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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.

REPLY TO TRIDENT'S RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

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Appellants Medical University of South Carolina ("MUSC") and University Medical Associates of the Medical University of South Carolina ("UMA") respectfully submit this Reply to the Hospital Defendants' Return to the Petition for Writ of Supersedeas.[1]

INTRODUCTION

The Hospital Defendants' Return does not articulate a single reason why this Court should permit them to remain in possession of Property that does not belong to them and that they acquired through misappropriation. In the Return, the Hospital Defendants do not dispute that they are in possession of the Property and that the Property in fact belongs to MUSC. Logic and fairness (fairness of course being the touchstone of equity) dictate that the Hospital Defendants, as competitors of MUSC, must return and refrain from using the misappropriated Property during the pendency of this appeal. If such relief is not granted, the fruits of the pending appeal will be devoured, as the Hospital Defendants will continue to possess and use the Property until this appeal is decided. Every day the Hospital Defendants continue to possess and use the Property constitutes further erosion of the competitive advantage MUSC enjoys over the Hospital Defendants as the first-in-time innovator and creator of the Property. To preserve this advantage, MUSC seeks supersedeas relief to protect the Property until this appeal can be decided.

ARGUMENT

I. The Hospital Defendants do not respond to MUSC's argument that supersedeas relief is necessary to prevent this appeal from becoming moot.

Rule 241(c)(2), SCACR identifies two reasons why supersedeas relief will be granted—to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot. The latter reason is applicable here.

[1] There were several defined terms in the Petition, such as "Property," "Individual Defendants," and "Hospital Defendants." Those defined terms in the Petition continue to have the same meaning in this Reply.

Courts perform the mootness analysis by inquiring whether a supersedeas is necessary to preserve the fruits of a meritorious appeal where they otherwise might be lost. *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 468, 470 (Ct. App. 1990). In the Petition, MUSC argued and presented evidence that Hospital Defendants' retention and use of the Property during the pendency of appeal irreversibly erodes MUSC's competitive advantage in having developed the Property over several decades prior to the Hospital Defendants starting a competing head and neck cancer practice in North Charleston. Thus, an injunction is necessary to preserve what is left of MUSC's competitive advantage during the pendency of the appeal.

The Hospital Defendants' several-page diatribe purportedly addressing the mootness issue never actually discusses or responds to MUSC's arguments. (**Return pp. 11-15**). This is because the Hospital Defendants cannot deny that the fruit of a meritorious appeal in this case is MUSC's competitive advantage, and the Hospital Defendants cannot deny that this competitive advantage will be lost the longer the Hospital Defendants retain unfettered access to the Property. Lacking the ability to effectively rebut MUSC's mootness arguments, the Hospital Defendants instead summarily declare that a supersedeas would not prevent issues on appeal from becoming moot. The Court should disregard the Hospital Defendants' conclusory statement and find that supersedeas relief is necessary to preserve the fruits of MUSC's appeal.

II. The Hospital Defendants seek to define "status quo" in such a way as to strip this Court of its power to grant supersedeas relief as contemplated by Rule 241.

The Hospital Defendants opine at length on the concept of "status quo" for purposes of granting supersedeas relief. The condensed version of their argument is that the relevant time-period for defining status quo is the date of the circuit court order, and this Court cannot require the Hospital Defendants to return and refrain from using the Property because it was in the Hospital

Defendants' possession at the time the circuit court denied MUSC's motion for temporary injunction.[2] The Hospital Defendants' arguments are incorrect for four reasons.

First, the Hospital Defendants have sought to define status quo in such a way as to make supersedeas relief impossible. If the Hospital Defendants were correct, neither this Court, nor the Supreme Court would ever have the power to grant supersedeas relief after the circuit court issues an order, because the status quo would be the way things are at the time of the circuit court's order. The Hospital Defendants' argument disregards the plain language of Rule 241(c)(1), SCACR, which states "any party may move for an order imposing a supersedeas ***of matters decided in the order . . . on appeal***."[3] (emphasis added). Under the Hospital Defendants' view of things, this State's appellate courts are powerless to grant supersedeas relief after the circuit court enters an order. That is not what Rule 241 says, and that is not how appellate courts function. Appellate courts were not created to sit idly by and remain powerless. Rule 241 recognizes this and empowers appellate courts to grant supersedes relief to prevent contested issues on appeal from becoming moot.

Second, the Hospital Defendants' reading of Rule 241 disregards case law. In *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, 550 S.E.2d 287, 290 (2001), the South Carolina Court of Appeals granted a petition for writ of supersedeas, which imposed an injunction during the pendency of appeal, after the

[2] The Hospital Defendants argue "[t]he status quo in this case at the time the circuit court denied [MUSC's] Motion for Temporary Injunction, and when the pending appeal was filed, was that there was no injunction in place." (**Return pp. 13-14**).

[3] Similarly, the Hospital Defendants argue without citation that there is nothing to superseade in this case. (**Return pp. 1, 12**). This argument ignores the plain language of Rule 241(c)(1). Rule 241(c)(1) allows a party to move to superseade any matter decided in an order on appeal. Furthermore, the Hospital Defendants' position disregards case law, where courts have granted the exact relief requested in the Petition. *See Sea Pines*, *supra*.

circuit court denied the motion for a temporary injunction. Thus, either this Court was wrong (its decision was not reversed), or the Hospital Defendants' reading of Rule 241(c) is simply incorrect.

Third, the rigidity of how the Hospital Defendants seek to define status quo is antithetical to how equity works. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009) (Equitable relief is "not bound by cast-iron rules" but instead "exists to do fairness and is flexible and adaptable to particular exigencies."). The Hospital Defendants' tortured definition of the applicable status quo aims to distract from the real purpose of the relief MUSC seeks, which is to prevent the Hospital Defendants from devouring the fruits of its meritorious appeal during the pendency of the appeal. If the Court is persuaded that MUSC has a meritorious claim, the Court may use its equitable powers to impose the injunction without being bound by a rigid (and nonsensical) application of the status quo.

Fourth, the Hospital Defendants have not defined status quo in the correct manner. The term "status quo" refers to "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). Status quo, like equity itself, cannot be defined in a way that results in rigidity and robs the court of the flexible powers it must have to respond to particular situations. For instance, a court would not allow the definition of status quo to prevent it from addressing conduct that violates the law. *See*, *e.g.*, *LeFurgy v. Long Cove Club Owners Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) (holding that an injunction may issue "when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected").

This Court should disregard the Hospital Defendants' attempts to define status quo in such an artificial and rigid way as to prevent the granting of the relief requested in the Petition.

III. MUSC made the required showing for supersedeas relief on its breach of duty of loyalty cause of action.

MUSC relies on two causes of action in support of its request for supersedeas relief: (1) breach of duty of loyalty[4] and (2) violation of SCTSA. Before proceeding any further, it is important to identify the injunction elements this Court should consider with respect to these causes of action.

The Hospital Defendants contend MUSC must establish the following three elements to obtain an injunction during the pendency of appeal: (1) likelihood of success on the appeal, (2) irreparable harm if the injunction is not granted, and (3) no adequate remedy at law. (**Return pp. 15-16**). The Hospital Defendants cite two federal cases in support of this proposition: *Alcala v. Hernandez*, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015) and *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). The Hospital Defendants misquote the elements enumerated in these cases. Both the cases cited by the Hospital Defendants and the South Carolina case cited in the Petition set forth the following elements to consider when determining whether to grant an injunction during the pendency of appeal: (1) potential for irreparable harm to appellant if the injunction is not granted, (2) likelihood of success on the merits, (3) prejudice (if any) that could be sustained by the respondent if the injunction is granted, and (4) the public interest. *Id.*; *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Svcs. Ino. Tech. Mgmt. Office*, No. 98-CP-40-3945, 2000 WL 35456881, at *9 (S.C. Comm. Pl. 2000) (citing *Graham*, *supra*).

As discussed below, MUSC satisfied all of the injunction elements with respect to its breach of duty of loyalty cause of action.

a. The Hospital Defendants concede that MUSC established a likelihood of success on the merits on the breach of duty of loyalty cause of action.

[4] The Hospital Defendants are jointly and severally liable for the Individual Defendants' breach of their duties of loyalty. *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972).

The Hospital Defendants do not respond to MUSC's argument that it established a likelihood of success on the merits with respect to its breach of duty of loyalty cause of action. In South Carolina, if a party fails to respond to an issue, "the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct." *First Union Nat'l Bank of South Carolina v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1997) (quoting 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995)); *see also In re Infinity Bus. Group*, 628 B.R. 213, 231 (D.S.C. 2021) ("[A]n appellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes a forfeiture."). MUSC argued in the Petition that it made the necessary prima facie showing that the Hospital Defendants are liable for the Individual Defendants' breaches of their duties of loyalty under well-established South Carolina law. *See* **Petition pp. 16-17** (citing relevant cases). Because the Hospital Defendants failed to respond, the Court should find that the Hospital Defendants conceded this issue.

b. The Hospital Defendants did not properly articulate the legal standard for establishing irreparable harm, and the Hospital Defendants did not rebut MUSC's arguments.

The Hospital Defendants begin with the assertion that MUSC must show "that [it] **will** suffer an irreparable harm if the temporary injunction is not issued." (**Return p. 20**) (emphasis in original). In the very next sentence, the Hospital Defendants state that the law requires MUSC to "demonstrate that irreparable harm is likely in the absence of an injunction." (***Id.***) (emphasis in original). The Hospital Defendants then attack MUSC's allegations of irreparable harm as being merely "potential," and suggests that the harm has already occurred and is therefore no longer "potential." (***Id.* at 20-21**).

Ultimately, it is unnecessary to parse out which of the two standards articulated by the Hospital Defendants (imminent versus likely harm) are in fact correct. South Carolina courts have consistently found irreparable harm when a competitor is in possession of specific property belonging to another and have routinely issued injunctions to protect those materials from exploitation by the new employer. *See* **Petition p. 14** (citing relevant cases). MUSC is losing its competitive advantage in real time as the Hospital Defendants continue possessing and using the Property. The Hospital Defendants effectively concede this in the Return. But that does not mean MUSC could not retain some of its competitive advantage if the Court issues an injunction requiring the Hospital Defendants to return and refrain from using the Property during the pendency of appeal. This would prevent further irreparable harm and preserve the fruits of MUSC's appeal.

The Hospital Defendants also argue that MUSC did not act with sufficient expediency in seeking injunctive relief. The Hospital Defendants offer no support for this arbitrary conclusion. In reality, MUSC took all of the procedural steps necessary and met all of the applicable deadlines in order to preserve the relevant issues for appeal and to pursue supersedeas relief from this Court.

c. The Hospital Defendants did not address the public interest and prejudice prongs for seeking an injunction during the pendency of appeal; thus the Hospital Defendants conceded these issues.

The Hospital Defendants provide no analysis or discussion of the last two elements for issuing an injunction pending appeal, which are potential prejudice to the respondent and the public interest. MUSC made substantive arguments about both of these elements. (**Petition pp. 17 -19**). Again, the Court can assume that the Hospital Defendants' failure to respond is a concession that MUSC is correct. *First Union Nat'l Bank of South Carolina*, 321 S.C. at 502, 469 S.E.2d at 617.

The Hospital Defendants' statements in the Return actually provide support for the conclusion that the Hospital Defendants will suffer no prejudice if they were ordered to return the Property and to refrain from using it. In the Return, the Hospital Defendants stated multiple times that they do not need the Property. *See* **Return p. 14** ("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 and Trident could not operate the HNO practice at Trident without them."); ***Id.* p. 18** ("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."). By contrast, MUSC has presented evidence and made arguments revealing that it will experience significant hardship in the form of loss of competitive advantage if the Hospital Defendants are allowed to continue possessing and using the Property during the pendency of appeal. (**Petition p. 18**).

Based on the foregoing, this Court should grant the requested supersedeas relief because MUSC has demonstrated the elements necessary to receive such relief with respect to its breach of duty of loyalty cause of action.

IV. The Hospital Defendants applied the wrong standard when arguing likelihood of success on the merits on the SCTSA cause of action, and the Hospital Defendants did not effectively rebut MUSC's prima facie showing that it was likely to succeed on the SCTSA claim.

As set forth above, there were two causes of action for this Court to consider in ruling on the Petition: (1) breach of duty of loyalty and (2) violation of SCTSA. As set forth above in Roman Numeral III, the requisite elements for supersedeas relief have been established with respect to the breach of duty of loyalty cause of action. Thus, no further analysis is necessary, and the supersedeas should be issued. Nonetheless, for purposes of thoroughness, MUSC will respond

to the Hospital Defendants' arguments about whether there is a likelihood of success on the merits on its SCTSA claim.[5]

The Hospital Defendants first argue that MUSC must show a "probability" of success on the merits, requiring a "very clear and strong case." *See* **Return p. 16**) (citing *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 813 (4th Cir. 1991)). This is not controlling South Carolina law. Under South Carolina law, a party seeking injunctive relief is only required to make a prima facie showing of success on the merits. *See Compton v. S.C. Dep't of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011) (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"); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005) ("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.").

The Hospital Defendants argue that MUSC did not demonstrate the necessary elements of secrecy and reasonable steps to protect secrecy as it relates to the Property. In order to argue that the Property was not secret, the Hospital Defendants assert that the Individual Defendants helped develop the Property and would be capable of "duplicating" the Property. When determining whether something is a trade secret, courts must consider "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). In response, MUSC simply asks: if the Individual Defendants could so easily create new instrument lists and preference cards to use, why are the Hospital

[5] The analysis for the other elements for an injunction during the pendency of appeal (irreparable harm, prejudice, and public interest) are the same for the breach of duty of loyalty and SCTSA claims. To avoid redundancy, MUSC will not repeat these arguments.

Defendants vigorously litigating this issue instead of simply returning the Property and creating their own? Why did the Hospital Defendants' counsel state to the circuit court that enjoining their use of the Property would "tie Trident's hands" and cause the "shutting down [of] the care of patients"? (**R. 121, R. 125**). Clearly, the Property would be difficult to duplicate, supporting MUCS' prima facie showing that it is trade secret.

The mere fact that the Individual Defendants helped create some of the Property within the scope of their employment with MUSC does nothing to diminish the SCTSA cause of action. If MUSC's employees did not develop trade secrets for it, who would? The argument that MUSC's Property is somehow not a trade secret because its employees helped develop it is nonsensical and contrary to clear South Carolina law recognizing 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.").

In addition, the Hospital Defendants argue that MUSC did not label or identify the Property as belonging to MUSC or as confidential and proprietary. But labels are not required under the SCTSA or South Carolina case law. Thus, this argument is nothing more than a red herring. Under the SCTSA a party is only required to engage in reasonable efforts to maintain the secrecy of the documents or information. S.C. Code § 39–8–20(5)(a). There is no requirement that documents or information be marked or labeled in any particular way. Based on the evidence presented in the Petition, MUSC made the required prima facie showing to demonstrate that the Property is a trade secret. To summarize that evidence, 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. (**R. 144-45, R. 161, 466**). In addition, faculty physicians, including the Individual Defendants, are contractually prohibited from disclosing MUSC's confidential materials, and faculty physicians are prevented from using MUSC's confidential materials for their own benefit. (**R. 359, R. 466**).

The Hospital Defendants also point to an affidavit filed by Dr. Peter Horwich, who is a current employee of Trident. (**R. 519-22**). According to Dr. Horwich, he was a fellow at MUSC for approximately one year. (**R. 519, ¶ 4**). Because of the COVID-19 pandemic, Dr. Horwich states "there were few opportunities for employment," so after completing his fellowship with MUSC, he applied for another fellowship at LSU Health Shreveport. (**R. 519, ¶ 5**). Dr. Horwich claims he did not have his own physician preference cards; thus, he asked an unidentified nurse at MUSC if he could review Dr. Hornig's preference cards to create his own. (**R. 520, ¶ 7**). Dr. Horwich does not identify how he obtained Dr. Hornig's "case logs," but he appears to claim that despite creating his own preference cards, Dr. Hornig's preference cards and case logs were transferred to LSU Health Shreveport. (**R. 520, ¶ 8**). It is not clear how this alleged transfer occurred, and Dr. Horwich does not attach documents showing how these materials were sent to LSU (if they were). Then, Dr. Horwich summarily claims, "no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU." (***Id.***).

There is a lot to unpack with Dr. Horwich's affidavit. According to Dr. Horwich, he spoke to an unidentified nurse about reviewing Dr. Hornig's physician preference cards for the sole purpose of creating his own physician preference cards, not for sending Dr. Hornig's physician preference cards to LSU. (***Id.***). Dr. Horwich claims the unidentified nurse provided him with Dr. Hornig's physician preference cards to review based on that request. (***Id.***). Dr. Horwich does not

identify any occasion when he asked the unidentified nurse (or anyone else at MUSC) whether he could send Dr. Hornig's physician preference cards to LSU. Dr. Horwich does not identify how he obtained Dr. Hornig's case logs. Again, Dr. Horwich does not identify any occasion when he asked the unidentified nurse (or anyone else at MUSC) whether he could send Dr. Hornig's case logs to LSU. Thus, when Dr. Horwich claims no one at MUSC objected to the transfer of Dr. Hornig's case logs and preference cards to LSU, this is not a compelling statement given the facts testified to by Dr. Horwich. The facts testified to by Dr. Horwich demonstrate two things: (1) Dr. Horwich never asked anyone at MUSC whether he could send Dr. Hornig's case logs and physician preference cards to LSU; and (2) MUSC never gave him permission to transfer Dr. Hornig's case logs and physician preference cards to LSU.

In addition to Dr. Horwich's affidavit, the Hospital Defendants rely on the affidavit of Elaine Meuli, the Director of Medical Staff Services at Trident. (**R. 523-25**). Ms. Meuli summarily states she has "never heard of such case logs ever being identified as trade secrets or as protected confidential information or proprietary records or documents." (**R. 524**). This statement from Ms. Meuli and the affidavit of Dr. Horwich do nothing to keep MUSC from clearing the low bar of a prima facie case with respect to their SCTSA cause of action, which they have easily done based on the evidence presented.

Accordingly, this Court should grant supersedeas relief to MUSC with respect to their SCTSA cause of action.

V. The Hospital Defendants have repeatedly attempted to expand the scope of the relief MUSC has requested, in an effort to avoid returning the Property.

The Hospital Defendants' argument that MUSC's request for an injunction is "improperly vague, ambiguous, and overbroad" is disingenuous (at best). (**Return pp. 21-22**). From this

platform, the Hospital Defendants renew their argument that MUSC is surreptitiously attempting to prevent the Individual Defendants from practicing medicine at Trident.

MUSC has been very clear about the specific ***documents and materials*** that constitute the Property. MUSC has further confirmed in two hearings before the circuit court and both petitions for supersedeas that they are NOT attempting and will not attempt to prevent the Individual Defendants from performing surgeries at Trident or from using their own knowledge and expertise. (**Petition p. 11**). MUSC is happy to reiterate, yet again, that it simply seeks to enjoin the Hospital Defendants from possessing and using the Property.

In the Settlement Agreements, the Individual Defendants agreed to destroy and refrain from using the exact same Property that is at issue here. (**R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 329-30, R. 341-42**). Logically, it makes no sense that Hospital Defendants could somehow possess and use the Property without causing the Individual Defendants to violate their Settlement Agreements. For example, who exactly is supposed to use the physician preference cards that Hospital Defendants refuse to return, if not the Individual Defendants who are contractually bound to refrain from using them? It is also preposterous to imply that the Individual Defendants could agree, as consideration for a Settlement Agreement, to destroy and refrain from using the Property they misappropriated but that their employer ***to whom the Individual Defendants provided the misappropriated Property*** could then provide the Individual Defendants with separate copies. The Settlement Agreements would be meaningless if that were the case.

MUSC's request for injunctive relief is specific and clear. The Hospital Defendants' attempts to muddy the waters are simply a continuation of a pattern of misdirection and obfuscation to distract from the undeniable fact that the Hospital Defendants have MUSC's Property, and they refuse to return it despite their employed physicians agreeing to the same.

VI. There is no "heightened standard" MUSC must clear to obtain supersedeas relief, but even if there were, MUSC has cleared it.

The Hospital Defendants argue MUSC must meet a "heightened standard" in order to obtain an injunction pending appeal. (**Return p. 15**). In support of this assertion, the Hospital Defendants cite a 1912 opinion from a lone justice—Justice Woods—in *Kuhn Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912), a 1913 opinion from a lone justice—Justice Fraser—in *Silverthorne v. Barnwell Lumber Co.*, 96 S.C. 32, 79 S.E. 519, 519 (1913), and an opinion issued by Justice Sotomayor in *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401 (2012). In *Kuhn*, Justice Woods denied the request to issue an injunction during the pendency of appeal, remarking that the issue involved "difficult questions of law." 75 S.E. at 79. In *Silverthorne*, Justice Fraser stated an injunction during the pendency of appeal "ought not to be exercised ***unless the right*** … is very clear and beyond reasonable question." 79 S.E.2d at 519 (emphasis added). In *Hobby Lobby*, Justice Sotomayor denied a party's motion for an injunction pending resolution of the appeal, stating the right asserted was not "indisputably clear." 568 U.S. at 1403-04.

The Hospital Defendants cherry pick statements from *Kuhn*, *Silverthorne*, and *Hobby Lobby* to try to create a new standard for supersedeas relief. These cases do not create a standard. This is evidenced by the fact that these statements did not find their way to Rule 241, SCACR, and subsequent courts (including this one) have not cited them when considering supersedeas relief in other instances. *See*, *e.g.*, *Sea Pines*, 345 S.C. at 598, 550 S.E.2d at 290.

The statements in *Kuhn*, *Silverthorne*, and *Hobby Lobby* are a reflection of the type of cases they were. In all three cases, the moving parties sought an injunction during the pendency of appeal for rights that were uncertain. In *Kuhn*, the appellant asked for a supersedeas and a writ of mandamus (the highest judicial writ available) to require the Secretary of State to sign and issue certificates of the proposed amendments to the charter of a corporation. 75 S.E. at 79. In

Silverthorne, the appellant sought an injunction reinstating him to the position of superintendent and general manager of the respondent company, which appellant claimed he was "entitled to." 96 S.C. at 32, 79 S.E. at 519-20. Justice Fraser noted that appellant's claimed contractual right to a position at the company was unclear in the record and therefore did not warrant reversing the circuit court's ruling. *Id.* In *Hobby Lobby*, two closely-held corporations sought an injunction to prevent enforcement of the contraception-coverage requirement in the Patient Protection and Affordable Care Act, claiming that enforcement violated the corporations' rights under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act. 568 U.S. at 1402. Justice Sotomayor found that the corporations' rights were not "indisputably clear" because the Supreme Court had never previously addressed a similar claim and because the lower courts were split on whether to grant injunctions in similar cases. *Id.* at 1403-04.

By contrast, the legal claims that are the subject of this Petition—claims for breach of duty of loyalty and violation of the SCTSA—are well-developed and established legal concepts. South Carolina courts have routinely granted injunctions in cases just like this one where 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); *Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *9 (D.S.C. Sept. 15, 2015); *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). Thus, the situations in *Kuhn, Silverthorne, and Hobby Lobby* are not analogous here.

But even if a heightened standard applied, MUSC has cleared it. The Hospital Defendants have never disputed that the Property belongs to MUSC. The Hospital Defendants have conceded

that MUSC developed the Property with assistance from the Individual Defendants while they were employed by MUSC. (**Return pp. 4, 14**). South Carolina law is clear that materials developed by employees within the scope of their employment belong to their employer. South Carolina law is also clear that employees owe a duty of loyalty to their employer, which necessarily includes not misappropriating a former employer's property and providing it to a new employer. *See* **Petition p. 16**. Thus, MUSC's rights to the Property and to a duty of loyalty from the Individual Defendants (a breach of which Hospital Defendants are jointly and severally liable under South Carolina law) are indisputably clear, and MUSC would meet the heightened standard, if it applied.

VII. The Hospital Defendants' argument that the Court must deny supersedeas relief because of HCA's pending Motion to Dismiss is erroneous.

The Hospital Defendants argue that the Court must deny the Petition because it would impose injunctive relief over HCA despite a lack of personal jurisdiction. This argument fails for several reasons.

First and foremost, HCA's Motion to Dismiss and supporting Memorandum of Law blatantly disregard the controlling rule that, at the pre-trial stage of the proceedings, a plaintiff need only make a prima facie showing that a court has personal jurisdiction over the defendant. *Brown v. Inv. Mgmt. & Research, Inc.*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). In making the determination whether a plaintiff made a prima facie showing of the court's jurisdiction, a court must accept as true the allegations in the complaint and other evidentiary submissions, and all evidence must be viewed in the light most favorable to the plaintiff. *Id.* Under those standards, MUSC easily made a prima facie showing of the court's general and specific jurisdiction over HCA through the allegations in the complaint and the pre-discovery evidence submitted to the court (including affidavits, publicly available websites and regulatory filings, and emails).

More specifically, the complaint and evidence viewed in the light most favorable to MUSC demonstrate HCA's enduring relationship with South Carolina and its continuous and systematic affiliations with the State, sufficient to find the court has general personal jurisdiction over HCA. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005); *Cribb v. Spatholt*, 382 S.C. 475, 483, 676 S.E.2d 706, 710 (Ct. App. 2009). Further, the complaint and evidence viewed in the light most favorable to MUSC demonstrate that HCA engaged in tortious conduct in South Carolina, that HCA directed its activities to residents of South Carolina resulting in the instant cause of action, and that the State has an interest in exercising jurisdiction, sufficient to find the court has specific jurisdiction over HCA. S.C. Code § 36-2-803; *Cribb*, 382 S.C. at 484-488, 676 S.E.2d at 711-713. As such, HCA's Motion to Dismiss must fail under the applicable standard for determining personal jurisdiction at the pre-trial stage, and this Court can and should exercise jurisdiction over HCA.

<u>Second</u>, HCA has taken almost no action to have its Motion to Dismiss for lack of personal jurisdiction heard by the Business Court, where the underlying case is pending. 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 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 (over 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 its Motion to Hold the Appeal in Abeyance or before filing its Return.

The Hospital Defendants prefer delay because it inures to their benefit. The longer they can impede this Court from addressing MUSC's urgent requests for relief, the longer they can remain in unfettered possession of the Property and irreparably erode MUSC's competitive advantage. The Hospital Defendants' consistent dilatory conduct confirms the reasons this Court should grant immediate relief to MUSC; to do otherwise is inequitable and rewards bad behavior.

Third, even assuming this Court does not have personal jurisdiction over HCA, there is no allegation that this Court does not have personal jurisdiction over Trident. If the Court is so inclined, it could fashion an order that preserves the fruits of a meritorious appeal to MUSC without asserting personal jurisdiction over HCA. Specifically, the Court could grant supersedeas relief to MUSC in the form of an injunction requiring Trident to return and refrain from using the Property pending a determination on HCA's Motion to Dismiss. Further, the Court could order Trident to collect from HCA any of the Property that it may have shared with HCA and to return the same to MUSC.

CONCLUSION

MUSC urges this Court to view the Petition for Writ of Supersedeas through the appropriate lens, which is at its core an equitable request. The Hospital Defendants are in possession of MUSC's Property, and the Hospital Defendants have articulated no reason why they have any right to possess the Property. The balance of equities and hardships tips decidedly in MUSC's favor. Therefore, MUSC respectfully request this Court to grant supersedeas relief and impose an injunction requiring the Hospital Defendants to return and refrain from using the Property while this appeal is pending.

[*signature block to follow*]

Respectfully submitted,

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Columbia, South Carolina
August 8, 2022

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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. 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 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 Reply to Trident's Return to 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 8th day of August, 2022, as follows:

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