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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

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

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 whom HCA Healthcare, Inc. and Trident Medical Center, LLC; are the..... Respondents.

RETURN TO APPELLANTS' PETITION FOR WRIT OF SUPERSEDEAS

Respondent Trident Medical Center, LLC ("Trident"), respectfully submits the following Return to the Appellants' Petition for Writ of Supersedeas.

INTRODUCTION

In truth, there is no existing writ or order existing in this case to supersede. Appellants have filed what they have styled a Petition for Writ of Supersedeas, which is – in fact – a request for new injunctive relief during the pendency of the appeal. The injunctive relief Appellants now seek to obtain is a variation on the injunctive relief they have requested three times from the circuit court and have been denied. Appellants now shop for a different court to give them what they want, but what they have been unable to establish a right to obtain.

Appellants' Petition should be denied because: (1) they have not established personal jurisdiction over HCA and, therefore, any purported order against HCA would be improper and a nullity; (2) Rule 241, SCACR, does not apply in this case to provide justification or authorization for the Court to impose injunctive relief against Respondents in this case; (3) Appellants have never satisfied their burden to establish the elements necessary to obtain injunctive relief and have not established that the Circuit Court (on three separate occasions) has committed a clear error of law or abused its discretion in denying the requests for injunctive relief; and (4) the injunctive relief requested by Appellants is improperly vague, ambiguous and overbroad.

FACTUAL BACKGROUND

The underlying litigation involves a lawsuit by Appellants against the Respondents and six (6) individual physicians who were formerly employed by or practiced at the Appellants, but who gave notice to and resigned their employment with Appellants in the period of July/August 2021. The resignations were effective December 1, 2021. Appellants alleged a collection of causes of action against only one or more of the physicians and several other causes of action against both the physicians and the Respondents.

In their Complaint, Appellants alleged a cause of action for injunctive relief. At the same time, Appellants filed a Motion for Temporary Injunction. In summary, Appellants seek preliminary injunctive relief which (1) prohibits Respondents from further utilizing Appellants' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data; (2) requires the return of all confidential and proprietary information taken, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data; (3) prohibits Respondents from billing or collecting money for services performed utilizing any of Appellants' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data; (4) prohibits

Respondents from further interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow; (5) prohibits Respondents from contacting any fellowship accreditation bodies regarding MUSC; and (6) prohibits Respondents from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA.

On the day prior to the circuit court hearing on the Motion for Temporary Injunction, Appellants finalized a Settlement Agreement with each of the six (6) individual physician Defendants. In each of those Settlement Agreements, Appellants and the individual physicians agreed only that the Physician "has destroyed, or shall destroy . . . the following specific documents or records (including photocopies) to the extent that any are in Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC and membership with UMA . . . Physician hereby warrants that . . . he will refrain from using any of the documents or records specifically referenced in this Section 2." (emphasis added).

In their Complaint, Appellants allege that prior to the end of the Defendant Physicians' employment, the Defendant Physicians obtained proprietary information from Appellants which was transmitted to Trident. (R. 29; Complaint ¶ 111). Specifically, Appellants allege that the materials misappropriated by the Physician Defendants consist of the following items:

1. Case logs for Defendant Day (R. 23; Complaint ¶¶ 69 and 70);

2. Physician preference cards (R. 22; Complaint ¶ 59);

3. Instrument lists (R. 22; Complaint ¶ 59);

4. Financial information showing the amount of revenue generated by four of the Physician Defendants during their employment with MUSC and MUHA hospital and their RVUs (R. 23; Complaint ¶¶ 65 and 66);

5. Financial information showing the salaries for four of the Individual Defendants received while employed by MUSC (R. 23; Complaint ¶ 66); and

6. Salaries for MUSC's residents and signed contracts for incoming fellows in the Head and Neck Fellowship Program (R. 23-24; Complaint ¶¶ 71, 72, and 73).

However, the Record developed at the circuit court as part of the deliberative process for the Motion for Temporary Injunction reveal that: (a) the case logs at issue in the case are the records of the procedures performed by the physicians in the past, and those documents are used to demonstrate the physicians' competency to perform procedures (R. 524; Affidavit of E. Meuli ¶ 7); (b) it is a standard and routine practice in the practice of medicine for case logs from prior institutions where the physician practiced to be provided to a new hospital where the physician seeks to obtain privileges (R. 524; Affidavit of E. Meuli ¶ 7); (R. 519; Affidavit of P. Horwich ¶ 6); (c) the case logs for the individual physician Defendants presented to Trident bear no designation or notation that they came from MUSC, or that they are trade secrets, or proprietary, or confidential (R. 525; Affidavit of E. Meuli ¶ 11); (d) a physician preference card is a catalogue of the specific tools, supplies, instruments, pharmaceuticals and processes that a particular physician prefers to (R. 17; Complaint ¶ 49); (e) an instrument list is a list of the specific instruments that a particular physician prefers to have available when he/she performs that specific procedure (R. 21; Complaint ¶ 51); (f) the instrument lists and physician preference cards at issue in this case were developed by each of the six individual Defendant Physicians based on their personal knowledge and preferences. (R.170-171; Affidavit of T. Brendle ¶¶ 4-5). Importantly, the Record before the circuit court plainly revealed that the "instrument lists" and "physician preference cards" alleged to have been provided to Trident were not: (i) labeled or identified in any way as coming from, belonging to or involving MUSC or UMA; (ii) labeled or identified in any way as being "Trade Secret;" or (iii) labeled or identified in any way as being "confidential"

or "proprietary." Furthermore, the evidence, (R. 468 - 476; Appellants' Master Exhibits 6 and 7), reflects that the transmissions of those lists and cards to Trident were actually made by employees of MUSC using MUSC emails. There is no allegation or evidence that Trident knew such lists or cards had been "misappropriated" from MUSC, or that the transmissions of those lists and cards (by way of MUSC employees and MUSC email system) were not authorized. In fact, Respondents vigorously dispute such conclusions (which have no factual basis and exist only as naked, conclusory allegations by Appellants).

Additionally, the Record before the Circuit Court reflected that Dr. Peter Horwich—a former MUSC Fellow who studied under the individual Defendant Physicians from July 1, 2019 to June 30, 2020—attested to the fact that when he was being hired at his second fellowship and needed to become privileged at LSU Health Shreveport, he was required to provide his case logs from MUSC to LSU. To accomplish this, he asked the MUSC Nurse Coordinator to provide him with his mentor's (Dr. Hornig) preference cards so that Dr. Horwich could use those preference cards as a template to prepare and submit his preferred instruments to LSU. (R. 519-520; Affidavit of P. Horwich ¶ 6-7). Those preference cards were provided for Dr. Horwich and, at no time did anyone from MUSC assert that the case logs or preference cards were a trade secret, or confidential or proprietary, and no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU. (R. 520; Affidavit of P. Horwich ¶ 8).

PROCEDURAL HISTORY

1. On November 22, 2021, Appellants filed a Complaint against Trident, HCA (collectively with Trident, "Respondents")[1], and six individual physicians[2] who were, at the time, employed by UMA. (R. 10)

2. On the same day Appellants filed their Complaint against Respondents, Appellants filed a Motion for Temporary Injunction. The relief sought by Appellants was an injunction that specifically:

    a. Prohibits Respondents from further utilizing Appellants' allegedly confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data;

    b. Prohibits Respondents from billing or collecting money for services performed utilizing any of Appellants' allegedly confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data;

    c. Prohibits Respondents from further interfering with MUSC's Fellowship Program in any way, or recruiting any MUSC Fellow;

    d. Prohibits Respondents from contacting any Fellowship accreditation bodies regarding MUSC;

    e. Prohibits Respondents from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA; and

    f. Requires Respondents to return all allegedly confidential and proprietary information taken, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data.

(R. 38-39).

3. On December 7, 2021, HCA filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(2), SCRCP, based upon the circuit court's lack of personal jurisdiction over HCA.

[1] As discussed more fully in the Rule 12(b)(2) Motion to Dismiss filed by HCA, Appellants have not met their burden of establishing that any South Carolina State Court has personal jurisdiction over HCA, and given that, the Court cannot order injunctive relief against HCA.

[2] After filing the above-captioned lawsuit, Appellants settled their claims with the Individual Defendant Physicians.

That same day, HCA filed an affidavit of Michael Bray and a Memorandum of Law in Support of its Motion to Dismiss. (R. 497).

4. On December 9, 2021, the circuit court held a hearing on the Appellants' Motion for Temporary Injunction against Respondents. Prior to that hearing, Trident submitted a memorandum of law in opposition to Appellants' Motion for Temporary Injunction. In that memorandum, Trident again asserted the argument that Appellants have not met their burden to establish that the circuit court has personal jurisdiction over HCA and, therefore, the circuit court could not properly order injunctive relief against HCA. (R. 213).

5. On December 9, 2021, the circuit court held a hearing on the Appellants' Motion for Temporary Injunction.

6. Six (6) days later, on December 15, 2021, without conducting any hearing on HCA's Motion to Dismiss or issuing any decision on the issue of personal jurisdiction over HCA, the circuit court issued an order denying Appellants' Motion for Temporary Injunction. The circuit court's order denied Appellants' Motion on the grounds that Appellants failed to demonstrate that irreparable harm would occur if the temporary injunction is not granted and Appellants failed to sufficiently demonstrate that they do not have an adequate remedy at law for their purported claims. (R. 1).

7. On December 28, 2021—the last possible day—Appellants filed a Motion to Alter or Amend the Court's order denying their Motion for Temporary Injunction. (R. 237).

8. On February 18, 2022, the circuit court denied Appellants' Motion to Alter or Amend. (R. 4).

9. On March 11, 2022, the circuit court granted Appellants' request for protection for Appellants' counsel "and her clients from the scheduling of hearings or trial" between

March 24, 2022, and April 15, 2022, because "Counsel has long standing vacation out of the country and has purchased airline tickets and hotel accommodations." (R. 494).

10. Thirty (30) days after the circuit court issued the Order denying the Motion to Alter or Amend, on March 21, 2022—the last possible day—Appellants filed a Notice of Appeal of the circuit court's two prior orders denying Appellants' request for injunctive relief.

11. On March 25, 2022, one hundred twenty-three (123) days after their initial Motion for Temporary Injunction was filed, 100 days after it was denied, and 35 days after denial of their Motion to Alter or Amend, Appellants filed a Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal. That motion sought, for a third time, an order from the circuit court imposing injunctive relief to which the circuit court had twice previously found Appellants were not entitled. However, in that Motion Appellants altered their request for injunctive relief and asked the circuit court to issue an injunction prohibiting Respondents "from retaining and using Plaintiffs' Property while the appeal is pending." (R. 250; 253)

12. On June 29, 2022, the circuit court issued an order denying Appellants' Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal. (R. 7).

13. On July 22, 2022—twenty-three (23) days after the circuit court denied the Motion to Supersede Prior Orders Denying Appellants Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal—Appellants filed a Petition for Writ of Supersedeas with the Court requesting the Court to issue an order: (a) superseding the circuit court orders denying the Appellants' requested injunctive relief, and (b) imposing a temporary injunction on Respondents that would "require the [Respondents] to return the Property and to refrain from using it while this appeal is pending."

STANDARD OF REVIEW

A writ of supersedeas is an order suspending another writ previously issued. A writ of supersedeas merely directs the officer to whom it is issued to refrain from executing or acting on another writ which may have previously been issued. *See Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946). Supersedeas suspends proceeding; it does not impose new proceedings or obligations.

In this case, Appellants have specifically and expressly couched their Petition as being one "[p]ursuant to Rules 240(a) and 241(c) of the South Carolina Appellate Court Rules . . . ." (Appellants' Petition p. 1). While it has been said that the purpose of a supersedeas is to preserve the status quo pending the determination of an appeal, *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990); *see also* 83 C.J.S. *Supersedeas* § 8 at 896 (1953) (a supersedeas suspends the judgment but does not annul the judgment itself), in fact, a review of a petition for writ of supersedeas pursuant to Rule 241, SCACR, has as its premise that the "appellate court . . . should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

South Carolina appellate courts are historically reluctant to grant injunctive relief during the pendency of an appeal. *See Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (denying a motion for injunctive relief during the pendency of an appeal "on the ground that petitioners have not clearly shown that, pending the appeal, it will result in irreparable injury or the miscarriage of justice."). In *Silverthorne v. Barnwell Lumber Company*, Justice Fraser denied the appellant's request for an injunction during the pendency of the appeal and found:

> A justice of this court has the power to make the order of injunction; **but it ought not to be exercised unless the right of the appellant is very clear and beyond reasonable question**. I cannot say that the appellant's right is clear and beyond reasonable question . . . The questions [in this case] are not **so clear as to warrant a single**

> **justice of this court in practically reversing the judgment of the circuit judge**.

96 S.C. 32, 79 S.E. 519, 519-20 (1913) (emphasis added).

The United States Supreme Court has applied a similar heightened standard when reviewing requests for injunctive relief during the pendency of an appeal. Like Rule 241, SCACR, the All Writs Act, 28 U.S. C. § 1651(a), provides the United States Supreme Court with the authority to issue writs necessary or appropriate to preserve jurisdiction. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403, 133 S. Ct. 641, 642–43, 184 L. Ed. 2d 448 (2012). The Supreme Court has found that this Act authorizes the issuance of temporary injunctive relief during the pendency of an appeal; however, in deciding whether to grant an injunction while an appeal is pending, the United States Supreme Court has stated that, "a request for an injunction pending appeal 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (citation omitted). In analyzing whether to provide relief that was previously denied by a lower court, the United States Supreme Court has repeatedly found that injunctions during the pendency of an appeal should only be issued "when it is '[n]ecessary or appropriate in aid of [the court's] jurisdiction' and '**the legal rights at issue are indisputably clear**.'" *Id.* (emphasis added); *Respect Maine PAC v. McKee*, 562 U.S. 996, 131 S. Ct. 445, 178 L. Ed. 2d 346 (2010).

ARGUMENTS

I. The Court must deny the Petition which seeks to impose injunctive relief over HCA because the Court lacks personal jurisdiction over HCA and, in the absence of such jurisdiction, the Court may not impose an injunction on HCA.

Appellants' Petition for a Writ of Supersedes requests the Court issue an injunction that is binding on both HCA and Trident during the pendency of the above-captioned appeal. In order for the Court to impose relief (the injunction) against HCA, the Court must have jurisdiction over

HCA to issue an injunction that is binding on HCA.[3] *See* Rule 65(d), SCRCP; *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) (stating that "a party cannot obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that person").

It is the burden of the party seeking to have the injunctive relief imposed to establish that personal jurisdiction over the other party exists in the first place. As demonstrated by HCA's pending Motion to Dismiss, pursuant to Rule 12(b)(2), for lack of jurisdiction, Appellants have not satisfied their burden of establishing that any South Carolina State Court has personal jurisdiction over HCA. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). Without established jurisdiction over HCA, no injunction issued by the Court can be binding over HCA. Whether South Carolina courts have personal jurisdiction over HCA must be decided first – because judgements made by courts which lack personal jurisdiction are void and a complete nullity. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002); *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617-18, 799 S.E.2d 310, 316 (Ct. App. 2017).

II. Granting Appellants' Petition is not necessary or appropriate under Rule 241(c)(2), SCACR, to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

In reviewing a Rule 241 Petition, the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. That consideration is the lynch-pin for the Court to grant any relief under Rule 241(c). In this case, no such action by the Court is necessary for that purpose and, therefore, no relief under Rule 241 is appropriate. Granting Appellants' Petition would not

[3] On July 12, 2022, Respondents filed a Motion to Hold the Appeal in Abeyance until the lower court rules on HCA's pending Motion to Dismiss pursuant to Rule 12(b)(2). That Motion is pending.

serve these limited purposes or objectives established by the Rule; therefore, the Petition should be denied.

Appellants' Petition does not seek to prevent the issues on appeal from being rendered moot. The purpose of Rule 241, is not to allow Appellants another bite at the apple, or to grant relief that materially alters the status of the issues on appeal, or renders the issues on appeal moot. *Melton v. Walker*, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946).

Appellants are, in fact, not asking the Court to supersede any existing writ of the circuit court, but rather to *grant* an injunction which has three times been denied to them after full hearing. Appellants seek to have this Court, while the case is already on appeal, completely overrule the prior decisions by the Circuit Court and simply grant them their ultimate relief – an injunction – which they have not earned and do not deserve.

When a case is already in the appeal stage, the standard for issuance of an injunction is altered. In reviewing requests for injunctive relief pending appeal, South Carolina courts have found that the legitimate purpose of the injunction must be to maintain the status quo at the time the order on appeal was issued. *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Cnty. Council of Charleston v. Felkel*, 244 S.C. 480, 483-84, 137 S.E.2d 577, 578 (1964) ("It is apparent upon its face that the Order appealed from is a temporary restraining Order. The sole object of a temporary injunction is to **preserve the subject of controversy in the condition which it is at the time of the Order** until opportunity is offered for full and deliberate investigation." (emphasis added) (citations omitted)).

When the original request for injunctive relief is denied, and the matter is already on appeal, the status quo that is then relevant is the status quo at the time of the appeal. When an appeal

exists, the purported status quo at the time the original suit was filed, or when the original request for injunctive relief was made, is not the relevant concern. *See id.*

While Appellants attempt to argue that their Settlement Agreements with the individual Physician Defendants should somehow alter the perspective of their current efforts to obtain injunctive relief against Respondents, which relief has never before been granted or existed, their argument is meritless. The Settlement Agreements with the individual Physician Defendants should have no bearing or preclusive effect with regard to the Respondents.

At the time the circuit court first denied Appellants' Motion for Temporary Injunction: (i) all claims against the original Physician Defendants had been released and dismissed; (ii) contrary to Appellants' misrepresentations, in the Settlement Agreements between the physicians and Appellants, the physicians merely agreed that they "destroyed, or shall destroy . . . the following specific documents or records (including photocopies) to the extent that any are in Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC and membership with UMA . . . Physician hereby warrants that . . . he will refrain from using any of the documents or records specifically referenced in this Section 2" (emphasis added); and (iii) the physicians never agreed that they could not or would not use any knowledge or information they had, even if acquired while employed by Appellants or even if reflected in the various documents or records at issue. This was the status quo at the time the circuit court denied Appellants' Motion for Temporary Injunction. Indeed, this status quo is what is specifically at issue in Appellants' appeal.

Appellants' Petition does not seek to protect this status quo. Instead, Appellants improperly ask the Court to materially alter the status quo – in their favor. The law does not sanction Appellants' manufacturing a fictional status quo as the basis for obtaining a writ of supersedeas, which is not really a supersedeas, but a newly imposed injunction. The status quo in

this case at the time the circuit court denied Appellants' Motion for Temporary Injunction, and when the pending appeal was filed, was that there was no injunction in place.

The Settlement Agreements executed by and between the Defendant Physicians and Appellants do not bar the Defendant Physicians from using the knowledge and skills associated with providing head and neck oncology treatment at Trident's facilities. For Appellants to have voluntarily executed settlements with the physicians on these terms but then seek to prevent Trident (where the physicians carry on their medical practices) from "using" the same information that the physicians are free to use, is not merely inconsistent, it is incongruous.

For example, the disputed physician preference cards indicate how a particular physician prefers to have his or her operating room set up for surgery. Appellants' own Affidavits offered to the circuit court in support of their Motion for Temporary Injunction admits explicitly that the preference cards and equipment lists were created by the individual Physician Defendants. There is no evidence offered that the Physicians could not recreate those cards and lists from their own knowledge or experience, or that the Physicians or Trident could not operate the HNO practice at Trident without them. Nonetheless, Appellants' requested injunctive relief in the original Motion for Temporary Injunction was that "[Respondents] be prohibited from further utilizing [Appellants]' confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data" (emphasis added); and "prohibit[ing] [Respondents] from billing or collecting money for services performed utilizing any of [Appellants]' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data." (emphasis added) If Trident's "use" of information about the physicians' preferences were enjoined, MUSC might argue that any surgeries at Trident that reflected a Defendant Physician's past preferences were also enjoined. So construed, the requested injunction would gut a key provision of the Defendant Physicians' settlements with MUSC, making it

difficult if not impossible for them to perform their surgeries at Trident. Therefore, Appellants' Petition does not preserve the status quo at the time the orders on appeal were issued or prevent the issues of appeal from being rendered moot. Accordingly, Appellants' Petition should be denied.

III. Appellants have never satisfied their heavy burden of establishing entitlement to the extraordinary remedy of injunctive relief.

Appellants assert that Rule 241(c)(3), SCACR, permits the Court to "order other affirmative relief upon such terms as are deemed appropriate." In truth, this language in the Rule does not alter the aforementioned condition that any relief under Rule 241 is first predicated on it being established that the relief sought is necessary to "preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." And, while there may be a case when the Court has authority to grant injunctive relief while an appeal is pending, South Carolina courts analyzing whether to issue an injunction while an appeal is pending have applied a heightened standard of review (compared to the issuance of a temporary injunction pursuant to Rule 65, SCRCP). The courts have concluded that an injunction should not be issued unless "the right of the appellant is very clear and beyond reasonable doubt." *Silverthorne v. Barnwell Lumber Company*, 96 S.C. 32, 79 S.E. 519, 519-20 (1913). Similarly, South Carolina Courts have found that the entitlement to such relief must be "clearly shown." *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912). This heightened standard apparently increases the burden applied by courts analyzing whether to issue a Rule 62, SCRCP, injunction during the pendency of an appeal. To obtain such injunctive relief during the pendency of an appeal pursuant to Rule 62, Appellants bear the burden of establishing:

1. Appellants are likely to succeed on the appeal;
2. Appellants would suffer irreparable harm if the injunction is not granted; and

3. Appellants have no adequate remedy at law.

Alcala v. Hernandez, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015); *George Sink PA Inj. Laws. v. George Sink II L. Firm LLC*, No. 2:19-CV-01206-DCN, 2019 WL 6318778, at *7 (D.S.C. Nov. 26, 2019); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1987042, at *2 (N.D. Cal. June 4, 2012).[4]

A. Appellants do not, and cannot, establish that there is a likelihood of success on their appeal.

1. Appellants are not likely to succeed on the appeal of the merits of their claim for violation of the South Carolina Trade Secrets Act.

In order to find that Appellants have established a likelihood of success on the merits on the pending appeal, the Court must conclude that Appellants have established:

> a probability (not mere possibility) of success of the ultimate trial on the merits. "Probability of success" implies that the plaintiff must have a very clear and strong case. Some courts have stated this in terms by the maxim that in considering preliminary injunctive relief "to doubt is to deny." That is, if there is doubt as to the probability of plaintiff's ultimate success on the merits, the preliminary injunction must be denied.

Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991) (citing 2 McCarthy on Trademarks and Unfair Competition, §30.16, at 485-86 (2d ed. 1980)).

Because Appellants have specifically and expressly grounded their Petition on the assertion that they have a valid claim under the South Carolina Trade Secrets Act, it is necessary and critical to assess whether Appellants have established that they are likely to succeed on the merits of their Trade Secrets Act claim. As the circuit court has previously concluded, examination of that issue

[4] "In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (citing *Gardner v. Newsome Chevrolet–Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991)).

leads overwhelmingly to the conclusion that Appellants are not likely to be successful on the merits of their claim.

In this case, Appellants have alleged their Trade Secrets Act Cause of Action in only the broadest, most conclusory terms. They simply say (*ipse dixit*) that the information at issue in this case "is proprietary to MUSC and UMA." (R. 32; Complaint ¶ 128). They merely say the information has independent economic value. (R. 32; Complaint ¶ 129). They simply conclude that they make "reasonable efforts to maintain the secrecy . . . including but not limited to confidentiality agreements." (R. 32; Complaint ¶ 130).

To the contrary, other allegations of the Complaint, as well as the Exhibits attached to the Complaint, and the Affidavits filed in support of the Motion for Temporary Injunction, reveal a more complete, and very different, story. In particular, facts (rather than merely self-serving conclusory statements) reveal:

a. The instrument lists and physician preference cards at issue in the case were developed by the Defendant Physicians. (R. 170; Affidavit of Timothy Brendle, ¶ 4-5).

b. The so-called "Code of Conduct" incorporated in the bowels of the so-called "MUSC Faculty Handbook" merely states that "No employee shall disclose confidential information or use such information for his or her personal benefit." (R. 466). Nowhere is there evidence that Appellants ever identified what information was "confidential," and certainly not that the information and documentation at issue in this case was "confidential."

c. The "instrument lists" and "physician preference cards" which are alleged in this case to have been provided to Trident: (i) were not labeled or identified in any way as involving or belonging to MUSC or UMA; (ii) were not labeled or identified in any way as being "Trade Secret;" and (iii) were not labeled or identified in any way as being "confidential" or "proprietary." (R. 468 – 476).

d. The evidence (Appellants' Master Exhibits 6 and 7) reflects that the transmissions of those lists and cards to Trident were made by employees of MUSC using MUSC emails. There is no evidence that Trident knew such lists or cards had been misappropriated from MUSC or that the transmissions of those lists and cards (by way of

MUSC employees and MUSC email system) were not authorized. (R. 468 – 476).

It is axiomatic that there can be no claim or protection available under the Trade Secrets Act unless Appellants establish that there is a trade secret. To constitute a trade secret, the information must be secret. *Carolina Chem. Equip., Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). When the information claimed to be a trade secret is readily ascertainable from other sources, it does not qualify for protection under the Trade Secrets Act, S.C. CODE ANN. §39-8-20 (5). Information does not qualify for trade secret protection when the information can, with reasonable effort, be properly acquired or duplicated by or through others. *See Carolina Chem. Equip., Co.*, 322 S.C. at 296, 471 S.E.2d at 724. Even the affidavits submitted by Appellants in support of the Motion for Temporary Injunction admits that the lists and cards were, in fact, prepared by the individual physicians. There is not a scintilla of evidence that those physicians were not capable of duplicating such cards and lists from their own knowledge, skill and general memory.

One of the alleged trade secrets at issue in this case is "financial information" such as physician salaries. In *Campbell v. Marion Cty. Hospital Dist.*, 354 S.C. 274, 289, 580 S.E.2d 163, 170 (Ct. App. 2003), the court held that such information does not constitute a trade secret and is not even exempted from FOIA by a public hospital. So, Appellants cannot succeed on a claim to protect or restrict access to such information.

More broadly, a person otherwise entitled to trade secret protection must take all proper and reasonable steps to keep it secret, in order to maintain legal protection. *See Lowndes Prod., Inc. v. Brower*, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972). When Appellants fail to demonstrate that they, in fact, took proper and reasonable steps to protect their alleged secrets – and how they did that – their lack of proper precautions supports the conclusion that a secret (or

its protection) was not intended and does not exist. *See id.* at 329, 191 S.E.2d at 765. As the Supreme Court of South Carolina declared:

> [E]ternal vigilance in the form of constant warnings to all persons to whom the trade secret has become known and obtaining from each an agreement, preferably in writing, acknowledging its secrecy and promising to respect it, is required.

Id. at 331, 191 S.E.2d at 766.

Appellants utterly failed to make any demonstration that they exercised such "eternal vigilance." As the *Lowndes* court stated, to prove it exercised the kind of "eternal vigilance" required, a claimant must [prove it has taken steps to provide "constant warnings to all persons to whom the trade secret has become known" along with requiring an] acknowledgement from such persons that they have been advised of the secrecy of the information and a promise to respect it, preferably in writing. *Id.* Further, South Carolina law is clear that "warnings alone are insufficient to place a trade secret within the sphere of protection provided by the [Trade Secrets] Act." *Hill Holliday Connors Cosmopulos, Inc. v. Greenfield*, 433 Fed App's 207, 215 (4th Cir. 2011). In order to enjoy protection under the Trade Secrets Act, a plaintiff must demonstrate reasonable efforts to maintain secrecy and "isolated steps" toward secrecy are not enough. *See Lowndes Prods.*, 259 S.C. at331, 191 S.E.2d at 766.

In addition to Appellants' failure to demonstrate that they took proper and reasonable steps to protect the purported trade secrets, Appellants make no substantiated allegation that Respondents knew or should have known the physician cards, equipment lists, and case logs were considered to be Appellants' trade secrets. In fact, as stated in the affidavits of Dr. Horwich and Elaine Meuli, this information (equipment cards, lists, and case logs) is not confidential, proprietary, or considered to be a trade secret. (R. 520; Horwich Affidavit ¶¶ 7, 8); (R. 524-525; Meuli Affidavit ¶¶ 7 -13).

Appellants clearly have failed to demonstrate that they are likely to succeed on the merits of their claim in a manner that is "very clear and beyond reasonable question." Accordingly, the Court should deny Appellants' Petition and decline to grant Appellants' their requested temporary injunctive relief pending the resolution of the appeal.

B. Appellants have not, and cannot, show that they will suffer irreparable harm if the Petition is denied.

It is fundamental that an injunction cannot issue unless Appellants satisfy their heavy burden of demonstrating that they **will** suffer an irreparable harm if the temporary injunction is not issued. *Twin City Power Co. v. Savannah River Electric Co.*, 163 S.C. 438, 161 S.E. 750 (1930), *app. dism'd*, 284 U.S. 574, 52 S. Ct. 17 (1931); *see also S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

To satisfy this burden, Appellants must demonstrate "more than the mere 'possibility' of being irreparably harmed; rather, the [Appellants] must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *George Sink, P.A. Inj. Laws.*, 407 F. Supp. 3d at 559.

At this point, the only proper inquiry is how Appellants will be irreparably harmed from this point forward. They seek to impose an injunction now. So, why is it necessary now to prevent irreparable harm in the future. The individual physician Defendants have been performing the medical procedures away from MUSC for eight (8) months. It is not enough for Appellants to assert or argue that the irreparable harm is "merely problematic" or "conditioned on possible future events." *Direx Israel, Ltd.*, 952 F.2d at 816. Appellants must present probative evidence that there exists a "present threat of irreparable harm." *Id.*

In this case, Appellants have couched their allegations of irreparable harm as being "potential." Specifically, in their original Motion for Temporary Injunction (Page 6, Section II), Appellants candidly admitted that "MUSC's Head and Neck Fellowship Program faces potential irreparable harm without issuance of this requested injunctive relief." (emphasis added). Now, at

this stage, Appellants can make no specific allegation of even "potential" irreparable harm from now into the future.

Furthermore, while Appellants assert that they will suffer irreparable harm without the requested extraordinary (injunctive) relief, Appellants own actions belie this assertion. If the Appellants were to actually suffer an imminent and irreparable harm without the issuance of an injunction, then Appellants would have acted urgently after each instance when the circuit court denied Appellants' request for such relief. However, instead of taking immediate action following the circuit court's denials of Appellants' requests for injunctive relief, Appellants waited days—if not weeks—to take another action attempting to obtain the requested injunctive relief. Such delay and a complete lack of urgency on behalf of the Appellants further evidences the fact that Appellants will not suffer irreparable harm if the Court denies Appellants' Petition.

Because there is no viable assertion or claim of irreparable harm going forward, and there is no presumption of irreparable harm applicable in this case, the Petition must fail. *Atwood Agency v. Black*, 374 S.C. 68, 72-73, 646 S.E.2d 882, 884 (2007).

IV. The injunctive relief Appellants request is improperly vague, ambiguous, and overbroad.

Every order granting injunctive relief "shall be specific in terms" and "shall describe in reasonable detail . . . the act or acts sought to be restrained." Rule 65(d), SCRCP. The use of the word "shall" means an action is mandatory. *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608-09, 790 S.E.2d 430, 434 (Ct. App. 2016). As observed in Federal Court decisions, since an injunction prohibits conduct under threat of judicial punishment and contempt, the terms of the injunction must be sufficiently specific and clear so as to provide explicit notice to the litigant of precisely what conduct is prohibited. *See Lau v. Meddaugh*, 229 F. 3d 121, 123 (2d Cir. 2000).

In this case, the injunctive relief requested by Appellants lacks the necessary specificity. Moreover, the requested relief has been changing from the original Motion for Temporary

Injunction (now on appeal) to the current Petition for Writ of Supersedeas. For instance, Appellants seek an Order prohibiting Respondents from "using" Appellants' "Property," which they argue includes the instrument lists and physician preference cards. What does it mean to "use" the preference cards or instrument lists? Of course, in their original Motion for Temporary Injunction, we know plainly that Appellants were asking for far more than merely Defendants not using the physical cards and lists. They demanded that Defendants be prohibited from "utilizing" the "information," which apparently Appellants assert merely "includ[es]" the lists and cards. So Appellants clearly want an injunction that allows them the opening to argue that the experience and knowledge gathered and developed by the Defendant Physicians, which Appellants admitted in their Affidavits is what was used by the Physicians who developed the cards and lists, is now to go to waste. In effect, Appellants seek to enjoin the Defendant Physicians from practicing medicine at Trident, since Trident would be prohibited from "using" (whatever that means) the information on the instrument lists and physician preference cards. Trident cannot conform its behavior to an injunction (or any restriction) which does not define what it means to "use" Appellants' "Property." And how does one possibly understand a restriction not to "use" information – particularly when that use will actually be by the Physicians who developed the information.

Despite Appellants' arguments that they are not seeking to prevent Trident from providing healthcare services, the express goal of Appellants' Petition is to obtain an order prohibiting Trident employees from "using" information related to the provision of healthcare services. An order barring the use of such information is an order barring the provision of healthcare services to patients in need of them. At a minimum, the requested relief is non-specific, vague and ambiguous. Imposing the threat of contempt on a party based on such non-specific, vague and ambiguous terms cannot be condoned. South Carolina law does not allow it.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition for Writ of Supersedeas.

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August 1, 2022
Columbia, South Carolina

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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

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

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 whom HCA Healthcare, Inc. and Trident Medical Center, LLC; are the..... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on August 1, 2022, copies of **RESPONDENTS' RETURN TO PETITION FOR WRIT OF SUPERSEDEAS** and **RESPONDENTS' SUPPLEMENTAL APPENDIX FOR RETURN TO PETITION FOR WRIT OF SUPERSEDEAS** were served on all counsel of record via emails containing the above referenced document to counsels' individual AIS email addresses:

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