IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-TS-01807
CA

MELISSA WHITING — APPELLANT

V.

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

REPLY BRIEF FOR THE APPELLANT
DR. MELISSA WHITING

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

ORAL ARGUMENT REQUESTED

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REPLY BRIEF FOR THE APPELLANT DR. MELISSA WHITING

I. THE DEFENDANTS CONCEDE AND ADMIT THAT THE MISSISSIPPI TORT CLAIMS ACT [MTCA] DOES NOT CONSTRAIN OR IMPACT THIS CASE IN ANY WAY SINCE IT IS A CASE INVOLVING AN EXPRESS, WRITTEN CONTRACT:

This case is simplified since the Appellees/Defendants ["USM, *et al*"] concede and admit that the MTCA does not constrain or control this case. Consequently, this case should be remanded since the Circuit Judge believed otherwise.

Literally none of the facts or cases provided by Dr. Whiting have been either distinguished or found wanting for some reason by either the Circuit Court or by USM, *et al*. The Circuit Court does not refer to any fact that is not genuinely disputed. USM, *et al* also agrees that there are numerous genuine issues of material fact.

Please recall that the Circuit Judge opined and ordered that:

> "***any claim*** *that the plaintiff* **may have** *that she was deprived of* ***contractual due process*** *or that her right to due process under* Mississippi's constitution was violated ***is subject to the Mississippi Tort Claims Act [MTCA***] which requires not only that plaintiff comply with certain notice requirements but also that administrative remedies be exhausted prior to suit's being brought." [emphasis supplied]. [CP 1028].

Consequently, the Circuit Court did not apply the law correctly herein. Dr. Whiting's "contractual due process" claim and all of her contractual claims were, in actuality, not addressed by the Circuit Court because the Circuit Court erroneously believed the MTCA controlled. His foregoing opinion reflects this belief.

Not one case, provided by Dr. Whiting in her original brief herein, is refuted by Defendants. The actual, applicable law overwhelmingly supports her contractual contentions. The MTCA has no role herein. It applies to torts – not to express, written

contracts. This is a contract case. There are genuine factual disputes emanating from this contract case. What was the contract? What are its terms? Were the terms breached? If so, what relief is Dr. Whiting entitled?

Amongst those entitlements was ***"CONTRACTUAL DUE PROCESS".*** Her Faculty Handbook **"guaranteed"** her **Due Process. [CP 449, 564] [FACULTY HANDBOOK; Exhibit 1 [XI-1].**

She "MUST" have been informed by September 1, 2001 of any non-renewal. [CP 449, 561] However, she was not.

Not only was Dr. Whiting deprived of due process and the requisite notice and hearings due process entails, she also never received the terminal contract she was entitled pursuant to the Faculty Handbook. Furthermore, she never received the benefit and entitlement of the critical deadlines contained in the Faculty Handbook. As will be seen *infra*, and as was described definitively in her Original Brief, there were numerous breaches of her contract.

The Faculty Handbook states in part:

> ***"These procedures collectively constitute contractual due process**—the sum total of the procedural **guarantees, explicit and implicit,** afforded by a **contracting employer [USM]** to a **contracting employee [Dr. Whiting]** for the regulation and enforcement of the substantive terms of employment." [RE 4] **[CP 564].***

> ***"Academic staff members are thus protected against arbitrary and capricious personnel actions, objective standards of evaluation constituting an essential component of contractual due process."* (Exhibit 1, p. XI-2 to XI-3).**

In other words the "collective procedures" "guarantee" Dr. Whiting, both "explicitly and implicitly" that her "personnel action" will be free from [indeed she is "protected"] "arbitrariness and capriciousness". The decision regarding whether that occurred or not,

whether she received what was contracted, is a fact question to be determined by the jury – not the Judge. Was she, as a fact, protected from arbitrary or capricious treatment? She contends she was not.

Consequently, summary judgment is not appropriate.

When the constitutional questions were in federal court, the federal judge noted that a state jury should resolve the contractual aspect of this case:

> "Your argument [speaking to counsel for the defendants] on this and whether or not she's abandoned her job or what have you, it seems –I mean, it perhaps maybe ***creates an issue of fact for a jury to decide on the issue of breach of contract claims."*** [CP 898;T34].

In fact **counsel opposite agreed with the district judge** that the Handbook "creates certain obligations between the university and the faculty." [CP 906].

Upon reviewing the Circuit Judge's Opinion and Order please also note that there is no factual analysis, and there is no analysis of the actual, applicable law. None of the foregoing points were discussed or even mentioned by the Circuit Judge in his opinion.

Was Dr. Whiting actually, *from a contractual perspective*, provided Due Process? Were the time lines violated? Was there nepotism involved? [Nepotism is prohibited in the Faculty Handbook]. Was Dr. Thames prejudiced against her? Was Dr. Whiting in fact provided notice of a hearing? Was she provided a hearing? Is she entitled to a terminal contract? If not, what are her damages? Had she been replaced before there was any contact with her? Can Dr. Thames ignore what the University Advisory Committee recommended to him? Can he ignore what his Provost advised him? [Both the Provost and the UAC recommended Dr. Whiting be retained and tenured. The Provost recommended promotion also]. Did Dr. Thames observe the untruths his daughter had planted in Dr. Whiting's file? How did that impact this matter? What

impact upon Dr. Whiting occurred by the May 1 deadline not being complied? Why was there a delay of virtually three months [until after September 1 when she received his August 30 letter]? Was this done to prevent Dr. Whiting from finding employment anywhere since the academic year, nation-wide, begins in early August? [That is the reason why May 1 is critically important]. How could she return to her position if she had already been replaced in early August?

The foregoing are all *contractual* breaches that the Circuit Court never addressed or discussed. These genuine, material factual concerns should be resolved by the Jury not the Judge. The Defendants herein either overlook or ignore most of the foregoing factual disputes in their brief.

Since this case is replete with genuine issues of material fact, this matter should be remanded. The Circuit Court's view to the effect that the MTCA impacts or constrains the express *contractual* due process contentions is erroneous and should not be countenanced by this Court.

II. DR. WHITING'S WRITTEN, EXPRESS CONTRACT ENTITLED HER, IN A CONTRACTUAL CONTEXT, TO DUE PROCESS, TO BEING PROTECTED AGAINST ARBITRARY AND CAPRICIOUS TREATMENT, AND NUMEROUS OTHER BENEFITS CONTAINED IN THE FACULTY HANDBOOK.

It is axiomatic that the finder of fact should determine whether or not Dr. Whiting received benefits and contractual rights contained in the foregoing documents and *contract.* **"The existence of a contract and its terms are <u>questions of fact</u>** to be resolved by the fact-finder, whether a jury or a judge in a bench-trial." *Gandy v. Estate of Ford,* 17 So.3d 189, 192(¶ 6) (Miss.Ct.App.2009) (quoting *Anderson v. Kimbrough,* 741 So.2d 1041, 1045 (Miss. Ct. App.1999)).

Consequently, the Jury, not the Judge, should determine the existence of the contract, its terms, and whether those terms were satisfied or not.

As described *supra* and in her original Brief filed herein, Dr. Whiting has delineated breach upon breach of her contract. To this point no court has ruled as to why her ***contract*, indeed her admitted "guaranteed" contractual rights,** should not provide her relief.

The Circuit Court ruled the MTCA was a hurdle that needed to be leapt, but this is clearly incorrect. The Circuit Court referred to the Fifth Circuit ruling regarding *constitutional* issues BUT NOT contractual issues. As this Court well knows the analysis regarding contractual issues is completely different than a constitutional analysis. For example, one may have a contractual right to buy and receive a loaf of bread but may not have a constitutional right to that loaf of bread.

A contractual right is not controlled by constitutional concerns. A contractual right is only controlled by elemental principles of contract. The esoteric constitutional issues

do not come into play. Certainly issues emanating from 42 U.S.C. §1983 are not pertinent.

If the Fifth Circuit believed that the contractual aspect of this case was or could be, somehow, determined by that Court, it would have done so. It had the power to do that pursuant to its pendent jurisdiction and/or supplemental jurisdictional powers. It did not. Indeed, the rulings from the federal sector, pertaining to the contractual aspect of this case, favored Dr. Whiting: there *"seems to be some . . .* ***different interpretations of the facts*** *that might lend itself to a weighing of the evidence and* **something for a jury to decide**." [CP 908] (T44).

The following Federal District Judge's view was not countermanded by the Fifth Circuit:

> "It's interesting that you argued no agreement, **but it *seems as if the employment contract that she did have was supplemented by the handbook, the faculty handbook. And it appears as if the Board's bylaws in the handbook impose some obligations on the university that extend beyond the nine month period of the employment contract." [then he proceeds to provide some of the examples]. [CP 904].***

Dr. Whiting's written contract "guarantees" her, amongst other contractual rights, to be "protected" against "arbitrary and capricious" treatment.

> ***"Academic staff members are thus protected against arbitrary and capricious personnel actions, objective standards of evaluation constituting an essential component of contractual due process."*** **(Exhibit 1, p. XI-2 to XI-3).**

As seen *supra*, based upon case after case, the Jury should determine whether Dr. Whiting actually received what her contract provides. What *contractual* relief is due her is a classic example of what a jury should determine. *See Gandy* and *Anderson, supra*. Please note that the Handbook does not limit itself to *constitutional* due process.

It broadly, "explicitly and implicitly" "protects" Dr. Whiting from "arbitrariness and capriciousness". It "guarantees" her that the process regarding tenure and promotion will not be tainted with arbitrariness and capriciousness. The constitutional requirements are simply not applicable to the issues here regarding *contractual obligations.*

USM prepared the contracts and Faculty Handbook. All of the language, therefore, is to be construed most strictly against USM. *Kight v. Sheppard Building Supply*, Inc., 537 So. 2d 1355, 1358 (Miss. 1989).

If the language of the contract is ambiguous, it is, of course, a question of fact to be resolved by the Jury. *Dennis v. Searle,* 457 So. 2d 941, 945 (Miss.1984).

In *Stampley v. Gilbert,* 332 So.2d 61 (Miss.1976), this Court held:

> "There is also the universal rule of construction that when the terms of a contract are vague or ambiguous, they are always construed more strongly against the party preparing it." 332 So.2d at 63.

None of these salient points were mentioned by either USM, *et al* herein or by the Circuit Court in its opinion.

It is evident that a jury should determine whether these contractual entitlements were provided or not. The law is clear. The genuine factual disputes are self -evident.

III. THE DEFENDANTS CONCEDE THAT THERE ARE GENUINE ISSUES OF FACT. CONSEQUENTLY, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED:

Even the Defendants concede, perhaps unwittingly, that there are genuine issues of material fact. They list, again unwittingly, points that are genuinely disputed:

For example, was Dr. Whiting in fact provided a hearing with the decision maker, Dr. Shelby Thames? The Defendants' view is genuinely contested. We will not repeat and reiterate all of Dr. Whiting's evidence yet again, but it was robust. [CP419-945]. These hundreds of pages of depositional testimony, documents, the entire Faculty Handbook, written contracts, and considerable other evidence substantiate the genuine factual disputes – not only with this particular point but all of the other factual points that have been accentuated in this Brief and in Dr. Whiting's original Brief filed herein.

Additionally, did Dr. Whiting receive notice of an actual hearing with sufficient time to attend any hearing? The Defendants' view and argument is genuinely contested.

Additionally, was it arbitrary and capricious to terminate her without a hearing? This is genuinely contested.

Additionally, was it arbitrary and capricious and a violation of the nepotism provision of the Faculty Handbook, for the father of Dr. Whiting's principal antagonist, Dana Thames, to make a decision that protected his daughter as opposed to providing Dr. Whiting treatment that was not arbitrary or capricious? Was he prejudiced or biased against Dr. Whiting? How did the fact that he had been sued by Dr. Whiting *before* rendering a decision impact his view of Dr. Whiting? This is genuinely contested.

Additionally, was it arbitrary and capricious to ignore and violate the critical deadline of May 1 for three months? This is genuinely contested.

Additionally, was it arbitrary and capricious, not to provide the terminal contract that Dr. Whiting was guaranteed? This is genuinely contested.

Additionally, was it arbitrary and capricious to replace Dr. Whiting before any hearing whatsoever was provided her? Since she had been replaced, how could she return? There was no position to return to. This is genuinely contested.

Additionally, can Dr. Thames ignore what the University Advisory Committee recommended to him? Can he ignore what his Provost advised him? Why did he not follow their recommendations to retain, tenure, and promote her? Since he did not follow their recommendations, was that arbitrary and capricious? Did he observe the untruths his daughter had written about Dr. Whiting and planted in Dr. Whiting's file? How did that impact this matter?

As can be seen herein and in the Original Brief, there are many, many questions of fact that are genuinely disputed. All of the foregoing genuine factual disputes are, at a minimum, genuinely contested material facts. Consequently, Summary Judgment is not appropriate or legally allowable pursuant to Rule 56 *MRCP* or the applicable case law pertaining to the issue of summary judgments. *See e.g., Mink v. Andrew Jackson Cas. Ins. Co.*, 537 So. 2d 358 (Miss. 1988); *Triplet v. Dempsey*, 633 So. 2d 1011 (Miss. 1994).

IV. THE CIRCUIT COURT NEVER RULED WHETHER THE POLICIES AND PROCEDURES WERE VIOLATED. THE DEFENDANTS ACKNOWLEDGE THE FACTUAL DISPUTES. CONSEQUENTLY, SUMMARY JUDGMENT IS NOT APPROPRIATE:

It has been shown herein and in Dr. Whiting's original brief that there is considerable evidence that the policies and procedures were violated by USM, *et al.* USM, *et al* disputes the violations. Consequently, the genuine disputes are evident. The Circuit Court never denied they were genuinely disputed in its opinion. Consequently, summary judgment should not have been allowed.

Dr. Whiting did not receive a terminal contract. The Defendants suggest it was "available". This is denied and genuinely disputed for the reasons provided herein and in Dr. Whiting's original brief. Dr. Whiting never received a purported letter dated August 30 until well into September. More importantly, she was never provided an actual terminal contract and certainly not one by September 1 as was required. Furthermore, there was nowhere to return to since she had been replaced in early August. Classes began on or about August 15.

Once again, at a minimum, these material facts are genuinely disputed.

The Defendants concede that May 1 is a pivotal date. They gloss over it and admit she received a decision "at a later date". [Appellees' Brief at p. 20] IT WAS THREE MONTHS LATE. IT WAS THREE MONTHS PAST THE DEADLINE. This harmed her greatly as described herein and in her original brief.

Again, at a minimum these genuinely contested facts present to the jury questions for the jury to resolve as to whether this conduct was a violation of the "guaranteed due process". The Jury should decide whether Dr. Whiting was provided the guaranteed, assured, and promised action *without* "arbitrariness or capriciousness".

Indeed, Dr. Thames never made a decision and likely never would have *until* he had been sued. Consequently, these disputes should be resolved by the Jury not the Judge. Once he was sued his treatment of Dr. Whiting became discordant, uncivil, and certainly was not without bias. Then, his close connection to his own daughter created a situation where arbitrariness was created – not muffled.

Dr. Whiting most assuredly had a right to a hearing before both Dr. Thames and the Board. The Handbook guarantees her contractual due process and that she not be victimized by arbitrariness and capriciousness. Due process must include a hearing and notice of a hearing. She received no notice of an actual hearing and no concomitant hearing from either Dr. Thames or the Board.

Indeed, Dr. Thames finally, after month upon month had elapsed, said he would "meet" with her. This is not an "invitation" to an *actual* hearing. However, irrespective of that, the invitation was in fact accepted. Again, apparently, this is genuinely disputed. Again, summary judgment is not appropriate.

As to the Board, they have abused their discretion and denied Dr. Whiting a hearing and the guaranteed due process she was entitled. This case, especially since blatant nepotism is pregnantly evident, is a prime example of a situation where the Board should be proactive and provide relief to Dr. Whiting as a counter balance to the egregious conduct of the Thames [both of them]. The fact that a suit was pending should have signaled *more* assistance and involvement -- not less. The Complaint was amended, naming the Board as a defendant, AFTER the Board refused to provide due process –not before. The Complaint was amended on March 10, 2003 –well AFTER the time the Board had to make this situation right.

On p. 22 of its brief USM mentions that Dr. Whiting did not appear before the UAC. She did not need to. The strength of her accomplishments were evident. CONSEQUENTLY, The UAC RECOMMENDED HER FOR TENURE. So did the Provost. Those decisions were clear. Yet, Dr. Thames ignored them.

As to supplementation of her dossier, Dr. Whiting was directed by her boss, Dr. Dana Thames, NOT to do that. All of this is discussed in Dr. Whiting's original brief. The Jury should be allowed to weigh all of these factors and arrive at a just result.

The Jury, not the Judge, should resolve these disputes and consider all of the evidence – not just part of it.

We will refrain from reiterating all of the contractual violations again. However, it is evident they are genuinely disputed. USM acknowledges these disputes. Consequently, summary judgment is not appropriate.

The Defendants' reference to *Suddith v. The Univ. of Sou. Miss.*, 977 So. 2d 1158 (Miss. App. 2007) is illogical and misplaced. *Suddith* had nothing to do with the issues of this case. USM contended he had no written contract whatsoever. He was not tenure track. He was not guaranteed contractual rights. He never even applied for tenure or promotion. He ran the art gallery at USM. His status and requests for relief were utterly different than here. Indeed, S*uddith* was dominated by the fact that he had had an affair with a student - - an affair he had admitted to. Also, his attempt to use the grievance procedure, also not involved here, was deemed to be time barred. Lastly, the Court of Appeals opined it did not have before it the procedures that were sought to be used for relief. *Id.* At p.1172.

Here, none of those issues are present. As the Fifth Circuit made clear the contractual aspect of this case is controlled by *Robinson v. Bd. of Trustees of E. Cent.*

Junior Coll., 477 So. 2d 1352, 1353 (Miss.1985); *Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356, 361 (Miss. 1992), *cited in, Whiting v. University of Southern Mississippi et al,* 451 F. 3d 339,345 (Fifth Cir. 2006),

In fact the Fifth Circuit affirmed that "Mississippi courts have held that **employee manuals become part of the employment contract, *creating contract rights*** to which employers may be held, such as Dr. Whiting's ***right to the procedures*** *outlined in the handbooks*. *Id.*

That is the controlling law. The reference to *Suddith* is the reddest of herrings. USM, *et al* is not denying the procedures that were "contractually guaranteed" to Dr. Whiting. USM knows full well that Dr. Whiting is not requesting tenure or even continued employment. She is requesting that the procedures in her Faculty Handbook be effected fairly and impartially and without arbitrariness and capriciousness – just as her contract literally "guarantees" her. It would be redundant to repeat those violations here again. We will, of course, refrain from doing that. She wants the contractual rights the Fifth Circuit held she was entitled as well as the rights her written contract provides and as well as the rights the numerous rulings and cases this Court has previously assured her she is entitled. She wants the "explicit and implicit" rights her written contract promises her.

It is particularly odd and peculiar for the Defendants refer to a circuit court case, *Servedio v. USM,* [No. 3-95-4473]. Then, the Defendants pose as if "this Court" ruled or opined this or that. [Appellees' Brief at p. 20]. "This Court" did not render any opinion in that case – nor did any appellate court.

The Circuit Court of Forrest County has ruled in favor of many Plaintiffs who have had claims against USM. This counsel has represented many of them. It would not be

appropriate to enumerate all of those cases since the Circuit Court is not a forum to be cited for precedential purposes. For example, in *Brewer v. USM* et al,[CI 96 –0248] that professor was successful in his suit against USM, and the Circuit Court Judge [the same Judge in *Servedio*] denied USM's the motion for summary judgment. Exhibit A. Ultimately, Dr. Brewer's case was settled. His contentions were similar to Dr. Whiting's.

There are many other USM employees and faculty members who have settled with USM regarding similar issues. Normally, these settlements occurred after suit was filed in the circuit court of Forrest County. However, it is more appropriate to focus upon this case and its facts and its actual, applicable precedence. As we have shown, the actual appellate rulings of this Court and other courts are the applicable precedent, and those cases strongly support the contentions of Dr. Whiting.

V. THE FEDERAL COURT INTENTIONALLY MADE NO RULING REGARDING THE *CONTRACTUA*L RIGHTS OF DR. WHITING.

It is evident that the Fifth Circuit did not wish to resolve or even address the issues presented to this Court. It avoided the contractual aspect and did not disrupt or disagree with the Federal District Judge who clearly opined that a jury should resolve the contractual aspect of this case. The District Judge's opinion in this record is a matter of record and has been presented herein and in Dr. Whiting's original brief. Suffice it to say the Federal District Judge opined that he believed a jury should resolve the contractual issues discussed herein.

In *Whiting v. University of Southern Mississippi, Dr. Shelby Thames, Dr. Dana Thames, and Dr. Carl Martray* 451 F. 3d 339 (Fifth Cir. 2006), Dr. Whiting was not allowed *constitutiona*l relief. However, the Federal sector pointedly remanded the contractual claims herein to the Circuit Court. *Id at p. 341.*

Indeed, the 5th Circuit recognized, of course, its power to decide the contractual aspect but pointedly declined to do so. "While the federal courts have power to hear cases in such circumstances, they may exercise discretion over whether or not to exert that power." citing "*United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966)." *Id. at p. 344.*

The Fifth Circuit was explicit that the contractual aspect of this case should be analyzed completely differently than the constitutional aspect. The Court held, "While a plaintiff **may have an action in state court for damages *for breach of contract***, he may not sue under §1983 unless his constitutional rights have in some way been denied or his exercise of those rights penalized in some way." *Id at p.345.*

Consequently, it is evident the Fifth Circuit concluded and told the world: CONTRACTUAL ISSUES AND CONSTITUTIONAL ISSUES ARE SEPARATE AND SHOULD BE ADDRESSED SEPARATELY. That is exactly the position of Dr. Whiting herein.

The Fifth Circuit also correctly noted that, "Mississippi courts have held that contract rights constitute enforceable property rights. *Univ. of Miss. Med. Ctr. v. Hughes,* 765 So.2d 528, 536 (Miss. 2000) (citing *Wicks,* 536 So.2d at 23 (Miss. 1988))." "[I]t is federal constitutional law, [however,] which determines whether that property interest rises to the level of a constitutionally protected interest." *Hughes,* 765 So.2d at 536. *Id.*

Thus, the Fifth Circuit felt there was a federal constitutional problem regarding the constitutional aspect of this case, but, here, in State Court, there is no federal constitutional law concern regarding the contractual aspect of this case. Only the contractual issues are here, and the Fifth Circuit made it clear, of course, that in a contract case, such as this one as it presently exists, Dr. Whiting should and could proceed to a jury trial in state court since no one disputes that she had an express written contract accompanied by an express written Faculty Handbook.

If fact, the Fifth Circuit summarized the importance of Handbooks when it held,

> "Mississippi courts have held that **employee manuals become part of the employment contract**, ***creating contract rights*** to which employers may be held, such as Dr. Whiting's ***right to the procedures*** *outlined in the handbooks*. *Robinson v. Bd. of Trustees of E. Cent. Junior Coll.*, 477 So.2d 1352, 1353 (Miss.1985); *see also, Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356, 361 (Miss. 1992)." *Id.* [emphasis added].

That is precisely the point here. It is the right to the procedures [not to tenure], and, more specifically, the right to procedures that are not arbitrary or capricious, that are the contractual rights involved here.

Consequently, the Fifth Circuit wanted all contract issues decided in the state court. Nothing was held by it that detrimentally impacted this aspect of the case. Indeed, much of what it held or opined *favored* Dr. Whiting's position herein. Also, most of her evidence, regarding contractual breaches, and her evidence establishing genuinely disputed facts was not addressed by the Fifth Circuit – much less decided by it.

The Fifth Circuit felt there was a "federal constitutional" concern that prevented the providing of federal constitutional relief. None of those concerns affect this case regarding *contractual* issues and facts. Clearly, none of those rulings were intended to prevent a well-instructed state court jury from evaluating the evidence and arriving at a just resolution of the genuine factual disputes regarding the contractual obligations of the Defendants.

VI. DR. WHITING CONSISTENTLY ASKED FOR INJUNCTIVE RELIEF. INJUNCTIVE RELIEF IS ALSO NOT AFFECTED BY THE MTCA. THE CIRCUIT COURT DID NOT MAKE ANY MENTION OF THE INJUNCTIVE RELIEF ASPECT OF THIS CASE IN ITS ORIGINAL OPINION.

The Defendants concede that the Circuit Court overlooked any discussion of the Injunctive Relief issue herein *until* the Circuit Court addressed the issue regarding Dr. Whiting's Motion for Reconsideration.

Throughout this case, Dr. Whiting has sought Injunctive Relief. She has asked for it so that all of the contractual breaches could be rectified, the Handbook provisions that were violated would be complied, and, that, ultimately, she would have a fair and impartial rendering of the contractual due process she was "guaranteed". [R 1037-39].

The injunctive request for relief was and is not affected, of course, by the MTCA. Since the Circuit Court did not address it, it was overlooked or, perhaps, the Circuit Court thought it was also affected by the MTCA. Even the Defendants concede, now, that it is not.

What Dr. Whiting desired was the application of the procedures *sans* arbitrariness and capriciousness. Injunctive relief would and should aid in this quest. All of these violations were painstakingly discussed and presented to the Circuit Judge. [CP 419-945]. The specific Handbook provisions, contractual provisions, depositional references, and documents and exhibits were provided the Circuit Judge. Although none of them were addressed in the Circuit Court's opinion, the amalgam of them support the opportunity to present the evidence so that they be considered regarding the issue of injunctive relief.

The Circuit never mentioned or discussed *any* of the extensive, robust actual evidence presented to it by Dr. Whiting. Consequently, it is disingenuous for the Defendants to argue that the evidence is lacking in some respect.

Since the threat of irreparable harm continues to injure Dr. Whiting, the enjoining of USM to make right its wrongs here should be an avenue for relief. Here, she is entitled to monetary damages and injunctive relief. The injunctive relief would compel USM to provide the procedures it has been disinclined to voluntarily provide to this point. *See e.g., Greyhound Welfare v. Mississippi State Univ.*, 736 So. 2d 1048-49 (Miss. 1999).

VII. SINCE THE GRANTING OF SUMMARY JUDGMENT IS ALWAYS *A DE NOVO* STANDARD OF REVIEW, THE DE NOVO STANDARD IS THE APPLICABLE STANDARD. WHENEVER QUESTIONS OF LAW ARE PRESENTED, THE *DE NOVO* STANDARD OF REVIEW IS THE APPLICABLE STANDARD:

USM, *et al* does not dispute that the "last order" was the denial of the Motion for Reconsideration. It is also not disputed that the Notice was timely. The Notice was accompanied by the requisite "Statement of Issues" and Designation of Record to include ***"all clerk's papers*** and condensed versions of depositons". [CP 1072]. Furthermore, the "Statement of Issues" included numerous issues to include the erroneous granting of summary judgment. ["Should Summary Judgment have been granted in this case?"] [CP 1074-75]. $2,152.00 was paid to cover the *entire case*. [CP 1077].

The entire case is presented to this Court. The Motion for Reconsideration is tied directly to the granting of summary judgment and focuses on the Circuit Court's Opinion that granted summary judgment.

Summary judgments are only appropriate when *no* material fact is genuinely disputed. Rule 56 *MRCP.* Material facts are those that might affect the outcome of the suit under the applicable substantive law. *Leffler v. Sharp*, 891 So. 2d 152 (Miss. 2004). The Circuit Court must consider *all* evidence before it. *Rein v. Benchmark Constr. Co.*, 865 So. 2d 1134 (Miss. 2004). It must view *all* evidence in the light *most favorable against whom* the motion is made. *Montgomery v. Woolbright*, 904 So. 2d 1027 (Miss. 2004). The Defendants must show there is no genuine issue as to any material fact. *Palmer v. Anderson Infirmary Ben. Assoc.* 656 So. 2d 79o, 794 (Miss. 1995).

This Court has specifically directed courts, when a Motion for Summary Judgment is made, to determine only if material facts have been genuinely disputed.

Mink v. Andrew Jackson Cas. Ins. Co., 537 So. 2d 358 (Miss. 1988). Furthermore, in *Triplet v. Dempsey*, 633 So. 2d 1011 (Miss. 1994), this Court admonished trial courts not to try issues of fact but only decide if there are issues to be tried.

In *Triplet*, the Supreme Court held as follows:

> "The trial court cannot try issues of fact on a Rule 56 Motion; ***It may only determine if there are issues to be tried.***" Id. at p. 1013.

Additionally, in *Triplet*, the Supreme Court held:

> "The trial court should overrule a Motion for Summary Summary Judgment ***unless it finds, beyond a reasonable doubt***, that the Plaintiff would be unable to prove any facts to support his claim." *Id.*

The trial court should use Summary Judgment with "great caution". *Stegall v. W T WV Inc.*, 609 So. 2d 348 (Miss. 1992).

Here there are juxtaposing, genuinely contested factual issues. That is precisely why summary judgment is not appropriate.

It is elemental that all errors of law are reviewed *de novo*. **"This Court reviews *errors of law*, which include the proper application of the Mississippi Tort Claims Act, *de novo*." *Fairley v. George County*, 800 So.2d 1159, 1162 (Miss.2001).** This Court, of course, examines *all* the evidentiary matters before the trial court, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Bullock v. Life Ins. Co. of Miss.*, 872 So. 2d 658, 660 (Miss.2004). All the evidence is viewed in the light *most favorable to the nonmoving party. Id.* It makes no difference if the trial judge was given an opportunity to correct a mistake he made. *Rayner v. Pennington*, 25 So. 3d 305, 308 (Miss. 2010). Indeed, in *Rayner* there was a granting of summary judgment and two motions for reconsideration. *Id.* Yet, the *de novo* standard was utilized.

The Defendants surely realize that errors of law are always *de novo* reviewed. In any case, such as *Rayner* and herein, where a summary judgment was granted or denied, the standard is *de novo*. Motions for reconsideration are encouraged because they prevent unnecessary appeals and offer the trial court an opportunity to correct mistakes that were made at an early juncture in the proceedings. Motions for reconsideration promote judicial economy and promote an assiduous effort to have mistakes rectified as early as possible –hopefully without the need for an appeal.

In light of the foregoing actual, applicable law, it is unfortunate and illogical the Defendants refer this court to a divorce case as some kind of precedent. *Bruce v. Bruce*, 587 So. 2d 898 (Miss. **1991)** has nothing to do with this matter – either legally or factually. It dealt with the time for appeal in a divorce case. Furthermore, it could not [and does not] cite *Bang v. Pittman*, 749 So. 2d 47 (Miss. **1999**) because *Bang*, which also is not applicable, [it deals with service of process problems], was not decided until *eight years after Bruce*!

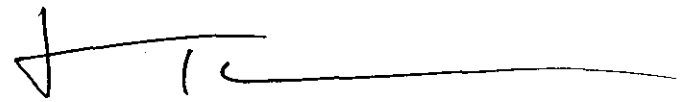
At any rate, the standard of review here, because of the questions of law and because of the summary judgment involvement, is the *de novo* standard of review.

As this Court has made clear many times, i.e. *Rayner supra*, issues of law and issues pertaining to the granting of summary judgment, even when a motion for reconsideration is made, will be decided using the *de novo* standard of review.

CONCLUSION

It is respectfully requested, in light of the foregoing, that this matter be remanded to the Circuit Court of Forrest County so that all concerned will be provided an appropriate trial before a well-instructed Jury. In that way the genuine issues of material fact may be resolved fairly and impartially.

RESPECTFULLY SUBMITTED this the 16th day of August, 2010.



KIM T. CHAZE

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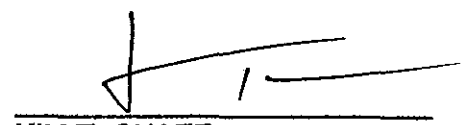
CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellant herein do certify that I have this day caused to be mailed by United States first class mail with postage prepaid the original and three copies of the Reply Brief for the Appellant Dr. Melissa Whiting along with a CD-Rom containing a PDF of the Reply Brief for the Appellant Dr. Melissa Whiting for filing to Kathy Gillis, Clerk, Supreme Court of the State of Mississippi, at P.O. Box 249, Jackson, Mississippi 39205-0249; and have also this day caused to be mailed by United States first class mail with postage prepaid a true and correct copy of the Reply Brief for the Appellant Dr. Melissa Whiting to the following persons at their regular business addresses:

Honorable Robert B. Helfrich
FORREST CO. CIRCUIT JUDGE
P.O. Box 309
Hattiesburg, MS 39401

Mr. John S. Hooks,Esq.
ADAMS & REESE
P.O. Box 24297
Jackson, MS 39225-4297

This the 16th day of August, 2010.



KIM T. CHAZE

APPENDIX

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

DR. THOMAS M. BREWER — PLAINTIFF

V.

CASE NO.: CI-96-0248

FILED

AUG 10 2005

FORREST COUNTY CIRCUIT CLERK

THE UNIVERSITY OF SOUTHERN MISSISSIPPI, BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, DR. AUBREY K. LUCAS, Individually and Officially, DR. G. DAVID HUFFMAN, Individually and Officially, and HARRY C. WARD, Individually and Officially — DEFENDANTS

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS DAY this matter came on to be heard regarding Defendants' filing of their Motion for Summary Judgment.

The Court has reviewed the Memoranda of Authorities filed by the parties, the court file, the discovery and depositional points that counsel for the parties have referred, and all exhibits and references that counsel have referred in their respective Memoranda filed with the court. Moreover, this matter was noticed for hearing, and the Court has heard extensive argument of counsel. This hearing is a matter of record.

UPON CONSIDERING all of the foregoing, the COURT FINDS that the Motion for Summary Judgment should be and is hereby denied. The Defendants are not entitled to Summary Judgment as a matter of law. Furthermore, there are genuine issues of material fact that preclude summary judgment.

EXHIBIT A

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion for Summary Judgment is hereby denied.

SO ORDERED AND ADJUDGED this the 10th day of August 2005.

CIRCUIT COURT JUDGE