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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 RESPONDENTS' RETURN TO PETITION FOR FULL APPELLATE COURT
REVIEW OF ORDER DENYING SUPERSEDEAS

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ATTORNEYS FOR APPELLANTS

Appellants Medical University of South Carolina (“MUSC”) and University Medical Associates of the Medical University of South Carolina (“UMA”) respectfully submit the following Reply to Respondents’ Return to Appellants’ Petition for Full Appellate Court Review of Order Denying Supersedeas.

ARGUMENT

- I. Judge Lockemy’s Order denying Appellants’ Petition for Writ of Supersedeas is procedurally and substantively incorrect, and results in further injustice to Appellants who have never received any analysis or reasoning from a court as to why their urgent requests for injunctive and supersedeas relief have been denied.**

Appellants filed a Petition for Full Appellate Court Review (“Petition”), asking the full Court of Appeals to review Judge Lockemy’s Order denying Appellants’ Petition for Writ of Supersedeas. *See* Rule 241(d)(2), SCACR (“Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision.”). Respectfully, Judge Lockemy’s Order is procedurally and substantively incorrect. Procedurally, the Order does not conform to Rule 220(b) of the South Carolina Appellate Court Rules because it fails to include any reasoning for the decision. Substantively, the Order fails to grant supersedeas relief under circumstances where it is warranted.

In the Return, Respondents spend significant time attempting to parse what differences they perceive to exist between the word “order” and the word “opinion.” Respondents argue that the Court of Appeals need only provide the reasoning for its decision when issuing an opinion, not an order. Respondents then argue that Judge Lockemy’s Order was substantively correct (without actually addressing the substance of the issue) and that Appellants offered nothing new in the Petition to support what effectively amounts to a petition for rehearing. Appellants address Respondents’ arguments below.

- a. Under Rule 220, appellate courts must state the reasons for their decisions.**

Respondents argue that appellate *orders* are distinguishable from appellate *opinions*, and that Rule 220, SCACR applies only to opinions, not to orders. In an attempt to cite some authority in support of their position, Respondents claim to cite to Black’s Law Dictionary to define the term “order.” In actuality, Respondents do not cite to the Black’s Law Dictionary definition of “order”; instead, they rely on a quotation from a 1902 treatise referenced in the dictionary entry. Black’s Law Dictionary defines “order” as, “A written direction or command delivered by a government official, esp. a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.” ORDER, Black’s Law Dictionary (11th Ed. 2019). Presumably, this definition did not help Respondents’ argument; thus, they relied on the 1902 treatise instead.

In a further attempt to rely on some authority for their argument, Respondents point to recent orders and opinions issued by the South Carolina Supreme Court in *Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church*, No. 2020-000986, 2022 WL 3560664 (S.C. Aug. 17, 2022). It is not clear why Respondents believe the orders and opinions issued in this case help their cause. After all, as Respondents admit, the Court in that case “issued a lengthy substitute opinion” to explain its ruling on the petitions for rehearing at issue. To be sure, that is exactly what Appellants contend is required to dispose of their petition for supersedeas—a reason for the decision. *See* Rule 220(b), SCACR.

Respondents’ arguments ignore the operative term in Rule 220, SCACR, which is “decision.” Rule 220(a) states that “[t]he appellate court shall make its decisions in writing by published opinions or memorandum opinions” (emphasis added). Rule 220(b), SCACR goes on to state:

In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated

in writing and must, with the reason for the court's decision, be preserved in the record of the case.

(emphasis added).

Black's Law Dictionary defines "decision" as "a judicial . . . determination after consideration of the facts and the law; esp., a ruling, **order**, or judgment pronounced by a court when considering or disposing of a case." DECISION, Black's Law Dictionary (11th Ed. 2019) (emphasis added). See *Berkeley Cnty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."). Thus, according to Black's Law, the term "decision" as used in Rule 220 is broad enough to include the term "order." Under a plain reading of Rule 220, and applying the definition of "decision" as found in Black's Law, it follows that when the appellate court or an individual judge of the appellate court renders a determination after consideration of the facts and the law, the appellate court or judge must provide a determination in the form of a written opinion that states the court or the judge's reasoning on the necessary points supporting the decision.

As a practical matter, not every decision requires the same amount of analysis or reasoning. Some matters require very little, such as motions for additional time or for additional pages. Other, more substantive matters, require more analysis or reasoning. Here, the petition before Judge Lockemy was one for supersedeas. A petition for supersedeas is not a generic petition or motion contemplated by Rule 240, SCACR. Petitions for supersedeas are of such importance that a Rule—Rule 241, SCACR—is dedicated to them. Petitions for supersedeas are, in effect, motions for temporary injunction that last during the pendency of the appeal. See *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 598, 550 S.E.2d 287, 291 (2001). The Rules of Civil Procedure require courts to make findings of fact and conclusions of law in deciding

injunctions. Rule 52(a), SCRCF. So does our case law. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). By extension, these authorities, on their own, support Appellants' position that Judge Lockemy was required to provide a reason for his decision when he decided Appellant's petition for supersedeas.

Petitions for supersedeas involve substantive matters that operate to preserve the fruits of a meritorious appeal in the time span between when the notice of appeal is filed and a decision is rendered on the underlying appeal. *See* Rule 241(c)(2), SCACR. As such, petitions for supersedeas deserve the Court's attention. Rule 220(b), SCACR, like Rule 52(a), SCRCF, exists to ensure that the court or an individual judge gives due attention to the matters raised in a petition for supersedeas, and that the reviewing court has something to review. There is certainly no page requirement, but some reason must be given for the decision. With all due respect to Judge Lockemy's Order, there is no reason set forth in his Order. For this reason, the Order violates Rule 220(b).

b. Respondents ignore the plain language and purpose of Rule 241, SCACR, which governs petitions for supersedeas.

Respondents next argue that Appellants' request is "tantamount to a petition for rehearing," and that Appellants offer no new arguments justifying reconsideration or rehearing. Respondents cite to Rule 240(j), SCACR in support of this position. Rule 240(j) states, "[a]ny review of an order issued by an individual judge or justice shall be by petition for rehearing." But Respondents' argument ignores Rule 241, SCACR, which again is the Rule dedicated to petitions for supersedeas. Rule 241 establishes its own procedure for the exact situation before the Court.

Rule 241(d)(2) allows an aggrieved party (here, Appellants), upon receipt of a final order by an individual judge or justice, to "petition the full appellate court for review of that decision." Rule 241(d)(7) reaffirms this, stating, "[a]ny party aggrieved by the decision of . . . an individual

judge or justice may petition under this Rule for a review of that decision.” These provisions in Rule 241 bespeak the purpose of supersedeas relief, which is set forth at Rule 241(c)(2) as either “to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Because preserving jurisdiction and avoiding mootness are important threshold issues necessary for a party’s appeal to meaningfully proceed, it follows that a party is entitled to petition for immediate review by the full appellate court if aggrieved by an order from an individual justice or judge related to supersedeas relief.

Rather than looking to Rule 241 which governs the procedure related to petitions for supersedeas, Respondents cite to Rule 240(j). Respondents give the Court no reason why it should look anywhere other than to Rule 241 to decide the matter before it. Furthermore, Respondents give the Court no reason why it should ignore the clear procedure established by Rule 241. The Court should not. Rule 241 *explicitly allows* an aggrieved party to petition for full appellate review of an order by an individual justice or judge. That is exactly what Appellants have done. Therefore, this Court should grant Appellants’ Petition in accordance with Rule 241 and afford Appellants a hearing in which to present the substance of their request for relief.

- c. Despite the issuance of several orders, no court has issued findings on Appellants’ arguments for injunctive relief or given any reasoning for denying Appellants’ requested relief.**

By way of a brief history, Appellants first sought a temporary injunction before the circuit court, and the circuit court denied Appellant’s motion in a Form 4 Order without issuing any analysis or basis for its decision. Appellants then filed a Motion to Alter or Amend under Rule 59(e), SCRCF, which the circuit court denied by way of a second Form 4 Order, again without

issuing any findings or analysis.¹ Appellants filed a Notice of Appeal, which is presently pending before this Court. Four days later, in conformity with Rule 241(c), SCACR, Appellants submitted a Motion to Supersede to the circuit court, which the circuit court denied by way of another Form 4 Order, again issuing no findings or analysis. Appellants then filed a Petition for Writ of Supersedeas to this Court, which Judge Lockemy denied without providing any analysis or reasoning. To date, no court has provided any reasoning, analysis, or findings in support of the decisions to deny Appellants' the relief they seek.

The simple premise of Appellants' urgent and repeated requests for injunctive relief is this: Respondents are direct competitors of MUSC; Respondents came into possession of MUSC's valuable property via unlawful means; and Respondents continue to wrongfully possess MUSC's property. Appellants are not aware of any legal justification for Respondents to remain in possession of MUSC's property. Respondents have provided no legal justification for their ability to remain in possession of MUSC's property. This is because there are no legal justifications under South Carolina law for an employer to be in possession of property that belongs to another. This is especially true in a case such as this one, where Respondents came into possession of MUSC's property through employee misappropriation.

Respondents have made a number of arguments that skirt the issue at hand, for example arguing both that they do not have any need for MUSC's property (despite refusing to return it) *and* that it would be disastrous if the Court required Respondents to return MUSC's property. Respondents have also argued that they were unaware the property was misappropriated (which, even if true at one time, has not been true for nearly a year), and that to require Respondents to

¹ Both circuit court orders clearly violate Rule 52(a), SCRCPP, because there were no factual findings in either order.

return the property would disturb the (unlawful) status quo. Meanwhile, Respondents continue possessing (and upon information and belief, using) MUSC's property while the appeal is pending, eroding MUSC's competitive advantage from being the lawful, first-in-time creators of the property.

The courts' continued refusal to issue any findings or reasoning for denying Appellants' requests for relief rewards Respondents for bad faith and dilatory tactics. Respondents have been allowed to continue possessing MUSC's property and devouring the fruits of a meritorious appeal for almost a year. Respondents' continued possession of MUSC's property that was admittedly acquired through employee misappropriation presents a critical issue for Appellants, and for South Carolina employers generally. For these reasons, Appellants respectfully request full appellate review of the Petition and the opportunity to be heard at a hearing.

II. Respondents' argument about *en banc* consideration is misplaced and incorrect.

Respondents argue that *en banc* consideration is not favored under Rule 219(a), SCACR, and that Appellants have provided no basis for meeting the two exceptions justifying *en banc* review: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Again, Respondents are ignoring Rule 241, SCACR, which specifically addresses the propriety of full appellate court review of petitions for supersedeas. Petitions for supersedeas are treated differently than other requests for *en banc* consideration. But, even assuming Appellants must meet an exception for *en banc* consideration (they do not), the issue before the court is of exceptional importance. MUSC, the State's flagship healthcare provider, is suffering ongoing and irreparable injury while their direct competitor continues using MUSC's lawfully-created property to erode its competitive advantage. But more than that, the precedent set by allowing employees

to surreptitiously deliver their former employer's property to a new employer and then allowing the new employer to blatantly retain and use such property will have dire consequences for South Carolina businesses. As such, the Petition involves an issue of exceptional importance justifying *en banc* consideration.

CONCLUSION

For the reasons set forth above, Appellants respectfully request full appellate court review of Judge Lockemy's Order, and Appellants further request a hearing before the full Court.

Respectfully submitted,

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s/James K. Gilliam

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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 Respondents' Return to Petition for Full Appellate Court Review of Order Denying Supersedeas was served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 2nd day of September, 2022, as follows:

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