable because a jury could compensate Petitioner for them with an award of money damages even while Respondents continue to fail to explain *how* a jury would calculate such an award. Respondents point to no pecuniary standard, formula, methodology, tables, or market data which a jury could consult to calculate how much damages to award to Petitioner for the harassment and retaliation, loss of

professional standing, reputation, notoriety, prestige, experience, and good will, change in faculty appointment, loss of faculty office, relocation to an inferior office, or emotional and mental distress, embarrassment, humiliation, and indignity she will endure. The truth is it will be difficult to quantify these losses because no such pecuniary standard exists.

Many of the losses Petitioner will suffer if a preliminary injunction is not granted are intangible in nature. "A pecuniary loss or damage must be one which can be measured by some standard." Bennett v. S. Ry.-Carolina Div., 98 S.C. 42, 79 S.E. 710, 715 (1913), aff'd, 233 U.S. 80 (1914). Notwithstanding cases such as Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994), which held "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate," Respondents argue the fact money damages would be difficult or "hard to ascertain" is insufficient to establish inadequacy of the legal remedy. See Return p.8. They maintain Petitioner must go beyond that and prove "her claimed injuries are incapable of being quantified in a damage award." Id. Respondents fail to cite any law adopting this legal standard.

An oft-cited legal treatise explains the correct legal standard as follows:

> Where damages are difficult to calculate, the injury may also be deemed irreparable. An injury is irreparable if any recoverable damages for it are estimable only by conjecture and not by any accurate standard. However, the plaintiff need not show that the injury is beyond all possibility of repair or compensation in damages.

42 AM. JUR. 2D Injunctions § 36 (2024) (footnotes omitted).

It is unnecessary for Petitioner to show her losses are "incapable" of being quantified or that it is impossible to compensate her losses with an award of money damages. She must simply show money damages are "difficult" to calculate mathematically or pursuant to an accurate standard. See Uhlig, LLC v. Shirley, No. 6:08–cv–01208, 2012 WL 2458062 at *3 (D.S.C. June

27, 2012) ("Where monetary damages are difficult to ascertain, remedies at law are generally inadequate."); Bone v. Univ. of N. Carolina Health Care Sys., No. 1:18-CV-994, 2023 WL 4144277, at *23 (M.D.N.C. June 22, 2023) (irreparable harm exists when "the types of harm alleged … are intangible and difficult to calculate mathematically"); Nat'l Bus. Servs., Inc. v. Wright, 2 F. Supp. 2d 701, 709 (E.D. Pa. 1998) ("Harm is irreparable when it cannot be adequately compensated in damages, either because of the nature of the right that is injured, or because there exists no certain pecuniary standards for the measurement of damages."); Gitlitz v. Bellock, 171 P.3d 1274, 1279 (Colo. App. 2007) ("An injury may be irreparable, therefore, where monetary damages are difficult to ascertain or where there exists no certain pecuniary standard for the measurement of the damages.").

"When there is difficulty and uncertainty in determining damages, it may be far better to prevent the injury through a temporary injunction than to attempt to compensate the injured party after the injury has occurred." Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship, 638 N.W.2d 214, 223 (Minn. Ct. App. 2002). Many of the damages Petitioner will suffer cannot be redressed retroactively. A jury could not *retroactively* return her to her position in the CofC's School of Humanities & Social Sciences, *retroactively* put her under Dr. Kendra Stewart's supervision, *retroactively* have Dr. Stewart perform Petitioner's annual evaluations, or *retroactively* return Petitioner to her office in the Riley Center even as part of a judgment in her favor.[1] The jury's verdict would only operate *prospectively*.

[1] Respondents attempt to trivialize Welch's forced relocation of Petitioner's faculty office to the Silcox Building, which is an old and dilapidated building located miles away on a different part of campus and is undergoing substantial construction and renovation work (including removal of asbestos ceiling tiles). See Return p.11. Respondents cite a federal court decision where the district judge held an employer's relocation of an employee's office down the hall in the same office building was not irreparable harm. Id. (citing Hornig v. Trustees of Columbia Univ. in

Respondents incorrectly argue the federal cases cited by Petitioner purportedly do not hold that a potential loss of employment opportunities short of an employee's complete loss of her job, livelihood, or career can constitute irreparable harm. See Return p.5. Respondents point out that "most of the [federal] cases involved discrimination or other civil rights claims," rather than a breach of employment contract, thus they claim reliance on those cases somehow is "misplaced." Id. Respondents also attempt to minimize or downplay the actual holdings in the federal cases. For the reasons discussed below, Respondents' arguments lack merit.

While the federal cases tend to involve discrimination and civil rights claims under federal statutes, Respondents nowhere offer any compelling reason for holding the loss of employment benefits constitutes irreparable harm for injunctive relief purposes in discrimination or civil rights cases, but the same losses fail to qualify as irreparable harm if breach of an employment contract is alleged. Federal courts have held that the loss of opportunity to pursue a chosen profession, loss of professional opportunities, loss of work experience, loss of meaningful opportunity to compete for promotions or jobs, loss of training, denial of promotion or tenure, and loss of other employment opportunities constitute irreparable harm. None of those cases indicate a different result would follow if the plaintiffs had been asserting claims under an

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City of New York, No. 17 CIV. 3602 (ER), 2018 WL 5800801 (S.D.N.Y. Nov. 5, 2018)). Respondents omit the fact the same federal 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. 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).

In any event, Petitioner did not seek an injunction simply because Welch moved her office down the hall. She sought relief because Welch repeatedly violated her MOU, including disregarding its requirements that Petitioner's faculty appointment be in the School of Humanities & Social Sciences and that her faculty office and grant-related offices be in the Riley Center (a modern and state of the art building), and because Welch unilaterally moved Petitioner's faculty appointment to another school and her faculty office to a different building that is old, dilapidated, and has unsafe, unhealthy, and unworkable conditions.

employment contract rather than the federal statutes. Perhaps former Chief Judge Sanders put it best when he said "whatever doesn't make any difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Respondents draw a meaningless distinction.

Although Respondents try to downplay the holdings in the federal cases, those cases clearly support Petitioner's appeal. In Johnson v. City of Memphis, 444 F. App'x 856 (6th Cir. 2011), for example, in rejecting the claim that the employees' injuries could be adequately 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 while "[b]ack pay could remedy [the employees'] injuries due to lost income alone," the "loss of experience and chances to compete for promotions are not easily valued." Id. at 860; see 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, [they] will be unable to gain experience and unable to seek the next rank during the following round of testing"); Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cnty., 535 F. Supp. 3d 393, 427-28 (D. Md. 2021) ("[T]he Court also finds irreparable harm from the ongoing effects of the promotion system, because delays in promotion affect [employees'] professional and leadership opportunities, as well as their long-term career trajectories. Although some aspects of delayed promotions could be remedied with back pay and retroactive promotions, such remedies would be incomplete.").

The case of Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir.1988), concerned a teacher suffering from a serious health condition. His employer sought to reassign him from his teaching position to an administrative position at the same rate of pay and benefits, but the teacher refused the offer and moved for a preliminary injunction "barring [his employer]

from excluding him from classroom duties." Id. at 704. The teacher argued the administrative job he was offered was "distasteful" and did not "utilize his skills, training or experience." Id. at 709. The court held that "[s]uch non-monetary deprivation is a substantial injury which the court was required to consider." Id. The court cited other cases and explained there was ample support for its holding that the teacher's "non-monetary deprivation is irreparable." Id. (citing E.E.O.C. v. Chrysler Corp., 546 F. Supp. 54 (E.D. Mich. 1982), aff'd, 733 F.2d 1183 (6th Cir.1984); E.E.O.C. v. City of Bowling Green, 607 F. Supp. 524, 527 (W.D. Ky. 1985); Oshiver v. Court of Common Pleas, 469 F. Supp. 645, 653 (E.D. Pa. 1979)). Intangible or non-monetary harm clearly can be irreparable for purposes of obtaining a preliminary injunction.

In Equal Emp. Opportunity Comm'n v. Tufts Inst. of Learning, 421 F. Supp. 152, 155 (D. Mass. 1975), after a college teacher was informed by her employer that she was denied tenure and her employment contract would not be renewed, she filed a discrimination lawsuit and moved for a preliminary injunction to have her employment reinstated during the litigation. The plaintiff asserted her male supervisor "had engaged in a course of action to defeat [her] tenure because she was a woman, and sought to influence [a college] subcommittee to produce the decision denying her tenure." Id. at 165. In granting a preliminary injunction, the court pointed to the difficulties tenured college faculty have in securing employment:

> Turning to the issue of irreparable harm, it is shown that White has the Ph.D. Degree in the field of art history. She is now 38 years of age, married, and the mother of two minor children. She has a good professional reputation. At her stage in life positions are rather difficult to obtain; the preference for faculty members in her field seems to run to younger candidates. This is not the case of the ordinary salaried employee who has been discharged wrongfully, and where damages would be an adequate remedy. Her ability to secure a faculty position has been and will be harmed because of the decision denying her tenure. There is little doubt that her reputation also has been impaired by reason of the decision. Any prospect for a position at the administrative level in a university seems foreclosed to her where she is not presently employed. These factors satisfy the

> court that the harm and injury to White from the decision denying her tenure will be irreparable.

Id.; see also McArdle v. Rodriguez, 659 N.E.2d 1356, 1365 (Ill. App. Ct. 1995) (In granting preliminary injunction to police officer alleging he was wrongfully denied promotion, court said that "[e]ven if the plaintiff were to receive the promotion and his lost pay, seniority and benefits, he would remain at a disadvantage for further promotions because of the experience and prestige he lost as a result of the defendants' actions.").

In Brinkley v. Bd. of Comm'rs of Franklin Cty., No. 2:12-CV-00469, 2013 WL 394158 (S.D. Ohio Jan. 29, 2013), the plaintiff was a police detective fired from her job. She sued her employer to require it to participate in an arbitration of her employment claims in accordance with a collective bargaining agreement. As part thereof, she sought a preliminary injunction and argued her employer's delay in arbitrating her claims was causing her irreparable harm. In ruling for the detective, the court noted the plaintiff "has lost employment opportunities including chances for promotion, open assignments, and training" because of the delay in arbitrating her claims, she "is losing work opportunities as time passes," and "[f]rom 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." Id. at *7. In rejecting the employer's argument that the detective's losses could be remedied by monetary damages, the court responded that "the loss of training and work experience, opportunities for advancement, and opportunities to compete for promotion are … difficult to value." Id. at *7 & n.9; see also Allied Const. Indus. v. City of Cincinnati, No. 1-14-CV-450, 2014 WL 2931421, at *15 (S.D. Ohio June 30, 2014) (potential loss of work as well as the opportunity to meaningfully compete for contracts constituted irreparable harm).

The potential injuries which prompted Petitioner to seek a preliminary injunction are mostly intangible in nature and cannot easily be remedied by money. These losses result in irreparable harm in employment contract cases just the same as in discrimination or civil rights cases. The factual record shows Petitioner will suffer irreparable harm unless a preliminary injunction is granted and that an award of money damages after a trial on the merits will be inadequate.

E. Petitioner Established a Likelihood of Success on the Merits.

Respondents weakly claim without any explanation that the written Memorandum of Understanding ("MOU") dated July 17, 2014, that Petitioner, the CofC, and Welch all signed supposedly "does not impose duties on Petitioner … beyond what she already provided as an employee." See Return p.16. This argument clearly ignores the fact the MOU specifically states it was an agreement by all the parties involved to alter or modify Petitioner's contract concerning her faculty appointment. (R_071-072).

"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." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). Among other changes to Petitioner's contract, the MOU includes the parties' agreement "to all of the stipulations noted above in regard to [Petitioner's] faculty line being transferred from the [School of Education, Health, and Human Performance] to the [School of Humanities & Social Sciences]." (R_072). The MOU expressly altered Petitioner's employment contract—it did not simply maintain what was already in effect. The MOU also certainly involves a mutual exchange of promises, which our courts have long held constitutes good consideration. Callaham v. Ridgeway, 138 S.C. 10, 135 S.E. 646, 649

(1926) ("Mutual promises also constitute a good consideration.").

Respondents next argue the MOU "leaves open material terms." See Return p.16. They claim the MOU "is lacking in definiteness" because its terms "could be subject to change" by the CofC at its whim. Id. Yet, their Return conspicuously fails to quote or cite any language in the MOU stating the CofC has a unilateral right to alter its terms. Respondents want the court to rewrite the MOU's actual terms to invent terms that do not exist and which Respondents now wish they had included when the agreement was executed.

Further, as discussed in Petitioner's Petition, the MOU is not "indefinite" simply because it does not state a specific duration or a termination date. This term is supplied by the MOU's express incorporation of the CofC's Faculty Administration Manual or "FAM" and the MOU's express mandate that the FAM "will need to be followed." (R_072). Because Petitioner is a tenured faculty member, Section VII.C.1 of the FAM governs the conditions under which her contract or faculty appointment can be terminated or altered. Under the FAM, Petitioner's contract and faculty appointment with the CofC continues until she retires or is terminated or her appointment is changed for "adequate cause."[2]

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,

[2] Respondents misstate the record when they claim Petitioner did not present the FAM to the Circuit Judge before his ruling. See Return p.17. In fact, Petitioner specifically quoted from the FAM and raised it to Circuit Judge on November 10, 2021, two days before the preliminary injunction was denied. (R_355; R_357 n.1; R_372). Due to time constraints, the Circuit Judge had cut short the hearing on November 2, 2021, and directed the parties' counsel to make their arguments to him in the form of proposed Orders. Petitioner' counsel raised the FAM to the Circuit Judge in his proposed order arguing Petitioner's position on the motions. The FAM is 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 available on the CofC's website at https://academicaffairs.cofc.edu/fam.pdf.

331 S.C. at 392, 503 S.E.2d at 188. 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 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). Notwithstanding Respondents assertions to the contrary, the MOU is a "legally enforceable contract."

For these reasons, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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