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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-000352
Case No. 2021-CP-10-05289

Medical University of South Carolina and University Medical
Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC;
Terry A. Day; Betsy Kay Davis; Joshua D. Hornig;
Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the Respondents.

PETITION FOR WRIT OF SUPERSEDEAS

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Pursuant to Rules 240(a) and 241(c) of the South Carolina Appellate Court Rules, the Medical University of South Carolina (“MUSC”) and the University Medical Associates of the Medical University of South Carolina (“UMA”) (collectively “Moving Parties”) petition this Court for a writ: (1) superseding the circuit court orders denying injunctive relief to the Moving Parties and (2) imposing a temporary injunction while the Moving Parties’ appeal is pending.

Introduction

Trident Medical Center, LLC (“Trident”) and HCA Healthcare, Inc. (“HCA”) (collectively “Hospital Defendants”) came into possession of MUSC’s Property through employee misappropriation by the Individual Defendants (defined *infra*), and they refuse to return it. (**R. 144-47, R. 160-63**). In this petition, MUSC asks this Court to require the Hospital Defendants to return the Property and to refrain from using it while this appeal is pending.

Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma (collectively “Individual Defendants”) were long-term employees of MUSC, providing sophisticated medical care to patients as part of MUSC’s head and neck cancer practice. (**R. 142, R. 158**). While employed by MUSC and while members in UMA, the Individual Defendants misappropriated MUSC’s Property and disseminated it to their future employer, the Hospital Defendants. (**R. 144-47, R. 160-63, R. 468-90**). MUSC’s misappropriated Property (“Property”) consists of the following:

1. Physician preference cards,
2. Instrument lists,
3. Financial information showing the amount of revenue generated by four of the Individual Defendants during their employment with MUSC,
4. Financial information showing the salaries four of the Individual Defendants received while employed by MUSC, and

5. Case logs for Individual Defendant Terry Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the head and neck cancer program.

(Id.).

Shortly after MUSC commenced this lawsuit, the Individual Defendants agreed to settle with the Moving Parties. As part of that settlement, the Individual Defendants agreed to pay \$1.7 Million¹ to the Moving Parties, to *destroy* the Property in their possession, and to *refrain from using the Property* in the future. (**R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 339-30, R. 341-42**). The Hospital Defendants entered into no such agreement. Instead, the Hospital Defendants defiantly insist on keeping the Property and using it to unlawfully compete with MUSC's long-running and nationally renowned head and neck cancer practice. (**R. 125, R. 272**).

The choice before the Court is simple: will it allow the Hospital Defendants to retain and continue to use Property that came to it through the Individual Defendants' misappropriation, or will it require the Hospital Defendants to return it? The Court's decision has significant public policy implications, as the Court will either decide to reward the Individual Defendants' brazen conduct and those who receive purloined materials, or the Court will decide to protect those who spend the time, money, and energy to innovate and develop the materials in the first place.

MUSC submits the choice is obvious and asks this Court to grant its petition for writ of supersedeas, which will return the parties to the status quo (that point in time before the Individual Defendants' misappropriation) and preserve the competitive advantage MUSC enjoys over the Hospital Defendants as the first-in-time creator and innovator of the Property.

¹ The Individual Defendants agreed to pay the following sums: Defendant Lentsch agreed to pay \$317,817.00, Defendant Davis agreed to pay \$201,150.00, Defendant Day agreed to pay \$201,150.00, Defendant Sharma agreed to pay \$201,150.00, Defendant Hornig agreed to pay \$447,866.00, and Defendant Neskey agreed to pay \$330,867.00. (**R. 280, R. 293, R. 305, R. 317, R. 329, R. 341**).

Factual/Procedural Background

The Moving Parties are MUSC and UMA. MUSC is a State Agency created by the General Assembly of South Carolina for the public service missions of providing comprehensive health care to South Carolina's citizens while educating and training future healthcare professionals. S.C. Code § 59-123-10, *et seq.* (**R. 10-11, R. 143, R. 159**). UMA is a South Carolina 501(c)(3) corporation that promotes and supports the missions of MUSC by *inter alia* providing patient care in MUSC's clinics through its physician members, who are employed by MUSC as medical school faculty. (**R. 10-12**).

The Hospital Defendants are private, for-profit entities. (**R. 143, R. 159**). Trident is a for-profit hospital, owned by wholly owned subsidiaries of HCA. (**R. 11, R. 122, R. 143, R. 159**). HCA is a for-profit operator of healthcare facilities. (*Id.*). HCA is publicly traded on the New York Stock Exchange and is obligated to earn profits for its shareholders. (**R. 143, R. 159**).

In the late 1990s, MUSC started its head and neck cancer practice, more formally known as the Head and Neck Oncology Division of the Otolaryngology Department. (**R. 141, R. 158**). MUSC's head and neck cancer team consists of numerous clinicians from different healthcare disciplines. (**R. 142, R. 158**). MUSC's head and neck cancer team performs multi-phased, complicated procedures, often lasting up to ten to fifteen hours. (**R. 143, R. 159, R. 171**). Through the investment of significant amounts of time and resources, MUSC built one of the largest programs in the country devoted to the care of the head and neck cancer patient. (**R. 141, R. 158**). Of particular note, MUSC established a head and neck fellowship program, which attained accreditation from the prestigious American Head and Neck Society.² (**R. 150, R. 164**).

² There are fewer than fifty such accredited fellowship programs in the country. (**R. 150, R. 164**).

Historically, the Hospital Defendants have not maintained a similar head and neck cancer practice at Trident Medical Center in North Charleston. (**R. 143, R. 159, R. 172, R. 177**). Thus, this case pits the competing hospital systems on opposite ends of the spectrum as it relates to their head and neck cancer practices in the Charleston area. (**R. 105-06**). On the one end, there is MUSC's more than two-decade old, nationally renowned practice. (*Id.*). On the other, there is the new, upstart practice of the Hospital Defendants in North Charleston. (*Id.*).

One of the drivers of the success of MUSC's head and neck cancer practice has been the development of the Property, in essence a playbook, that has enabled MUSC's head and neck cancer practice to operate efficiently and effectively. (**R. 106-07, R. 144-47, R. 160-63, R. 171-72**). The Property was not developed by any one person and it was not developed overnight; instead, it was developed over the course of the last two decades by various members of MUSC's head and neck cancer team. (**R. 106-07, R. 144, R. 160, R. 171-72**).

The Individual Defendants are at the center of the dispute between the Moving Parties and the Hospital Defendants. The Individual Defendants are highly trained practitioners who specialize in treating head and neck cancer. (**R. 105, R. 142, R. 158**). The Individual Defendants were long-term employees and faculty members at MUSC. (**R. 142, R. 158**). The Individual Defendants decided to leave their employment with MUSC and commence work for the Hospital Defendants' upstart head and neck cancer practice at Trident Regional Medical Center in North Charleston. (**R. 105, R. 142-43, R. 159**).

While still employed by MUSC and while still members of UMA, the Individual Defendants coordinated with each other and their new employer, the Hospital Defendants, for almost a year to effect a wholesale departure of MUSC's head and neck cancer team to Trident effective December 1, 2021. (**R. 104-05, R. 142, R. 144-47, R. 159, R. 160-63**). As part of the

wholesale departure, the Individual Defendants misappropriated the Property and disseminated it to the Hospital Defendants. (**R. 104-05, R. 144-47, R. 160-63, R. 468-90**). Prior to the unlawful actions of the Individual Defendants, the Hospital Defendants never had any right to access the Property. (**R. 108-09, R. 144-47, R. 160-63**).

The misappropriation occurred even though MUSC took reasonable steps to protect the Property. (**R. 144-45, R. 161, 466**). The Property is not available in the public domain, access is limited only to those individuals who have a legitimate need to access it, policies and procedures safeguard these materials from disclosure to unauthorized recipients, and a two-factor authentication system protects this information from remote access. (*Id.*). In addition, the Individual Defendants were contractually obligated to preserve and protect MUSC's confidential information, which includes the Property. (**R. 144-45, R. 161, R. 359, R. 405, R. 466**).

MUSC filed this lawsuit after learning of the misappropriation of the Property. (**R. 168-69**). As part of this lawsuit, MUSC moved for a temporary injunction, requesting, among other things, the return of the Property from the Individual Defendants and the Hospital Defendants. (**R. 132-39**). The Individual Defendants agreed to settle with MUSC shortly after the filing of this lawsuit. (**R. 280-353**). As part of this settlement, the Individual Defendants agreed to return the Property and to refrain from using it in the future. (**R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 339-30, R. 341-42**). The Hospital Defendants, however, refused (and continue to refuse) to return the Property. The Hospital Defendants have boldly claimed that the Property in their possession is "unrestricted," and they have asserted that the Individual Defendants can use the Property while working for them, even though such use would be in direct violation of the

settlement agreements between the Moving Parties and the Individual Defendants. (**R. 272**).³

The only plausible reason the Hospital Defendants could have for refusing to return the Property is that they intend to use it for their own economic gain in unlawful competition with MUSC, and they believe it would jeopardize or delay the return on their investment to take the time to develop these materials from scratch. The Hospital Defendants' counsel admitted as much during the supersedeas hearing before the circuit court, where counsel stated that if the court granted supersedeas relief to MUSC, "Trident now will have its hands tied." (**R. 125**). Clearly, the Hospital Defendants are relying on the Property to build and develop a competing head and neck cancer program.

Despite the facts of this case, the circuit court unjustifiably denied MUSC's request for injunctive relief. (**R. 1**). The circuit court never explained the rationale for its decision, so it is difficult to say why the circuit court refused to order the return of stolen Property to its rightful owner.⁴ (*Id.*). Instead, all the parties received was a series of Form 4 Orders denying the motion for temporary injunction, denying the Rule 59(e) motion, and denying the petition for supersedeas.⁵ (**R. 1-9**). MUSC timely filed a notice of appeal on March 21, 2022, appealing the circuit court's denial of its motion for injunctive relief. (**R. 40-41**). That appeal is currently pending before this Court.

³ The Hospital Defendants have asserted, "the [Individual Defendants] had merely agreed to destroy certain documents and records but never agreed they could not or would not use any knowledge or information ... reflected in the various documents and records at issue to carry on their practice of medicine at Trident." (**R. 272**).

⁴ Rule 52(a), SCRPC requires the circuit court to set forth findings of fact and conclusions of law in support of its decision to grant or deny an injunction. Even when MUSC brought this to the attention of the circuit court in its Rule 59(e) motion, the circuit court still refused to set forth any basis for its decision. (**R. 247-48**).

⁵ The circuit court issued a Form 4 Order denying the Moving Parties' motion for temporary injunction on December 15, 2021. (**R. 1**). The circuit court issued a Form 4 Order denying the Moving Parties' motion to alter or amend on February 18, 2022. (**R. 4**). The circuit issued a Form 4 Order denying the Moving Parties petition for supersedeas relief on June 29, 2022. (**R. 7**).

MUSC now petitions this Court to order the Hospital Defendants to return the Property and to refrain from using it while this appeal is pending. This relief would last only during the pendency of the appeal. If this relief is not granted, the Hospital Defendants will continue to erode the competitive advantage MUSC has gained through lawful means.

Legal Standard

Upon serving a notice of appeal, “any party may move for an order imposing a supersedeas of matters decided in the order.” Rule 241(c)(1), SCACR. An application for supersedeas should first be made to the lower court that entered the order, except in extraordinary circumstances. Rule 241(d)(1), SCACR. When determining whether to issue an order under Rule 241, the court “should consider whether such an order is necessary . . . to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. Supersedeas relief under Rule 241(c) may include issuing a temporary injunction during the pendency of an appeal. *See, e.g., Sea Pines Ass’n for Protection of Wildlife, Inc. v. S.C. Dep’t of Natural Res. & Comty. Serv. Assoc., Inc.*, 345 S.C. 594, 598 (2001) (referencing a circumstance where the appellate court properly issued an injunction via writ of supersedeas after the trial court denied appellant’s motion for a temporary injunction).

The purpose of issuing an injunction pending appeal is “to preserve the status quo pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Svcs. Info. Tech. Mgmt. Office*, No. 98-CP-40-3945, 2000 WL 35456881, at *9 (S.C. Comm. Pl. 2000) (citing *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 468 (Ct. App. 1990)). Courts consider the following when determining whether to grant an injunction during the pendency of appeal: (1) the potential for irreparable harm to the appellant if the injunction is not granted; (2) the likelihood

of success on the merits; (3) the prejudice (if any) that could be sustained by the respondent if the injunction is granted; and (4) the public interest. *Unisys*, 2000 WL 35456881, at *9.

Analysis

I. The Hospital Defendants are in unlawful possession of the Property and have no basis in law or equity to retain or use it.

The analysis should begin and end with this uncontroverted fact: the Hospital Defendants are in possession of Property that belongs to MUSC. There is no proposition of law or equity that would allow the Hospital Defendants to retain and use misappropriated materials of another in any context. *See* John Adams, 6 *The Works of John Adams, Second President of the United States* 9 (Charles Francis Adams, ed. 1851) (“The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If ‘Thou shalt not covet’ and ‘Thou shalt not steal’ were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.”). Rather than address this issue head-on, the Hospital Defendants have resorted to distraction and misdirection to attempt to explain why their possession of the Property is not a problem.

For example, the Hospital Defendants have made much of the fact that the Individual Defendants helped develop some of the Property (specifically, the physician preference cards and instrument lists) “based on their know-how.” (**R. 83, R. 222**). Presumably, the implication is that the Individual Defendants have some ownership or other rights to the Property because they helped develop some of it. What the Hospital Defendants ignore is that these tangible materials were developed within the scope of the Individual Defendants’ employment with MUSC. South Carolina courts consistently find that materials developed by an employee (even using his or her know-how) within the scope of employment belong to the employer. *See, e.g., Milliken & Co. v.*

Morin, 399 S.C. 23, 35, 731 S.E.2d 288, 294 (2012) (“An employer therefore has a legitimate interest in protecting inventions that are the fruits of its employees’ efforts while working for the company. Indeed, such provisions are simply a recognition of the fact of business life that employees sometimes carry with them to new employers inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer.”) (internal citations and quotations omitted).

The Hospital Defendants argue that *Milliken* is distinguishable because it involved “an assignment of intellectual rights in ... employment contracts,” which is not at issue in this case because no “such contractual right” existed between MUSC and the Individual Defendants. (**R. 125-26**). This assertion is patently wrong. MUSC’s Code of Conduct, which is part of MUSC’s Faculty Handbook and incorporated into the employment contract with the Individual Defendants, explicitly prohibits employees from disclosing MUSC’s confidential information (which includes the Property) or using such information for the employee’s personal benefit. (**R. 359, R. 405, R. 466**). Thus, the Individual Defendants maintained a contractual obligation not to disclose the Property to the Hospital Defendants, and the finding in *Milliken* is directly on point.

However, even if there were no contract between MUSC and the Individual Defendants with regard to the Property, the law prohibits the Individual Defendants from misappropriating the Property, and the law prohibits the Hospital Defendants from receiving and using the misappropriated Property. The South Carolina Trade Secrets Act, S.C. Code § 39-8-10, *et seq.* (“SCTSA”), and the common law duty of loyalty owed by an employee to his employer prohibit such conduct. *See Colgate-Palmolive Co. v. Carter Prod., Inc.*, 230 F.2d 855, 864 (4th Cir. 1956) (“One may not escape liability for appropriating the business secrets of another by employing one who has been entrusted with the secrets and permitting him to make use of them”); *Nucor Corp.*

v. Bell, 482 F.Supp.2d 714, 723 n.5 (D.S.C. 2007) (“[A] company that hires its competitor’s employees and then induces them to divulge their former employer’s trade secrets, or aids or assists them to violate their trust, is liable to the former employer”); *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972) (per curiam) (When a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage deriving from the employee’s breach of duties of loyalty to his former employer, the new employer is “jointly and severally” liable with the employee for any profits it received from the employee’s wrongful conduct as it relates to his former employer); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 606–07, 518 S.E.2d 591, 595 (1999) (“Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter’s business....”).

The Hospital Defendants have also asserted they were not on notice that the Property received from the Individual Defendants was confidential and proprietary because it was not specifically marked as such. (**R. 85, R. 223**). What the Hospital Defendants ignore is that the law does not require confidential and proprietary property to be marked as such. *See* S.C. Code § 39-8-20(5)(a) (in order for a document or piece of information to have trade secret protection under the SCTSA, a party is only required to engage in reasonable efforts to maintain the secrecy of the documents or information). Moreover, the Hospital Defendants gloss over the fact that upon being informed that the Property was confidential and proprietary, the Hospital Defendants still refused to return it.

The Hospital Defendants have also boldly claimed that when they received the Property from the Individual Defendants, they were unaware that the Individual Defendants took and

disseminated the Property without authorization from MUSC. (**R. 85, R. 223-24**). Even if this absurd assertion were true, MUSC subsequently put the Hospital Defendants on notice that they did not authorize the taking and dissemination of the Property, and yet the Hospital Defendants still refuse to return it.

As a final Hail Mary, the Hospital Defendants argue that in seeking injunctive relief, MUSC is circuitously attempting to prevent the Individual Defendants from using their expertise to perform surgeries as employees of the Hospital Defendants. (**R. 125, R. 274**). To be clear, MUSC is requesting that the Hospital Defendants return and refrain from using the Property that the Individual Defendants misappropriated, which is exactly what the Individual Defendants already agreed to in their settlement agreements. MUSC is not attempting to do anything else. MUSC has made this clear time and time again. During the hearing on the motion for temporary injunction, counsel for MUSC stated, “[W]hat they [the Individual Defendants] know between their head, in their head, they can use. They can’t use our proprietary information.” (**R. 89**). During the supersedeas hearing, counsel for MUSC repeated this sentiment, “Trident HCA is going to . . . say MUSC is just trying to keep these physicians from practicing medicine or MUSC is trying to keep these physicians from using what’s in their head. To be clear, we are not and that’s never been MUSC’s aim. We’re saying you have our materials and we want it back, that’s all we’re saying in this case”. (**R. 111-12**).

The Hospital Defendants have consistently and repeatedly shown, they are either unable or unwilling to engage in fair competition by investing the time and effort to work with their new employees to independently create their own materials. Instead, the Hospital Defendants accepted misappropriated Property from the Individual Defendants and refuse to return it despite having no

right to it. This Court should not allow the Hospital Defendants to continue possessing and using the Property while this appeal is pending.

II. A temporary injunction during the pendency of the appeal is necessary to preserve the status quo, to preserve the fruits of a meritorious appeal, and to prevent a contested issue from becoming moot.

“The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation.” *Peek v. Spartanburg Reg’l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36-37 (Ct. App. 2005). “The status quo to be preserved by a preliminary injunction, however, is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the ‘last uncontested status between the parties which preceded the controversy.’” *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *Stemple v. Bd. of Ed. of Prince George’s Cnty.*, 623 F.2d 893, 898 (4th Cir. 1980)). “To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but ... “[s]uch an injunction restores, rather than disturbs, the status quo ante.” *Aggaro*, 675 F.3d at 378 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)).

Supersedeas relief involves the imposition of an injunction that lasts during the pendency of an appeal. *See* Rule 241(c)(4), SCACR (“If an order is issued pursuant to Rule 241(c)(1), the terms of that order continue in effect during the pendency of the appeal ...”). Supersedeas relief is thus equitable in nature. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (“The power of the court to grant an injunction is in equity.”). The relevant consideration in deciding a petition for supersedeas is whether it is necessary to prevent a contested issue from becoming moot. Rule 241(c)(2), SCACR. Alternatively stated, the inquiry is whether the requested relief is necessary to preserve the fruits of a meritorious appeal where they might otherwise be lost. *Graham*, 301 at 130, 390 S.E.2d at 470. Equitable relief, which includes the

requested supersedeas relief, is “not bound by cast-iron rules” but instead “exists to do fairness and is flexible and adaptable to particular exigencies.” *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009).

Here, the status quo is unmistakable: MUSC is the rightful and sole owner of the Property, and the Hospital Defendants have no right to the Property. The Hospital Defendants never had access to, possession of, or any claim of right to the Property prior to the unlawful misappropriation by the Individual Defendants that precipitated the current lawsuit. Thus, allowing the Hospital Defendants to retain and use the Property during the pendency of the appeal upsets the status quo.

An order requiring the Hospital Defendants to return the Property and refrain from using it during the pendency of appeal is necessary to prevent the contested issue on appeal (*i.e.*, whether the Moving Parties are entitled to a temporary injunction pending a resolution on the merits) from becoming moot. The Hospital Defendants gain an unfair competitive advantage every day they continue to possess the Property—they gain the use of their competitor’s playbook. MUSC’s playbook—the Property—is a product of its experience, innovation, investment of time, and investment of resources over the last two decades. As more time passes with the Hospital Defendants possessing and using the Property, MUSC’s competitive advantage continues to erode. Preserving what remains of MUSC’s competitive advantage can only be achieved through an order protecting the Property during the pendency of this appeal.

III. MUSC meets the required elements for granting a temporary injunction during the pendency of the appeal.

Courts consider the following when determining whether to grant an injunction during the pendency of appeal: (1) the potential for irreparable harm to the appellant if the injunction is not granted, (2) the likelihood of success on the merits, (3) the prejudice (if any) that could be sustained

by the respondent if the injunction is granted, and (4) the public interest. *Unisys*, 2000 WL 35456881, at *9. MUSC succeeds on each of these considerations with regard to the Property.

First, MUSC will suffer irreparable harm if this Court does not enter the requested injunction. A litany of courts have found irreparable harm when a competitor is in possession of specific property belonging to another. *See Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003); *Milliken*, 399 S.C. at 37, 731 S.E.2d at 295; *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014); *see also Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *9 (D.S.C. Sept. 15, 2015) (finding that in cases involving the misappropriation or threatened misappropriation of trade secrets, courts generally presume that the harm from a wrong will be irreparable and “difficult to measure in monetary damages because once the secret is lost, it is indeed lost forever”). Courts have consistently shown disdain for this type of conduct and routinely issue injunctions to protect the former employer’s confidential and proprietary information from exploitation by a new employer. *See, e.g., Indus. Packaging Supplies*, 2012 WL 1067650, at *7 (enjoining both the former employee and the new employer from using and/or selling any products based on former employer’s trade secrets and confidential information, and ordering the return of the information to the former employer).

Second, MUSC has made a prima facie showing of success on the merits. The Court need examine the merits of the plaintiff’s underlying claims “only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief.” *Compton v. S.C. Dep’t of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011); *see Peek*, 367 S.C. at 456,

626 S.E.2d at 37 (“The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made.”). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate [determination] of the case on the merits.” *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1991). “Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” *LaCount v. Gen. Asbestos & Rubber Co.*, 184 S.C. 232, 192 S.E. 262, 266 (1937).

MUSC has made a prima facie showing of success on the merits on its cause of action under the SCTSA. Under the SCTSA, information may be a trade secret only if it “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” S.C. Code § 39–8–20(5)(a). “In order to decide whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Wilson v. Gandis*, 430 S.C. 282, 315, 844 S.E.2d 631, 649 (2020).

MUSC satisfied the elements for a prima facie case for violation of the SCTSA through the affidavits submitted by Dr. Patrick Cawley (CEO of MUSC Health) and Dr. Raymond DuBois (former Dean of the College of Medicine at MUSC). (**R. 144-47, R. 160-63**). The fight the Hospital Defendants have put up to try to retain and use the Property demonstrates the independent economic value it possesses and the difficulty associated with recreating it. If it were not valuable and if it were easy to recreate, the Hospital Defendants would have returned the Property long ago

and developed their own materials. The fact that they have not speaks volumes and demonstrates that the Property possesses the attributes necessary to constitute a trade secret—it derives independent economic value and it is difficult to replicate. In addition, as set forth above in Roman Numeral I, the Hospital Defendants are liable under the SCTSA for receiving and using the misappropriated Property. *See* S.C. Code § 39-8-30(C) (allowing a party to bring an action under the SCTSA if the party is “aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets”).

MUSC has also made a prima facie showing that the Individual Defendants breached their duty of loyalty, for which the Hospital Defendants as the new employers of Individual Defendants are jointly and severally liable. To establish a claim for breach of duty of loyalty, a plaintiff must show the existence of a duty of loyalty, a breach of that duty by the defendant, and damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). An employee owes a duty of loyalty to his employer to remain faithful to the employer’s interests throughout the term of employment, to abide by his employer’s instructions and policies, and to carry out those instructions and policies. *Nucor*, 482 F.Supp.2d at 727 n.9; *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); *Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985); *Berry v. Goodyear Tire and Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551 (1978).

Here, the Individual Defendants breached their duties of loyalty by misappropriating valuable materials belonging to MUSC and providing them to MUSC’s competitor and their new employer, the Hospital Defendants. By receiving the materials and using them, the Hospital Defendants are liable as well. In *Lowndes Prods., Inc. v. Brower*, the Supreme Court held that

when a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage deriving from the employee's breach of duties of loyalty to his former employer, the new employer was "jointly and severally" liable with the employee for any profits it received from the employee's wrongful conduct as it relates to his former employer. 259 S.C. at 337-38, 191 S.E.2d at 769-70.

Third, the Hospital Defendants will not sustain prejudice as a result of being enjoined from continuing to retain and use the Property during the pendency of the appeal. Two federal district courts in South Carolina have found that the defendants will suffer no harm at all when an injunction is issued protecting the confidential and proprietary information of the former employer, because all the injunction does is prevent the defendants from using information that does not belong to them in the first place. *Rockford Mfg.*, 296 F.Supp.2d at 685; *Boone*, 2020 WL 5052956, at *6. Again, the Hospital Defendants have never argued the Property belongs to them. Instead, puzzlingly, counsel for the Hospital Defendants argued at the supersedeas hearing that enjoining the Hospital Defendants' use of the Property would "tie Trident's hands" and cause the "shutting down [of] the care of patients." (**R. 121, R. 125**). But in the *same hearing*, counsel for the Hospital Defendants also stated that "HCA has lots of hospitals around and they have lots of preexisting head and neck units like this one . . . The idea that they needed equipment lists in order to set up an HNO operation is ridiculous." (**R. 122-23**). He also stated that the physicians have the requisite knowledge and "likely [don't] need those cards or those lists." (**R. 121**). So, if the Individual Defendants already have the knowledge they need to treat patients and HCA already has this same

information from its other facilities, how would an injunction related to the Property tie the Hospital Defendants' hands or cause the shutting down of patient care?⁶

In contrast, MUSC would suffer significant prejudice if the Hospital Defendants are allowed to retain and use the Property during the pendency of the appeal. MUSC will have no adequate remedy at law to redress the Hospital Defendants' use of the Property at this crucial stage of developing their competing head and neck cancer program. Courts have recognized that the loss of a trade secret is "difficult to measure in monetary damages because '[a] trade secret lost is, of course, lost forever.'" *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at *20 (D.S.C. Mar. 14, 2008) (citing *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 62 (2d Cir.1984)). Money alone cannot replace the loss of the Property. And if the Hospital Defendants are allowed to continue using the Property in these early, crucial stages of developing their head and neck cancer program, there is no way to make MUSC whole for the damage they would sustain. The only way to protect the Property during the pendency of the appeal and prevent a contested issue from becoming moot is to enjoin the Hospital Defendants from possessing and using the Property.

Fourth, the public interest favors issuing an injunction during the pendency of the appeal. Even if the Moving Parties prevail at trial and are awarded damages, the fact remains that the Hospital Defendants have been allowed to jump-the-line. They have received the unfair competitive advantage of having unlawful access to the Property. If courts refuse to enter injunctions under this particular set of facts, it could encourage competitors to receive misappropriated information, knowing that it may be more economically desirable to receive such

⁶ The Hospital Defendant offer no evidence in support of the bald assertion that patient care would be impacted by the grant of the supersedeas relief. See *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (arguments from counsel are not evidence).

information and pay damages later. Such a policy might prompt competitors to accept misappropriated property, if it saves them time and money on research and development. But issuing an injunction during the pendency of the appeal acknowledges that the value of an employer's confidential and proprietary materials lies in its secrecy and exclusive use in the marketplace, and demonstrates that marketplace competitors cannot gain competitive advantage from misappropriated property while running out the clock on the litigation process.

IV. This Court is not bound by the circuit court's orders denying injunctive relief to the Moving Parties.

The three circuit court Form 4 orders are devoid of any factual findings or legal analysis (which is one basis for the Moving Parties' appeal). The closest indication of the court's reasoning for the denials came from statements made by the circuit court at the end of the hearing on the motion for supersedeas. The court stated that the instant case is distinguishable from "cases involving textile mills or protection of wildlife" because "the Court must view these healthcare cases through a slightly different lens for obvious public policy purposes." (**R. 130**). The circuit court offered no further explanation.

While the Moving Parties are sensitive to the fact that access to safe, quality healthcare is of paramount importance to the public at large, it does not follow that longstanding South Carolina laws protecting employers from misappropriation of their confidential and proprietary materials and imposing duties of loyalty on employees do not apply to hospitals. Hospitals are often the largest employers in their communities, and must be afforded the same protections as other South Carolina employers in order to thrive and provide quality patient care. In the case of MUSC, such protection is necessary to enable it to fulfill its tri-partite mission of education, research, and providing clinical excellence the citizens of South Carolina. (**R. 143, R. 159**). The Moving Parties do not intend to prevent the Hospital Defendants or the Individual Defendants from developing a

competing head and neck cancer program that potentially benefits patients and the community at large. The Moving Parties simply want the Hospital Defendants to compete on a fair playing field by returning and refraining from using the Property.

Notwithstanding the fact that the circuit court's statements are contrary to South Carolina law and the circuit court's orders violate Rule 52(a), SCRCPP, the standard for this Court to issue a writ of supersedeas granting a temporary injunction does not require finding an error by the circuit court. Rather, the standard for issuing a writ of supersedeas is set forth in Rule 241(c), SCACR: the Court should consider whether such an order is necessary to prevent a contested issue from becoming moot. Rule 241 does not mandate a particular standard of review (*i.e.*, de novo or abuse of discretion), nor does Rule 241 require this Court to defer to the circuit court's findings and analysis (which is fortunate because the circuit court in this case did not issue any findings or analysis). This is because the petition for supersedeas under Rule 241 is not an appeal of the circuit court's findings (that appeal is pending separately); instead, it is a direct petition to this Court to protect the fruits of a meritorious appeal and prevent mooting an issue while the appeal is pending.

The circuit court's decision to deny supersedeas relief to the Moving Parties was unjustifiable and contrary to law. If this case remains in the posture in which the circuit court left it, a competitor of MUSC, the Hospital Defendants, will remain in possession of Property that does not belong to them and that they acquired through employee misappropriation. This Court should not allow this to continue.

Conclusion

Pursuant to the authority in Rule 241 of the South Carolina Appellate Court Rules, the Moving Parties submit this petition for writ of supersedeas to Chief Judge Bruce H. Williams, and ask that Chief Judge Williams grant the Moving Parties' petition and require the Hospital Defendants to return the Property to MUSC and order the Hospital Defendants to refrain from

using it while this appeal is pending. This relief would last only while the appeal is pending and would return the parties to status quo—that point in time prior to the misappropriation by the Individual Defendants.

Rule 241(d)(2) of the South Carolina Appellate Court Rules presents Chief Judge Williams with at least two options in deciding this petition. Chief Judge Williams could: (i) grant the requested relief to last during the pendency of the appeal without a full hearing from the entire appellate court, or (ii) grant the requested relief on a temporary basis and refer this matter to the full appellate court for a later hearing to determine whether the temporary relief should continue during the pendency of the appeal. *See* Rule 241(d)(2), SCACR.

The Moving Parties specifically and respectfully request a hearing before either Judge Williams or the full appellate court to decide this petition. This petition details very serious matters that are of significant importance to the Moving Parties.

[signature page to follow]

Respectfully submitted,

BURR & FORMAN, LLP

s/James K. Gilliam

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MEDICAL ASSOCIATES OF THE
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SOUTH CAROLINA*

Columbia, South Carolina
July 22, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-000352
Case No. 2021-CP-10-05289

Medical University of South Carolina and University Medical
Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC;
Terry A. Day; Betsy Kay Davis; Joshua D. Hornig;
Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the Respondents.

VERIFICATION OF APPELLANTS

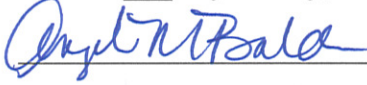
Annette R. Drachman, General Counsel for the Medical University of South Carolina, and
Andrea H. Brisbin, General Counsel for the University Medical Associates of the Medical
University of South Carolina, who being duly sworn, do depose and state that they have reviewed
Appellants' Petition for Writ of Supersedeas and that the matters set forth therein are true to the
best of their knowledge. They specifically submit the verification in support of the factual
assertions in the motion.



Annette R. Drachman, General Counsel for the
Medical University of South Carolina

SWORN to and subscribed before

Me this 21st day of July, 2022.



NOTARY PUBLIC

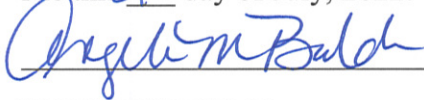
My Commission Expires: August 13, 2023



Andrea H. Brisbin, General Counsel for the
University Medical Associates of the Medical
University of South Carolina

SWORN to and subscribed before

Me this 21st day of July, 2022.



NOTARY PUBLIC

My Commission Expires: August 13, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2022-000352

RECEIVED
Jul 22 2022
SC Court of Appeals

Medical University of South Carolina and University Medical
Associates of the Medical University of South Carolina,..... Appellants,

v.

HCA Healthcare, Inc.; Trident Medical Center, LLC;
Terry A. Day; Betsy Kay Davis; Joshua D. Hornig;
Eric J. Lentsch; David M. Neskey; and Anand K. Sharma,..... Defendants,

Of Which HCA Healthcare, Inc. and Trident Medical Center, LLC, are the Respondents.

PROOF OF SERVICE

I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the Petition for Writ of Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 22nd day of July, 2022, as follows:

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s/Amy C. Elkins
Amy C. Elkins

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Jul 22 2022

SC Court of Appeals

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BURR.COM

July 22, 2022

Chief Judge H. Bruce Williams
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Medical University of South Carolina et al vs. HCA Healthcare, Inc. et al
Appellate Case Number 2022-00352
Civil Case Number 2021-CP-10-05289
Our File Number 2018000.0000026

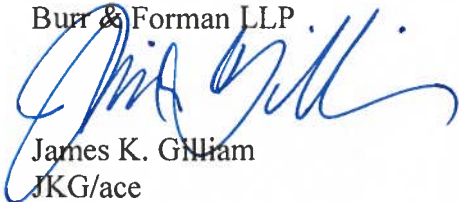
Dear Judge Williams:

Pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules, the Medical University of South Carolina and the University Medical Associates of the Medical University of South Carolina (collectively "Moving Parties") are directing this Petition for Writ of Supersedeas to you for resolution. See Rule 241(d)(2), SCACR (allowing a moving party to petition an individual judge to resolve a petition for writ of supersedeas). The Moving Parties have filed the following documents with the Court of Appeals on July 20, 2022:

- Petition for Writ of Supersedeas,
- Verification of the Moving Parties,
- Appendix to the Petition for Writ of Supersedeas
- Proof of Service

Please let me know if you need anything more from the Moving Parties.

Sincerely,
Burr & Forman LLP


James K. Gilliam
JKG/ace
Enclosures

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Jul 22 2022

SC Court of Appeals

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BURR.COM

July 22, 2022

VIA EMAIL (cctappfilings@sccourts.org)

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Medical University of South Carolina et al vs HCA Healthcare, Inc., et al
Appellate Case Number 2022-00352
Civil Case Number 2021-CP-10-05289
Our File Number 2018000.0000026

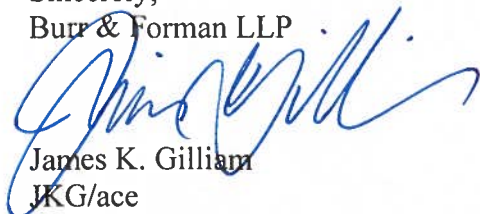
Dear Ms. Kitchings:

Attached for filing with the Appellate Court are the following documents:

- Petition for Writ of Supersedeas,
- Verification of the Moving Parties,
- Appendix to the Petition for Writ of Supersedeas
- Proof of Service

Thank you very much. A check for the filing fees of \$50.00 is being mailed this same date.

Sincerely,
Burr & Forman LLP



James K. Gilliam
JKG/ace

Attachments

cc: All Counsel of Record (w/Attachments, via Email)