THE STATE OF SOUTH CAROLINA
In The Supreme Court

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,..... Petitioners,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Full Appellate Court Review of Order Denying Supersedeas was made and finally ruled upon on by the Court of Appeals on September 13, 2022.

QUESTIONS PRESENTED

I. The Court of Appeals committed procedural errors in denying Petitioners' Petition for Supersedeas and Petition for Full Appellate Court Review of Order Denying Supersedeas ("Petition for Full Review").

   a. The Court of Appeals erred in failing to issue written opinions stating the reasons for its decisions to deny Petitioners' Petition for Supersedeas and Petition for Full Review.

   b. The Court of Appeals erred in applying Rules 240, 219, and 221 of the South Carolina Appellate Court Rule to the Petition for Full Review, rather than Rule 241, which governs petitions for supersedeas.

II. The Court of Appeals erred in failing to issue Petitioners' requested temporary injunction upon Respondents' failure to rebut or respond to Petitioners' arguments demonstrating Petitioners met the elements for injunction pending appeal.

III. The Court of Appeals erred in failing to apply settled South Carolina law governing ownership of materials developed within the scope of an employee's employment and a new employer's joint and several liability for breach of the duty of loyalty.

   a. Respondents have no right to retain and use Petitioners' Property, which is confidential and proprietary, and which Respondents obtained through employee misappropriation.

   b. The Physician Defendants and their new employer, Respondents, have no ownership or right to access Petitioners' Property.

INTRODUCTION

This Petition comes to this Court from a series of Orders issued by the circuit court and the Court of Appeals on an issue of critical importance for Petitioners (*i.e.*, a competitor's retention and use of Petitioner's valuable property). The Orders from the Court of Appeals raise novel, important procedural questions, including whether the Appellate Court Rules entitle litigants to written opinions stating the Court of Appeals' reasoning for its decisions. If not, then the Court of

Appeals is empowered to disregard the purpose of Rule 240, SCACR and summarily deny litigants any findings upon which to base their potential appeals (and more generally, their legal strategy). Another novel procedural question raised by these orders is whether the standards applied to petitions for rehearing *en banc* are also applicable to petitions for supersedeas under the Appellate Court Rules. If petitions for supersedeas are tantamount to petitions for rehearing *en banc*, then Rule 241, SCACR is superfluous.

In addition to reflecting significant procedural errors, the Court of Appeals' Orders denying Petitioners injunctive relief during the pendency of appeal also conflict with substantive South Carolina law. First, Petitioners demonstrated the necessary elements for injunctive relief pending the outcome of their appeal on their claims for breach of duty of loyalty and violation of the South Carolina Trade Secrets Act ("SCTSA"). Respondents did not rebut or even respond to Petitioners' arguments on having met the elements necessary for a temporary injunction on Petitioners' claim for breach of duty of loyalty. Despite Respondents' constructive waiver/acceptance of Petitioners' arguments, the Court of Appeals denied Petitioners' request for injunctive relief for unknown reasons.

Second, the Court of Appeals' Orders denying supersedeas relief are erroneous because they conflict with this Court's decisions governing the ownership of materials developed within the scope of an employee's employment, as well as a new employer's joint and several liability to an employee's former employer for breach of the duty of loyalty. These conflicts raise significant public policy implications for employers across South Carolina, in addition to the immediate and material harm imposed on Petitioners.

STATEMENT OF THE CASE

This case centers on employee misappropriation. Petitioners, the State's flagship medical university ("MUSC") and its corresponding physician group ("UMA"), developed a renowned hospital-based head and neck cancer program over two decades, which both treats patients and educates new practitioners. (**R. 141-42**). A group of Petitioners' employees ("Physician Defendants") elected to leave Petitioners' head and neck cancer program, and instead work with Respondents (for-profit hospital operators) to start a new head and neck cancer program to compete with Petitioners. Prior to their exodus from Petitioners' head and neck cancer program, the Physician Defendants furnished materials to their new employer (Respondents). (**R. 144-47**). The misappropriated materials consisted of documents reflecting the head and neck cancer surgical "playbook" developed by Petitioners over a series of decades, including physician preference cards, instrument lists, patient case logs, and certain financial documents ("Petitioners' Property"). *Id.* Respondents, a local hospital competitor of Petitioners, refuse to return and refrain from using Petitioners' Property.

Petitioners filed this lawsuit against Respondents and the Physician Defendants under several theories, including breach of the duty of loyalty and violation of the SCTSA. (**R. 27-38**). At the same time, Petitioners moved for a temporary injunction requiring Respondents and Physician Defendants to return and refrain from using Petitioners' Property during the pendency of this case. (**R. 132-39**). Prior to arguing the Motion for Temporary Injunction, Petitioners entered into settlement agreements with each of the Physician Defendants wherein the Physician Defendants agreed to destroy and refrain from using Petitioners' Property. (**R. 280-353**).

The circuit court denied Petitioners' Motion for Temporary Injunction in a Form 4 Order that did not include any findings of fact. (**R. 1**). With no findings of fact, the Order violated Rule

52(a), SCRCP, which requires the circuit court to set forth findings of fact and conclusions of law in granting or denying a motion for injunctive relief. Petitioners filed a Motion to Alter or Amend requesting that the circuit court issue findings of fact and change its decision. The circuit court denied the motion in a Form 4 Order with no factual analysis. (**R. 4**). Petitioners then filed a notice of appeal with the Court of Appeals, appealing the circuit court's orders denying injunctive relief. (**R. 40-41**). In conformity with Rule 241, SCACR, Petitioners filed a Motion to Supersede the Form 4 Orders with the circuit court after filing the appeal. The circuit court denied the Motion to Supersede in a Form 4 Order with no factual or legal analysis. (**R. 7**). Petitioners then filed a Petition for Supersedeas with the Court of Appeals, asking the Court of Appeals to (1) supersede the circuit court orders denying injunctive relief to Petitioners and (2) impose a temporary injunction requiring the Respondents to return Petitioners' Property and to refrain from using it while the appeal is pending. In a two-sentence order devoid of findings or reasoning, the Court of Appeals denied the Petition for Supersedeas. (**R. 491**). Petitioners then filed their Petition for Full Review, which the Court of Appeals denied in a three-sentence order devoid of any findings. (**R. 493**). This Petition followed.

ARGUMENTS

I. The Court of Appeals committed procedural errors in denying Petitioners' Petition for Supersedeas and Petition for Full Review.

After "careful consideration" of a combined sixty-five pages of appellate briefing from the parties and hundreds of pages of records and briefing from the circuit court level, the Court of Appeals issued an Order denying the Petition for Supersedeas that included no factual or legal analysis or reasoning ("First Order"). (**R. 491**). After "careful consideration" of another combined twenty pages of legal briefing from the parties, the Court of Appeals issued an Order denying the Petition for Full Review, again with no analysis or reasoning ("Second Order"). (**R. 493**). The

Court of Appeals couched its denial in the Second Order on the relevant considerations when reviewing a petition for rehearing under Rule 221, SCACR, despite the Petition for Full Review arising under Rule 241, SCACR.

In issuing these First and Second Orders, the Court of Appeals committed procedural errors. Not only did these procedural errors violate the Appellate Court Rules, but they have also created serious impediments to the proper functioning of our appellate system. With no findings or reasoning from the Court of Appeals (in addition to no findings or reasoning from the circuit court), this Court can only guess as to the reasons for the decisions below. That is not how appeals should work.

a. The Court of Appeals erred in failing to issue written opinions stating the reasons for its decisions to deny Petitioners' Petition for Supersedeas and Petition for Full Review.

Under Rule 220(b), SCACR, the Court of Appeals is required to provide, in writing, the reasoning for every decision it renders and the points arising in the record that are necessary to the decision. The Court of Appeals failed to do this in the First Order, which Petitioners brought to the Court of Appeals' attention in their Petition for Full Review. (**R. 575**). In their Return to the Petition for Full Review, Respondents argued that "opinions" are distinguishable from "orders," and that Rule 220(b), SCACR only requires the Court of Appeals to issue a written opinion when deciding the appeal (*i.e.*, not when deciding motions or petitions). (**R. 581-84**). Petitioners argued in response that the operative term in Rule 220(b) is "decision," which by definition includes decisions issued in the form of an order on a petition. (**R. 591-91**). Petitioners noted that not all decisions require the same amount of analysis or reasoning, so as a practical matter some opinions can and should be relatively short. *Id.* But a petition for supersedeas imposing a temporary injunction during the pendency of an appeal is a substantive and important request for relief (as

demonstrated by there being a specific rule in the Appellate Court Rules dedicated to these types of petitions). *Id.* The South Carolina Rules of Civil Procedure and South Carolina case-law require courts to make findings of fact and conclusions of law when deciding temporary injunctions. Rule 52(a), SCRCP; *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). Similarly, the Appellate Court Rules require the Court of Appeals to provide (in writing) the reasons for its decision on a petition for supersedeas. Without addressing either party's arguments, the Court of Appeals issued the Second Order denying the Petition for Full Review that included no substantive analysis or reasoning.

This Court should reverse the Court of Appeals' First and Second Orders that do not set forth any substantive analysis or reasoning in writing. As a matter of public policy, litigants should be and are entitled to an explanation of the courts' reasoning in granting or denying relief. This ensures that decisions are reviewable, and not arbitrary or capricious. It is also more efficient. In this case, Petitioners have continually restated and reframed the same catalogue of arguments in support of their claims for relief, having no way of knowing how the courts arrived at their decisions (again, the circuit court also did not issue any substantive findings or analysis). If the courts had provided the basis for their decisions, Petitioners could have tailored their subsequent arguments to those specific issues, saving significant time and effort for all involved.

b. The Court of Appeals erred in applying Rules 240, 219, and 221 to the Petition for Full Review, rather than Rule 241, which governs petitions for supersedeas.

In the Petition for Full Review, Petitioners requested relief pursuant to Rule 241, SCACR, which governs supersedeas in civil actions. (**R. 574-75**). Specifically, Petitioners sought review by the full appellate court of the First Order under Rules 241(d)(2) and 241(d)(7). After the appellate court makes an initial decision on a petition for supersedeas, Rules 241(d)(2) and 241(d)(7) allow

an aggrieved party to request full appellate court review of the initial appellate court "decision."[1] Respondents argued in their Return to the Petition for Full Review that Petitioners' request for full appellate court review "is tantamount to a petition for rehearing," and that Petitioners did not provide any justification for rehearing. (**R. 584**). Respondents further argued that under Rule 219(a), the Court of Appeals should only grant *en banc* consideration for issues that threaten the uniformity of its decisions or for questions of exceptional importance, neither of which the Petitioners satisfied. *Id.* at 5-6. In response, Petitioners reiterated that Rule 241 governs petitions for supersedeas and corresponding requests for full appellate review, not Rules 240 and 219, which govern petitions for rehearing and hearings *en banc*. The Court of Appeals apparently agreed with Respondents and treated the Petition for Full Review solely as a petition for rehearing *en banc*.[2] In the Second Order, the Court of Appeals referred to the Petition for Full Review as a "petition for rehearing," and stated the Court of Appeals was "unable to discover any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing." (**R. 493**).

The primary problem with treating the Petition for Full Review as a petition for rehearing *en banc* is that it imposes standards not set forth in Rule 241.[3] First, under Rule 221(a), petitions

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[1] Note that Rule 241(d) refers to a "decision" on petitions for supersedeas, bolstering Petitioners' argument in Section I.a. of this Petition for Certiorari that the Court of Appeals should have issued a written opinion stating its findings and reasoning in conformity with the requirements of Rule 220(b).

[2] Petitioners moved for an *en banc* hearing under Rule 219(a) as an alternative to Petitioners' primary request for full appellate review under Rule 241(d). However, this motion in the alternative did not change the nature of Petitioners' request for full appellate review under Rule 241, which the Court of Appeals simply ignored.

[3] Another problem with the Court of Appeals disposing of the Petition for Full Review as if it were a petition for rehearing is that the Court of Appeals allowed Respondents to file a Return to the Petition for Full Review despite the Court not requesting one. This does not conform with Rule 221(a), SCACR.

for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Here, the Court of Appeals clearly attempted to impose that standard when deciding whether to grant the Petition for Full Review (although the Court of Appeals used the word "disregarded" instead of "misapprehended"). Rule 241 does not require Petitioners to show that the Court of Appeals overlooked or misapprehended particular points, which of course would be impossible for Petitioners to do because the Court of Appeals did not intimate what facts or arguments it relied on in denying the Petition for Supersedeas.

Second, under Rule 219(a), the Court of Appeals will only order a hearing or rehearing *en banc* "(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." Although Petitioners included compelling arguments in their Reply on the Petition for Full Review as to why the Petition for Supersedeas involves a question of exceptional importance, Petitioners should not have to meet that specific bar. (**R. 595-96**). Rule 241 specifically governs petitions for supersedeas, which are intended to prevent contested issues from becoming moot. Rule 241(c)(2), SCACR. Because mootness of a pending appeal is an important threshold issue, the Appellate Court Rules provide a specific avenue for seeking full appellate court review separate and apart from Rule 219 governing hearings and rehearings *en banc*. Thus, it does not make sense to apply the standard for seeking *en banc* consideration under Rule 219 in the context of petitions for supersedeas under Rule 241.

While the Court of Appeals' procedural errors are technical in nature, the result is that Petitioners have no findings to assess and appeal (if warranted). Petitioners were also denied full appellate court review under standards inapplicable to their situation and again with no specific reasoning or analysis to assess and appeal (if warranted). Petitioners have not undertaken their

continued outreach to the court system for immediate relief lightly; this is an issue of utmost importance for Petitioners. Similarly, as evidenced by Respondents' extensive briefing in response to Petitioners' requests, this is an issue of utmost importance for Respondents. At a minimum, the litigants are entitled to judicial attention to these matters, and are entitled to know the reasoning for those decisions.

II. The Court of Appeals erred in failing to issue Petitioners' requested temporary injunction upon Respondents' failure to rebut or respond to Petitioners' arguments demonstrating Petitioners met the elements for injunction pending appeal.

Petitioners petitioned the Court of Appeals for supersedeas relief to prevent the contested issue (*i.e.*, the proprietary nature and competitive value of Petitioners' Property) from becoming moot during the pendency of appeal. Petitioners have consistently argued that Respondents' ability to retain and use Petitioners' Property at this critical time in the development of their new head and neck cancer program wrongfully erodes Petitioners' competitive advantage derived from being the first-in-time to develop this type of program in the Charleston region. (**R. 517; R. 557-58**) Without an injunction during the pendency of Petitioners' appeal, Respondents are jumping-the-line and competing with Petitioners much sooner than they otherwise could. If enough time passes before the appeal is decided, there will be no competitive edge left for Petitioners to regain.

The Court of Appeals may issue a supersedeas if it is necessary to prevent a contested issue from becoming moot during the pendency of the appeal. Rule 241(c)(2), SCACR. Supersedeas relief under Rule 241(c) may include issuing a temporary injunction during the pendency of an appeal. *See, e.g., Sea Pines Ass'n for Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Comty. Serv. Assoc., Inc.*, 345 S.C. 594, 598, 550 S.E.2d 287, 290 (2001). The available South Carolina case-law regarding temporary injunctions during the pendency of appeal sets forth four elements that Petitioners must meet to obtain relief: (1) potential for irreparable harm to Petitioners

if the injunction is not granted, (2) likelihood of success on the merits, (3) prejudice (if any) that could be sustained by Respondents if the injunction is granted, and (4) the public interest. *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); *Alcala v. Hernandez*, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015); *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 v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 468, 470 (Ct. App. 1990).

In the Petition for Supersedeas, Petitioners demonstrated that they meet the four required elements for a temporary injunction pending appeal. Specifically, Petitioners demonstrated:

1. Petitioners will suffer irreparable harm if Respondents are allowed to continue retaining and using Petitioners' Property. A litany of courts have found irreparable harm when a competitor is in possession of specific property belonging to another. *See Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681, 685 (D.S.C. 2003); *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 29 (2012); *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014); *see also Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *9 (D.S.C. Sept. 15, 2015) (finding that in cases involving the misappropriation or threatened misappropriation of trade secrets, courts generally presume that the harm from a wrong will be irreparable and "difficult to measure in monetary damages because once the secret is lost, it is indeed lost forever").

2. Petitioners made a prima facie showing of entitlement to injunctive relief under two theories: breach of duty of loyalty and the SCTSA.[4] (**R. 513-16**). As it relates to the breach of duty of loyalty claim, Petitioners cited to *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761. 769 (1972), in which this Court held that when a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage derived from the employee's breach of the duty of loyalty to his former employer, the new employer is "jointly and severally" liable with the employee for any profits it received from the employee's wrongful conduct as it relates to his former employer.
3. Respondents will not sustain prejudice if enjoined from continuing to retain and use Petitioner's Property during the pendency of the appeal. Petitioners cited to Respondents' own claims about how they do not need Petitioners' Property, which Respondents reiterated in their Return to the Petition for Supersedeas. (**R. 121-23**; **R. 541**). Petitioners also cited to two federal district courts in South Carolina that found defendants will suffer no harm when an injunction is issued protecting confidential and proprietary information from an employee's former employer because the injunction merely prevents the defendants from using information that does not belong to them in the first place. (**R. 516**). *See Boone*, 2020 WL 5052956; *Rockford Mfg.*, 296 F.Supp.2d at 685.
4. Petitioners demonstrated that the public interest favors issuing an injunction during the pendency of appeal. (**R. 517-18**). Allowing a new employer to benefit from materials

[4] Petitioners arguments as to their prima facie showing on the SCTSA claim are in Roman Numeral III(a).

misappropriated from an employee's former employer sets a dangerous precedent impacting all South Carolina employers.

In their Return to Petition for Supersedeas, Respondents did not address or even mention two of the elements for injunction during the pendency of appeal: (1) prejudice (if any) to Respondents, and (2) the public interest. Respondents also did not respond to or even mention Petitioners' prima facie showing on its breach of duty of loyalty claim. By simply ignoring these elements, Respondents effectively conceded that Petitioners met three of the four necessary requirements for injunction during pendency of appeal. *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)) ("[T]he [appellate] court may treat the failure to respond as a confession that the appellant's position is correct."); *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.").

With regard to the fourth element (irreparable harm), Respondents did not properly articulate the legal standard and did not rebut Petitioners' arguments. Instead, Respondents confusingly argued that Petitioners would suffer no future harm because all of the "potential" harm already occurred by virtue of the Physician Defendants working for Respondents over the past many months. (**R. 547-48**). Respondents also argued that Petitioners did not act with sufficient expediency in seeking injunctive relief, despite Petitioners taking all of the requisite procedural steps within the applicable deadlines. (**R. 548**). At no point did Respondents address or rebut Petitioners' argument that South Carolina recognizes irreparable harm in the exact situation at hand (*i.e.*, when a competitor is in possession of property belonging to another). Nor did

Respondents argue that their possession of Petitioners' Property is not in fact harmful to Petitioners.

Instead of focusing on rebutting the four elements Petitioner demonstrated in support of a temporary injunction during the pendency of the appeal, Respondents argued that the Court of Appeals simply cannot impose an injunction that would upset the status quo as of the date the appeal was filed. (**R. 540-41**). Petitioners alerted the Court of Appeals that Respondents' status quo argument is incorrect because it (1) would render supersedeas relief for a denied injunction impossible in contravention of Rule 241, (2) disregards South Carolina case-law in *Sea Pines*, 345 S.C. at 598, 550 S.E.2d at 290, wherein the Court of Appeals granted a supersedeas imposing an injunction pending appeal (which this Court did not reverse), (3) is antithetical to the purpose of the Court's equitable powers, and (4) defines status quo in the incorrect manner (*i.e.*, Petitioners assert that status quo means the last uncontested status between the parties, not the status as of the appeal). (**R. 553-55**).

Respondents have repeatedly relied on their misapprehension of the status quo concept because it is the only available argument that would support Respondents continuing to possess and use Petitioners' Property. But even if Respondents' understanding of the status quo were correct (it is not), South Carolina courts do not protect an ***unlawful*** status quo. *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"). Such an outcome would be at odds with the very concept and purpose of equity. *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.").

Petitioners cannot be sure why the Court of Appeals did not grant the Petition for Supersedeas. But because Petitioners' effectively demonstrated the required elements for an injunction pending the outcome of the appeal, Respondents provided no facts or substantive analysis that rebuts Petitioners' showings (to the extent Respondents addressed Petitioners' arguments at all), and Respondents' status quo arguments are without merit, the Court of Appeals erred in denying Petitioners an injunction pending the outcome of the appeal.

III. The Court of Appeals erred in failing to apply settled South Carolina law governing materials developed within the scope of an employee's employment and a new employer's joint and several liability for breach of the duty of loyalty.

The basis of this case is whether South Carolina law allows Petitioners' competitor (Respondents) to retain and benefit from Petitioners' Property gained through unlawful means. Respondents have admitted they have Petitioners' Property. (**R. 79, R. 85**). Respondents have effectively admitted that they are using and will continue to use Petitioners' Property. (**R. 272**). And, Respondents have effectively admitted that the Physician Defendants are also using Petitioners' Property, in direct violation of their settlement agreements. (**R. 125**). In defense of their actions, Respondents have made many confusing and circular assertions that can be boiled down to two arguments: (1) Petitioners' Property was not confidential and proprietary (thus Respondents have every right to use it despite acquiring it through employee misappropriation), and (2) the Physician Defendants have some ownership rights to the Petitioners' Property because the Physician Defendants helped to create it during the scope of their employment by Petitioners. Neither of these defenses is in accord with South Carolina law.

a. Respondents have no right to retain and use Petitioners' Property, which is confidential and proprietary, and which Respondents obtained through employee misappropriation.

Petitioners based their request to the Court of Appeals for a temporary injunction during the pendency of the appeal on their prima facie showings under the SCTSA and the common law duty of loyalty owed by employees to their employer. (**R. 513-16**). Respondents spent significant time in their briefs and oral arguments arguing that Petitioners' Property was not sufficiently marked as trade secret or confidential, and that Petitioners did not take sufficient steps to protect the secrecy of their property. (**R. 543-47**). Petitioners disagree and have addressed each of Respondents' arguments previously. (**R. 514-15; R. 560-63**). In summary, Petitioners demonstrated the following: (1) Petitioners took the requisite steps to protect the secrecy of their property, (2) it would be difficult for Respondents to recreate the property (which is a consideration for finding whether something is a trade secret), (3) it is of no legal consequence under the SCTSA that the Physician Defendants helped to develop Petitioners' Property, (4) the SCTSA does not require that Petitioners' Property be labeled as "secret" or "confidential," and, (5) the affidavits submitted by Respondents regarding the secrecy (or lack thereof) of Petitioners' Property do nothing to advance Respondents' arguments. *Id.*

However, even if the Court of Appeals was not convinced that Petitioners made a prima facie showing on Petitioners' SCTSA claim, Petitioners have a valid claim against Respondents for admittedly ratifying and benefiting from the Physician Defendants' breach of their duty of loyalty ***regardless*** of whether Petitioners' Property is trade secret under the SCTSA. South Carolina law is clear that employees owe a common law duty of loyalty to their employers and that a third-party benefitting from an employee's breach of that duty is jointly and severally liable. *See Colgate-Palmolive Co. v. Carter Prod., Inc.*, 230 F.2d 855, 864 (4th Cir. 1956) ("One may not escape liability for appropriating the business secrets of another by employing one who has been entrusted with the secrets and permitting him to make use of them"); *Nucor Corp. v. Bell*, 482

F.Supp.2d 714, 723 n.5 (D.S.C. 2007) ("[A] company that hires its competitor's employees and then induces them to divulge their former employer's trade secrets, or aids or assists them to violate their trust, is liable to the former employer"); *Lowndes Prods*, 259 S.C. at 337, 191 S.E.2d at 769 (When a new employer obtains confidential and proprietary information from a new employee belonging to the former employer or uses information or gains an advantage deriving from the employee's breach of duties of loyalty to his former employer, the new employer is "jointly and severally" liable with the employee for any profits it received from the employee's wrongful conduct as it relates to his former employer).

South Carolina law is also clear that taking and using a former employer's confidential information for one's personal or competitive gain is a breach of the duty of loyalty. *See, e.g., Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 606–07, 518 S.E.2d 591, 595 (1999) ("Fairness dictates that an employee not be permitted to exploit the trust of his employer so as to obtain an unfair advantage in competing with the employer in a matter concerning the latter's business...."). Courts routinely issue injunctions to prevent this type of behavior. *Indus. Packaging Supplies*, 2012 WL 1067650, at *7 (enjoining both the former employee and the new employer from using and/or selling any products based on the former employer's trade secrets and confidential information, and ordering the return of the information to the former employer).

Respondents have argued that Petitioners' Property was not confidential and proprietary. *See, e.g.*, (**R. 544**). This argument is simply wrong. Petitioners' Property was not readily available to Respondents or the public at large, *which is why the Physician Defendants made sure it was transmitted to their new employer* ***prior to*** *discontinuing their employment with Petitioners.* (**R. 144-47; R. 160-63**). Thus, Petitioners' Property was confidential. Petitioners' Property is proprietary because Petitioners, through their employees within the scope of their employment

(including but not limited to the Physician Defendants), created and developed the materials. Thus, it belongs to Petitioners.

Respondents have also argued that they do not need Petitioners' Property because Respondents could either recreate it or obtain similar materials from Respondents' hospital affiliates in other markets, implying that Petitioners' Property therefore has no economic value to Respondents. *See, e.g.*, **(R. 121-23)**. But Petitioners' Property clearly has economic value or Respondents would not be so vigorously litigating to keep it rather than recreating it or obtaining similar materials elsewhere.

Finally, Respondents have argued that they were not aware that Petitioners did not consent to the Physician Defendants transmitting (or causing to be transmitted) Petitioners' Property to Respondents. *See, e.g.*, **(R. 544-45)**. This assertion defies logic. Regardless, upon receiving notice that Petitioners' did not consent to the transmission of their confidential and proprietary materials to a local competitor for the purpose of implementing a competing head and neck cancer program, Respondents continue to refuse to return it. Therefore, they are jointly and severally liable for the Physicians' breach of the duty of loyalty and should be subject to the injunction sought by Petitioners.

b. The Physician Defendants and their new employer, Respondents, have no ownership or right to access Petitioners' Property.

Respondents have repeatedly asserted that the Physician Defendants had a hand in developing Petitioners' Property in an attempt to argue that Petitioners cannot prevent Physician Defendants and their new employer (Respondents) from using Petitioners' Property. *See, e.g.*, **(R. 544)**. But this argument has no merit. It is settled South Carolina law that materials developed by an employee (even using his or her know-how) within the scope of employment belong to the employer. *Milliken*, 399 S.C. at 35, 731 S.E.2d at 294. While it may be inconvenient for Physician

Defendants and Respondents to develop new materials reflecting the same or similar information to assist the Physician Defendants in the scope of their new jobs, that is an obvious cost of starting a new head and neck cancer program.

Respondents also made a "slippery slope" argument that if Petitioners were to obtain an injunction preventing Respondents from using Petitioners' Property, Petitioners may then seek to prevent the Physician Defendants from using ***any information*** obtained or developed during the scope of their employment by Petitioners (including knowledge of the Physician Defendants' own surgical preferences). (**R. 541-42; R. 548-49**). Notably, each of the individual Physician Defendants has already agreed to destroy and refrain from using the exact same materials defined as Petitioners' Property. (**R. 280-81, R. 293-94, R. 305-06, R. 317-18, R. 329-30, R. 341-42**). Petitioners have reiterated numerous times ***on the record*** that they have no intention to prevent the Physician Defendants from performing surgeries at Respondents' facility, nor do Petitioners intend to prevent Physician Defendants from using their own knowledge and know-how. (**R. 510; R. 563-64**). Petitioners simply request that Respondents return and refrain from using Petitioners' Property, as set forth with specificity in the Petition for Supersedeas. (**R. 500-501**).

In summary, Respondents came into possession of Petitioners' Property through their new employees' breach of the duty of loyalty to their former employer. Respondents are using Petitioners' Property in furtherance of their upstart, competing head and neck cancer program. Under these facts, South Carolina courts routinely issue temporary injunctions. The Court of Appeals erred as a matter of law in denying Petitioners' Petition for Supersedeas. This is an issue of particular importance that this Court should correct because it has far-reaching implications for South Carolina employers.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant their petition for writ of certiorari, reverse the Court of Appeals, and impose a temporary injunction during the pendency of appeal, requiring the Respondents to return Petitioners' Property and to refrain from using it while the appeal is pending.

Respectfully Submitted,

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