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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.

RETURN TO MOTION TO HOLD APPEAL IN ABEYANCE

HCA Healthcare, Inc. ("HCA") and Trident Medical Center, LLC (collectively the "Hospital Defendants") filed a Motion to Hold this Appeal in Abeyance until HCA's Motion to Dismiss for Lack of Personal Jurisdiction is decided by the Business Court.[1] The Medical University of South Carolina ("MUSC") and the University Medical Associates of the Medical

[1] The Hospital Defendants say repeatedly that their Motion to Dismiss is pending before the circuit court. It is not. It is pending before the Business Court, and it has been since February 24, 2022. (**Order for Case Assignment to Business Court**).

University of South Carolina ("UMA") file this Return in response and respectfully ask this Court to deny the Hospital Defendants' motion.

Background

The subject of the appeal before this Court concerns the circuit court's denial of MUSC/UMA's motion for temporary injunction. MUSC/UMA filed this lawsuit and moved for a temporary injunction after learning that the Hospital Defendants were in possession of confidential and proprietary materials belonging to MUSC (defined below as the "Property"). Terry Day, Betsy Davis, Joshua Hornig, Eric Lentsch, David Neskey, and Anand Sharma (collectively "Individual Defendants") were long-term employees of MUSC and members of UMA,[2] providing sophisticated medical care to patients as part of MUSC's head and neck cancer practice. 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. After misappropriating MUSC's Property, the Individual Defendants commenced work for the Hospital Defendants' upstart head and neck cancer practice at Trident Regional Medical Center in North Charleston.

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

[2] 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 also are employed by MUSC as medical school faculty.

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.

Shortly after MUSC commenced this lawsuit, the Individual Defendants agreed to settle with MUSC/UMA. As part of that settlement, the Individual Defendants agreed to pay $1.7 Million[3] to MUSC/UMA, to ***destroy*** the Property in their possession, and to ***refrain from using the Property*** in the future. 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.

Despite the facts of this case, the circuit court denied MUSC/UMA's motion for injunctive relief in a Form 4 Order on December 15, 2021.[4] Thereafter, MUSC/UMA filed a motion to alter or amend under Rule 59(e), SCRCP, which the circuit court denied in another Form 4 Order on February 18, 2022. Then, MUSC/UMA timely filed a notice of appeal. This appeal remains pending before this Court.

While the appeal was pending, MUSC/UMA filed a petition for writ of supersedeas with the circuit court. The circuit court issued another Form 4 Order denying the petition for supersedeas relief on June 29, 2022. Thereafter, MUSC/UMA filed a petition for writ of supersedeas with this Court. This petition remains pending before Chief Judge H. Bruce Williams.

After the filing of this lawsuit, HCA filed a Motion to Dismiss for Lack of Personal Jurisdiction ("Motion to Dismiss"). This motion was scheduled to be heard by the circuit court on

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[3] 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.

[4] Rule 52(a), SCRCP 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.

February 25, 2022. Prior to that hearing, the Hospital Defendants, along with MUSC/UMA, filed two Consent Motions seeking the following relief: (1) assignment of this case to the Business Court, and (2) continuing the hearings scheduled before the circuit court on February 25, 2022. (**Consent Motion to Assign to Business Court; Consent Motion to Continue Hearings**). The parties asked to continue the hearings on February 25, 2022 for a number of reasons, including because "of the pending Motion for Assignment to Business Court." (**Consent Motion to Continue Hearings**). The parties reasoned, "[s]hould the Business Court accept this case, all motions will be heard by the Business Court." (***Id.***)

One day prior to the scheduled hearings before the circuit court, the Honorable Roger M. Young, Sr., Chief Business Court Judge for Administrative Purposes, granted the Consent Motion to assign this case to Business Court. (**Order for Case Assignment to Business Court**). Judge Young assigned "exclusive jurisdiction" over this case to the Honorable J. Maite Murphy "to hear and handle all pretrial motions and other pertaining to this case." (***Id.***) After learning of the assignment of this case to Business Court, the common pleas non-jury coordinator wrote to the parties on February 24, 2022, informing them that the motions would "be removed from tomorrow's docket."

The underlying case, and the Motion to Dismiss, is pending before the Business Court (not the circuit court as argued by HCA), and it has been since February 24, 2022. The Business Court functions differently than the circuit court. For one, the same judge, Judge Murphy in this instance, presides over the case for its entire duration. *See* S.C. Sup. Ct. Order dated Jan. 30, 2019 ("The Business Court Judge shall retain jurisdiction over the case regardless of where he or she is assigned to hold court ...."). For another, unlike circuit court where hearings are scheduled by court administrative staff (such as the clerk of court), in Business Court, parties schedule their own

hearings in conjunction with the assigned Business Court judge. *See Id.* ("The Business Court Judge … may schedule hearings as may be necessary at any time without regard to whether there is a term of court scheduled.").

During the time this case has been pending before the Business Court—from February 24, 2022 to the present (almost five months' time), HCA has made one attempt to schedule a hearing on its Motion to Dismiss, and this one attempt did not occur until June 1, 2022 (more than three months after the assignment to Business Court). This one attempt happened on June 1, 2022, when counsel for HCA sent a rambling three-page letter to Judge Murphy via email at mmurphysc@sccourts.org, requesting a hearing on its Motion to Dismiss.[5] Judge Murphy never responded to the letter, and HCA never followed-up on it.

Despite the important and exigent matters that are pending before this Court (whether to grant a petition for writ of supersedeas and whether to reverse the denial of a motion for temporary injunction), HCA filed this Motion to Hold the Appeal in Abeyance on July 12, 2022. HCA did so after filing its second motion for additional time to file its initial brief. In the Motion to Hold the Appeal in Abeyance, HCA asks for this entire appeal to be held in abeyance until there is a ruling on HCA's Motion to Dismiss.

Analysis

I. The Court should deny the Motion to Hold the Appeal in Abeyance because of HCA's delay in failing to schedule a hearing with the Business Court, and because MUSC/UMA would suffer prejudice if the appeal were held in abeyance.

"[T]he very definition of 'abeyance' is that of 'temporary inactivity' or 'suspension.'" *Blackwell v. Fulgum*, 375 S.C. 337, 345, 652 S.E.2d 427, 431 (Ct. App. 2007) (citing Black's Law

[5] Of note, counsel for HCA did not send a copy of the June 1, 2022 letter to Judge Murphy's law clerk, whose email address is mmurphylc@sccourts.org.

Dictionary 4 (7th ed. 1999)). "To stay an order is to hold it in abeyance or refrain from enforcing it; a stay is a stopping." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). The court's power to impose a stay or hold a matter in abeyance "is incidental to the power inherent in every court to control the disposition of cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 166, (1936); *see State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (The court's power to hear and decide cases "carries with it the inherent power to control the order of its business."); *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999) ("The adjudicative power of the Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants.").

South Carolina courts have not identified an analytical framework to use when deciding a motion to stay or to hold an appeal in abeyance. Other courts, including the Fourth Circuit and federal district courts in South Carolina, have. *United States v. Georgia Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977); *Auto Body Express LLC v. Corp. ADR LLC*, No. 8:20-CV-03349-DCC, 2021 WL 2291776, at *2 (D.S.C. June 4, 2021). The Fourth Circuit, federal district courts in South Carolina, and federal district courts across the country "overwhelmingly" use the test announced by Justice Cardozo in the United States Supreme Court's decision in *Landis*, *supra* or something very similar in deciding a motion to stay. *Kuang v. United States Dep't of Def.*, 2019 WL 1597495, at *3 (N.D. Cal. Apr. 15, 2019).

The decision as to whether to impose a stay calls for "the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55, 57 S.Ct. at 166. The movant requesting a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work

damage to some one else." *Id.* at 255, 57 S.Ct. at 166. In the Fourth Circuit, "[t]he party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983); *see also CTF Hotel Holdings v. Marriot*, 381 F.3d 131, 139 (3d Cir. 2004) (stating that a party seeking a stay must state a clear and countervailing interest to abridge a party's right to litigate).

When looking at the factual circumstances in this case, this Court is faced with competing hospitals—MUSC on the one hand and the Hospital Defendants on the other. The pending appeal and the pending petition for writ of supersedeas concern whether the Hospital Defendants can remain in possession of misappropriated Property from MUSC. As a general proposition, federal district courts typically refuse to impose stays when a case involves direct competitors. *See Nidec Corp. v. LG Innotek Co.*, No. CIV.A. 6:07CV108, 2009 WL 3673433, at *4 (E.D. Tex. Apr. 3, 2009) ("Courts have recognized that where the parties are direct competitors, a stay would likely prejudice the non-movant"); *see also Tesco Corp. v. Weatherford Int'l*, No. H–08–2531, 2009 WL 529212, *3 (S.D.Tex.2009) (listing cases). For this reason alone, this Court should deny HCA's Motion to Hold the Appeal in Abeyance.

If more analysis is needed, this Court should first turn its attention to HCA to decide whether it can carry its burden of persuasion, which it must as the moving party. *See Landis*, 299 U.S. at 255, 57 S.Ct. at 166. In doing so, this Court should examine HCA's conduct to assess whether it is to blame for the fact that its Motion to Dismiss remains pending. It is. The circuit court was scheduled to hear the Motion to Dismiss on February 25, 2022, and HCA, along with MUSC/UMA, moved to continue that hearing in part because of the pending motion to assign the case to Business Court. Once this case was assigned to Business Court (which it has been for

almost five months), HCA has done next to nothing to have its Motion to Dismiss heard. In Business Court, the parties maintain responsibility for scheduling their hearings with the Business Court Judge. *See* S.C. Sup. Ct. Order dated Jan. 30, 2019.

For the first three months when this case was pending before the Business Court, HCA took no action whatsoever to have a hearing scheduled on its Motion to Dismiss. HCA could have reached out to MUSC/UMA and the Business Court to obtain dates when a hearing could occur, but instead, HCA did nothing. HCA made its lone request for a hearing to the Business Court on June 1, 2022. From June 1, 2022 to present date (almost two months' time), HCA has again done nothing. HCA did not even bother asking the Business Court for a hearing on its Motion to Dismiss before filing this Motion to Hold the Appeal in Abeyance.

HCA's actions (or inactions as the case may be) during the five-month time period when this case has been pending in Business Court cannot be ignored and demonstrate that this Court should not stay this appeal until the Motion to Dismiss is decided. If this Court were to hold the appeal in abeyance, it would be rewarding HCA's dilatory conduct. By the same token, if this Court were to hold the appeal in abeyance, it would inflict unreasonable and unfair harm on MUSC/UMA, which have important and exigent matters pending before this Court.

Right now, the Hospital Defendants, an upstart competitor of MUSC's long-standing and nationally renowned head and neck cancer practice, have confidential and proprietary materials belonging to MUSC in their possession. The Hospital Defendants came into possession of this Property not through legitimate means or by accident, but by employee misappropriation. Of course the Hospital Defendants want more delay from this Court and from the Business Court. The more delay the Hospital Defendants obtain, the longer they remain in possession of the Property. The Property has been very important to MUSC in building its head and neck cancer

practice, which it started in the late 1990s. The Property in essence functions as a playbook, enabling MUSC's head and neck cancer practice to operate efficiently and effectively. MUSC did not develop the Property overnight; instead, it was developed over the course of the last two decades by various members of MUSC's head and neck cancer team.

Because the Hospital Defendants have not historically maintained a significant head and neck cancer practice at Trident Regional Medical Center in North Charleston, the Hospital Defendants do not have their own playbook. It would take a significant amount of time and resources for the Hospital Defendants to develop their own playbook. According to the Affidavit of Mr. Timothy Brendle, it would take the Hospital Defendants eight to ten years to develop their own playbook. (**Affidavit of Timothy Brendle**). Rather than doing the hard work themselves, the Hospital Defendants would rather use MUSC's playbook to build their own competitive head and neck cancer practice in North Charleston. By retaining the Property, the Hospital Defendants jump-the-line and erode the competitive advantage MUSC enjoys over the Hospital Defendants as the first-in-time creator and innovator of the Property.

This Court has important substantive decisions in front of it in this case. 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.

These matters not only need to be decided; they need to be decided in a timely manner. If nothing happens or if delay happens, HCA wins. HCA assuredly knows that, and that is why they have filed this instant motion with the Court to obtain more delay.

Based on the foregoing, delay should not be an option this Court is willing to entertain. The parties are direct competitors in the healthcare industry; there are exigent and important matters pending before this Court that need to be decided on a timely basis; MUSC/UMA will suffer if an abeyance is imposed; and HCA's dilatory inaction is to blame for the fact that the Motion to Dismiss remains pending with the Business Court. For these reasons, this Court should deny HCA's Motion to Hold the Appeal in Abeyance.

II. HCA's pending Motion to Dismiss is no reason to delay the entire appeal.

HCA argues the entire appeal (which is asserted against it **and** Trident Medical Center, LLC) should be held in abeyance until HCA's Motion to Dismiss is decided. This argument is illogical. Regardless of how HCA's Motion to Dismiss is decided, the appeal against Trident remains and must go forward. HCA is but one Respondent on appeal, and even if HCA prevailed on its Motion to Dismiss, the appeal against Trident would stay the same—in the exact same posture it is in right now. Thus, contrary to HCA's assertions, there is no judicial economy associated with holding the entire appeal in abeyance pending resolution of one Respondent's Motion to Dismiss. It would actually be inefficient for this Court to do so, as the abeyance would only serve needless delay of an appeal that is inevitable regardless of how the Motion to Dismiss is decided.

Perhaps the Hospital Defendants' argument would be more compelling if they would have sought to stay the appeal against HCA only until the Motion to Dismiss is decided. But, that is not the relief the Hospital Defendants sought. *See State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817

(Ct. App. 1991) ("[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). That is not relief the Hospital Defendants sought because that is not what they want. The Hospital Defendants want the entire appeal delayed (not just the appeal against HCA), so they can have more time to use the Property, and that is why they overplayed their hand and asked for more relief than they could possibly justify. This Court should not hold the entire appeal in abeyance pending the outcome of one Respondent's Motion to Dismiss.

III. The Court could hold the appeal in abeyance if it ordered the Hospital Defendants to return the Property to MUSC and to refrain from using the Property until the abeyance is lifted.

In life and in law, you cannot have it both ways. The Hospital Defendants seek to do just that by asking this Court to stay the appeal until the Business Court decides its Motion to Dismiss. All the while, during the requested stay, the Hospital Defendants would benefit unfairly from retaining and using the Property while the appeal sits at a standstill. MUSC/UMA would suffer during any imposed abeyance as their competitive advantage would continue to erode.

If the Hospital Defendants are to be believed, they do not need the Property. They have said so in open court. During the supersedeas hearing, counsel for the Hospital Defendants stated, "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." (**Supersedeas Transcript pp. 24-25**). Counsel for the Hospital Defendants also stated that the physicians have the requisite knowledge and "likely [don't] need those cards or those lists." (***Id.* p. 23**). 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 the Hospital Defendants be harmed if they returned the Property and refrained from using it until

the abeyance is lifted? A related question is if the foregoing statements are true why are the Hospital Defendants in court in the first place, spending hundreds of thousands of dollars to pay attorneys to ensure they receive just one more day of competitive advantage—of retention and use of the Property?

Nonetheless, if this Court is inclined to allow for the resolution of the Motion to Dismiss before proceeding further with this appeal, this Court should craft an order that does not inflict harm on MUSC/UMA. This Court is well within its power to fashion an order that allows for the Business Court to decide HCA's Motion to Dismiss before taking any further action on the appeal while at the same time protecting MUSC/UMA's competitive advantage by ordering that the Hospital Defendants return and refrain from using the Property during the abeyance. *See Renaissance Enters*, 334 S.C. at 651, 515 S.E.2d at 258 ("The adjudicative power of the Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants."). That way, the abeyance would not create an unfair advantage to the Hospital Defendants.[6]

Conclusion

For the foregoing reasons, MUSC/UMA asks this Court to deny the Hospital Defendants' Motion to Hold the Appeal in Abeyance and grant such other and further relief to MUSC/UMA as may be appropriate under the circumstances.

[*signature block to follow*]

[6] Such a ruling would also render MUSC/UMA's petition for writ of supersedeas moot until the abeyance is lifted.

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