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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case # 2013-000-125

Case No. 2009-CP-42-5567

Melanie Taylor

Petitioner,

v.

Converse College

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE CONTRACT AT ISSUE WAS COMPLETE AND ONLY CAPABLE OF ONE INTERPRETATION AND, THEREFORE, WAS NOT A SCINTILLA OF EVIDENCE TO SUPPORT PETITIONER'S CLAIM THAT A CURRICULAR EXIGENCY NEVER EXISTED?

STATEMENT OF THE CASE

Taylor filed this action on October 13, 2009, as a result of her separation from employment with Converse and the events leading up to the same. In her Complaint, Taylor alleged claims against Converse for (1) wrongful termination/breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) declaratory judgment and request for temporary and permanent injunctive relief; (4) fraud in the inducement; and (5) intentional misrepresentation. Converse filed its Answer to Taylor's Complaint on November 20, 2009. The parties engaged in extensive discovery in this matter, including multiple depositions and multiple sets of written discovery requests.

Taylor filed her Motion for Partial Summary Judgment on April 28, 2010, seeking judgment as a matter of law on her claims for breach of contract and declaratory judgment. Converse filed its Motion for Summary Judgment with respect to all of Taylor's claims on April 29, 2010. The trial court held a hearing on September 17, 2010, at which both parties presented extensive oral arguments in support of their respective positions as well as thorough memoranda of law for the trial court's consideration. On April 25, 2011, Taylor submitted a supplemental filing in which she attempted to identify an additional "fact" relevant to her motion for partial summary judgment. On August 2, 2011, the trial court granted Converse's Motion for Summary Judgment with respect to each of Taylor's claims. On November 7, 2012, the Court of Appeals filed a per curiam decision affirming the trial court's decision to grant Converse's motion for summary judgment on all Taylor's claims. Taylor filed a Petition for Rehearing on November 19, 2012, which the Court of Appeals denied on December 19, 2012. Taylor then filed a Petition for Writ of Certiorari with this Court on January 13, 2013 presenting two

questions for review. On June 12, 2014, this Court granted Taylor's petition as to Question II but denied her petition as to Question I.

STATEMENT OF THE FACTS

A. Events Leading Up To Taylor's Employment With Converse.

On December 19, 1996, Taylor submitted an application letter to Converse in which she declared her interest in the "Piano Pedagogy position" for which Converse had posted an announcement in the "Music Vacancy List of the College Music Society." (R. pp. 631-35, 686-87.) In her application letter, Taylor demonstrated her understanding that, if hired, she would serve as "the teacher of Piano Pedagogy" at Converse. (R. pp. 635, 687.) Converse acknowledged Taylor's application letter through its January 14, 1997 correspondence to Taylor, in which Dr. Douglas Weeks thanked Taylor for her "application for the piano pedagogy position at Converse." (R. pp. 636, 691)

After Converse completed the interview process with the three finalists for the Piano Pedagogy position, the search committee recommended Taylor for the position on March 26, 1997. (R. pp. 637-40, 692-93.) In its recommendation letter, the search committee noted that Taylor "demonstrated an impressive depth of knowledge in the pedagogy discipline." (R. p. 692.) Based on the recommendation of the search committee, Jack Bowman (Dean of the Petrie School of Music at that time) issued a memorandum to Tom McDaniel (Provost of Converse at that time) on April 15, 1997, in which Dean Bowman recommended the appointment of Taylor as "Assistant Professor of Piano Pedagogy." (R. pp. 639, 694.)

On April 15, 1997, Dean Bowman sent Taylor a letter tentatively offering her "a position as Assistant Professor of Piano Pedagogy." (R. pp. 640, 695.) Dean Bowman noted that Converse "eagerly anticipate[d] [Taylor] building a dynamic piano pedagogy

program at Converse.” (R. p. 695.) On April 16, 1997, Sandra C. Thomas (President of Converse at that time) sent Taylor a letter formally offering Taylor a position as “Assistant Professor of Piano Pedagogy.” (R. pp. 642, 696–97.) President Thomas echoed Dean Bowman’s statement regarding Converse’s anticipation that Taylor “build[] a strong piano pedagogy program at Converse.” (R. p. 697.)

Prior to the time that Taylor accepted employment with Converse as Associate Professor of Piano Pedagogy, Taylor had an opportunity to review the Converse Faculty Handbook (“Handbook”). (R. pp. 673-74.) The Handbook in effect at the time Taylor was engaged in the interview and offer stages of her employment provided as follows, in pertinent part: “The employment of a faculty member on tenure may be terminated for the following reasons: professional ineffectiveness or misconduct . . . , financial exigencies of the College, or such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member.” (R. p. 759.) The Dismissal Procedures in the Handbook stated similarly, “In order to preserve academic integrity, the Board of Trustees may remove any faculty member at any time by a majority vote. Such a dismissal may be only for financial exigency, curricular exigency, medical circumstances, or cause.” (*Id.*) After reviewing the Handbook, Taylor accepted employment as Assistant Professor of Piano Pedagogy by signing and returning President Thomas’s offer letter on May 5, 1997. (R. pp. 696–97.)

B. Taylor’s Employment With Converse.

Each year during Taylor’s employment with Converse, the then-current President of Converse would provide Taylor with a letter that set forth Taylor’s salary for the upcoming school year. (R. pp. 641, 711-17.) Each year, Taylor’s salary letter stated as follows: “As always, the terms of your employment are controlled by the provisions of

the College By-Laws and the *Faculty Handbook*.” (R. pp. 643, 711-17) (emphasis in original.) Based on this recurring statement in her annual salary letters, Taylor understood that her “employment was . . . controlled by the provisions of the College By-Laws and the Faculty Handbook” throughout her employment with Converse. (R. p. 643.)

Also on an annual basis, Converse conducted evaluations of its professors, including Taylor. (R. pp. 644-45.) The evaluations that Taylor received throughout her employment consistently emphasized the importance of her building enrollment in the Piano Pedagogy program. (R. pp. 720-36.) For example, Taylor’s 1999 End-of-Year Evaluation noted, “Development of the Piano Pedagogy program must remain a high priority.” (R. p. 720.) Taylor’s 2000 evaluation stated similarly, “Building the enrollments in piano pedagogy remains a high priority.” (R. p. 723.) Likewise, Taylor’s 2003 evaluation provided, “Building enrollments in the Pedagogy degree remains a priority.” (R. p. 730.) Dean Joseph Hopkins noted the following in an undated evaluation of Taylor’s performance: “Melanie, you are a wonderful champion of pedagogy. I believe that you can develop a strong program here, but, as has been mentioned before, enrollment is a key. Teaching has been effective, especially in the area of pedagogy, but more attention should be given to early theory courses.” (R. p. 731.) In a second undated evaluation, Dean Hopkins stated, “The teaching concerns noted [earlier in the same evaluation] may be addressed by reassigning you to areas closer to your expertise, and I hope enrollment in the pedagogy area will be enhanced by your good work in the profession.” (R. p. 735.)

Significantly, Taylor herself recognized the importance of building enrollment in the Piano Pedagogy program. In a self-evaluation that Taylor completed in 1999, Taylor included the following: “In 1998, only one person applied to Converse for the pedagogy degree. This year, there have been 8 applicants so far. Is that an 800% improvement? Go me! I look forward to having FULL pedagogy classes in the future which will be more stimulating than the 1-4 population of this year’s classes.” (R. p. 719) (emphasis in original.) However, Taylor acknowledges that Converse’s courses that contain only Piano Pedagogy majors “have not been consistently full” throughout her employment with Converse. (R. pp. 646-48.)

Taylor first applied for tenure at Converse in 2000. (R. pp. 649, 737.) However, the Tenure and Promotion (“TAP”) Committee did not recommend tenure for Taylor at that time. (R. p. 737.) Dean Bowman concurred with the recommendation of the TAP Committee and recommended that Taylor not receive tenure and not be promoted. (*Id.*) Dean Bowman explained part of the rationale underlying his recommendation as follows: “Converse hired Dr. Taylor with a clear expectation that she build the piano pedagogy program. During her four years at Converse College, the program has not grown. Each year over the past four years, the program has had only a couple of majors.” (*Id.*) Provost McDaniel reiterated Dean Bowman’s concerns in a April 2, 2001, letter to Taylor that noted the following: “In your case, there was concern about the current enrollment and projections for growth in your primary area of responsibility: piano pedagogy. That concern alone is sufficient grounds for caution in a tenure decision. Consequently, [Dean Bowman’s] suggestions that you do everything you can to strengthen piano pedagogy enrollment deserve careful consideration.” (R. p. 738.)

Taylor reapplied for tenure in 2002. (R. pp. 649-50.) In 2003, Converse granted tenure to Taylor. (R. pp. 649-50, 740-41.) At the time Converse granted tenure to Taylor, the then-current version of the Handbook contained provisions regarding termination and dismissal of tenured faculty members that were nearly identical to the earlier-discussed provisions from the 96-97 Handbook. Specifically, the Termination of Employment provision in the 02-03 Handbook stated,

In order to preserve institutional integrity, the employment of a faculty member on tenure . . . may be terminated at any time for the following reasons: financial exigency, curricular exigency (which includes such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member), medical circumstances, or cause.”

(R. p. 762.) The Dismissal Procedures in the 02-03 Handbook further clarified, “In order to preserve institutional integrity, the Board of Trustees may remove any faculty member at any time by a majority vote. Such a dismissal may only be for financial exigency, curricular exigency, medical circumstances, or cause.” (*Id.*)

C. Development Of Converse Reorganization Plan.

Like nearly every organization across the United States, Converse experienced substantial financial setbacks in 2008 as a result of the dire economic circumstances with which our country was faced. As of December 31, 2008, the College’s endowment had suffered a 33.46% decline for the 2008 calendar year. (R. p. 74.) The endowment spend rate for the following fiscal year is calculated based on the December 31 fair market value of the endowment. (*Id.*) The College’s investment policy requires that the withdrawal rate from the endowment be less than the three-year weighted average return. (*Id.*) The weighted average return was 13.3% in 2006 and 6.02% in 2007. (*Id.*) The three-year weighted average return as of December 31, 2008, was -4.35%. (*Id.*) For

fiscal year 2008-2009, the concept endowment income was \$4.2 million, at a blended withdrawal rate of 5.57%. (*Id.*) Assuming the Board of Trustees would grant a waiver to the three-year weighted average return stipulation, the projected concept endowment income for 2009-2010 would result in a budget shortfall of \$1.8 million. (*Id.*)

In an effort to ensure the long-term viability and success of the College, the Executive Committee of the Board of Trustees gave President Elizabeth Fleming a directive during a November 2008 meeting. (R. p. 65, ¶ 3.) Specifically, the Executive Committee instructed President Fleming to create proposals for organizational and operational changes at Converse, and to present any such proposals to the Board for consideration at its April 2009 meeting. (*Id.*)

In order to create the proposals for organizational and operational changes that the Executive Committee had requested, President Fleming created the Academic Programs, Student Services, and Operations Task Forces in January 2009. (R. pp. 771-72, 779, 791-92.) The Academic Programs Task Force (“APTF”) included distinguished administrators and tenured faculty members of the College—Dr. Jeff Barker, Dr. Thomas Faulkenberry, Dr. Jerry Howe, Professor Teresa Prater, Dr. Scott Robbins, Dr. Melissa Walker, and Dr. Madelyn Young. (R. pp. 768-69, 779.) The task forces utilized the services of a facilitator—John Brantley—to accelerate the process in order to meet the deadline that the Executive Committee had given to President Fleming. (R. pp. 770, 791-92.)

President Fleming charged the APTF with specific deliverables that involved making recommendations to effect cost reductions for the College and provide for greater impact in fulfilling the College’s mission and strategic plan. (R. p. 779) The APTF’s

recommendations were to take the form of one to three reorganization models for consideration by President Fleming. (*Id.*) The charge to the APTF included a requirement that the proposed reorganization models include both a reduction in the number of majors and the elimination of a number of faculty positions. (*Id.*) President Fleming also directed the APTF to consider the possible combination of departments or even the realignment of schools within the College. (*Id.*) Given the urgency of the financial situation and the Executive Committee's mandate that President Fleming report back with proposals in April 2009, the APTF was required to provide President Fleming with its recommendations by no later than April 9, 2009. (*Id.*)

President Fleming called meetings with the faculty and staff as a whole in mid-January 2009, during which she made all faculty and staff aware of the three task forces and the general purposes thereof. (R. pp. 651-52.) In his report to the Board of Trustees during its February 3, 2009, meeting, Faculty Senate President Woody Hughes noted that the "Faculty Senate is very appreciative of President Fleming's open, frank communication regarding the state of the College and her willingness to engage faculty and staff in developing the most appropriate strategies for our success during these challenging times." (R. p. 788.) President Fleming held another meeting with the faculty as a whole on February 10, 2009, at which she provided the faculty with a copy of her specific directives to the APTF. (R. pp. 774-75, 779)

On February 16, 2009, President Fleming sent an e-mail to all faculty and staff that provided an update on the various steps Converse was taking to assure the College's success during the challenging economic times. (R. pp. 653-54, 742) As indicated in President Fleming's e-mail, Converse engaged in a number of actions to mediate the

budget shortfall the College was experiencing: (1) a reduction of matching contributions to employees' retirement accounts from 10% to 7%; (2) an alteration of housekeeping services and staffing to decrease expenses; (3) a freeze on open positions that were non-essential to College safety and operations; (4) the prioritization and trimming of deferred maintenance expenses; (5) a hold on salaries for the 2009-2010 academic year at the 2008-2009 level; (6) the cancellation of course releases for department chairs; (7) a hold on full-time faculty course loads at no less than 24 semester hours; (8) the cancellation of overload payments for full-time faculty; (9) a significant reduction in the use of adjunct faculty; and (10) the implementation of a policy not to hire adjuncts to teach courses for which there was sufficient expertise among current full-time faculty. (R. p. 742.) In the closing paragraph of her February 16, 2009 e-mail, President Fleming made clear that "[w]ith regard to employment at Converse, the College is committed to following provisions outlined in the Faculty Handbook and the Administrative and Staff Handbook." (*Id.*)

In addition to the cost-saving measures described in President Fleming's February 16, 2009, e-mail, Converse announced a voluntary early retirement option and voluntary phased retirement plan for tenured and tenure-track faculty on April 1, 2009. (R. p. 773.) A total of three faculty members and one staff member expressed an interest in and eventually accepted these voluntary plans. (*See id.*)

In generating its proposals for President Fleming, the APTF analyzed a number of factors in determining whether to recommend the elimination of specific majors as part of the proposed reorganization models. (R. pp. 776-77.) For example, the APTF considered each of the following with respect to all majors: (1) whether the major program advanced

the College's strategic mission and plan; (2) trends in enrollment; (3) demand for the major program in the market; (4) student satisfaction and retention; (5) whether the program drove applications and increased enrollment; (6) the degree to which there were opportunities for internal collaborative opportunities or actions taking place related to the major program; (7) the degree to which there were opportunities for external collaborative opportunities between the major program and organizations outside the College; and (8) whether the major program supported the unique market position of the College. (*Id.*)

After meeting on a regular basis and spending countless hours analyzing the various facts and data with which it was provided, the APTF provided President Fleming with two proposed reorganization models on April 9, 2009. (R. pp. 743-55.) Both proposed models recommended the elimination of a number of majors. (*Id.*) Both models proposed the elimination of the College's Piano Pedagogy program in its entirety—both the undergraduate and graduate degree programs. (*Id.*) Because both proposed models recommended the elimination of the Piano Pedagogy program, both models also recommended the elimination of one full-time faculty position associated with the program. (*Id.*)

In recommending the elimination of the Piano Pedagogy program, the APTF considered the recent enrollment statistics related to the program. For example, at any given point from Spring 2004 through December 2008, Converse had three or fewer officially-declared Piano Pedagogy majors. (R. pp. 794-96.) From Fall 2004 through Fall 2008, Converse matriculated a total of two officially-declared Piano Pedagogy majors—some students added Piano Pedagogy after matriculating, which is why

Converse has had between zero and three majors and why Converse has graduated four undergraduate majors in six years. (*Id.*) At the time the APTF reviewed major enrollments, Converse had one officially-declared Piano Pedagogy major. (R. p. 790.) From May 2004 through May 2009, Converse graduated a total of 4 Piano Pedagogy majors (undergraduate) and 2 graduate (M.M.) students, with the specific years broken down as follows:

- 2004 – 1 undergraduate and 0 graduate;
- 2005 – 0 undergraduate or graduate;
- 2006 – 0 undergraduate and 2 graduate;
- 2007 – 1 undergraduate and 0 graduate;
- 2008 – 2 undergraduate and 0 graduate; and
- 2009 – 0 undergraduate or graduate.

(R. pp. 794-96.) Based on these enrollment numbers, the lack of student desire—and, thus, viability—with respect to the Piano Pedagogy program was unquestionable, rendering the program an obvious choice for selection as part of the proposed reorganization models.

Upon receipt of the final report and recommendations from the APTF, President Fleming reviewed the report and the proposed models. (R. pp. 766-67.) After due consideration, President Fleming made several minor changes to APTF Model 2 in finalizing a proposal to bring before the Board of Trustees. (R. pp. 77-94, 743-55, 766-67.) These changes included the retention of three majors that the APTF had proposed for elimination or reduction to minor status, thereby reducing the total number of faculty positions to be eliminated. (R. pp. 77-94, 743-55.) However, the elimination of the Piano Pedagogy program, in its entirety, remained a part of the proposed Reorganization

Plan that President Fleming ultimately brought to the Board of Trustees for consideration pursuant to the Executive Committee's directive. (R. pp. 77-94.)

D. Implementation Of The Converse Reorganization Plan.

On April 24, 2009, President Fleming presented the proposed Reorganization Plan to the Board of Trustees in accordance with the Executive Committee's November 2008 directive. (R. pp. 65-66, ¶ 4; R. pp. 77-94.) After consideration of the proposed Reorganization Plan, the Board, with members of the Academic Affairs Committee in attendance and voting, unanimously approved and authorized President Fleming to implement the Plan. (*Id.*) At the time the Board voted on and approved the Plan, the Board had full knowledge that the Plan would result in the elimination of majors, the integration of departments, the relocation of functions serving students, the reduction and elimination of certain positions, and the reductions of salary for senior-level employees. (*Id.*) The Board specifically understood at this time that the Reorganization Plan would result in the phasing out of eight major programs—French, Modern Languages, Computer Science, Computer Science and Mathematics, Music Performance—Organ, Piano Pedagogy (BA and MM), and Music Business. (*Id.*) The Board further understood that the Plan included the elimination of seven faculty positions in the coming years, with four faculty members being offered phased-out employment or phased-out retirement opportunities. (*Id.*) In order to implement the Reorganization Plan, the Board authorized and directed President Fleming to extend generous offers of phased-out employment or phased-out retirement to the faculty members affected by the Plan. (*Id.*)

Pursuant to the Board's directions to implement the Reorganization Plan, President Fleming presented Taylor and three other faculty members with offers of phased-out employment. (R. pp. 656-62, 756.) Specifically, Converse offered to allow

Taylor to continue in her full-time status for the 2009-2010 academic year, to shift to a 50% course load for the 2010-2011 academic year with a corresponding 50% reduction in compensation, and to be eligible to work in the same capacity during the 2011-2012 academic year. (R. p. 756.) Notwithstanding the reduction in compensation during the year(s) in which Taylor taught a reduced course load, Converse offered to maintain benefits at the current level throughout the remainder of her employment. (*Id.*) Converse's phased-out employment offer to Taylor was made expressly contingent upon her acceptance of the same, stating clearly that Taylor was to "sign and return a copy of th[e] Letter Agreement to [Converse's Director of Human Resources], confirming [Taylor's] agreement and acceptance of th[e] Letter Agreement." (*Id.*) However, the phased-out employment offer never became effective, as Taylor did not accept and return the same to Converse. (R. p. 661.)

On June 2, 2009, the Board of Trustees approved a motion approving and ratifying the selection of Taylor, Ms. Mary Nicholson, Dr. Leon Couch, and Dr. Jeri Dubois King as the faculty members affected by the Reorganization Plan. (R. p. 66, ¶ 5; R. pp. 99-100.) The Board further approved the selection of Ms. Dena Gomez, Ms. Kathy Miller, Ms. Karen Finnegan, Mr. Oleg Klymentyev, and Mr. Adam Greene as the staff members affected by the Reorganization Plan. (*Id.*) Also on June 2, 2009, the Board approved a motion authorizing President Fleming to continue her attempts to negotiate a phased-out employment plan with Taylor for a period of 30 days, and if the parties were unable to agree to a phased-out employment plan within 30 days, to notify Taylor that she would be removed from employment due to curricular exigency on August 31, 2010. (R. p. 66, ¶ 6; R. p. 100.)

The version of the Faculty Handbook that was in effect at the time of the Board's April 24, 2009 and June 2, 2009, meetings contains provisions regarding Termination of Employment and Dismissal Procedures that are identical to those set forth in the 02-03 Handbook. (R. pp. 663-66, 701-02.) The Termination of Employment provision provides as follows:

In order to preserve institutional integrity, the employment of a faculty member on tenure . . . may be terminated at any time for the following reasons: financial exigency, curricular exigency (which includes such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member), medical circumstances, or cause.

(R. p. 701.) Similarly, the Dismissal Procedures state, "In order to preserve institutional integrity, the Board of Trustees may remove any faculty member at any time by a majority vote. Such a dismissal may be only for financial exigency, curricular exigency, medical circumstances, or cause." (R. p. 702.)

Converse was not able to reach an agreement with Taylor with respect to a phased-out employment plan within the timeline set by the Board. Accordingly, Converse notified Taylor that she would be removed from employment on August 31, 2010, due to curricular exigency. This litigation and Taylor's appeals followed.

ARGUMENTS

I. STANDARD OF REVIEW

This Court clarified in *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009), that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. "A scintilla of evidence is any *material* evidence that, if true, would tend to establish the issue in the

mind of a reasonable juror.” *Taylor v. Railway Co.*, 78 S.C. 552, 556, 59 S.E. 641, 643 (1907) (emphasis added.) As Justice Littlejohn noted in his concurrence and dissent in *Small v. Springs Indus., Inc.*,

Whilst adhering to the scintilla rule, this court has recognized a rule supplemental to the scintilla rule, which is thus propounded in the case of *National Bank v. Thomas J. Barrett, Jr. & Co.*, 173 S.C. 1, 174 S.E. 581, 582 (1934); ‘If it be conceded that there may be deduced by process of unusual finesse of reasoning that there is a scintilla of evidence * * * nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference *not just one inference, but one reasonable inference*, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.’

300 S.C. 481, 491, 388 S.E.2d 808, 814 (1990) (emphasis added) (stating the employee in a breach of an employment contract case improperly sought to “create a scintilla of evidence by bootstrapping her claim based on her own conclusions not supported by the record.”)

This Court has explained that “the scintilla of evidence upon which a case should be sent to the jury must **be real, material, and pertinent and relevant evidence, not speculative and theoretical deductions.** *Turner v. American Motorists, Ins. Co.*, 176 S.C. 260, 180 S.C. 55, 57 (1935) (emphasis added) (stating that the scintilla rule “does not authorize the admission of speculative, theoretical and hypothetical views”); *see also Hart v. Doe*, 261 S.C. 116, 120-22, 198 S.E.2d 526, 528-29 (1973) (granting defendant’s motion for summary judgment and finding that plaintiff did not meet her burden under the scintilla rule). Taylor improperly attempts to show a scintilla of evidence in support of her contract claim through factual allegations unsupported by the record, immaterial and irrelevant factual allegations, and by proposing a wholly unreasonable interpretation

of the term “curricular exigency” which ignores the language contained in the Faculty Handbook. Such arguments are insufficient to resurrect her breach of contract claim.

II. THE LOWER COURTS PROPERLY FOUND THAT NO SCINTILLA OF EVIDENCE EXISTED TO SUPPORT TAYLOR’S CLAIM THAT A CURRICULAR EXIGENCY NEVER EXISTED.

Taylor claims that there was sufficient evidence present to submit the issue of contract interpretation to a jury. Converse reiterates to the Court that Taylor also moved for summary judgment on the contract claim because there was **no** issue of material fact for the jury. In filing her summary judgment motion, Taylor alleged that there existed no genuine issue of material fact with respect to her contract claim and that she was entitled to judgment as a matter of law. Converse agreed that there existed no issue of material fact and filed its own motion for summary judgment. The lower courts similarly agreed that no material factual dispute was present and that they could properly determine whether a breach occurred as a matter of law. However, now that the lower courts have ruled against her as a matter of law, Taylor has changed her tune and currently contends that there exist issues of material fact that precluded an entry of summary judgment.

Taylor cannot have her cake and eat it too—Taylor acknowledged the absence of a genuine issue of material fact in filing her summary judgment motion and arguing in support of judgment as a matter of law. Taylor’s repeated contentions in her brief that there exist factual disputes that cannot be determined as a matter of law are simply disingenuous. Now, Taylor specifically challenges the Court of Appeals’ finding that a “curricular exigency” existed. Taylor maintains that the “facts” outlined in her brief “demonstrate that a scintilla of evidence exists to support Petitioner’s claim that Respondent did not suffer a curricular exigency.” (Petitioner’s Brief p. 8)

Contrary to Taylor's position, South Carolina law provides the circuit court and Court of Appeals with more than ample grounds for interpreting the contract as a matter of law. Relevant provisions of the Handbook (Contract) provide:

In order to preserve institutional integrity, the employment of a faculty member on tenure or one whose term contract has not yet expired may be terminated at any time for the following reasons: financial exigency, curricular exigency (which includes such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member), medical circumstances, or cause.

(R. p. 701.) Section VII of the Faculty Handbook further explained that a majority vote of the Board of Trustees was required to dismiss a tenured faculty member.

In order to preserve institutional integrity, the Board of Trustees may remove any faculty member at any time by a majority vote. Such a dismissal may be only for financial exigency, curricular exigency, medical circumstances, or cause.

(R. p. 702.)

The Handbook provides a definition of curricular exigency by example rather than a traditional definition, but this constitutes a definition nonetheless. Accordingly, the circuit court was required to apply this definition in interpreting the Handbook. *See C.A.N. Enterprises, Inc. v. S.C. Health & Human Services Financial Comm'n.*, 296 S.C. 373, 378, 373 S.E. 2d 584, 587 (1988) (“[W]here the parties define the words or terms which they propose using, the contract will be interpreted according to such definition if free from ambiguity.” (citing *Standard Oil Co. v. Powell Paving & Contracting Co.*, 139 S.C. 411, 138 S.E. 184 (1927))). The circuit court and the Court of Appeals applied the Handbook's definition of curricular exigency and concluded that the situation at hand—

in which Converse reorganized the academic structure in a way that resulted in the elimination of the Piano Pedagogy major program for which Converse recruited, employed, and retained Taylor—constituted curricular exigency as a matter of law pursuant to the express language of the Handbook. (R. p. 23.)

Taylor’s response to this interpretation is the vague allegation that “more than one inference can be drawn from the term ‘curricular exigency.’” (Petitioner’s Brief p. 6.) However, whether other situations might constitute a curricular exigency sufficient to invoke the Board’s power to immediately terminate a tenured faculty member does not require a jury to decide whether this situation—which fits ever-so-neatly into the example set forth in the Handbook itself—constituted curricular exigency. The lower courts properly made that determination as a matter of law, as there is no dispute that (1) Taylor was hired and served throughout her employment as the “professor of Piano Pedagogy”; (2) Converse implemented a Reorganization Plan in April 2009; (3) the Reorganization Plan eliminated the Piano Pedagogy undergraduate and graduate major programs from the Converse curriculum; and (4) the Board invoked its power to terminate Taylor for curricular exigency in June 2009 upon implementing the Reorganization Plan and being unable to reach a consensual phased-out employment agreement with Taylor.

Taylor is unable to identify a single fact within the record that contradicts the above four facts and instead relies on her own self-serving and conclusory allegations that there did not exist a curricular exigency and that Converse drummed up the curricular exigency explanation in furtherance of its alleged conspiracy to terminate her employment. She improperly attempts to show a scintilla of evidence to support her claim by raising immaterial, unsupported factual allegations and by proposing her own

wholly unreasonable interpretation of the term “curricular exigency.” The circuit court and the Court of Appeals properly recognized that such allegations are not sufficient to overcome summary judgment.

A. **The Lower Courts Correctly Concluded That The Board of Trustees Terminated Taylor’s Employment For Curricular Exigency In Accordance With The Terms Of The Handbook.**

On April 24, 2009, President Fleming presented a proposed Reorganization Plan to the Board of Trustees for consideration in accordance with a specific directive the Executive Committee had given President Fleming in November 2008. (R. pp. 65-66, ¶¶ 3–4; R. pp. 77-94.) The proposed Reorganization Plan included the elimination of the Piano Pedagogy program in its entirety, as well as the elimination of seven faculty positions. (R. pp. 65-66, ¶ 4; R. pp. 77-94.)

There can be no doubt that the Board’s approval and implementation of the Reorganization Plan was well within the Board’s discretion, as Section 2 of the Converse Bylaws expressly provides that “Converse College shall be governed by a Board of Trustees.” (R. p. 704.) Moreover, the Handbook expressly provides, “Approval by the Academic Affairs Committee of the Board of Trustees is necessary for any curricular change that involves an alteration of college policy or an important financial consideration.” (R. p. 700.) The Reorganization Plan unquestionably constituted a “curricular change that involves an alteration of college policy or an important financial consideration,” (*id.*), and “members of the Academic Affairs Committee [were] in attendance and voting” when the Board unanimously approved the Reorganization Plan, (R. pp. 65-66, ¶ 4). Thus, the Board could not have overstepped its authority in approving and implementing the Reorganization Plan, as the Board was the only entity

that possessed the power to take such action pursuant to express terms of the Bylaws and the Handbook.

The Handbook provisions regarding Termination of Employment and Dismissal Procedures make clear that the Board acted in accordance therewith in its decision to remove Taylor from employment due to curricular exigency. Both of these provisions empower the Board to remove a tenured faculty member “at any time” in the event of curricular exigency. (R. pp. 701-02.) The Termination of Employment provision clarifies this power by providing the following as an example of an event that creates curricular exigency: “such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member.” (R. p. 701.)

As Taylor’s letter of application, offer letter, evaluations, and even title demonstrate, the reason that Converse recruited, hired, and employed Taylor was for her to serve as its sole professor of the College’s Piano Pedagogy program and to build the program at Converse. *See supra* pp. 2–6. When the Board implemented the Reorganization Plan, it eliminated the Piano Pedagogy discipline by eliminating the program in its entirety. This elimination thus constituted curricular exigency pursuant to the very example provided by the Handbook as to what constitutes such a situation. Moreover, even assuming that Taylor’s “discipline” should not be limited to Piano Pedagogy, the Handbook in no way limits the term curricular exigency to situations in which the College eliminates the affected faculty member’s department or discipline, but merely provides this as one example of a situation constituting curricular exigency.

There is no dispute that the Reorganization Plan eliminated the Piano Pedagogy program from the academic structure of the College. There can likewise be no dispute

that in eliminating the Piano Pedagogy program, the Reorganization Plan eliminated the primary justification for Taylor's recruitment, initial hiring, and continued employment. This certainly constitutes curricular exigency sufficient to implicate the ability of the Board to remove Taylor from employment, notwithstanding her tenured status. Accordingly, the Board—and, through the Board, the College—did not breach any provision of the Handbook or any other contractual obligation that it allegedly owed to Taylor with respect to her employment or separation therefrom.

Taylor failed to establish a genuine issue of material fact with respect to her contract claim as a result of her inability to demonstrate that Converse breached any contractual obligations that it allegedly owed to her. As the South Carolina Supreme Court has noted:

[W]e cannot understand how any contract can give rise to a cause of action until there has been some breach of such contract. The mere fact that a person has entered into a contract with another can give no cause of action, and none can arise until there is some breach of such contract The contract may give a party the right to demand its performance according to its terms, but there is no delict and no cause of action until the other party refuses or neglects to perform some duty required of him by the terms of the contract.

Tillinghast v. Boston & Port Royal Lumber Co., 39 S.C. 484, 491, 18 S.E. 120, 123 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988). Thus, the lower courts were correct in awarding summary judgment to Converse on Taylor's contract claim.

B. No Alleged Ambiguity in the Handbook Alters the Fact that there Existed Curricular Exigency as a Matter of Law Based on the Clear and Unambiguous Terms of the Handbook.

Taylor argues that “it is unclear whether a curricular exigency existed because the term is not fully defined and the contract is incomplete as it lacks a definition of curricular exigency, department, and discipline.” (Petitioner’s Brief p. 6). In arguing that the phrase “curricular exigency” is ambiguous, Taylor refuses to acknowledge the significance of the parenthetical that follows the phrase in the Handbook itself, particularly considering the facts at hand: “curricular exigency (*which includes such reorganization of the academic structure as may eliminate the department or discipline of the affected faculty member*).” (R. p. 701 (emphasis added).) While this language does not expressly state that curricular exigency shall be defined as “X,” the Handbook takes time to describe one example that will always constitute curricular exigency without limiting the definition to any one situation.

As discussed above, the Handbook thus provides a definition of curricular exigency by example rather than a traditional definition. Taylor’s response to this interpretation is that “more than one inference can be drawn from the term ‘curricular exigency’” (Petitioner’s Brief p. 6.) However, whether other situations might also constitute a curricular exigency sufficient to invoke the Board’s power to immediately terminate a tenured faculty member does not require a jury to decide whether this situation constituted a curricular exigency. Taylor even argues that Converse’s substantial financial setbacks and its resulting concern for the long-term viability and success of the College was not sufficiently urgent as to constitute an exigency. (Petitioner’s Brief p. 7). Taylor’s proposed interpretation of the language “curricular exigency” ignores the other provisions of the contract and is wholly unreasonable. *See,*

e.g., Scheuer v. Creighton University, 199 Neb. 618, 630-32, 260 N.W.2d 595, 600-01 (1977) (rejecting a former professor’s proposed interpretation of the term “financial exigency” as limiting the term to an imminent crisis threatening the survival of the institution as a whole and noting, “The inevitable result of this type operation would be to spread the financial exigency in one school or department to the entire University. This could likely result in the closing of the entire institution.”)

The lower courts properly made the determination that a curricular exigency existed as a matter of law, as there is no dispute that (1) Taylor was hired and served throughout her employment as the “professor of Piano Pedagogy;” (2) Converse implemented a Reorganization Plan in April 2009; (3) the Reorganization Plan eliminated the Piano Pedagogy undergraduate and graduate major programs from the Converse curriculum; and (4) the Board invoked its power to terminate Taylor for curricular exigency in June 2009 upon implementing the Reorganization Plan and being unable to reach a consensual phased-out employment agreement with Taylor. Taylor is unable to identify a single fact within the record that contradicts the above four facts and instead relies on her own self-serving and conclusory allegations that there did not exist a curricular exigency and that Converse drummed up the curricular exigency explanation in furtherance of its alleged conspiracy to terminate her employment. The lower courts properly recognized that such allegations are insufficient to overcome summary judgment.

C. **The Power of the Academic Affairs Committee does not Outweigh the Power of the Board at Large with Respect to a Decision to Terminate a Tenured Faculty Member.**

Taylor argues that the Bylaws require the Academic Affairs Committee to “advise the President and Board on matters affecting the academic programs of the College

including tenure of employment of faculty” and that “[t]here is no evidence in the record that Respondent’s Academic Affairs Committee ever recommended to the Board that Petitioner’s tenure or employment end as required in the Faculty Handbook.” (Petitioner’s Brief p. 3) In making this argument, Taylor focuses on (and even emphasizes) the word “shall” with respect to the Committee’s responsibilities, contending that Converse breached the Bylaws if it did not follow this procedure. However, Taylor ignores the fact that members of the Committee were in attendance and voting both (1) when the Board unanimously approved and implemented the Reorganization Plan in April 2009, and (2) when the Board voted unanimously in June 2009 to terminate Taylor’s employment based on curricular exigency if she did not agree to the terms of the phased-out employment offer.

Taylor apparently contends that the Committee was required to meet separately from the Board and to “recommend” separately from the Board that Taylor’s employment be terminated. Any such requirement would essentially place a greater power in the Committee—a subcommittee of the Board at large—than in the Board itself with respect to tenure decisions. However, if the Board has the power to create the Committee and to delegate certain responsibilities to the Committee, the Board undoubtedly has the power to act on its own with respect to responsibilities otherwise delegated to the Committee—particularly when members of the Committee participated in and unanimously voted in favor of the decisions that form the basis for Taylor’s claims. The manner in which the Bylaws describe the power of the Committee—“advise the President and Board”—only solidifies this conclusion, as the Bylaws clearly contemplate the Board retaining the

power to overrule the Committee if the Board at large disagrees with the Committee's advice. Accordingly, Taylor's argument is without merit.

D. Taylor's Contentions Regarding Converse Allegedly Hiring an Adjunct Faculty Member to Teach Piano Pedagogy after Taylor's Termination are Unsupported by any Facts in the Record.

Despite a lack of any support in the record, Taylor argues that "Respondent hired a non-tenured professor . . . to teach some of the same piano pedagogy courses Petitioner had taught." (Petitioner's Brief p. 5). In a last-ditch effort to convince the trial court that Converse had somehow breached the Handbook in terminating her employment, Taylor submitted what she captioned as a "Notice of Additional Facts" on April 25, 2011. (R. pp. 797-99.) In her Notice, Taylor alleged that Converse had hired an adjunct faculty member to teach Piano Pedagogy courses at Converse. (*Id.*) However, the caption of Taylor's filing is a misnomer in that the allegations contained therein are entirely unsupported by any actual fact in the record. As the trial court noted, "There is no affidavit, deposition testimony, or authenticated document [anywhere in the record] that verifies her filing in any regard." (R. p. 28 n.1.) As such, Plaintiff's Notice was inadmissible as a matter of law and should not be considered on appeal. *See Petersen v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (1999) ("In reviewing a grant of summary judgment, the appellate court is limited to the *evidence* that was before the trial court" (emphasis added) (*quoting* 5 Am. Jur. 2d *Appellate Review* § 700)). To hold otherwise would allow litigants to submit unverified pleadings such as Taylor's to create factual disputes in any case, regardless of the merit underlying the allegations in such pleadings. Such a result would fly in the face of all procedural rules and case law related to the concept of summary judgment, which require the non-moving party to bring forward specific and admissible facts and evidence to overcome a summary judgment

motion. Even assuming that Taylor's Notice should have been considered, the information alleged therein in no way impacts the finding that Converse did not breach the Handbook in terminating Taylor's employment for curricular exigency.

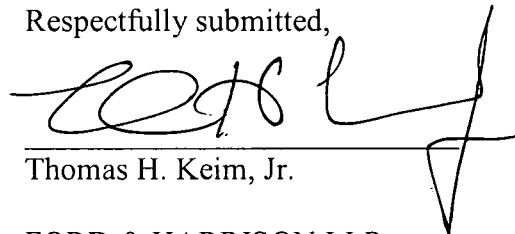
For the reasons set forth herein, the lower court's decision finding Converse entitled to summary judgment on Taylor's contract claim should be upheld because Converse acted in accordance with all relevant provisions of the Handbook as a matter of law, and there is no scintilla of evidence to support Taylor's claim that no curricular exigency existed.

CONCLUSION

Based on all documents on file with lower courts in this matter, there existed no scintilla of evidence to support Taylor's allegation that no curricular exigency existed, and Converse was entitled to judgment as a matter of law. Taylor's claim for breach of contract fails due to the lack of any evidence showing that Converse breached any contractual obligations it allegedly owed to Taylor. Accordingly, Converse respectfully requests that this Court uphold the Court of Appeals' decision finding that Converse was entitled to summary judgment in favor of Converse on Taylor's breach of contract claim.

August 8, 2014

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case # 2013-000-125

Case No. 2009-CP-42-5567

Melanie Taylor

Petitioner,

v.

Converse College

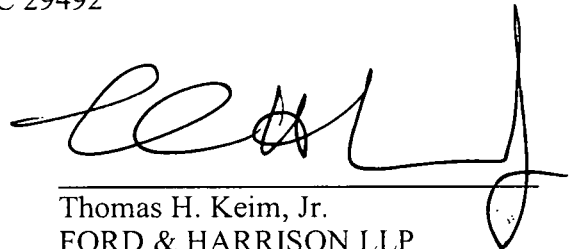
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Brief has been served upon Plaintiff by placing a copy of same in the U.S. Mail with the correct amount of postage affixed thereon and properly addressed to:

Nancy Bloodgood
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This the 6th day of August, 2014.



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