RECEIVED

Nov 14 2022

S.C. SUPREME COURT

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. 2021-CP-10-05289
Appellate Case No. 2022-001431

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

RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI

James Lynn Werner SC Bar No. 6029
David B. Summer SC Bar No. 7974
Katon E. Dawson Jr. SC Bar No. 101167
Ashley W. Johnson SC Bar No. 101423
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017

Attorneys for Respondents HCA Healthcare, Inc. and Trident Medical Center, LLC

Respondent Trident Medical Center, LLC ("Trident"), respectfully submits the following Return to the Petition for Writ of Certiorari field by Medical University of South Carolina ("MUSC") and University Medical Associations of the Medical University of South Carolina ("UMA" and collectively with MUSC, "Petitioners").[1]

QUESTIONS PRESENTED

I. **Whether the orders issued by the Court of Appeals denying the Petition for Supersedeas and the Petition for Full Appellate Court Review satisfied the requirements of Rule 241 of the South Carolina Appellate Court Rules.**

II. **Whether the Court of Appeals erred in denying Petitioners' request for a temporary injunction during the pendency of the appeal.**

III. **Respondents did not waive any of their positions or arguments, or concede any of the arguments raised by Petitioners in their Petitions for Supersedeas.**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The underlying litigation began with the filing of a lawsuit by Petitioners against Respondents Trident and HCA Healthcare, Inc. (collectively, "Respondents") and six (6) individual physicians (the "Defendant Physicians") who were formerly employed by UMA or practiced at MUSC's facility. Those Defendant Physicians had previously given notice and resigned their employment with Petitioners in July and August 2021. Defendant Physicians' resignations were effective December 1, 2021.

Prior to the Defendant Physicians' resignations becoming effective, Petitioners commenced this litigation by filing the Complaint on November 21, 2021. Petitioners' Complaint contained a First Cause of Action for alleged breach of the duty of loyalty against only the Defendant Physicians. That cause of action makes no allegations against and, indeed, never even

[1] Respondent HCA Healthcare, Inc. challenged personal jurisdiction over it by Motion to Dismiss under Rule 12 (b)(2) at the very outset of this litigation. Petitioners have never met their burden of establishing that any South Carolina court has personal jurisdiction over HCA Healthcare and the Court cannot issue an order awarding Petitioners any of their requested relief against HCA Healthcare. until Petitioners have met their burden of establishing jurisdiction over HCA Healthcare.

mentions Respondents. The Complaint never even alleges—even in conclusory fashion—that Respondents owe a duty of loyalty to Petitioners. Otherwise the Complaint purports to assert some other causes of action collectively against Respondents and the Defendant Physicians and some additional causes of actions against only one or more of the Defendant Physicians. In their Complaint, Petitioners allege that prior to the end of the Defendant Physicians' employment, the Defendant Physicians obtained information or documentation from Petitioners which was then transmitted to Trident. Such allegations are alleged in, and the *ipse dixit* assertion that the documentation was secret or proprietary in wholly conclusory fashion. (R. 29).

The Complaint alleges only that the Defendant Physicians took the so-called confidential or proprietary information. Specifically, Petitioners allege that the materials misappropriated by the Defendant Physicians consist of the following items:

1. Case logs for Defendant Day (R. 23);
2. Physician preference cards (R. 22);
3. Instrument lists (R. 22);
4. Financial information showing the amount of revenue generated by four of the Defendant Physicians during their employment with MUSC and MUHA hospital and their RVUs (R. 23);
5. Financial information showing the salaries for four of the Defendant Physicians received while employed by MUSC (R. 23); and
6. Salaries for MUSC's residents and signed contracts for incoming fellows in the Head and Neck Fellowship Program (R. 23-24).

However, the Record reveals that: (a) the case logs at issue are records of the procedures performed by the Defendant Physicians in the past, and are used to demonstrate those physicians' competency, (R. 524; Meuli Aff. ¶ 7); (b) it is standard and routine in the practice of medicine for case logs from prior institutions where a physician practiced to be provided to a new hospital where the physician seeks to obtain privileges, (R. 524; Meuli Aff. ¶ 7); (R. 599; Horwich Aff. ¶ 6); (c) the case logs for the individual Defendant Physicians presented to Trident bear no designation or

notation that they came from MUSC, or that they are trade secrets, or proprietary, or confidential, (R. 525; Meuli Aff. ¶ 11); (d) a physician preference card is a catalogue of the specific tools, supplies, instruments, pharmaceuticals and processes preferred for use by a particular physician, (R. 20); (e) an instrument list is a list of the specific instruments that a particular physician prefers to have available when he/she performs a specific procedure, (R. 21); (f) the instrument lists and physician preference cards at issue in this case were developed by each of the six Defendant Physicians themselves based on each's individual, personal knowledge, experience and preferences. (R. 171-172; Brendle Aff. ¶¶ 4 - 5).

Importantly, the Record plainly reveals that the "instrument lists" and "physician preference cards" alleged to have been provided to Trident were not labeled or identified in any way as coming from: (i), belonging to or being the property of Petitioners; (ii) being "Trade Secret;" or (iii) being "confidential" or "proprietary." Furthermore, the evidence, (R. 468 - 476), reflects that the transmissions of those lists and cards to Trident were actually made by employees of MUSC using MUSC emails. There is no allegation or evidence that Trident knew such lists or cards had been "misappropriated" from MUSC, or that the transmissions of those lists and cards (by way of MUSC employees and MUSC's email system) were not authorized. In fact, Respondents vigorously dispute such conclusions (which have no factual basis in the Record and exist only as naked, conclusory allegations by Petitioners).

Additionally, the Record before the circuit court reflected that Dr. Peter Horwich—a former MUSC Fellow from July 1, 2019, to June 30, 2020, at MUSC—attested to the fact that when he was being hired at his second fellowship in 2020 and needed to become privileged at LSU Health Shreveport, he was required to provide his case logs from MUSC to LSU. To accomplish this, he asked the MUSC Nurse Coordinator to provide him with his mentor's (Dr. Hornig) preference cards so that Dr. Horwich could use those preference cards as a template to prepare and

submit his preferred instruments to LSU. (R. 599-600; Horwich Aff. ¶ 6-7). Those preference cards were provided to Dr. Horwich and, at no time did anyone from MUSC assert that the case logs or preference cards were a trade secret, or confidential or proprietary. Indeed, no one at MUSC objected to the transfer of the case logs or Dr. Hornig's preference cards to LSU. (R. 600; Horwich Aff. ¶ 8).

On the same day Petitioners filed their Complaint against Respondents, Petitioners filed a Motion for Temporary Injunction. In summary, Petitioners sought preliminary injunctive relief which (1) prohibits Respondents from further utilizing Petitioners' alleged confidential and proprietary information, including instrument lists, patient lists, physician preference cards and financial data; (2) requires the return of all confidential and proprietary information, including, but not limited to instrument lists, patient lists, physician preference cards, and financial data; (3) prohibits Respondents from billing or collecting money for services performed utilizing any of Petitioners' confidential and proprietary information, including instrument lists, patient lists, physician preference cards, and financial data; (4) prohibits Respondents from further interfering with MUSC's Fellowship Program in any way or recruiting any MUSC Fellow; (5) prohibits Respondents from contacting any fellowship accreditation bodies regarding MUSC; and (6) prohibits Respondents from further recruiting or soliciting, or otherwise contacting current MUSC and UMA employees, associates, agents, and fellows regarding any potential employment with HCA. (R. 38-39).

On December 8, 2021—the day prior to the circuit court hearing on the Motion for Temporary Injunction—Petitioners finalized a Settlement Agreement with each of the six (6) individual Defendant Physicians. In each of those Settlement Agreements, Petitioners and the individual physicians agreed only that the Physician "has destroyed, or shall destroy . . . the following specific documents or records (including photocopies) to the extent that any are in

Physician's possession, custody or control: physician preference cards, case logs, or instrument lists created during his employment with MUSC and membership with UMA . . ." Otherwise, each Physician only agreed that he/she will refrain from using any of the documents or records specifically referenced in this Section 2." (emphasis added). The Defendant Physicians never agreed they could not or would not use their knowledge and experience from which they prepared the cards and lists in the first place, or that they would not duplicate such cards and lists using such knowledge and experience.

On December 9, 2021, the circuit court conducted a hearing on the Petitioners' Motion for Temporary Injunction against Respondents. [2] At that time, Petitioners had the opportunity and the burden to prove their entitlement to the injunctive relief requested.

On December 15, 2021, the circuit court, after receiving and hearing the arguments of the parties, issued an order denying Petitioners' Motion for Temporary Injunction. (R. 1). The circuit court's order denied Petitioners' Motion with specific reference to the grounds that Petitioners failed to demonstrate that irreparable harm would occur if the temporary injunction is not granted and Petitioners failed to sufficiently demonstrate that they do not have an adequate remedy at law for their purported claims. (R. 1).

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

[2] On December 7, 2021, HCA filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(2), SCRCP, based upon the circuit court's lack of personal jurisdiction over HCA. That same day, HCA filed an affidavit of Michael Bray and a Memorandum of Law in Support of its Motion to Dismiss. (R. 497). Prior to that hearing, Trident submitted a memorandum of law in opposition to Petitioners' Motion for Temporary Injunction. In that memorandum, Trident again asserted the argument that Petitioners have not met their burden to establish that the circuit court has personal jurisdiction over HCA and, therefore, the circuit court could not properly order injunctive relief against HCA. (R. 213).

On February 18, 2022, the circuit court issued its order denying Petitioners' Motion to Alter or Amend. (R. 4). Thirty (30) days after the circuit court issued the Order denying the Motion to Alter or Amend, on March 21, 2022—the last possible day—Petitioners filed a Notice of Appeal of the circuit court's two prior orders denying Petitioners' request for injunctive relief.

On March 25, 2022, one hundred twenty-three (123) days after their initial Motion for Temporary Injunction was filed, 100 days after it was denied, and 35 days after denial of their Motion to Alter or Amend, Petitioners filed with the circuit court a Motion to Supersede Prior Orders Denying Petitioners Injunctive Relief and to Grant a Temporary Injunction During Pendency of Appeal. That motion sought, for a third time, an order from imposing injunctive relief to which the circuit court had twice previously found Petitioners were not entitled. (R. 250; 253).

On June 29, 2022, the circuit court issued an order denying Petitioners' March 25 Motion. (R. 7).

On July 22, 2022—twenty-three (23) days after the circuit court denied the March 25 Motion, Petitioners filed a Petition for Writ of Supersedeas with the Court of Appeals requesting the Court of Appeals to issue an order: (a) superseding the circuit court orders denying the Petitioners' requested injunctive relief, and (b) imposing a temporary injunction on Respondents that would "require the [Respondents] to return the Property and to refrain from using it while this appeal is pending."

On August 11, 2022, the Court of Appeals issued an order denying Petitioners' Petition for Supersedeas. (R. 491). On August 16, 2022, Petitioners filed a Petition for Full Appellate Court Review of Order Denying Supersedeas. (R. 573). Petitioners raised two arguments in their Petition: (1) the Court of Appeals' prior order, dated August 11, 2022, denying the Petition for Supersedeas is procedurally incorrect because it does not comply with Rule 220(b), SCACR, due to a purported failure to state details supporting the Court of Appeals' denial of that petition; and

(2) the Court of Appeals' prior order, dated August 11, 2022, is substantively incorrect because without the relief requested Petitioners will lose "the fruits" of their appeal. Petitioners alternatively requested the Court grant them a hearing *en banc*.

On September 13, 2022, the Court of Appeals issued an order denying Petitioners' Petition for Full Appellate Court Review of Order Denying Supersedeas. (R. 493).

On October 12, 2022, Petitioners filed a Petition for Writ of Certiorari requesting this Court reverse the Court of Appeals' orders denying the Petitions for Supersedeas.

ARGUMENT

I. The Court of Appeals' Orders denying the Petition for Supersedeas and the Petition for Full Appellate Panel Review were procedurally proper.

A. The South Carolina Appellate Court Rules do not require the Court of Appeals to make findings of fact or state the Court of Appeals' application of the law to the facts when ruling on appellate motions and petitions for supersedeas.

In this case, what was at issue before the Court of Appeals was a Petition for Supersedeas—not the full blown appeal on the merits. After considering that Petition, the Court of Appeals directly ruled upon and responded to the Petition.

The Court of Appeals' "Order" denying Petitioners' Petition for Supersedes is concise, direct and correct. That "Order" states:

> After careful consideration, Appellants' petition for supersedeas is denied. Appellants' request for a hearing on their petition is denied.

(R. 491).

Similarly, the Court of Appeals' "Order" denying the Petition for Full Appellate Panel Review of the Order Denying the Petition for Supersedeas is concise, direct and correct. That "Order" states:

> Appellants seek rehearing of this court's August 11, 2022 order denying their petition for supersedeas. After careful consideration of the petition for rehearing, the Court is unable to discover that any

> material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

(R. 493).

In issuing an order in response to a motion or petition, the Court of Appeals is not obligated under any rule or statute to provide a full opinion. Indeed, nothing more is required than the direct, clear, unambiguous decision on the motion or petition. The Orders denying the Petitions for Supersedeas did exactly that.

Petitioners argue that the Court of Appeals' Orders violate Rule 220, SCACR—which is titled "Opinions." Petitioners' argument is wrong and based upon the assertion of an incorrect application of Rule 220(b), SCACR. The relevant portion of Rule 220(b) states:

> 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.

Of course, Rule 220(b), SCACR, is explicitly and plainly stated in to apply to "the decision of the appeal." The Orders denying the Petitions for Supersedeas are not the "decision of the appeal." The appeal was filed March 21, 2022, and remains pending before the Court of Appeals even now.

The "Orders" denying the Petitions for Supersedeas were issued in response to separate petitions and are not *opinions* expressing the Court of Appeals' decision of the appeal. Rule 220(b), SCACR, does not address any requirement regarding the form or content of an order denying a petition or motion filed with the Court.

The distinction between an order and an opinion was recently illustrated by the South Carolina Supreme Court in *The Protestant Episcopal Church in the Diocese of S.C., et. al, v. The Episcopal Church (a/k/a, The Protestant Episcopal Church in the United States of Am., et. al*.,)

No. 2020-000986, 2022 WL 3560664, at *1 (August 17, 2022). In that case, the South Carolina Supreme Court issued a concise order ruling on eight petitions for rehearing in the case. The response to the petitions by the Supreme Court was identified specifically as an "ORDER" and stated:

> The Court received eight separate petitions for rehearing. On June 7, we denied one petition in its entirety and denied three petitions in part. We requested briefing on two arguments: (1) revocation based on subsection 62-7-602(a) of the South Carolina Code (2022), and (2) no trust was created because the language purporting to constitute accession existed in the bylaws or constitutions before 1979. After careful consideration of these two arguments in the remaining petitions for rehearing, we grant the following petitions for rehearing . . . . We deny the following petition . . . .

It is clear that the Supreme Court's "Order" deciding the "petition for rehearing" in *The Protestant Episcopal Church in the Diocese of S.C.* required and contains no discussion of the facts or law supporting the Supreme Court's rulings on the petitions for rehearing. After issuing its "Order" granting the petitions for rehearing, the Supreme Court—in a separately captioned filing—issued a lengthy substitute "Opinion" (Opinion No. 28095). In that "Opinion" deciding the appeal, the Court detailed the facts and authorities supporting its decision on the merits of the appeal. Thus, the Supreme Court clearly recognizes the difference in the two circumstances and in the applicable standards for each.

Similarly, in *Alan Wilson v. Truth Squad*, Sup. Ct. Order 2010-06-21-01, the Supreme Court issued a concise "Order" ruling on a Petition for Writ of Supersedeas. The entirety of that Order is as follows:

> Appellants have filed a petition for a writ of supersedeas regarding a temporary restraining order (TRO) issued by the circuit court. Respondents have filed a return. After hearing arguments, the petition for a writ of supersedeas is granted. We remind the parties that all other relief requested by respondents remains pending before the circuit court.

The ”Orders” “issued” by the Supreme Court in *The Protestant Episcopal Church in the Diocese of S.C.* and *Truth Squad* demonstrate plainly and clearly that South Carolina appellate courts are not required to issue orders in response to motions or petitions setting forth detailed factual findings, or applying the facts to the law Accordingly, Petitioners' contention that the Court of Appeals' Orders denying the Petition for Supersedeas are procedurally improper because of their brevity lacks merit and entitles Petitioners to no further action by the Court.

Petitioners erroneous attempt to impute upon the appellate courts the requirements of Rule 52, SCRCP is also erroneous. Rule 52, SCRCP, is not applicable to orders issued by South Carolina appellate courts. Rather, South Carolina appellate practice is controlled by the South Carolina Appellate Court Rules. *See Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 215, 810 S.E.2d 856, 858 (2018); Rule 101(a), SCACR; Rule 73, SCRCP; Rule 81, SCRCP. Thus, Petitioners' arguments regarding the application of Rule 52, SCRCP lacks merit.

B. The Court of Appeals did not treat the Petition for Full Review *solely* as a petition for rehearing *en banc*.

After the Court of Appeals had denied Petitioners' Petition for Supersedes, Petitioners regurgitated the same legal and factual arguments, this time labeling it as a Petition for Full Appellate Court Review of Order Denying Supersedeas. In response to that Petition, three Judges of the Court of Appeals signed and issued and “ORDER” denying the Petition. Now, Petitioners complain that the Court of Appeals “treated the Petition for Full Review solely as a petition for rehearing *en banc*.” Nothing in the Record supports this bald and incorrect assertion. The Court of Appeals' “ORDER” denying the Petition for Full Review provides no support for the contention that the Court of Appeals applied the standard for rehearing *en banc*. Therefore, Petitioners' argument that the Court of Appeals applied an erroneous *en banc* standard has no basis and lacks merit.

Furthermore, Petitioners' argument that the Court of Appeals applied the wrong standard to their Petition for Full Review by treating it as a Petition for Rehearing also lacks foundation or merit. The so-called Petition for Full Appellate Court Review was, in fact, considered by Full Appellate Court Review and was denied by an order signed and issued by a Full panel of three judges. Thus, the Petition for Full Review was a request that the Court of Appeals review and rehear the Petition for Supersedeas which had been originally decided by Judge Lockemy. The Court of Appeals committed no error in styling the denial of that petition as a denial of a petition for rehearing.

II. The Court of Appeals properly denied the Petition for Supersedeas because Petitioners have never satisfied their heavy burden of establishing entitlement to the extraordinary remedy of injunctive relief.

Entitlement to any relief under Rule 241(c) is first predicated on Petitioners establishing that the relief sought is necessary to "preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." That consideration is the lynch-pin for the Court to grant any relief under Rule 241(c). In this case, no such action by the Court is necessary for that purpose and, therefore, no relief under Rule 241 is appropriate.

There are two salient predicates for the Petitioners to obtain the injunctive relief requested during the pendency of the appeal. First, they must show that the injunction they seek is necessary to preserve the status quo existing at the time they filed their appeal. *See Miltenberger v. Chesapeake & O. Ry. Co.*, 450 F.2d 971, 974 (4th Cir. 1971); *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974, 978 (N.D. Cal. 2019), *aff'd*, 964 F.3d 832 (9th Cir. 2020) (stating that for purposes of an injunction during the pendency of an appeal the "'status quo' means the state of affairs at the time the appeal was filed"). Second, Petitioners must show that they have met their heavy burden of establishing the necessary elements for obtaining injunctive relief during the pendency of an appeal.

While there could be a circumstance when a court has authority to grant injunctive relief while an appeal is pending, this is not such a case. South Carolina courts analyzing this issue have applied a heightened standard of review (compared to the mere issuance of a temporary injunction pursuant to Rule 65, SCRCP). South Carolina courts have concluded that an injunction should not be issued unless "the right of the appellant **is very clear and beyond reasonable doubt**." *Silverthorne v. Barnwell Lumber Company*, 96 S.C. 32, 79 S.E. 519, 519-20 (1913) (emphasis added). Similarly, South Carolina courts have found that the entitlement to such relief must be "**clearly shown**." *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (emphasis added).

This heightened standard raises the burden to establish a right to an injunction during the pendency of an appeal. To obtain such preliminary injunctive relief during the pendency of an appeal, Petitioners bear the burden of establishing:

1. Petitioners are <u>likely to succeed on the appeal</u>;
2. Petitioners would suffer irreparable harm if the injunction is not granted; and
3. Petitioners have no adequate remedy at law.

See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) (stating the elements for obtaining preliminary injunctive relief and finding that "balancing the equities" is not a requirement for the issuance of a preliminary injunction in South Carolina); *see also 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) (stating that a clear showing of the likelihood of success on the merits relates to the merits of the pending appeal)[3]; *Alcala v.*

[3] "In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (citation omitted).

Hernandez, No. 4:14-CV-04176-RBH, 2015 WL 7312891, at *7 (D.S.C. Nov. 19, 2015).

The standard for obtaining an injunction during the pendency of an appeal is heightened further by the fact that the Court is to determine whether Petitioners are likely to succeed on the merits of their appeal—not whether the Petitioners are likely to succeed on the merits of the underlying claim. *See Miltenberger*, 450 F.2d at 974; *Rhoades v. Savannah River Nuclear Sols., LLC*, No. 1:21-CV-03391-JMC, 2021 WL 6133833, at *3 (D.S.C. Dec. 28, 2021). Therefore, Petitioners must show beyond a reasonable doubt that the circuit court abused its discretion in refusing to grant the injunctive relief requested by the Petitioners. *See Richland Cty. v. S.C. Dep't of Rev.*, 422 S.C. 292, 307, 811 S.E.2d 758, 766 (2018) ("An order granting or denying an injunction is reviewed for abuse of discretion." (citation omitted)).[4] Petitioners have not even addressed this standard and burden, let alone satisfied it.

A. The injunctive relief requested by Petitioners is not necessary to preserve, and would not preserve, the status quo existing at the time Petitioners filed their appeal in this case.

As noted above, the controlling legal standard for issuance of an injunction pending appeal is that the injunction be necessary to maintain the status quo at the time of the appeal. *See Miltenberger*, 450 F.2d at 974. The purported status quo at the time the original suit was filed, or when the original request for injunctive relief was made, is not determinative or even material. Even crediting Petitioners' allegations, at the time their appeal in this case was initiated: (i) all claims against the Defendant Physicians had been released and dismissed; (ii) in the Settlement Agreements between the Defendant Physicians and Petitioners, the Defendant Physicians had merely agreed to destroy certain documents and records <u>but never agreed</u> they could not or would

[4] Petitioners arguments regarding the prejudice that could be sustained by Respondents if the injunction is granted and the public interest are drawn from the federal standard for granting a temporary injunction. The elements for obtaining injunction relief in South Carolina state courts does not include those elements. *See Poynter Invs., Inc.*, 387 S.C. at 587, 694 S.E.2d at 17.

not use any knowledge or information acquired while employed by Petitioners which might be reflected in the various documents and records at issue to carry on their practice of medicine at Trident; and (iii) whatever documents and records relative to the physicians which had previously been delivered to Trident by MUSC or the physicians were not restricted by any order or agreement. This was the status quo at the time of the appeal. Indeed, this status quo is why Petitioners' have pursued the appeal.

However, Petitioners do not seek to protect this status quo. Instead, Petitioners improperly ask the Court to materially alter such current status quo in their favor. The law does not sanction manufacturing a fictional status that did not exist at the time of the filing of the appeal. The status quo in this case at the time the appeal was filed was that there was no injunction in place. Trident was not subject to the terms of the requested injunction.

There is limited authority in the courts of this state regarding the issuance of a temporary injunction during the pendency of an appeal. However, courts in other jurisdictions have analyzed this issue and applied the status quo that existed at the time the appeal was filed. Specifically, application of these legal principles is reflected in *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1987042, at *2 (N.D. Cal. June 4, 2012). In that case, the Court considered Apple's motion for an injunction during the pendency of an appeal in a case where Apple claimed that Samsung's products, including the Galaxy Tab 10.1, infringed on Apple's design patents. Apple sought to enjoin Samsung from continuing to infringe on its design patents though the sale of certain products. At the time of the appeal, Samsung was engaged in selling the Galaxy Tab 10.1 which purportedly included the use of Apple's design patents and intellectual property. While the appeal was pending, Apple moved the Court to issue a temporary injunction prohibiting Samsung from selling the Galaxy Tab 10.1. The Court denied Apple's motion because granting the requested injunction and prohibiting Samsung from selling the Galaxy Tab 10.1 would change

the status quo that existed at the time of the appeal. *Apple, Inc.*, 2012 WL 1987042, at *2. Therefore, Samsung was permitted to continue selling the Galaxy Tab 10.1 while Apple argued on appeal that the Court erred in failing to grant its request for injunctive relief barring Samsung from continuing to sell products that infringed on Apple's design patents.

In the present case, Petitioners' requested injunctive relief would alter the status quo as of the time the appeal was filed. When Petitioners filed their appeal (March 21, 2022) no injunction was in place and there was no prohibition against the possession by Trident of any of the documents or information at issue. Furthermore, the Defendant Physicians were already performing head and neck oncology procedures at Trident's facilities.

The Settlement Agreements executed by and between the Defendant Physicians and Petitioners only affected the Defendant Physicians "using" the specific documents in issue. The Defendant Physicians were not barred from using the experience, knowledge and skills associated with providing head and neck oncology treatment at Trident's facilities, or from recreating the documents from their own knowledge or experience. For Petitioners to have voluntarily executed settlements with the Defendant Physicians on these terms, but then seek to enjoin and prevent Trident (where the physicians carry on their medical practices) from "retaining and using" the same information that the physicians are free to use, is not merely inconsistent, it is incongruous. For example, while the disputed physician preference cards may indicate how a particular Defendant Physician preferred in the past to have his or her operating room set up for surgery. Trident cannot be enjoined from using information provided now about the surgeon's preferences to facilitate his practice now in its facilities. Petitioners' requested injunctive relief would do far more than preserve the status quo at the time of the appeal and, therefore, it should not be granted.

Furthermore, Petitioners argue that South Carolina courts will not maintain an "unlawful" status quo. Petitioners' argument ignores that any basis for finding a purported "unlawful" status

quo would require a court to find that Petitioners have met their burden of establishing the disputed information constitutes a protected trade secret. As discussed in detail below, Petitioners have failed to meet this burden and the disputed information is not subject to protection under the South Carolina Trade Secrets Act and, therefore, there is no "unlawful" status quo that is being protected.

B. Petitioners failed to satisfy the heavy burden necessary to entitle them to the requested injunctive relief during the pendency of the appeal.

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

In order to find that Petitioners have established a likelihood of success on the merits of the pending appeal, the Court must conclude that Petitioners have established that they are likely to be successful on their appeal of the circuit court's orders denying the Petitioners' Motion for Preliminary Injunction. *See Miltenberger*, 450 F.2d at 974; *Rhoades*, 2021 WL 6133833, at *3. In order to establish a likelihood of success on the merits of their appeal, Petitioners are required to establish clearly that an appellate court is likely to find that the circuit court abused its discretion in denying the original Motion for Temporary Injunction and the subsequent related Rule 59(e) Motion. *See Richland Cty.*, 422 S.C. at 307, 811 S.E.2d at 766. Thus, Petitioners bear the burden of establishing the likelihood that the circuit court's prior decisions denying Petitioners' requests for injunctive relief will be found by an appellate court to be without evidentiary support, or to be based upon an error of law. *Id*. Accordingly, if the Court is unable to conclude that it has been clearly shown, or that Petitioners' right to injunction relief "is very clear and beyond a reasonable doubt," that the circuit court abused its discretion or committed clear error of flow in the Orders now on appeal, it cannot conclude that Petitioners are likely to succeed on the merits of their appeal. Indeed, in their Petition for Writ of Certiorari, Petitioners never even acknowledge or address this burden they face, and they never establish a <u>likelihood of success on their appeal</u>.

Petitioners are not likely to succeed on the merits of their appeal because they failed to carry their burden of establishing that the disputed information is afforded protection under the South Carolina Trade Secrets Act or is even protectable as proprietary or confidential material. Without adequate proof that the documents in question are producible, Petitioners cannot (have not) established that they are likely to succeed on the merits.

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

Of course, they make no factual or evidentiary showing to support any of these purely conclusory, self-serving allegations. Furthermore, they make no showing to establish that the asserted liability for these allegations extends to Respondents.

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

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

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

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

d. The evidence (Petitioners' Master Exhibits 6 and 7) reflects that the transmissions of those lists and cards to Trident were made by employees of MUSC using MUSC emails. There is no evidence that Trident knew such lists or cards had been misappropriated from MUSC or that the transmissions of those lists and cards (by way of MUSC employees and MUSC email system) were not authorized. (R. 468 – 476).

It is axiomatic that there can be no claim or protection available under the Trade Secrets Act unless Petitioners establish that there is a trade secret. To constitute a trade secret, the information must be secret. *Carolina Chem. Equip., Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct. App. 1996). When the information claimed to be a trade secret is readily ascertainable from other sources, it does not qualify for protection under the Trade Secrets Act, S.C. CODE ANN. §39-8-20 (5). Information does not qualify for trade secret protection when the information can, with reasonable effort, be properly acquired or duplicated by or through others. *See Carolina Chem. Equip., Co.*, 322 S.C. at 296, 471 S.E.2d at 724. Even the affidavits submitted by Petitioners in support of the Motion for Temporary Injunction admit that the instrument lists and physician preference cards were, in fact, prepared by the individual physicians. (R. 171). There is not a scintilla of evidence that those physicians were not capable of duplicating such cards and lists from their own experience knowledge, skill and general memory.[5]

More broadly, a person otherwise entitled to trade secret protection must take all proper and reasonable steps to keep it secret, in order to maintain legal protection. *See Lowndes Prod.,*

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

Inc. v. Brower, 259 S.C. 322, 331, 191 S.E.2d 761, 766 (1972). When Petitioners fail to demonstrate that they, in fact, took proper and reasonable steps to protect their alleged secrets—and how they did that—their lack of proper precautions supports the conclusion that a secret (or its protection) was not intended and does not exist. *See Id.* at 329, 191 S.E.2d at 765. As the Court declared:

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

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

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

In addition to Petitioners' failure to demonstrate that they took proper and reasonable steps to protect the purported trade secrets, Petitioners make no substantiated allegation that Respondents knew or should have known the physician cards, equipment lists, and case logs were considered to be Petitioners' trade secrets. Indeed, as a teaching hospital, Petitioner is engaged in the dissemination of information on clinical practice through the training of doctors who

subsequently leave MUSC. In fact, as stated in the affidavits of Dr. Horwich and Elaine Meuli, this information (equipment cards, lists, and case logs) is not confidential, proprietary, or considered to be a trade secret. (R. 600; Horwich Aff. ¶¶ 7, 8); (R. 524-525; Meuli Aff. ¶¶ 7 -13).

Petitioners clearly have failed to demonstrate that they are likely to succeed on the merits of their appeal in a manner that is very clear and beyond reasonable question because Petitioners have failed to demonstrate the circuit court abused its discretion in denying the Motion for Preliminary Injunction. *Silverthorne*, 96 S.C. at 32, 79 S.E. at 519-20. Accordingly, the Court should deny the Petition for Writ of Certiorari and decline to grant Petitioners' their requested temporary injunctive relief pending the resolution of the appeal.

2. Petitioners have not, and cannot, show that they will suffer irreparable harm if an appellate court does not grant Petitioners the requested injunctive relief.

It is fundamental that an injunction cannot issue unless Petitioners satisfy their heavy burden of demonstrating that they **will** suffer an irreparable harm if a temporary injunction is not issued. *Twin City Power Co. v. Savannah River Elec. Co.*, 163 S.C. 438, 161 S.E. 750 (1930); *see also S.C. Pub. Serv. Auth.*, 244 S.C. at 474, 137 S.E.2d at 509-10.

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

It is not enough for Petitioners to assert or argue that the irreparable harm is "merely problematic" or "conditioned on possible future events." *Direx Israel, Ltd.*, 952 F.2d at 816. Petitioners must present probative evidence that there exists a "present threat of irreparable harm." *Id.* Yet, in this case, Petitioners have couched their allegations of irreparable harm as being "potential." Specifically, in their original Motion for Temporary Injunction (Page 6, Section II), Petitioners candidly admitted that "MUSC's Head and Neck Fellowship Program faces potential

irreparable harm without issuance of this requested injunctive relief." (emphasis added). Now, at this stage, Petitioners can make no specific allegation of even "potential" irreparable harm from this point into the future.

Furthermore, while Petitioners assert that they will suffer irreparable harm without the requested extraordinary (injunctive) relief, Petitioners own actions belie this assertion. If the Petitioners were to actually suffer an imminent and irreparable harm without the issuance of an injunction, then Petitioners would have acted urgently after each instance when the circuit court denied Petitioners' request for such relief. However, instead of taking immediate action following the circuit court's denials of Petitioners' requests for injunctive relief, Petitioners waited days—if not weeks—to take another action attempting to obtain the requested injunctive relief. Such delay and a complete lack of urgency on behalf of the Petitioners further evidences the fact that Petitioners will not suffer irreparable harm if the Court denies Petitioners' Petition. *See, e.g., Lawson Env't Servs., LLC v. U.S.*, 128 Fed. Cl. 14, 19 (2016) (finding the plaintiff's delay in seeking the injunctive relief weighed against a finding that irreparable harm would result if the requested injunction pending an appeal was not granted).

Because there is no viable assertion or claim of irreparable harm going forward, and there is no presumption of irreparable harm applicable in this case, the Petitioners are not entitled to the requested injunctive relief and their Petition for Writ of Certiorari should be denied. *Atwood Agency v. Black*, 374 S.C. 68, 72-73, 646 S.E.2d 882, 884 (2007).

3. Petitioners have an Adequate Remedy at Law.

It is fundamental that Petitioners can only establish an entitlement to injunctive relief if they meet the burden of demonstrating to the Court that they have no adequate remedy at law. "The party seeking an injunction must prove it has no adequate remedy at law." *Milliken & Co.*

v. Morin, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012) (citation omitted).

Thus, Petitioners must show the Court it is impracticable for them to obtain full and adequate compensation at law. *Nutt Corp. v. Howell Rd., LLC,* 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (citation omitted). This means that due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). However, in this case Petitioners have alleged an entitlement to money damages for each and every cause of action. Because the availability of money damages destroys the contention that there is no adequate remedy at law, Petitioners' own Complaint and the allegations therein reflects that there is available an adequate remedy at law. *See Charleston Dev. Co., LLC v. Alami*, 433 S.C. 533, 860 S.E.2d 687, 693 (Ct. App. 2021) (finding a plaintiff who asserted claims for monetary damages and was unsure if it would suffer an irreparably injury was not entitled to injunctive relief); *Macro Specialties, Inc. v. Legacy Cir. Enterprises, LLC*, No. 3:12-CV-1274-JFA, 2021 WL 1963597, at *1 (D.S.C. May 31, 2012).

III. Respondents did not waive any of their positions or arguments, or concede any of the arguments raised by Petitioners in their Petitions for Supersedeas.

Despite Respondents having responded to all of Petitioners arguments in prior motions to the Circuit Court and the Court of Appeals, Petitioners now attempt to argue that Respondents must continue to respond specifically and in detail to every specious regurgitation of the same arguments in every baseless motion or petition which Petitioners continue to file. Although Respondents have now responded multiple times to these same arguments, and have prevailed, and will be responding yet again in the pending appeal on the merits, Petitioners want to play the game that they somehow now win by forfeit what they have lost multiple times on the actual

Record. Petitioners' arguments that Respondents should be deemed to have waived or conceded points previously argued and preserved multiple times is misplaced.

To justify their assertion, Petitioners rely on the opinions issued by the courts in *First Union National Bank of S.C. v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) and *In re Infinity Business Group, Inc.*, 628 B.R. 213, 231–32 (D.S.C. 2021), *aff'd*, 31 F.4th 294 (4th Cir. 2022). They say these cases support the proposition that Respondents conceded the Petitioners' arguments were correct by failing to directly respond to those arguments in the Return to the Petition for Supersedeas filed with the Court of Appeals. In both cases argued by Petitioners, the courts considered only whether issues were conceded by a respondent due to the respondents' failure to respond to the issue in their *appellate brief*. *First Union*, 321 S.C. at 502, 469 S.E.2d at 617 (stating that the "failure to respond to [an] argument in [the Respondent's] **brief** could amount to a concession that the trial court ruled incorrectly" (emphasis added)); *In re Infinity*, 628 B.R. at 231–32 ("In the Fourth Circuit, 'an appellee's wholesale failure to respond to a conspicuous, nonfrivolous arguments **in the appellant's brief** ordinarily constitutes a forfeiture." (emphasis added)). Of course, in this case, the filings in issue are not the appeal brief.

Neither of these decisions is applicable in the case at bar. In this case, Respondents' Initial Brief in the appeal is only due to be filed with the Court of Appeals on December 9, 2022. Therefore, there has been no omission in an appellate brief. The stated premise of each case cited by Petitioners is inapplicable. Respondents have omitted nothing in an appellate brief. Respondents have neither waived, nor conceded any argument raised in the underlying appeal by failing to respond to an argument in a separate motion or petition. Petitioners cite no authority for the proposition that an argument in a motion is conceded when a respondent does not address the

argument raised in the appellate motion when the respondent files its written opposition to the motion.

Furthermore, the Petitioners' argument related to their likelihood of success on the merits on the claim for breach of duty of loyalty was raised by there under the argument heading "MUSC meets the required elements for granting a temporary injunction during the pendency of the appeal." (R. 512). Any review of the Petitioners' Complaint plainly reveals that the so-called cause of action for breach of the duty of loyalty is not made against Respondents. No allegations or claims for relief in that cause of action are against, or even mention Respondents. In the section of their Return titled, "Appellants have never satisfied their heavy burden of establishing entitlement to the extraordinary remedy of injunctive relief," (R. 542), Respondents yet again responded, and the Court of Appeals agreed with the Respondents and denied the Petition for Writ of Supersedeas. Accordingly, any argument that Respondents waived or conceded any positions raised by Petitioners lacks merit.

CONCLUSION

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

s/ James Lynn Werner
James Lynn Werner SC Bar No. 6029
David B. Summer SC Bar No. 7974
Katon E. Dawson Jr. SC Bar No. 101167
Ashley W. Johnson SC Bar No. 101423
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
jimwerner@parkerpoe.com
davidsummer@parkerpoe.com
katondawson@parkerpoe.com
ashleyjohnson@parkerpoe.com

November 14, 2022
Columbia, South Carolina

Attorneys for Defendants HCA Healthcare, Inc. and Trident Medical Center, LLC