IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01807

MELISSA WHITING — APPELLANT

V.

THE UNIVERSITY OF SOUTHERN MISSISSIPPI,
THE BOARD OF TRUSTEES FOR
INSTITUTIONS OF HIGHER LEARNING,
DR. SHELBY THAMES officially and individually,
DR. DANA THAMES officially and individually,
and DR. CARL MARTRAY officially and individually — APPELLEES

BRIEF OF APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Robert B. Helfrich, Forrest County Circuit Court Judge
2. Melissa Whiting, appellant;
3. The Board of Trustees of the Institutions of Higher Learning of Mississippi, appellee;
4. The University of Southern Mississippi, appellee;
5. Dr. Shelby F. Thames, appellee, former President of The University of Southern Mississippi;
6. Dr. Carl Martray, appellee, former Dean of the College of Education and Psychology of The University of Southern Mississippi;
7. James A. Keith and John S. Hooks, Adams and Reese LLP, attorneys of record for appellees;
8. Lee P. Gore, Special Assistant Attorney General; and
9. Kim T. Chaze, attorney for appellant;

Dated: June 29, 2010.

John S. Hooks

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Statement of the Issues

I. The circuit court did not abuse its discretion in denying Whiting's motion to reconsider and, alternatively, appropriately granted summary judgment because there is no genuine issue of material fact.

II. The Court did not improperly apply the Mississippi Tort Claims Act as a bar to Dr. Whiting's state law cause of action for Breach of contract.

III. Dr. Whiting's claim for injunctive relief was appropriately denied

The Standard of Review

In her brief, Whiting does not set out any standard of review.

In her notice of appeal, filed November 3, 2009, Whiting appeals "from the Order Denying her Motion for Reconsideration" filed under Mississippi Rules of Civil Procedure 59 and 60. R. 1060.

A motion for reconsideration of an order granting summary judgment will be treated post-trial motion under M.R.C.P. 59(e). *Brooks v. Roberts*, 882 So.2d 229 (¶ 15) (Miss. 2004). This Court reviews a trial court's denial of a Rule 59 motion to reconsider a summary judgment motion under an abuse of discretion standard. *Id.* (*citing Bang v. Pittman*, 749 So.2d 47, 52-53 (Miss. 1999)).

Alternatively, if Whiting is construed to have appealed the trial court's underlying decision—and not just the order denying the motion for reconsideration—the standard is *de novo*. *See, e.g., O.W.O. Investments, Inc. v. Stone Investments Co.*, 32 So.3d 439 (¶ 18) (Miss. 2010).

A party against whom a claim is asserted may move for summary judgment, and it "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.*

Statement of the Case

I. Nature of the case, course of proceedings, and disposition in the court below

On August 6, 2002, Dr. Whiting filed a complaint against the University and Drs. Shelby F. Thames, Carl Martray, and Dana G. Thames alleging damages arising from the tenure and promotion process. The complaint, filed originally in the Circuit Court of Forrest County, sought several forms of relief under state and federal law, including damages in the amount of $5,000,000.00. The individual Defendants were named in both their official and personal capacities.

The Defendants answered the complaint, denying any wrongdoing or liability and asserting a variety of defenses. The Defendants also removed the complaint to the United States District Court for the Southern District of Mississippi. United States District Judge Charles W. Pickering, Sr., denied Dr. Whiting's motion to remand.

Whiting amended her complaint on March 10, 2003, naming the Board of Trustees as an additional defendant. She did not specifically name any members of the Board of Trustees as defendants. Dr. Whiting alleged violations of her constitutional rights under the Civil Rights Act, 42 U.S.C. § 1983. She claimed the Defendants deprived her of substantive and procedural due process, as well as guarantees protected by the Equal Protection Clause and the First Amendment. Under state law, Dr. Whiting alleged breach of contract along with an apparent claim for "nepotism." In addition to her claims for "compensatory and actual" damages of $5,000,000.00, Dr. Whiting requested punitive damages, "appropriate injunctive relief," and "all relief to which she is entitled pursuant to 42 U.S.C. § 1983 et seq to include attorneys [sic] fees." Am. Compl. at p. 5.

After Judge Pickering's ascendancy to the Fifth Circuit Court of Appeals, this case was re-assigned to Judge Ivan L. R. Lemelle of the United States District Court for the

Eastern District of Louisiana. The Defendants presented a motion for summary judgment, heard before Judge Lemelle on September 13, 2004. The district court granted the Defendants' motion for summary judgment with respect to all federal claims but declined to review the merits of Whiting's state law claims. Instead, the district court remanded Whiting's state-law claims to the Forrest County Circuit Court.

The federal district court did not rule on the merits of Dr. Whiting's state law contract claim. The federal district judge who dismissed all of the federal claims clearly stated that his comments were not intended to have an effect on a subsequent ruling on Dr. Whiting's state law contract claim. During the summary judgment hearing on Dr. Whiting's federal claims, the district judge said: "I believe, while I have made some comments about the state law claim, the contract, the handbook, the bylaws, the effect of this, I in no way mean to indicate that those findings would have any effect on a later review in court." R. 928, Tr. 64. Dr. Whiting's argument that the federal judge made "rulings" or "findings" about the merits of the state-law claims are inconsistent with what the district court actually said.

Whiting appealed the district court's ruling to the Fifth Circuit Court of Appeals, including the disposition of federal claims and the decision to remand other claims to state court. The Fifth Circuit affirmed the award of summary judgment in favor of the defendants and upheld the district court's decision to remand the state claims. *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 349 (5th Cir. 2006). Whiting then petitioned the United States Supreme Court for review. The Court denied the petition for *writ of certiorari. Whiting v. The University of Southern Mississippi*, 127 S. Ct. 1038 (2007).

The Circuit Court of Forrest County then granted summary judgment in favor of defendants on all remaining state-law claims. R. 1056-61. Whiting petitioned for

reconsideration, and the Circuit Court denied her petition. Whiting now appeals from the order denying reconsideration. R. 1060.

II. Statement of the facts relevant to the issues presented for review

A. Contracts of employment and deliberations regarding tenure and promotion

In September 1996, the Board of Trustees of the State Institutions of Higher Learning (the "Board") approved the employment of Melissa Whiting as an assistant professor in the Department of Curriculum, Instruction, and Special Education in the College of Education and Psychology at The University of Southern Mississippi (the "University"). Dr. Whiting was hired under a nine-month contract effective August 21, 1996, and extending until May 22, 1997. *See* R. 36-39, Ex. 1.[1] The Board, in May 1997, approved Dr. Whiting for tenure-track status, effective August 21, 1996. *See* R. 40-43, Ex. 2. In addition to the 1996-97 contract, the Board and Dr. Whiting subsequently executed five successive nine-month contracts for academic years 1997-98, 1998-99, 1999-2000, 2000-01, and 2001-02. *See* R. 44-48, Ex. 3. Each contract identifies the parties (the Board and Melissa Whiting), the term of employment (a nine-month period), and the annual salary. *Id.* The contracts state they are subject to the "laws of the State of Mississippi and the policies and by-laws of the Board." *Id.*

In August 2001, at the beginning of her sixth year at the University, Dr. Whiting asked the University to consider her for tenure and for promotion to associate professor. *See* R. 49, Ex. 4 (attached).[2] Dr. Whiting submitted her credentials in the form of a "dossier." *Id.* An academic dossier is a collection of materials required to be assembled and submitted

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[1] All references to "Ex." Are to the Defendants' Motion for Summary Judgment. The exhibits are located in the record consecutively starting with page 36.

[2] This exhibit appears not to have copied properly in the record. It is attached to this brief.

by each candidate for tenure and promotion. *See* R. 50-76, Ex. 5 at p. 25. The dossier contains documentation demonstrating suitability for tenure and promotion. *Id.* The required format for tenure and promotion dossiers is set out in a publication of the College of Education and Psychology entitled "Policy and Procedures for Tenure and Promotions." *Id.* The procedures require that each candidate submit documentation about her work in the areas of teaching, scholarship and publication, and service activities. *Id.*

By the time Dr. Whiting's dossier reached the President, at least twenty-nine people had participated in the review of her dossier. Fifteen recommended against tenure, twelve recommend in favor of tenure, and two recused themselves or abstained. Fourteen recommended in favor of promotion, twelve recommended against promotion, and three recused themselves or abstained. University President Shelby F. Thames decided against tenure and promotion. The process regarding Dr. Whiting's application for tenure and promotion is summarized below.

1. The Department Level

a. The Tenure and Promotion Committee

First, the committee of tenured faculty from the Department of Curriculum, Instruction, and Special Education (the "Department") met on September 28, 2001, to consider Dr. Whiting's application for tenure and promotion. According to the summary report of this meeting, "some questions" arose during the committee's deliberations about "various articles in [Dr. Whiting's] publication section" of her dossier. *See* R. 77, Ex. 6. The committee "decided to delay consideration of her tenure and promotion requests until Dr. John Davis, Committee Chair, and Dr. Dana Thames, Department Chair, had the opportunity to meet jointly with Dr. Whiting to request a written response to these questions about various articles in her publication section (as per procedures in the Faculty Personnel Action,

XI-17, item 13.4)."[3] *Id.* Dr. Whiting submitted a written response to the committee. *See* R. 78-79, Ex. 7. In her response, Dr. Whiting gave her explanation of the "methodology and analysis" she used to write several published articles. *Id.*

The Department's tenure committee reconvened on October 2, 2001. Dr. Davis distributed Dr. Whiting's written response. *See* r. 80-81, Ex. 8. According to the written summary of the committee's meeting of October 2, 2001, "[q]uestions remained, however, about discrepancies in the raw data of the two published articles and about the similarities between the two published articles, the one in FOCUS: Teaching English Language Arts and the one in Journal of Research in Rural Education." *Id.* According to the committee's report:

> Extensive discussion related to Dr. Whiting's request for promotion took place. The discussion seemed to indicate that there were mixed opinions about Dr. Whiting's research/scholarly performance. There were questions about whether Dr. Whiting met the criterion for promotion related to consistently demonstrating quality performance in research/scholarly activities, making it questionable whether a rating in this area could be labeled satisfactory or higher, as specified in the College of Education and Psychology: Policy and Procedures for Tenure and Promotion, January 1997, pages 8-11.

Id. The report also indicates similar concerns about Dr. Whiting's application for tenure. *Id.* Although the committee "felt her teaching and service were good," there were concerns "about Dr. Whiting's consistent availability to advise students and about her sporadic attendance at meetings." *Id.* The committee, voting by secret ballot, decided to award Dr. Whiting a promotion. Six members in favor of promotion, three voted against it, and two abstained. *Id.*

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[3] Section XI (17) of the Faculty Handbook provides: "Although reviewees are not entitled to appear before Tenure Committees, Tenure Committees may at their discretion request that parties being reviewed appear before them. **Candidates may supplement their dossiers with additional information, including a response to negative recommendations, at any level of the promotion process.**" (underline and bold in original). R. 580, Ex. 9.

Next, the committee considered Dr. Whiting for tenure. "It was pointed out," states the report, "that IHL guidelines and Faculty Handbook indicate that tenure occurs between the completion of five and seven years of continuous service to the university." *Id.* (underline in original). According to the summary report, "[t]here was general agreement that Dr. Whiting should not request tenure until completion of her sixth year." *Id.* (emphasis in original); *see also* R. 193-94; Ex. 9 at p. X-5, § 4.7 (Faculty Handbook explaining that a tenure candidate may request a deferral of the tenure process until the seventh year of contracted employment). The Department committee voted against awarding tenure. *See* R. 80-81, Ex. 8. Six members voted against awarding tenure, four voted in favor, and one abstained. *Id.*

By two separate letters dated October 2, 2001, Dr. Davis, the committee chair, notified Dr. Whiting of the results of the promotion and tenure process. *See* R. 240 and R. 241, Exs. 10-11. The letter regarding tenure explained the committee's "considerable concerns" regarding Dr. Whiting's "research/scholarly performance." R. 241, Ex. 11. The letter also stated that Dr. Whiting had

> the option of continuing in the process, or withdrawing [her] request for early tenure, at this level or any of the subsequent levels of consideration. The vote of the Committee seems to indicate that you might want to consider withdrawing your request at this time, because you have until the end of the seventh year to attain tenure. The final decision about continuing the process rests with you.

Id.

b. The Department Chair

By two separate letters dated October 4, 2001, Dr. Dana Thames notified Dr. Whiting about the committee's determination. *See* R. 242-43, Exs. 12-13. Pursuant to University policy, Dr. Thames also prepared a written recommendation to Dr. Carl Martray, Dean of the College of Education and Psychology, regarding the recommendations of the Department

committee's report. *See* R. 244-47, Ex. 14; *see also* R. 202, Ex. 9 at p. XI-5, § 8.1 (requiring department chairs to provide college deans with written advice on departmental personnel recommendations). According to the letter written by Dr. Dana Thames to Dean Martray, Dr. Whiting "**requested that her materials be moved forward and reviewed for both Tenure and Promotion to Associate Professor rank**." Ex. R. 244-47, 14 (bold and underline in original); *see also* R. 216, Ex. 9 at p. XI-19, § 13.5 (requiring department chairs to "prepare independent written recommendations either concurring or disagreeing with the recommendations of Tenure Committees").

Dr. Dana Thames agreed with the Department's report "indicating that Dr. Whiting's progress toward the attainment of tenure is negative at this time and borderline at the present for promotion." R. 244-47, Ex. 14 at p. 1. According to Dr. Thames's letter:

> In summary, I feel that Dr. Whiting's progress toward tenure and promotion is marginal at the present time. In my opinion, it would be in Dr. Whiting's best interest for her to withdraw her papers from tenure and promotion consideration at this time, because she has until the end of her seventh year to acquire tenure, and promotion may be requested at the beginning of any academic year. I make this recommendation because I believe that she has the potential to overcome the concerns of departmental peers. . . .

Id. at pp. 2-3. A copy of this letter was mailed to Dr. Whiting. *Id.* at p. 3.

2. The College Level

a. The College Advisory Council

Notwithstanding the report of the Department committee and the recommendation of the Department chair, by e-mail dated October 12, 2001, Dr. Whiting indicated her desire to move her tenure and promotion application to the College Advisory Committee ("CAC"). *See* R. 248-49, Ex. 15. The CAC, consisting of representatives from each department of the College of Education and Psychology, met to consider Dr. Whiting's tenure and promotion dossier on October 30, 2001, and November 7, 2001. *See* R. 250-57, Exs. 16-17. According

to the tenure and promotion reports, the CAC conducted a "full and detailed discussion" of Dr. Whiting's dossier with awareness of the promotion and tenure guidelines of the Faculty Handbook. *Id.*

The CAC reviewed Dr. Whiting's dossier, the letter written by Dr. Dana Thames to Dean Martray, dated October 10, 2001 (R. 244-47, Ex. 14), and "a letter of rebuttal" submitted by Dr. Whiting to the CAC. R. 25-57, Exs. 16-17. The letter submitted by Dr. Whiting, eleven pages in length, challenges the recommendations of the Department committee and the recommendations contained in the October 10, 2002, letter by Dr. Thames. *See* R. 258, Ex. 18.

The CAC acknowledged the "disparity between the annual evaluations conducted by the various department chairs of Dr. Whiting's department and the report and recommendations of the promotion and tenure committee and the clarifications of the current department chair." *Id.* "The annual evaluations tended to be quite positive, while the report of the tenure and promotion committee was more negative."[4] *Id.* After examining the "credentials objectively and mak[ing] separate evaluations of Dr. Whiting's credentials contained in the dossier," the "CAC consensus was that it appeared that the annual evaluations of the chairs in the past were more optimistic than the credentials justified during many of the years." *Id.* According to the CAC:

> In considering Dr. Whiting's publication credentials, the CAC was concerned that there appeared to be a small number of refereed publications (three) and some publications were not in strong refereed journal outlets or represented contributions to invited publications (annotated bibliographies). A number of the publications contained in Dr. Whiting's vita were clearly published prior to her hire at USM (for example a book). Since her hiring at USM, it appears that she has published primarily annotated bibliographies. There is mention of a book chapter, but no documents in the dossier to substantiate the contract for that chapter. Although there is considerable debate in the dossier about Dr.

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[4] Consistent with University policy, Dr. Whiting had received annual evaluations from her Department chairs.

> Whiting's research efforts (her rebuttal/clarification letter and the Department Chair's letter), the consensus of the CAC members was that the research activity shown at this time, whether considered qualitatively or quantitatively, was not adequate and did not meet college research standards.

Id. at p. 2.

The CAC voted to deny Dr. Whiting tenure and promotion. The votes regarding tenure and promotion, although conducted separately, were identical in outcome: four against, two for, and zero abstentions. *Id.*

b. The Dean of the College

Dr. Carl Martray, Dean of the College of Education and Psychology, then reviewed Dr. Whiting's dossier for tenure and promotion as required by University policy. *See* R. 269-70, Ex. 19. Dr. Martray concluded that "after a thorough review of the recommendations of the CAC and the issues raised by the committee as well as a review of the portfolio materials submitted, I can find no compelling reason to recommend against the recommendations of the CAC." *Id.* Dr. Martray transmitted Dr. Whiting's application materials to the provost without recommending either promotion or tenure. *Id.*

By letter dated November 27, 2001, Dean Martray notified Dr. Whiting of his decision, enclosing copies of the CAC reports. *See* R. 271, Ex. 20. Dr. Martray reminded Dr. Whiting that "[u]pon receipt of this letter, you have the options of withdrawing your application for tenure and promotion and requesting that the recommendation be deferred to the seventh year (as recommended by your chair and departmental committee)." *Id.* Dr. Whiting did not withdraw her dossier from consideration. As provided in the tenure and promotion policy, the provost sought input from the University Advisory Committee. *See* R. 222, Ex. 9 at p. XI-25, § 20.1.

3. The University Level

a. The University Advisory Council

The University Advisory Council ("UAC") met on at least two occasions, on March 27, 2002, and on April 11, to consider Dr. Whiting's dossier. *See* R. 272-75, Ex. 21. Dr. Whiting was invited to the meetings but declined to attend on the advice of her attorney. *Id.* at pp. 2, 51. Dr. Whiting did present a letter to the members of the UAC, however, alleging "prejudicial failures of due process" and violations of due process rights under the Fourteenth Amendment. R. 276-77, Ex. 22. The UAC invited a number of witnesses to appear before it: Dr. Carl Martray, Dr. Dana Thames, Dr. Carolyn Reeves-Kazelskis, and Dr. John Davis. *See* R. 272-75, Ex. 21.

According to the report of the UAC, dated April 24, 2002, "[t]he concerns expressed by the department and college committees, chair, and dean pertaining to Dr. Whiting's research productivity and record of service were discussed at length. The UAC shared many of their concerns related to research, but found the area of service as documented to be more than adequate." R. 278-79, Ex. 23. The UAC ultimately voted in favor of awarding tenure to Dr. Whiting. The vote was five in favor of tenure, three against, and one recusal. *Id.* Regarding promotion, the UAC did not reach a definitive conclusion, with four voting in favor, four voting against, and one recusal. *Id.* As Dr. Whiting's dossier moved forward to the Office of the Provost, Dr. Whiting supplemented her dossier again. *See* R. 280, Ex. 24.

b. The Provost

Dr. Anselm Griffin, then provost, concurred with the recommendation of the UAC to grant Dr. Whiting tenure. By letter to Dr. Whiting dated May 17, 2002, Dr. Griffin indicated that he was "recommending to President Shelby F. Thames that you be granted tenure as a

faculty member." R. 281-82, Ex. 25. Although the UAC reached a tie regarding its vote for promotion, Dr. Griffin recommended promotion as well. *Id.*

4. The President

After carefully reviewing Dr. Whiting's credentials, University President Dr. Shelby Thames mailed Dr. Whiting two letters by Federal Express dated August 23, 2002, to her addresses in Petal, Mississippi, and Vinita, Oklahoma. *See* R. 283-84, Ex. 26. These letters, identical except for different addresses, requested a meeting with Dr. Whiting to discuss his concerns about her tenure application:

> I would like to discuss this matter with you prior to making my decision. I can meet with you on Tuesday, August 27, at 9:00 a.m. If you are unable to meet on Tuesday, I invite you to schedule a telephone conference. Please contact Ms. Polly Odom at 601-266-5301 to confirm a meeting on Tuesday or to schedule a telephone call.

Id.

Dr. Whiting chose not to meet with President Thames (in person or by telephone) to discuss his concerns about Dr. Whiting's tenure and promotion application. *See* R. 285, Ex. 27. Accordingly, President Thames wrote Dr. Whiting another letter on August 30, 2002, stating:

> I am disappointed that you did not take advantage of my invitation to meet with me and/or talk with me via conference call to discuss your tenure and promotion. This was an opportunity for you to talk with me about some of the issues raised during this process, and thus, I would have preferred to hear from you personally before making a decision.
>
> I have reviewed your tenure and promotion dossier and all the related materials. My conclusion is that I will not recommend to the Board of Trustees that you be granted tenure or promotion at The University of Southern Mississippi.
>
> This letter constitutes notice of non-renewal of your employment at USM. A contract of employment will not be offered to you after this academic year ending in May 2003.

Id.

5. The Board of Trustees

Dr. Whiting appealed the decision of President Thames to the Board of Trustees on September 16, 2002. *See* R. 286-305, Ex. 28. On November 11, 2002, Dr. Thomas D. Layzell, then Commissioner of Higher Education, sent Dr. Whiting's request for an appeal to the Board. Commissioner Layzell recommended that the Board decline to consider the appeal. *See* R. 306, Ex. 29.

After discussing Dr. Whiting's request for an appeal in executive session during its meeting of November 21, 2002, the Board of Trustees declined to consider Dr. Whiting's appeal. The Board unanimously denied review of the President's decision regarding promotion and tenure, because Dr. Whiting had already filed suit on August 6, 2002—even before the President had made his decision. *See* R. 307-10, Ex. 30 at pp. 26, 28-29. The Board notified Dr. Whiting of its decision by letter to her attorney dated November 21, 2002. *See* R. 311, Ex. 31.

Argument

I. The circuit court did not abuse its discretion in denying Whiting's motion to reconsider and appropriately granted summary judgment.

Dr. Whiting's appeals from the trial court's denial of a motion asking the trial court to change its grant of summary judgment in favor of the Defendants "under MRCP Rules 59 and 60. R. 1060. Because Dr. Whiting seeks to alter or amend the decision granting summary judgment for the Defendants, the motion must be analyzed under the Rule 59(e) legal framework. *Bruce v. Bruce*, 587 So.2d 898, 903 (Miss. 1991) (citation omitted).[5] This Court reviews a trial court's denial of a Rule 59 motion to reconsider a summary judgment motion under an abuse of discretion standard. *Id.* (*citing Bang v. Pittman*, 749 So.2d 47, 52-53 (Miss. 1999)).

In analyzing the motion, the trial court applied the correct legal standard. A party will not succeed under Rule 59(e), unless it shows: (i) an intervening change in controlling law, (ii) availability of new evidence that was not previously available, or (iii) the need to correct a clear error of law or prevent manifest injustice. *See, e.g., Bang v. Pittman*, 749 So.2d 47, 52-53 (Miss. 1999); *Boyles v. Schlumberger Tech. Corp.*, 792 So.2d 262, 265 (Miss. 2001). The party seeking relief has the burden of proof, and a court acts within its considerable discretion in denying a Rule 59(e) motion where the moving party fails. *See Brooks v. Roberts*, 882 So.2d 229 ¶16 (Miss. 2004). In fact, "[t]he standards of Rule 59(e)

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[5] *See* Miss. R. Civ. P. 59(e) ("A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment."). Rule 59 (a) – (d) apply only where a party seeks a new trial. Rule 60(a) applies only if amendment is sought due to a clerical error. Rule 60(b) does not apply—as a matter of law—where a party seeks to alter or amend a judgment. *See Miles v. Miles*, 949 So.2d 774, 783 n.2 (Miss. App. 2006) ("Rule 60 cannot be the basis for a motion to alter or amend a judgment. A motion to alter or amend a judgment must be filed pursuant to M.R.C.P. 59(e).").

favor denial of a motion to alter or amend a final judgment." *Rourke v. Thompson*, 11 F.3d 47, 51 (5th Cir. 1993).

Courts have repeatedly emphasized Rule 59(e) cannot be used by "unhappy" litigants trying to sway the trial court into making a different ruling. *See, e.g., Joe v. Minnesota Life Ins. Co.*, 272 F.Supp.2d 603, 604 n.1 (S.D. Miss. 2003) (interpreting the identical federal rule and explaining that "[w]hatever may be the purpose of Rule 59(e), it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.").[6]

In her motion to reconsider, Dr. Whiting did not make any arguments under Rule 59(e) standards. In denying the motion, the trial court did not abuse its discretion, because the motion for reconsideration simply reasserted the same arguments in Dr. Whiting's response to the summary judgment motion. According to the trial court, "the plaintiff's failure to offer anything other than what has been offered before places this matter beyond the reach of rule 59's allowance for reconsideration: 'A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments.'" R. 1059, Order Denying Motion to Reconsider. Because she had not met the requirements of Rule 59(e), the trial court's denial was proper.

Nevertheless, even if Whiting properly appealed to this Court the issue of whether summary judgment were appropriately granted, as set out below, the trial court properly concluded that no genuine issue of fact precluded summary judgment.

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[6] "The Mississippi Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, and we have looked to the federal interpretations of our state counterparts as persuasive authority." *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So.2d 1206, 1215 (¶ 32) (Miss. 2001)).

A. All policies and procedures were followed.

1. Dr. Whiting was not denied any contract of employment to which she was entitled.

As stated in section I.A, above, there is no dispute that Dr. Whiting was employed by the Board under six distinct contracts for six academic years: 1996-97, 1997-98, 1998-99, 1999-2000, 2000-01, and 2001-02 . The term of the last contract began on August 16, 2001, and ended on May 16, 2002, when it expired automatically. Dr. Whiting cannot maintain that she was entitled to—but did not receive—a contract for a sixth year. This is because Dr. Whiting *did* receive and execute contracts for six academic years.[7] Her claim that she was ddenied a sixth-year contract, is therefore, without merit: She had contracts for six academic years.

2. A terminal contract for the 2002-03 academic year was available to Dr. Whiting.

Although Dr. Whiting contends the Defendants breached a contract of employment with her by not providing her a "terminal contract," the President's letter dated August 30, 2002, to Dr. Whiting told her of his decision not to award tenure or promotion and proves she *would* have received a contract had she returned for the 2002-03 academic year: "This letter constitutes notice of non-renewal of your employment at USM. A contract of employment will not be offered to you after this academic year ending in May 2003." R. 285, Ex. 27. In other words, had she returned, the University anticipated extending a contract of employment to Dr. Whiting for the 2002-03 academic year, her seventh academic year at the University.

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[7] In her response to the Defendants' summary judgment, Dr. Whiting claimed she did not have contracts for six years, relying on the fact that only five—rather than six—contracts were contained in Exhibit No. 3 to the Defendants' motion. Although the 1997-98 contract was not included, there is no dispute as the whether Dr. Whiting was given this contract or that she actually worked as a professor at the University during the 1997-98 academic year.

She chose not to return to the University. The final "Personnel Action Form" of the University lists the reason why Dr. Whiting's employment ended as "failure to report to work." R. 347, Ex. 35.

3. Dr. Whiting had no legitimate expectation of employment beyond the 2002-03 academic year.

Dr. Whiting did not have a contractual right for a contract beyond the 2002-03 academic year. Although her allegations are vague, Dr. Whiting appears to contend the Faculty Handbook guaranteed that she would be employed for at least one year of employment beyond the 2002-03 academic year. Appellant's Brief, p. 27. Stated differently, Dr. Whiting claims a "pre-tenure" tenure right (i.e., a right to employment for a definite period to become a tenured employee). Dr. Whiting argues that the minimum time frame for attaining tenure as stated in the Faculty Handbook (ordinarily six years) amounted to a guarantee of employment for up to eight years within which to achieve tenure.[8] This is not so.

Although the Faculty Handbook does permit a candidate to request deferral of the tenure application to the seventh year of contracted employment, Dr. Whiting made no such request. R. 193-94, Ex. 9, Faculty Handbook, at ¶ 4.7. She applied for tenure in August 2001, at the beginning of her sixth year at the University. R. 49, Ex. 4. Despite concerns expressed by the department's tenure and promotion committee and the "general agreement that Dr. Whiting should not request tenure until completion of her sixth year," (R. 241, Ex. 11), Dr. Whiting "**requested that her materials be moved forward and reviewed for both Tenure and promotion to Associate Professor Rank**." R. 244-47, Ex. 14 (bold and underline in original). Dr. Whiting's department chair likewise indicated to Dr. Whiting that

[8] The Faculty Handbook states that tenure deliberation proceedings are "normally in the sixth year of full-time employment." R. 193, Ex. 9 at p. XI-17, § 13.4.

"it would be in Dr. Whiting's best interest for her to withdraw her papers from tenure and promotion consideration at this time, because she has until the end of her seventh year to acquire tenure, and promotion may be requested at the beginning of any academic year. I make this recommendation because I believe that she has the potential to overcome the concerns of departmental peers. . ." R. 244, Ex. 14 at p. 1. Notwithstanding the report of the Department committee and the recommendation of the Department chair, Dr. Whiting indicated her desire to move her tenure and promotion application to the College Advisory Committee. R. 248-49, Ex. 15.

The Faculty Handbook is clear: Absent a request for deferral, if tenure is not granted during the sixth year of full-time employment, tenure-track faculty members normally are given terminal contracts for their seventh year of full-time employment. R. 193 at 4.5, final paragraph, Ex. 9. Had Dr. Whiting returned to campus, she would have received the contract for her seventh year, but she was not entitled to more. The President's letter indicating that a subsequent contract following the 2002-03 academic year (her seventh year of employment) would not be offered to Whiting is totally consistent with all Handbook provisions.

Mississippi's appellate courts have twice ruled that non-tenured professors are not entitled to unlimited probationary periods within which to attain tenure. In *Suddith v. The University of Southern Mississippi*, 977 So. 2d 1158 (Miss. App. 2007) (en banc), *cert. denied*, 977 So. 2d 1144 (Miss. 2008), a professor argued he was entitled to a minimum of six years of employment within which to attain tenure. The Mississippi Court of Appeals disagreed:

> There is no indication in any portion of the Faculty Handbook contained in the appellate record that non-tenured faculty are entitled to protection against involuntary termination or to continuing employment for any period beyond the term of their current contracts. There are two references in the record to a "Third Year Review" and an excerpt from the deposition of Dr. Huffman concerning the tenure-track schedule being six years. There is nothing,

> however, in these brief references to raise a genuine issue of a tenure-track employee's entitlement to continued employment for the amount of time necessary to reach these stages of the tenure process.

Id. at 1172. Similarly, in *Servedio v. The University of Southern Mississippi*, Case No. 3-95-4473 (Cir. Ct. Forrest County, Miss., May 20, 2005), another professor denied tenure argued he had every expectation his contract would be renewed as long as he continued to do a good job. *See* R. 360, Ex. 37 at pp. 1-2. This Court stated that "the Plaintiff, who was a non-tenured professor, misunderstands the nature of his employment relationship with the University." *Id.* at p. 2. The Court observed, "No contract was terminated. When the final contract expired, the Plaintiff's employment with the University ended. . . . Non-renewal is not a breach of contract." *Id.* at 29. In a per curiam judgment without an opinion, the Mississippi Supreme Court affirmed this Court and taxed the appellant with the costs of appeal. *See* Ex. 38. Under clear Mississippi law, therefore, Dr. Whiting had no contractual right to multiple years of employment within which to attain tenure following the 2002-03.

4. There is no absolute right to receive a tenure decision on May 1.

Based on the Faculty Handbook, Dr. Whiting claims she had an unequivocal contract right to a decision on the tenure and promotion application from Dr. Shelby Thames no later than May 1, 2002, and this right was violated because she received notice on a later date. Appellate Brief, p. 4. In reality, the Handbook does not create the unequivocal notice described by Dr. Whiting. The Handbook actually says: "*Normally* candidates may expect to receive written notification of the final decision from the president or his/her designated representative by May 1 unless an appeal is invoked." (R. 589, Faculty Handbook at V-11,

§ 2.e.) (emphasis added)). President Thames did not assume office until May 1, 2002. R. 346, Ex. 34. Furthermore, the provost's review was not completed until May 17, 2002. R. 281, Ex. 25.

5. Dr. Whiting chose not to meet with President Thames and had no right to a hearing before the Board.

Dr. Whiting claims to have been contractually entitled to a hearing before the President before he made a decision regarding her tenure and promotion dossier. *See, e.g., id.* at p. 5. Regardless of whether Dr. Whiting was entitled to a hearing, the fact is that Dr. Shelby Thames extended an invitation for her to meet with him, and she passed up the opportunity. *Whiting*, 451 F.3d at 343. Dr. Whiting's counsel claims he responded to Dr. Thames's invitation for a meeting by letter dated August 27, 2002, "agreeing to meet." Ex. 36 at p. 19. Dr. Whiting's counsel, however, also wrote a letter dated August 29, 2002, to the University legal counsel, stating, "I am unsure as to what you mean by having a meeting about this matter in the sense that I do not understand what the meeting would accomplish. Her file is replete with information." R. 392, Ex. 39. Dr. Whiting chose not to accept Dr. Thames's offer of a meeting.

Dr. Whiting also maintains she was "entitled to a hearing before the Board of Trustees." R. 348, Ex. 36 at p. 29. According to the official policy of the Board, appeal to the Board from a decision of the President regarding tenure and promotion is not a matter of right; the Board has absolute discretion regarding whether it will entertain an appeal. *See* R. 341, Ex. 33 ("Review by the Board is not a matter of right, but is within the sound discretion of the Board."). Dr. Whiting, moreover, filed suit *before* requesting an appeal to the Board. Because Dr. Whiting had already filed suit before President Thames made his decision, the Board chose not to grant Dr. Whiting a hearing. *Id.* Thus, there are no genuinely disputed

material facts about whether the Defendants deprived Dr. Whiting of review rights guaranteed in the Handbook; they did not.

6. Dr. Whiting could have supplemented her dossier with additional materials.

Finally, Dr. Whiting contends that Dr. Thames advised her not to place certain research materials in her dossier. Even assuming these materials would have been considered in the tenure and promotion process, Dr. Whiting could have submitted them at any level of the review. The Faculty Handbook provides that individuals may supplement their dossier. *See* R. 211 at p. XI-14, § 12.1; R. 214 at p. XI-17, § 13.4. Dr. Whiting often supplemented her dossier by giving materials to the Department, CAC, UAC, and provost, as explained above in section I.A. Dr. Whiting was offered an opportunity to appear before two meetings of the UAC but declined on the advice of her attorney. *See* 272, Ex. 21 at pp. 2, 51. Nor did she meet with President Thames as discussed above. Dr. Whiting had ample opportunity to present these additional materials and chose not to.

7. The findings of federal courts confirm no procedural defects.

While examining this case to determine whether the Defendants had violated any due process rights to which Dr. Whiting might have been entitled under the policies and procedures of the University, the Fifth Circuit found that "reviewing the history of her tenure application suggests that she has been afforded the processes guaranteed her." *Whiting*, 451 F.3d at 346. Although the Fifth Circuit analyzed Dr. Whiting's claims in the context of her federal due process claims, its findings show there are no violations amounting to a breach of contract either.

The first alleged procedural deficit the Fifth Circuit addressed was Dr. Whiting's allegation that although she was entitled to a decision by President Thames by May 1, 2002,

the end of the academic year in which she applied for tenure, President Thames did not reach a decision until late August, 2002. *Id.* The Fifth Circuit made short work of this argument by drawing attention to the Faculty Handbook's language that "Presidential decisions are *normally* communicated to affected parties by May 1." *Id.* (quoting Faculty Handbook, R. 223, Ex. 9 at p. XI-26, § 22) (emphasis added). The court noted that this wording indicated "there may be times at which circumstances mandate a different date may apply: in this case, President Thames did not assume office until May 1, 2002; furthermore, the provost's review was not itself completed until May 17, 2002." *Id.* Just as the Fifth Circuit decided, there is no genuinely disputed fact on this issue.

The second purported deficiency addressed by the Fifth Circuit was Dr. Whiting's argument that the policies in the Faculty Handbook "create[d] an 'automatic' process, guaranteeing tenure to one who meets or exceeds the criteria applied during annual and third-year reviews." *Id.* The Fifth Circuit dismissed this argument by pointing to the language of the Handbook "emphasiz[ing] that the ultimate decision for tenure lies in the Board's hands, and that positive evaluations do not guarantee a grant of tenure." *Id.*; *see also* Ex. 9 at p. XI-17, § 13.2 ("A successful tenure review is not a promise or guarantee of tenure. Tenure is only obtained by grant of the Board.").

Finally, the Fifth Circuit addressed Dr. Whiting's third due process contention, "that the tenure and promotion procedures create[d] a *de facto* tenure program such that she ha[d] a protected interest in her continued employment." *Whiting*, 451 F.3d at 346. The Court distinguished the case upon which Whiting relied, *Perry v. Sindermann*, 408 U.S. 593 (1972), by observing that, unlike the junior college in *Perry*, the University had a formal tenure process, with the grant of tenure remaining at the discretion of the Board, so that

Whiting had no interest in continued employment apart from the Board's granting it. *Whiting*, 451 F.3d at 346.

In short, the federal courts found no procedural deficiencies with respect to Dr. Whiting's tenure and promotion application process. According to the Fifth Circuit, "reviewing the history of her tenure application suggests that she has been afforded the processes guaranteed her." *Whiting*, 451 F.3d at 346. Ignoring these findings, Dr. Whiting now chooses to reassert the same argumentative assertions and theories she relied on in federal court. The "disputed" material facts Dr. Whiting claims to have identified are nothing more than the same old conclusory assertions on which she based her federal claims—claims rejected by the U.S. District Court and the Fifth Circuit Court of Appeals. Just as the district court found Dr. Whiting failed to prove essential elements of her federal claims, using the same facts, Dr. Whiting cannot establish essential elements of her state law claims for breach of contract.[9] The unpersuasive response arguments, based on mere assertions, do not meet Rule 56 standards. Summary judgment is appropriate.

B. Dr. Shelby Thames's decision to deny tenure was not arbitrary and capricious, as a matter of law.

Dr. Whiting also argues the tenure decision was arbitrary and capricious. She suggests tenure was denied because Dr. Dana Thames "poisoned" the tenure dossier used to determine her suitability for tenure, thereby creating unwarranted doubts on the part of subsequent reviewers. She insists Dr. Shelby Thames was biased because he had a close

[9] The district court ruled that Dr. Whiting failed to adduce evidence showing genuinely disputed material facts as to the allegations underpinning the retaliation claim (i.e., the allegations that Dr. Whiting spoke out and consequently Dr. Dana Thames sought to prevent Dr. Whiting from attaining tenure). The Fifth Circuit Court of Appeals agreed and affirmed the district court findings. *See* R. 921-24, Tr. 57-58; *Whiting*, 451 F.3d at 344.

relationship with Dr. Dana Thames, his daughter, and they joined forces to prevent tenure. Again, Dr. Whiting offers no proof.

Dr. Shelby Thames testified he had not spoken with Dana Thames concerning Whiting's dossier and that he independently concluded that Dr. Whiting had not demonstrated satisfactory performance in the area of research and publication based on his own review of her materials. R. 346, Ex. 34. Dr. Whiting ignores the University's tenure policy requiring that each candidate "for tenure in this college must exhibit high and sustained quality performance in two of the three university missions (teaching, research and service) and exhibit satisfactory performance in the third." R. 62, Ex. 5 at p. 11. President Thames' determination that Dr. Whiting's research materials were unsatisfactory required him to deny tenure and promotion according to the Faculty Handbook.

The Fifth Circuit confirmed the decision was not inappropriately tainted. In disposing of Dr. Whiting's First Amendment retaliation claim, the Fifth Circuit dealt with issues regarding the alleged impropriety of President Thames's reviewing a dossier containing his daughter's comments and recommendations. Dr. Whiting characterized her dossier as "poisoned" by the inclusion of "scurrilous accusations of academic fraud" by Dr. Dana Thames. *Whiting*, 451 F.3d at 351. The court noted that the same dossier contained Dr. Whiting's rebuttals to Dr. Thames's allegations and Dr. Whiting's answers to expressed concerns over her qualifications in terms of the "service" criteria. *Id.* The dossier, moreover, had been evaluated by approximately thirty people by the time President Thames reviewed it, and it contained various opinions as to whether tenure should be awarded. *Id.* "The record suggests, then, that the file reaching President Thames contained not just Dr. Thames's accusations, but also concerns, praise, and questions from a substantial number of other people." *Id.*

The Fifth Circuit stated that Dr. Whiting "offer[ed] nothing but her own beliefs as a foundation" for her contention that "President Thames's close relationship with his daughter, Dr. Thames, left him 'biased and prejudiced' and inclined to go along with his daughter's alleged smear campaign." *Id.* "Nor does she offer anything beyond her own beliefs to suggest that President Thames himself carried an inherent bias against her due to his close relationship with his daughter." *Id. See also, Beattie v. Madison County School District*, 254 F.3d 595, 605 (5th Cir. 2001) (holding summary judgment appropriate because "Beattie offers nothing but her own beliefs" regarding allegations of impermissible employment decision.)). The court observed that President Thames's unrefuted affidavit stated he had not discussed Dr. Whiting's tenure and promotion application with his daughter or her "allies." Although Dr. Whiting continues to argue maintain that President Thames offered no reasons for denying tenure and promotion, (Appellant's Brief, p. 6), his unrefuted testimony proves that he based his decision on a careful and independent review of Dr. Whiting's dossier and found her research materials to be deficient. *Id.*; *see also* R. 346, Ex. 34. Finally, even if Dr. Dana Thames's accusations were retaliatory, she "was not responsible for the final decision to deny tenure." *Whiting*, 451 F.3d at 351.

The Fifth Circuit explained that Dr. Whiting failed to adduce evidence sufficient to give rise to an inference that Dr. Shelby Thames spoke with his daughter about the tenure decision or simply sided with Dr. Dana Thames because she was his daughter. *Whiting*, 451 F.3d at 351. Instead, the Fifth Circuit found evidence President Shelby Thames independently reviewed various conclusions of other reviewers and based his decision on their conclusions, as well as his own independent review of her dossier. *Id.* According to the Fifth Circuit, when the dossier reached President Thames it contained multiple layers of opinions from various participants, including "concerns, praise, and questions from a

substantial number of other people." *Id.* Dr. Whiting offered only personal, subjective opinions as a foundation for her assertion that Dr. Shelby Thames was biased because of his relationship with his daughter.

Accordingly, one aspect of the Fifth Circuit's analysis of the federal claims was a determination that Dr. Whiting received all the procedures to which she was contractually entitled, and that she was not prejudiced by Dr. Dana Thames's opinions being reviewed by President Thames as part of Dr. Whiting's overall dossier. There is no basis, then, for Dr. Whiting's claim of breach of contract based on the fact that Dr. Dana Thames and Dr. Shelby Thames are related.[10]

II. The Court did not improperly apply the Mississippi Tort Claims Act as a bar to Dr. Whiting's state law cause of action for breach of contract.

In her response to the Defendants' motion for summary judgment, Dr. Whiting alleged—for the first time—violations of the due process clause in the Mississippi Constitution. The Amended Complaint, however, does not allege claims under the Mississippi Constitution; therefore, Dr. Whiting cannot assert them now at this late stage.[11]

Second, even if she had asserted a valid claim, due process claims under the Mississippi Constitution are subject to the same legal analysis as those brought under the due

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[10] Dr. Whiting concedes there is no separate nepotism claim. Appellant's Brief, 32-33. She argues, however, that "nepotism" played a role in denying her the contractual rights to which she was entitled because of the relationship between Dr. Dana Thames and Dr. Shelby Thames. As more fully set out in the Defendants' motion for summary judgment, 1) the "nepotism" statute (Miss. Code. Ann. § 25-1-53) is inapplicable, 2) the policies and procedures of the Board and University regarding nepotism have not been violated, and 3) even if the statute were applicable, there was no violation. R. 405-06, Mot., pp. 13-15. There is no "nepotism," and the allegation that Dr. Shelby Thames' relationship with his daughter resulted in bias lacks evidentiary support.

[11] *See* Miss. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). The Amended Complaint does not allege a cause under the Mississippi Constitution. The discovery responses do not contend a violation of the Mississippi due process clause.

process clause of the United States Constitution.[12] The Fifth Circuit, assuming that Dr. Whiting had a protected property interest warranting due process protection, concluded that "it is not clear that she has adequately alleged any sort of deprivation." *Whiting*, 451 F.3d at 344. Just as Dr. Whiting's federal due process claims were rightfully dismissed at the summary judgment stage, her state due process claims are, therefore, subject to summary judgment for the same reasons.

Finally, claims based on violations of the Mississippi Constitution are subject to the procedural requirements of the Mississippi Tort Claims Act. *See, e.g., City of Jackson v. Sutton*, 797 So.2d 977 (Miss. 2001) (precluding a state constitutional due process claim for failure to advance claim under the Mississippi Tort Claims Act). Dr. Whiting did not satisfy these procedural requirements. There has been no notice of claim as required by Miss. Code Ann. § 11-46-11. Summary judgment on any "due process" claim arising under Mississippi's constitution was, therefore, appropriate. *See Suddith v. The University of Southern Mississippi*, 977 So.2d 1158 (Miss. App. 2007) (en banc), *cert. denied*, 977 So.2d 1144 (Miss. 2008); *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss. 1999); *Holmes v. Defer*, 722 So.2d 624, 628 (Miss. 1998).

The circuit court did not improperly apply the Mississippi Tort Claims Act as a bar to Dr. Whiting's state law cause of action for breach of contract. The trial court states that "any claim" Dr. Whiting "may have that she was deprived of *contractual due process* or that her

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[12] Claims asserted under the due process clause of the Mississippi Constitution are "analytically identical" to federal due process clause claims. *See, e.g., Mississippi Power Co. v. Goudy*, 459 So.2d 257, 261 (Miss. 1984) (applying same standard in assessing state and federal constitutional claims); *NCAA v. Gillard*, 352 So.2d 1072, 1081 (Miss. 1977) (applying a single standard and holding athlete declared ineligible for season was not denied due process under state or federal constitution); *Walters v. Blackledge*, 71 So.2d 433, 444 (Miss. 1954) (explaining the due process required by the United States Constitution is the same "due process of law" which is required by Section XIV of the Constitution of the State of Mississippi.) Dr. Whiting's federal due process claims were dismissed on summary judgment; therefore, the Defendants are—by definition—entitled to judgment on any claims brought under the due process clause of the Mississippi Constitution.

right to due process under Mississippi's Constitution was violated is subject to the provisions of the Mississippi Tort Claims Act." R. 1028 (emphasis added). The Court held Dr. Whiting's "noncompliance" with the MTCA's procedural requirements "entitles the defendants to summary judgment *on these claims*." *Id.* (emphasis added).[13] Thus, the Court's plain language belies Dr. Whiting's assertion the Court "shielded" the Defendants from her cause of action for express breach of contract under the MTCA. The court was referring only to her "contractual due process" claims made under Mississippi's constitution. In fact, the court also analyzed Whiting's claims as if she had filed a breach of contract claim tha was no dependent on the state constitution.

Furthermore, Dr. Whiting cannot complain about the Court's ruling because she actively argued in favor of a "contractual" due process analysis. The breach of contract fact allegations are incredibly vague. Dr. Whiting attempted to morph her ordinary claim for breach of contract into something greater by evoking Mississippi's constitution, as the trial court found. R. 1059, Order on Motion for Reconsideration, fn. 5. Given the allegations and her characterization of the claim, Dr. Whiting cannot complain about the result. Summary judgment was appropriate.

III. Dr. Whiting's claim for injunctive relief was appropriately denied.

To prevail on a complaint for injunctive relief, one must "show an imminent threat of irreparable harm for which there is no adequate remedy at law." *Punzo v. Jackson County*, Miss., 861 So.2d 340 (¶ 29) (Miss. 2003).

Here, the circuit court did not deny injunctive relief for any reasons having to do with application of the MTCA. According to the circuit court, 'the issue is not whether "there can

[13] The Opinion and Order states: "Because contractual due process rights may be subject to due process protection, the court will consider the plaintiff's contractual due process claim as being an assertion of a property interest for constitutional due process purposes rather than as a separate claim." R. 1028.

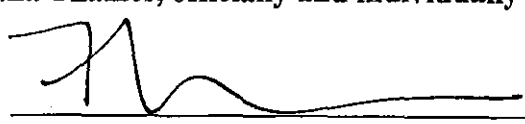
be sovereign immunity or MTCA application when injunctive relief is sought,'" as Whiting argues. R. 1027, Order Denying Motion for Reconsideration, p. 2. Rather, the issue is whether Whiting can show she is first entitled to a remedy and second that the remedy is inadequate at law. Because the circuit court determined Whiting had not first presented evidence entitling her to any remedy at all, the circuit court did not err in concluding that she was not entitled to an equitable remedy. Summary judgment is in order.

IV. Conclusion

Three courts have now examined Dr. Whiting's claims and three courts have now come to the conclusion that Dr. Whiting was afforded all the due processes to which she was entitled regarding review of her tenure and promotion application. She points to no evidence establishing any policy or procedure of the University equating to a breach of any contractual right to which she was entitled. Her own subjective beliefs regarding the ill motives of certain people involved in the evaluation process, without proof, are insufficient to defeat summary judgment. The circuit court did not abuse its discretion in denying Dr. Whiting's motion to reconsider and, alternatively, appropriately granted summary judgment because there is no genuine issue of material fact. The Court did not improperly apply the Mississippi Tort Claims Act as a bar to Dr. Whiting's state law cause of action for Breach of contract. Finally, Dr. Whiting's claim for injunctive relief was appropriately denied

Respectfully submitted, this the 29 day of June, 2010.

The Board of Trustees of the Institutions of Higher Learning,
The University of Southern Mississippi,
Dr. Shelby F. Thames, officially and individually,
Dr. Carl Martray, officially and individually, and
Dr. Dana Thames, officially and individually

By: 

John S. Hooks

Certificate of Service

I certify that I have caused to be hand delivered the original and three copies of the Brief Appellees and an electronic disk of the brief for filing to:

Ms. Betty Septhton, Clerk
Mississippi Supreme Court
Mississippi Supreme Court Building
450 High Street
Jackson, Mississippi 39201.

I have caused to be mailed by United States Mail, postage prepaid a copy of the Brief of Appellees to:

Honorable Robert B. Helfrich
Forrest County Circuit Court
Post Office Box 309
Hattiesburg, Mississippi 39401

Kim T. Chaze
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Durham, New Hampshire 03824

Dated: June 29, 2010.

John S. Hooks

THE UNIVERSITY OF SOUTHERN MISSISSIPPI

August 4, 2001

Dr. Melissa E. Whiting
Assistant Professor
Department of Curriculum, Instruction and
Special Education
SS 5057
Hattiesburg, MS 39406-5057

Dear Dr. Whiting:

Your email of August 3, 2001 has been received indicating that you wish to begin the process for tenure and promotion in the Department of Curriculum, Instruction and Special Education within the College of Education and Psychology. As per the "Promotion and Tenure Calendar" of the College of Education and Psychology's *Policies and Procedures for Tenure and Promotions Handbook*, you are to have all documentation that you wish to be considered in the Chair's office by September 24, 2001. You will find that guidelines for preparing your dossier are attached to this letter.

The Department's recommendations must be submitted to the College Advisory Committee by October 13, 2001. Therefore, your consideration of this time line will ensure that the process is completed in a timely fashion. Best wishes to you and I look forward to reviewing your papers. Should you have any questions, please feel free to contact me at your earliest convenience.

Sincerely,

Dana G. Thames, Ph.D.
Professor and Chair

xc: Dr. Anslem Griffin, Provost
Dr. Carl Martray, Dean

EXHIBIT
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