

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Nov 28 2022**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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.

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**REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONERS

Petitioners Medical University of South Carolina (“MUSC”) and University Medical Associates of the Medical University of South Carolina (“UMA”) respectfully submit this Reply to Respondents’ Return to the Petition for Writ of Certiorari.

### **INTRODUCTION**

Respondents’ Return does not articulate a single reason why this Court should permit Respondents to remain in possession of Petitioners’ Property acquired through employee misappropriation. Respondents do not dispute that they are in possession of Petitioners’ Property and that the Property in fact belongs to Petitioners. Every day Respondents continue to possess and use Petitioners’ Property further erodes the competitive advantage Petitioners enjoy over Respondents as the first-in-time innovator and creator of the Property.

While Petitioners should prevail on the merits, the immediate issue before this Court is whether to grant certiorari on the procedural and substantive questions set forth in the Petition. Petitioners’ procedural questions raise novel issues of law that this Court is uniquely situated to address (*i.e.*, when the Court of Appeals must set forth its reasoning in writing and whether a petition for supersedeas is subject to different standards than a petition for rehearing). Petitioners’ substantive questions raise a novel question of law (*i.e.*, what is the appropriate test for an injunction pending appeal), and involve an order from the Court of Appeals that conflicts with settled South Carolina employment law. *See* Rule 242(b), SCACR (identifying the reasons the Supreme Court considers in deciding petitions for certiorari).

The arguments advanced by Respondents in their Return are telling. They tactically avoid the elephant in the room—they are in possession of Property that does not belong to them and that they acquired through employee misappropriation. And they fail to articulate substantive reasons why this Court should deny certiorari. Instead, Respondents resort to making superfluous

arguments designed to distract and confuse. Petitioners will address those arguments below, but Petitioners urge this Court to keep two things in mind: (1) Respondents, fierce competitors of MUSC, are in possession of Petitioners' Property acquired through employee misappropriation, and (2) the issue here is simply whether this Court will grant certiorari and hear Petitioners' case.

## ARGUMENTS

### **I. Respondents misstate the standard for establishing a right to injunctive relief.**

Respondents are simply wrong when they assert “South Carolina courts have concluded that an injunction should not be issued unless ‘the right of the appellant **is very clear and beyond a reasonable doubt.**” (Return to Petition for Cert, p. 13) (emphasis in original). In support of this assertion, Respondents cite a 1912 opinion from a lone justice—Justice Woods—in *Kuhn Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912) and a 1913 opinion from a lone justice—Justice Fraser—in *Silverthorne v. Barnwell Lumber Co.*, 96 S.C. 32, 79 S.E. 519, 519 (1913). In *Kuhn*, Justice Woods denied the request to issue an injunction during the pendency of appeal, remarking that the issue involved “difficult questions of law.” 75 S.E. at 79. In *Silverthorne*, Justice Fraser stated an injunction during the pendency of appeal “ought not to be exercised **unless the right** ... is very clear and beyond reasonable question.” 79 S.E.2d at 519 (emphasis added).

The Hospital Defendants cherry pick statements from *Kuhn* and *Silverthorne* in an attempt to create a new standard for supersedeas relief. These cases do not create a standard, as evidenced by the fact that these statements did not find their way to Rule 241, SCACR, and subsequent courts have not cited them when considering supersedeas relief in other instances. *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).

Instead, the statements in *Kuhn* and *Silverthorne* reflect the type of cases they were. In both cases, the moving parties sought an injunction during the pendency of appeal for rights that

were uncertain. In *Kuhn*, the appellant asked for a supersedeas and a writ of mandamus (the highest judicial writ available) to require the Secretary of State to sign and issue certificates of proposed amendments to the charter of a corporation. 75 S.E. at 79. In *Silverthorne*, the appellant sought an injunction reinstating him to the position of superintendent and general manager of the respondent company, which appellant claimed he was “entitled to.” 96 S.C. at 32, 79 S.E. at 519-20. Justice Fraser noted that appellant’s claimed contractual right to a position at the company was unclear in the record and therefore did not warrant reversing the circuit court’s ruling. *Id.*

By contrast, the legal claims that are the subject of Petitioners’ Petition for Supersedeas—claims for breach of duty of loyalty and violation of the SCTSA—are well-developed and established legal concepts. South Carolina courts have routinely granted injunctions in cases just like this one where a competitor is in possession of specific property belonging to another.<sup>1</sup> Thus, the situations in *Kuhn* and *Silverthorne* are not analogous.

But even if a heightened standard applied (it does not), Petitioners have cleared it. Respondents have never disputed that the Property belongs to Petitioners. Respondents have conceded that Petitioners developed the Property with assistance from the Physician Defendants while employed by MUSC. (**R. 531, R. 541**). South Carolina law is clear that materials developed by employees within the scope of their employment belong to their employer. *Milliken & Co. v. Morin*, 399 S.C. 23, 35, 731 S.E.2d 288, 294 (2012). South Carolina law is also clear that employees owe a duty of loyalty to their employer, which necessarily includes not

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<sup>1</sup> See *Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 (D.S.C. Aug. 27, 2020); *Vessel Med., Inc. v. Elliott*, C/A No. 6:15-cv-00330-MGL, 2015 WL 5437173, at \*9 (D.S.C. Sept. 15, 2015); *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003); *Milliken*, 399 S.C. at 37, 731 S.E.2d at 295; *Lewallen Automation, LLC v. Lewallen*, 2014 WL 7925812 (S.C. Comm. Pl. 2014).

misappropriating a former employer's property and providing it to a new employer. *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 337, 191 S.E.2d 761, 769 (1972). Thus, Petitioners' rights to the Property and to a duty of loyalty from the Physician Defendants (a breach of which Respondents are jointly and severally liable under South Carolina law) are indisputably clear, and Petitioners would meet the heightened standard, if it applied. *See Id.* at 337-38, 191 S.E.2d at 769-70 (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 damages.).

**II. Respondents continue to misstate the relevant "status quo" for purposes of issuing a temporary injunction pending appeal.**

Respondents argue that the "status quo" to be preserved during the pendency of this appeal is the "status quo existing at the time [appellants] filed their appeal." Petitioners have consistently argued that this cannot be the true, as it would mean that South Carolina appellate courts are powerless to issue an injunction where it was previously denied by a circuit court. It would also render meaningless the supersedeas procedure contemplated by Rule 241, SCACR. If Respondents were correct, an appellate court could never grant an injunction pending appeal if the circuit court denied the injunction. That has never been the law.<sup>2</sup>

In support of their argument, Respondents cite to one Fourth Circuit case that does not mention the phrase "status quo," and to four federal district court cases from various jurisdictions. With regard to the four federal cases, Respondents overlook that in *each* of those cases, the issue

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<sup>2</sup> *See, e.g., Sea Pines*, 345 S.C. at 598, 550 S.E.2d at 290 (referencing a circumstance where the appellate court properly issued an injunction via writ of superdeas after the trial court denied appellant's motion for temporary injunction).

was whether a *district court* can use its limited jurisdiction under Rule 62(d), FRCP to impose or stay an injunction in a case that is within an appellate court’s jurisdiction.<sup>3</sup> That issue is not relevant here, as Petitioners sought an injunction via supersedeas *from the appellate courts* pursuant to Rule 241, SCACR.

There is good reason to view the “status quo” differently when seeking an injunction from the circuit court in a case pending appeal. Under Rule 62(c), SCRCF,<sup>4</sup> there is an exception to the divestiture rule that allows a circuit court to exercise limited jurisdiction over a case that is under the jurisdiction of the appellate court (by suspending, modifying, restoring, or granting an injunction). But because the circuit court no longer has jurisdiction, the circuit court cannot take any actions pursuant to Rule 62(c) that would upset the status quo *when the appeal was filed*. *East Bay Sanctuary Covenant*, 391 F.Supp.3d at 978; *Apple, Inc.*, 2012 WL 1987042, at \*1.

Again, Petitioners are not seeking relief from the circuit court pursuant to Rule 62(c), SCRCF. Petitioners are seeking supersedeas relief from the appellate courts pursuant to Rule 241, SCACR in a case over which the appellate courts have undisputed jurisdiction. Thus, when looking at whether an injunction is necessary to preserve the status quo, the appellate courts are not restricted to maintaining the status quo at the time of appeal. If they were, then our appellate courts could never upset the circuit court’s decision by issuing a supersedeas. In ruling on a petition for supersedeas, our appellate courts should look to preserve the status quo *ante*, which is the

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<sup>3</sup> See *East Bay Sanctuary Covenant v. Barr*, 391 F.Supp.3d 974, 978 (N.D. Cal. 2019); *George Sink PA Injury Lawyers v. George Sink II Law Firm LLC*, 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); *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 1987042, at \*1 (N.D. Cal. June 4, 2012).

<sup>4</sup> The four cases cited by Respondents discuss Rule 62(d), FRCP, which is the functional equivalent of Rule 62(c), SCRCF.

appropriate standard for temporary injunctions in South Carolina. *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010).

Here, the status quo *ante* (which Petitioners ask this Court to return the parties to) is that Petitioners have sole and exclusive possession of the Property, and Petitioners’ competitors, the Respondents, have no access to it. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (“The status quo to be preserved by a preliminary injunction, however, is not the circumstance existing at the moment the lawsuit or injunction request was actually filed, but the last uncontested status between the parties which preceded the controversy.”). This Court should grant certiorari to return the parties to the status quo while this appeal is pending.

**III. Respondents do not apply the appropriate test for imposing an injunction pending appeal.**

Respondents argue the test for imposing an injunction pending appeal is the same test for injunctions generally in South Carolina (*i.e.*, irreparable harm, likelihood of success on the merits, and no adequate remedy at law), and that the test Petitioners posit is “drawn from the federal standard for granting a temporary injunction.” Petitioners argue that the test for imposing an injunction is different when the injunction is sought from the appellate court during the pendency of appeal. Specifically, Petitioners argue the appropriate test on appeal has four prongs: (1) irreparable harm, (2) likelihood of success on the merits, (3) prejudice (if any) to Respondents if the injunction is granted, and (4) the public interest. *Id.* This distinction matters because Respondents did not address the last two elements of the four-prong test, which Petitioners briefed in their Petition for Supersedeas. Petitioners argue this means Respondents effectively conceded Petitioners met these two elements.

Similar to Respondents, Petitioners’ research has not yielded any precedential South Carolina case law on point. Therefore, Petitioners relied on two District of South Carolina cases

and one case from the South Carolina Court of Common Pleas in support of the four-prong test for injunctions *pending appeal*.<sup>5</sup> From a policy perspective, the four-prong test is a better fit for injunctions pending appeal than the standard three-prong test for injunctions generally. Assuming the moving party meets the irreparable harm and likelihood of success prongs, if issuing the injunction pending appeal will cause little or no harm to defendants and there are public interest arguments in favor of the injunction, then it is justifiable for the appellate court to impose the injunction during the limited timeframe necessary for the underlying appeal to be decided.

Practically, it also makes sense that the test for issuing an injunction pending appeal is different from the test for imposing an injunction denied at the circuit level. If both tests were the same, it would never be necessary to impose an injunction pending appeal, as issuing the injunction pending appeal would also resolve the subject of the underlying appeal. This is not how a supersedeas is intended work. The standard should be different. As such, Petitioners urge the Court to issue a writ of certiorari and adopt the four-part test imposed by the District of South Carolina.

**IV. Respondents do not adequately rebut Petitioners' factual and legal arguments that overwhelmingly support imposing a temporary injunction pending appeal.**

Respondents continue to misstate the law and avoid the undisputed facts when arguing that Petitioners are not entitled to a writ of supersedeas imposing injunctive relief during the pendency of appeal. Even using the standard three-prong test for an injunction, Petitioners have provided adequate factual support demonstrating a legal entitlement to injunctive relief via supersedeas. To correct the Court of Appeals' errors of fact and law, this Court should grant a writ of certiorari.

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<sup>5</sup> *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).

**a. Petitioners have demonstrated a likelihood of success on the merits of their underlying claims and on the appeal.**

Respondents argue that Petitioners have not met their burden to establish a likelihood of success on the appeal as relates to Petitioners' claim under the South Carolina Trade Secrets Act ("SCTSA"). Respondents also argue that Petitioners have no duty of loyalty claim against Respondents. Respondents argue, therefore, that Petitioners have not shown a likelihood of success on their appeal. For the reasons explained below, Respondents are incorrect.

**i. Respondents do not accurately articulate the standard of review.**

As a threshold issue, Respondents state that in order for Petitioners to demonstrate likelihood of success on their appeal, Petitioners must show that "the circuit court *abused its discretion* in refusing to grant the injunctive relief requested by Petitioners." (**Respondents' Return to Petition for Cert, p. 14**) (emphasis added).<sup>6</sup> While there is South Carolina case law stating the standard of review for reviewing an injunction is abuse of discretion, further analysis of the relevant case law indicates that the applicable standard is effectively *de novo*.

"An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). With regard to assessing whether a decision is supported by the evidence, this Court has stated that "[i]n equitable actions, an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). An injunction is an equitable claim. *Id.* Thus, in this case, a reviewing court may find its own facts in reviewing

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<sup>6</sup> Respondents assert that Petitioners must demonstrate "*beyond a reasonable doubt* that the circuit court abused its discretion." (**Respondents' Return to Petition for Cert, p. 14**) (emphasis added). There is no authority to support this assertion, and the Court should disregard it.

whether the circuit court erred in denying an injunction. As a practical matter, this Court *must* do so here because the circuit court did not issue any findings of fact in its two Form 4 Orders.

With regard to errors of law, appellate courts review questions of law *de novo* on appeal. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 570, 776 S.E.2d 397, 403 (Ct. App. 2015). Thus, here, the Court must assess whether Petitioners are entitled to a temporary injunction as a matter of law *de novo* without deference to the circuit court's decision. Practically, the Court must do so here because the circuit court's two Form 4 Orders are devoid of anything more than sparse legal conclusions pertaining to some of the elements of an injunction.

The standard of review in this case does not grant deference to the circuit court. A reviewing court will make its own findings of fact and conclusions of law in assessing whether the circuit court should have issued a temporary injunction to Petitioners. As a practical matter, a reviewing court could not grant any deference to the circuit court's decision because the two Form 4 Orders provide the reviewing court with effectively nothing to review.

**ii. Petitioners have met their burden to make a *prima facie* showing on their SCTSA claim.**

Petitioners have properly pled and produced sufficient evidence to make a *prima facie* showing under the SCTSA, which is the appropriate standard in South Carolina to establish a likelihood of success for a temporary injunction. *See Compton v. S.C. Dep't of Corrs.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Specifically, the Petitioners have provided evidence demonstrating the Property is not available in the public domain, access is limited only to those individuals who have a legitimate need to access it, policies and procedures safeguard the Property from disclosure to unauthorized recipients, and a two-factor authentication system protects the materials from remote access. (**R. 144-45, R. 161, R. 466**). In addition, faculty physicians,

including the Physician Defendants, are contractually prohibited from disclosing Petitioners' confidential materials, and faculty physicians are prevented from using Petitioners' confidential materials for their own benefit. (**R. 359, R. 466**).

In their Return, Respondents argue the merits of whether Petitioners' Property was in fact a trade secret, but Respondents' arguments miss the mark.<sup>7</sup> All Petitioners must do is produce sufficient evidence to make a *prima facie* showing under the SCTSA. Petitioners have carried that burden and thus satisfied this element.

**iii. Petitioners have met their burden to make a *prima facie* showing on their duty of loyalty claim.**

For the first time, Respondents assert that Petitioners did not state a cause of action against Respondents for breach of duty of loyalty in the Complaint. (**Return to Petition for Cert, pp. 2-3, 25**). The Complaint names the Respondents (Trident and HCA Healthcare) and the Physician Defendants as Defendants. (**R. 10**). The Complaint includes a cause of action for breach of duty of loyalty (**R. 27**), which includes the following allegations:

- “On information and belief, Physicians acted in concert, with each other and with HCA and Trident, to engage in unlawful conduct . . .” (**R. 26 at ¶ 88**).
- “But for the misappropriation of MUSC’s . . . confidential proprietary information, Trident and HCA would have limited if any ability to provide head and neck oncological surgical services.” (**R. 27 at ¶ 93**).
- “[Respondents], in concert with [Physician Defendants], raided [Petitioner’s] HNO Division, intending to effectively convert that practice to its own.” (**R. 27 at ¶ 94**).

In the Complaint, Petitioners seek to recover against all defendants and assert they are jointly and severally liable. Petitioners have also argued numerous times to the circuit court and the Court of Appeals that Respondents are jointly and severally liable under South Carolina law for the

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<sup>7</sup> Notably, Respondents' arguments continue to focus on issues that, even if true, do not defeat a successful SCTSA claim, such as Petitioners not labeling their Property as “confidential” or Respondents' alleged lack of knowledge that Petitioners' Property was misappropriated.

Physician Defendants’ breach of the duty of loyalty to their employer. (**R. 194-195; R. 260-261; R. 515-516; R. 556-557**).

The relevant case law states that “[t]he purpose of a pleading is fair notice to the opponent and the court,” and “[a] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001); *see Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Further, “[w]hen a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” *Id.*

The Complaint and all subsequent briefing put Respondents on notice that Petitioners assert an entitlement to relief against Respondents for the Physician Defendants’ breach of duty of loyalty. Further, the facts pled in the Complaint support an “inference” of Respondents’ joint and several liability for aiding and benefitting from the Physician Defendants’ breach of duty of loyalty under established South Carolina law. *Lowndes Prods., Inc.*, 259 S.C. at 337, 191 S.E.2d at 769

**iv. Petitioners have met their burden to show a prima facie case on their Rule 52(a), SCRPC claim.**

Petitioners have also appealed the circuit court’s error in not making specific findings as required by Rule 52(a), SCRPC. (**Initial Brief of Appellants, pp. 7-8**). The appellate courts will vacate an appealed order and remand for compliance with Rule 52(a) unless the appellate court finds that there has been “substantial compliance” with the Rule. *In re Treatment & Care of Lackabaugh*, 351 S.C. 122, 131-134, 568 S.E.2d 338, 342-344 (2002). Here, there was no compliance with Rule 52(a), substantial or otherwise. The circuit court did not set forth any findings that would allow a reviewing court to “ensure the law is faithfully executed below.” *Id.* at 133, 343; (**R. 1; R. 4; R. 7**).

Petitioners met the required elements for a temporary injunction, and therefore the circuit court's Orders should be reversed. However, at a minimum, this Court should vacate the circuit court's Orders and remand them for compliance with Rule 52(a), SCRPC. Petitioners have made a prima facie showing of likelihood of success on appeal, warranting an injunction during the pendency of appeal.

**b. Respondents did not properly articulate the legal standard for establishing irreparable harm, and did not rebut Petitioners' legal arguments.**

Respondents assert that Petitioners must show "that they **will** suffer an irreparable harm if the temporary injunction is not issued." (**Return to Petition for Cert, p. 21**) (emphasis in original). In the very next sentence, Respondents state that the law requires Petitioners to "demonstrate that irreparable harm is likely in the absence of an injunction." (*Id.*) (emphasis in original). Respondents then attack Petitioners' allegations of irreparable harm as merely "potential," and suggest that the harm has already occurred. (*Id. at 21-22*).<sup>8</sup>

Ultimately, it is unnecessary to parse out which of the two standards articulated by the Respondents (imminent versus likely harm) are in fact correct. South Carolina courts have consistently found irreparable harm when a competitor is in possession of specific property belonging to another and have routinely issued injunctions to protect those materials from exploitation by the new employer. (**Petition for Cert, p. 11**). Respondents did not rebut this. Petitioners are losing their competitive advantage as Respondents continue possessing and using the Property. But Petitioners could retain some of their competitive advantage if the Court issues

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<sup>8</sup> Petitioners stated the irreparable harm was "potential" in their original Motion for Temporary Injunction, which Petitioners filed *before* commencement of the Physician Defendants' employment by Respondents (*i.e.*, before the harm was ongoing). Respondents fail to point out this context to the Court in making their argument.

an injunction requiring Respondents to return the Property during the pendency of appeal. This would prevent further irreparable harm and preserve the fruits of Petitioners' appeal.

Respondents also argue that Petitioners (in Respondents' view) did not act with sufficient expediency in seeking injunctive relief. (**Return to Petition for Cert, p. 22**). In reality, Petitioners sought an injunction prior to the effective date of Physician Defendants' employment by Respondents and timely took all of the procedural steps necessary to preserve the issues for appeal.

**c. Respondents are incorrect that alleging money damages precludes succeeding on the "no adequate remedy at law" element for an injunction.**

Respondents assert that Petitioners' allegation of "an entitlement to money damages for each and every cause of action . . . destroys the contention that there is no adequate remedy at law." (**Return to Petition for Cert, p. 23**). Respondents' analysis is incorrect.

The questions of irreparable harm and adequate remedy at law involve a similar analysis. *See MercExchange, L.L.C. v. eBay, Inc.*, 500 F.Supp.2d 556, 569 n. 11 (E.D. Va. 2007) ("The irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin . . ."). Courts do not decide the questions of irreparable harm and available legal remedies under narrow and artificial rules. *CBS v. Custom Recording Co.*, 258 S.C. 465, 477-478, 189 S.E.2d 305, 311-312 (1972). An injunction is appropriate if no legal remedy exists, **or** if the legal remedy would not make the party whole, **or** if quantifying the damage caused by conduct to be enjoined is difficult or uncertain. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 457, 626 S.E.2d 34, 36-37 (Ct. App. 2005). Likewise, irreparable harm does not mean that the harm is beyond the possibility of compensation in damages. *Id.* at 36. Economic harm becomes irreparable when it is not easily calculated in pecuniary terms. *Id.*, 626 S.E.2d at 37 n.2. Moreover, South Carolina courts routinely find irreparable harm when a defendant wrongly acquires the confidential and proprietary materials of a competitor. (**Petition for Cert, p. 11**).

Here, Plaintiffs spent two decades of time and resources to develop the confidential and proprietary Property and the HNO Division. (R. 141 at ¶¶ 6-7; R. 157-158 at ¶¶ 8-9). It would have taken Defendants eight to ten years to develop independently the type of head and neck cancer practice developed by Plaintiffs. (R. 172 at ¶ 7). By acquiring Petitioners' Property through the Physician Defendants, Respondents avoided the time and expense necessary to do it on their own.

Monetary compensation alone cannot replace the loss of Petitioners' Property and the competitive advantage it affords. The value of such Petitioners' Property is its confidentiality and exclusive use in the marketplace. The value of such property to Respondents is the avoidance of the time and money necessary to develop it independently, the resulting ability to enter the market more quickly and more cheaply, and the ability to use all of that in competition with the true owner. If the Court allows Respondents to continue using the Petitioners' Property during the pendency of appeal, there is no way to make Petitioners whole for the damage they will sustain. The only way to protect the fruits of a meritorious appeal fully is to enjoin the Respondents during the appeal. This Court should grant a writ of certiorari to review and correct this error.

V. **Respondents incorrectly interpret the Appellate Court Rules governing written opinions and incorrectly assess the Court of Appeals' treatment of the Petition for Full Appellate Court Review.**

Respondents assert that Rule 220, SCACR only applies to decisions “on the appeal,” and that an order on the Petition for Supersedeas is not a decision “on the appeal.” (**Return to Petition for Cert, p. 9**). Petitioners disagree with Respondents' interpretation of the rules. Rule 220(a), SCACR, states that “[t]he appellate court shall make its *decisions* in writing by published opinions or memorandum opinions” (emphasis added). Rule 241(d)(2), SCACR, which governs supersedeas, states that “[u]nder the issuance of a final order by an individual judge or justice, an aggrieved party may petition for the full appellate court for review of *that decision*” (emphasis

added). The rules clearly contemplate that a final order on a petition for writ of supersedeas is a *decision*, requiring a written opinion. From a policy perspective, litigants are entitled to an explanation of the Court of Appeals' reasoning in granting or denying relief.

Likewise, Petitioners repeat their arguments about the Court of Appeals' errors in treating Petitioners' Petition for Full Appellate Court Review of Order Denying Supersedeas (**Petition for Cert, pp. 7-10**). Respondents offered no substantive analysis of this issue, simply arguing that Petitioners misconstrued the Court of Appeals' Orders (**Return to Petition for Cert, pp. 11-12**). These technical but important issues warrant this Court's review.

### CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to issue a writ of certiorari to review the procedural and substantive questions of law raised in the Petition for Cert.

Respectfully Submitted,

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