IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-CP-10-3661

Nancy L. Zisk,

Respondent,

v.

The Charleston School of Law, LLC; and George C. Kosko and Robert S. Carr, both in their individual capacities,

Defendants,

Of which The Charleston School of Law, LLC, is

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ABUSE ITS DISCRETION IN GRANTING RESPONDENT A PRELIMINARY INJUNCTION?

STATEMENT OF THE CASE

Respondent Nancy L. Zisk filed her verified Complaint on June 29, 2015, asserting seven causes of action: 1) breach of employment contract (Appellant only); 2) third-party beneficiary breach of contract (Appellant only); 3) breach of contract accompanied by a fraudulent act (Appellant only); 4) tortuous interference with a contract (Defendants George Kosko and Robert S. Carr only); 5) action to pierce corporate veil (Appellant and Defendants); 6) constructive trust (Appellant and Defendants); and, 7) preliminary and permanent injunctive relief (Appellant and Defendants). Respondent simultaneously filed her Motion for Restraining Order and Preliminary Injunction (the "Motion") on June 29, 2015.

Appellant and Defendants accepted service of Respondent's Summons, verified Complaint, and Motion on July 7, 2015. On Friday, July 24, 2015, Respondent served her Memorandum in Support of Preliminary Injunction, along with related, supporting documents. Thereafter, on July 28, 2015, Appellant and Defendants served their Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, along with affidavits of Wende Wood and Defendant Robert S. Carr.

The Circuit Court held two hearings regarding Respondent's Motion, on July 29 and August 3, 2015. At the hearing on August 3, 2015, Appellant and Defendants provided the

Circuit Court with an affidavit of Joseph Harbaugh.[1]

Subsequently, on August 11, 2013, the Circuit Court issued the Order Granting Preliminary Injunction ("Order"). The Order was filed on August 12, 2015, and counsel for Appellant received notice of the Order on August 12, 2015. On August 13, 2015, Respondent filed the bond required by the Order and, as a result, the Order became effective. Thereafter, on August 14, 2015, Appellant served the Notice of Appeal on Respondent.

FACTS

Appellant The Charleston School of Law, LLC, ("CSOL") is The Charleston School of Law (the "School"), a for-profit law school. Defendants Kosko and Carr are both members of the CSOL.

Respondent was employed as a faculty member by Appellant from in or about 2004 through May 22, 2015. In or about 2009, Respondent was approved for tenure and Appellant subsequently promoted her to Full Professor in or about February 2011. Most recently, Respondent was employed by Appellant pursuant to an annual contract for the period of August 1, 2014, through April 30, 2015. Respondent's most recent annual contract incorporated Appellant's Faculty Handbook (August 12, 2014 version).

On May 22, 2015, Respondent, and six other tenured faculty, were terminated due to Appellant experiencing a financial exigency. Appellant notified Respondent of the

[1] Harbaugh subsequently filed a supplemental affidavit in September 2015 to correct an error discovered in his August 2015 affidavit. While Harbaugh's September 2015 affidavit was not before the Circuit Court in regard to Zisk's Motion, a copy of Harbaugh's September 2015 is included in the Record on Appeal to disclose to this Court that a correction was later made to his August 2015 affidavit.

termination in writing. Respondent, thereafter, appealed her termination. Respondent's appeal was denied.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN CONCLUDING THAT RESPONDENT WILL SUFFER IRREPARABLE HARM AND THAT RESPONDENT HAS NO ADEQUATE LEGAL REMEDY

The Circuit Court, in its Order, concludes that Respondent will suffer irreparable harm and that she has no adequate legal remedy for her breach of employment contract claim because Respondent is a tenured professor of Appellant. Respondent's tenure status, along with her claimed "aspirational loss," are the basis for the Circuit Court's Order granting Respondent a preliminary injunction.

The Circuit Court, however, abused its discretion in issuing the Order for several reasons. First, neither tenure nor "aspirational loss" is a sufficient basis for concluding that Respondent will suffer irreparable harm. Second, and correspondingly, Respondent has an adequate remedy at law by way of monetary compensation, if she later prevails in her breach of employment contract claim. Third, the Order is contrary to the case law relied upon in it; case law that serves as the foundation for the Circuit Court concluding that a preliminary injunction is appropriate.

The Circuit Court, in essence, abused its discretion by "making law" instead of appropriately applying existing law, including binding and non-binding case law.

A. Abuse of Discretion Standard

"An order granting or denying an injunction is reviewed for abuse of discretion." *Strategic Resources Company v. BCS Life Insurance Company*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2005). "An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

B. Preliminary Injunction Standard

A preliminary injunction is a "drastic remedy issued by the court in its discretion to prevent irreparable harm" to Respondent. *Scratch Golf Co. v. Dunes West Residential Golf Props.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 - 908 (2004)(emphasis added). For a preliminary injunction to be granted, Respondent must establish each of the following: 1) she will suffer irreparable harm if the injunction is not granted; 2) she will likely succeed on the merits of the litigation; and, 3) there is not an adequate remedy at law. *Id.* Preserving the status quo is the only purpose of a preliminary injunction. *See Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

The burden is on Respondent to present sufficient facts and circumstances warranting a preliminary injunction. *Calcutt v. Calcutt*, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct.App. 1984). Respondent's allegations "must be sufficient to support a temporary injunction and the injunction must be reasonably necessary to protect" Respondent's rights. *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007).

"To warrant a temporary injunction, the complaint must allege facts sufficient to constitute a cause of action for injunction and the information offered by both sides must demonstrate the injunction to be reasonably necessary to protect the legal rights of the

plaintiff pending in the litigation." *MailSource, LLC v. M. A. Bailey & Associates*, 356 S.C. 363, 367, 588 S.E.2d 635, 638 (Ct.App. 2003). "'[A] temporary injunction is [used] to preserve the subject of controversy in the condition which it is in at the time of the Order until opportunity is offered for full and deliberate investigation and to preserve the existing status during litigation . . . .'" *Id.* at 368, 588 S.E.2d at 638 (*quoting County Council of Charleston v. Felkel*, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964)(brackets in original)).

C. Respondent Will Not Suffer Irreparable Harm and An Adequate Legal Remedy Exists

Respondent did not show she will suffer irreparable harm in the absence of a preliminary injunction. For instance, Respondent, similar to the plaintiff in *MailSource*, requests monetary damages in her verified Complaint, in addition to temporary and permanent injunctive relief in the form of reinstatement as a tenured faculty member (i.e., specific performance). A preliminary injunction, however, "is an equitable remedy; as such, it is available only where no remedy at law exists or where legal remedy would fail to make" Respondent whole. *Id.* at 369, 588 S.E.2d at 639. *See also Knohl v. Duke Power Co.*, 260 S.C. 374, 376, 196 S.E.2d 115, 116 (1973)(holding that "complaint fails to state a cause of action for injunctive relief unless facts are alleged which show that the plaintiff has no adequate and complete remedy at law").

Respondent requests monetary damages for breach of employment contract claim in her verified Complaint. Respondent's verified Complaint, similar to the plaintiffs'

complaints in *MailSource* and *Knohl*, shows that her claims allow for an adequate legal remedy for monetary damages.

If Respondent is successful on the merits with respect to any of her causes of action, including her claim for breach of employment contract, the appropriate and adequate remedy at law is a calculation of money damages. Though Appellant denies it is liable to Respondent or that Respondent suffered harm, monetary damages will sufficiently compensate her if she later proves liability (together with reinstatement at that time and based on having prevailed at trial). An injunction should only be granted when a party will suffer irreparable harm for which there is no adequate legal remedy. *See e.g. Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009)(*citing Greenwood Cnty. v. Shay*, 202 S.C. 16, 23 S.E.2d 825 (1943)); *see also Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co.*, 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978)(affirming the trial court's decision not to issue an injunction after the termination of an agency relationship because the plaintiff could sue for damages which would adequately compensate it).

In this case, monetary damages will adequately compensate Respondent for any injury she might later prove. For instance, any alleged damages Respondent incurs in relation to her claim for breach of an employment contract can be calculated by subtracting her current earnings, if any, from what she would have earned working for Appellant had she not been terminated (i.e., her net losses). *See e.g. Small v. Springs Indus., Inc.*, 300 S.C. 481, 484, 388 S.E.2d 808, 810 (1990)(employee who is discharged in violation of an employment contract can recover the net losses caused by the employer's breach, including back pay and

future damages). This measure of damages is appropriate and will indemnify Respondent for any alleged injury caused by Appellant as a result of Appellant's alleged breach of an employment contract.

In its Order, the Circuit Court wrongly concludes that Respondent's loss of tenure, in and of itself, with Appellant, coupled with the indefinite nature of tenure, constitutes irreparable harm. Further, the Circuit Court wrongly concludes in its Order that there is no adequate legal remedy for Respondent's loss of tenure. Respondent's tenure status is the foundation for the Circuit Court's Order. (August 3, 2015, Transcript, p. 3; Order, p. 5.) In both respects, the Circuit Court is wrong and abused its discretion.

First, the Circuit Court's reliance upon the court's decision in *American Association of College Professors v. Bloomfield College*, 136 N.J. Super. 442, 346 A.2d 415 (N.J. Super Ct. App. Div. 1975) is misplaced. For instance, the court's conclusion in *Bloomfield* that monetary damages alone were insufficient to compensate the tenured plaintiffs and, therefore, reinstatement of the tenured plaintiffs was appropriate, was not related to a request for preliminary injunctive relief. *Id.* at 444, 346 A.2d at 615. To the contrary, the result in *Bloomfield*, and relied upon by the Circuit Court in this matter, was reached after a trial on the merits. *Id.* The *Bloomfield* court did not conclude preliminary injunctive relief was either necessary or required for the tenured plaintiffs. *Id.*

The court's decision in *Bloomfield*, in contrast to the Circuit Court's application of it in this case, concludes and shows that a tenured professor, like Respondent, has an adequate remedy in the form of monetary damages and/or reinstatement to tenured status, if liability is proven. Like the tenured plaintiffs in *Bloomfield*, if Respondent later prevails

on the merits of her claims against Appellant, she can recover both monetary damages (back pay and future losses) or, in the alternative, seek reinstatement to her tenured status with Appellant and back pay. Although the Circuit Court recognized these issues in regard to *Bloomfield* during the initial hearing on July 29, 2015, the Circuit Court abused its discretion and ignored them in its Order. (July 29, 2015 Transcript, p. 13; Order, p. 6 - 7.)

Similarly, the Circuit Court abused its discretion and wrongly relied upon this Court's prior decisions in *Levine v. Spartanburg Regional Services District, Inc.*, 367 S.C. 458, 626 S.E.2d 38 (Ct.App. 2005) and *Peek v. Spartanburg Regional Health Care System*, 367 S.C. 450, 626 S.E.2d 34 (Ct.App. 2005). (Order, p. 7.) Neither the plaintiff in *Levine* nor the plaintiff in *Peek* is analogous to Respondent.

First, neither *Peek* nor *Levine* involved issues related to tenure or an employment contract. Second, neither the plaintiff in *Peek* nor the plaintiff in *Levine* were employees of the defendant in either case. Third, the losses this Court determined were difficult to calculate in both *Peek* and *Levine* were economic loss and the loss of goodwill related to plaintiffs' potential loss of patients and related lost revenues to their medical practices. *Peek* at 457, 626 S.E.2d at 37-8; *Levine* at 466-67; 626 S.E.2d at 42-3. The losses found difficult to calculate in *Peek* and *Levine* are unlike Respondent's alleged losses arising from the termination of her employment contract - losses that are calculable. *See Small* at 484, 388 S.E.2d at 810.

Beyond plaintiffs in *Peek* and *Levine* requesting and obtaining preliminary injunctions, there is little, if any, direct relationship between those plaintiffs' circumstances and Respondent. Nonetheless, the Circuit Court abused its discretion and relied upon this

Court's decisions in *Peek* and *Levine* in concluding Respondent is entitled to a preliminary injunction.

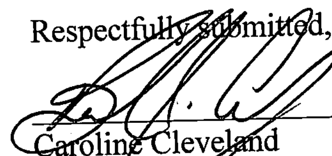
Finally, the Circuit Court bases its Order, in part, on Respondent's claimed "aspirational loss." (Order, p. 9.) The Circuit Court, however, provides no law or precedent recognizing that an alleged "aspirational loss" can provide a basis for a preliminary injunction (or that it is a recoverable element of damage), including that such an alleged loss could constitute irreparable harm for which there is no adequate legal remedy.

In summary, in the absence of precedent supporting the Circuit Court's conclusion that Respondent is entitled to a preliminary injunction because she is a tenured professor, the Circuit Court abused its discretion. The Circuit Court's clear misapplication of *Bloomfield*, *Peek* and *Levine*, combined with the Circuit Court's use of Respondent's alleged "aspirational loss" as a basis for its Order, show the Circuit Court abused its discretion.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,



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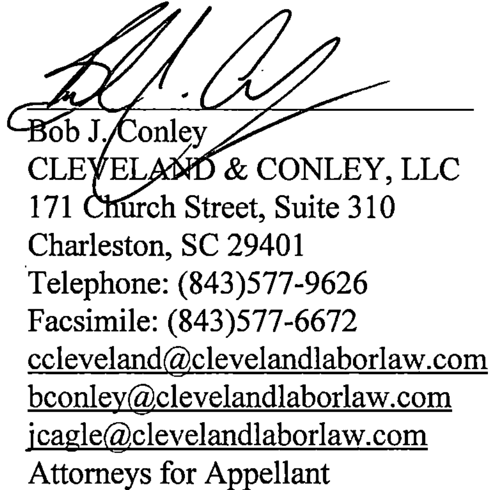
PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief on Nancy L. Zisk by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2015, addressed to her attorney of record, Capers G. Barr, III, Barr, Unger & McIntosh, LLC, P. O. Box 1037, 11 Broad Street, Charleston, South Carolina 29401.

October 14, 2015



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