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**Jan 18 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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Appellate Case No. 2022-000352  
Case No. 2021-CP-10-05289

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Medical University of South Carolina and University Medical  
Associates of the Medical University of South Carolina,..... Appellants,

v.

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

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

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MOTION TO FILE DOCUMENTS UNDER SEAL

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ATTORNEYS FOR APPELLANTS

This Court is presently presiding over Appellants' appeal of the circuit court's orders denying Appellants a temporary injunction. Appellants seek a temporary injunction requiring Respondents to return and refrain from using certain confidential and proprietary documents delivered to Respondents by former employees of Appellants. The confidential and proprietary documents generally consist of Appellants' "playbook" for performing highly complex head and neck surgeries and related financial/employment matters.

Appellants and Respondents have submitted their Initial Briefs to the Court and are now required to submit the Record on Appeal pursuant to Rule 210, SCACR. The content designated by the parties to be included in the Record on Appeal includes Plaintiffs' Master Exhibits filed in support of Appellants' Complaint and Motion for Temporary Injunction. Within Plaintiffs' Master Exhibits, four (4) of the exhibits consisted of emails with attachments where Appellants submitted the attachments separately to the circuit court for *in camera* review. The four (4) sets of attachments Appellants submitted for *in camera* review included the attachments to Exhibit 6 (Email sending Physician Preference Cards to HCA); the attachments to Exhibit 7 (Email sending Instrument Sets list to HCA); the attachments to Exhibit 10 (Email requesting case logs); and, the attachments to Exhibit 15 (Email requesting and receiving incoming fellows contracts) (collectively, the "Confidential Documents"). The Confidential Documents are the subject of the temporary injunction Appellants are seeking.

Appellants transmitted the Confidential Documents to the circuit court for *in camera* review prior to the hearing on Appellants' Motion for Temporary Injunction via email transmittal. As such, the Confidential Documents were not file-stamped by the circuit court and are not part of the public record. Appellants are moving this Court to allow the parties to file the Confidential

Documents under seal and to consider the Confidential Documents, along with the Record on Appeal, in deciding this appeal.

As an initial matter, *but for* the confidentiality issue, the Confidential Documents are appropriate to include in the Record on Appeal, which must consist only of documents presented to the lower court that are relevant to the appeal. Rule 210(c), SCACR; Rule 209(b), SCACR. Appellants furnished a copy of the Confidential Documents to the circuit court for review ahead of the hearing on the Motion for Temporary Injunction, and the Confidential Documents are relevant to the appeal in that they are the subject of the requested temporary injunction.

With regard to filing the documents under seal on appeal, the Appellate Court Rules are silent on the proper procedure. However, “documents may be filed under seal upon motion to the appellate court pursuant to Rule 41.1, SCRCF.” JEAN HÖEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 420 (3rd ed., South Carolina Bar 2016) (1991). With regard to filing a motion to seal, Rule 41.1(b), SCRCF states:

The motion shall state the reasons why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors:

- (1) the need to ensure a fair trial;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality;
- (4) the public or professional significance of the lawsuit;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- (7) why the public interest, including but not limited to, the public health and safety, is best served by sealing the documents.

To begin, it is necessary and indispensable to file the Confidential Documents under seal because the value of these documents lies in their confidential and proprietary nature. Appellants developed these materials that are integral to performing head and neck surgeries over two

decades, and the documents are not otherwise available to the public. Filing the Confidential Documents in the public record would materially and irreparably erode the value of this confidential and proprietary property.

It is imperative that the Court consider this highly relevant evidence when deciding the appeal. The Confidential Documents are the subject of the injunction Appellants seek. Accordingly, there are no less drastic alternatives to filing the Confidential Documents under seal. Submitting the Confidential Documents under seal is the only method by which the confidentiality of the documents can be maintained while also balancing the Court's interest in having full and fair knowledge of the facts relevant to this appeal.

With regard to the seven factors enumerated in Rule 41.1(b), Appellants assert the following:

- **Impact on a Fair Trial:** Sealing the Confidential Documents will not have a negative impact on any possible trial in this case, nor will it have a negative impact on this appeal. Both Appellants and Respondents already have access to the documents, and the general public interest in openness in court proceedings does not outweigh the public interest in protecting the value of an employer's confidential and proprietary property. In contrast, sealing the Confidential Documents will have the positive impact of protecting Appellants' confidential and proprietary materials from further disclosure.
- **Impact on Witnesses:** Sealing the Confidential Documents will not have a negative impact on any potential witnesses in this case. Most importantly, the former employees that Appellants allege misappropriated the Confidential Documents and who are likely to be witnesses in the case already executed

Settlement Agreements with Appellants agreeing to return/destroy and refrain from using the Confidential Documents, so they are not harmed by the documents remaining confidential. With regard to the appeal specifically, there will be no witness testimony outside of any affidavits included in the Record on Appeal, so this factor is largely irrelevant at this stage.

- **Expectations of Confidentiality**: Appellants have an expectation that their confidential and proprietary materials will remain confidential and proprietary. Appellants maintain policies and procedures to ensure the confidentiality of the Confidential Documents. Again, Appellants' expectation of the confidentiality and proprietary nature of these documents is the very basis of this appeal.
- **Public and Professional Significance**: The public and professional significance of this appeal, and the lawsuit more generally, is of paramount importance. This case implicates longstanding South Carolina case law related to employees' duty of loyalty and employers' rights related to property developed by their employees within the scope of employment. As such, filing the Confidential Documents under seal is warranted to ensure the Court has access to all relevant evidence when deciding this important appeal.
- **Perceived Harm from Disclosure**: If the Confidential Documents are publicly disclosed, there will be no chance for Appellants to achieve any meaningful relief in this appeal and in the case generally. It would enable any competitor to access what Appellants argue is their confidential and proprietary property. If the Court ultimately agrees that Appellants are entitled to the injunction they seek, then the

only way to provide Appellants with meaningful relief is to maintain the confidentiality of the Confidential Documents.

- **No Available Alternatives:** There are no other alternatives to sealing the Confidential Documents. The central argument in this case is that the Confidential Documents are confidential and proprietary to Appellants. The only means to preserve the confidential and proprietary nature of the Confidential Documents is to file them under seal.
- **Public Interest:** The public interest is served by filing the Confidential Documents under seal because there is a public interest in promoting and protecting South Carolina employers' investment in innovation.

Based on the foregoing, Appellants move the Court to grant this Motion. Specifically, Appellants move the Court to allow the parties to file the Confidential Documents under seal and to consider the Confidential Documents along with the Record on Appeal. The circuit court similarly reviewed and considered these documents *in camera*, and therefore it is appropriate for this Court to do the same.

Prior to the filing of this Motion, counsel for Appellants conferred with counsel for Respondents requesting their consent to this Motion. In response, Respondents stated that they do not object to the Appellants' Motion to File Documents Under Seal to the limited extent that the Motion requests permission for Appellants to file under seal the documents that they previously presented to the circuit court for *in camera* review. Although Respondents do not object to this Motion, this position in no way constitutes any agreement or consent by Respondents that the documents in question are in any way confidential, proprietary, or subject to protection under the South Carolina Trade Secrets Act.

Respectfully Submitted,

/s/ James K. Gilliam

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PROOF OF SERVICE

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I, Amy C. Elkins, an employee of Burr & Forman LLP, hereby certify that a true and correct copy of the **Motion to File Documents Under Seal** were served upon counsel for the Respondents in the above-captioned matter via email at the email addresses shown below, this 18<sup>th</sup> day of January, 2023, as follows:

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