

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2019-CP-12-00308

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SC Court of Appeals

Terry D. Sims,Respondent,

v.

Carolina Primary Care Physicians, LLC, d/b/a MUSC Health Appellant.

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I. STATEMENT OF ISSUE ON APPEAL

Did the Circuit Court err by denying the motion for preliminary injunction filed by Carolina Primary Care Physicians, LLC, d/b/a MUSC Health?

II. STATEMENT OF THE CASE

Sims filed the instant action on May 29, 2019, alleging defamation, breach of contract, and tortious interference with contractual relations. On June 3, 2019, Sims filed an Amended Complaint naming Carolina Primary Care Physicians, LLC d/b/a MUSC Health as the proper Defendant. On June 18, 2019, MUSC Health filed its Answer and Verified Counterclaims. MUSC Health brought counterclaims for breach of contract, tortious interference, violation of the South Carolina Trade Secrets Act, breach of the implied covenant of good faith and fair dealing, and injunctive relief. On the same day, MUSC Health filed a Motion for Preliminary Injunction and Expedited Discovery. A hearing was held on June 26, 2019. The Circuit Court entered a written Order denying entry of a preliminary injunction on July 5, 2019. MUSC Health timely filed a motion to reconsider, which was heard on August 7, 2019. The Circuit Court denied the motion to reconsider from the bench and entered a Form 4 Order on August 9, 2019. MUSC Health timely served and filed a notice of appeal appealing the denial of a preliminary injunction on September 6, 2019.

Appellant Carolina Primary Care Physicians, LLC, d/b/a MUSC Health (“MUSC Health”) appeals the denial of its motion for preliminary injunctive relief seeking enforcement of the non-compete agreement executed by the parties. Under South Carolina law, to obtain a preliminary injunction, a moving party must establish a prima facie case by showing: (1) irreparable harm; (2) a likelihood success on the merits; and (3) an inadequate remedy at law. *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (citing *Denman v. City of Columbia*,

387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010)). The following undisputed facts in the record demonstrate that the Circuit Court erred in denying MUSC Health's motion for preliminary injunction:

- MUSC Health's offer of employment to Respondent Terry D. Sims ("Sims") was contingent on his execution of certain restrictive covenants;
- Sims executed a Restrictive Covenants and Enforcement Agreement ("Non-Solicitation and Non-Compete Agreement") with MUSC Health when MUSC Health hired him to perform services on its behalf as an advanced practice registered nurse;
- Sims was employed by MUSC Health and practiced as an advanced practice registered nurse at MUSC Health's clinic in Great Falls, South Carolina;
- The Non-Solicitation and Non-Compete Agreement contains a non-competition provision that restricts Sims from practicing as an advanced practice registered nurse within 20-miles of MUSC Health's clinic in Great Falls, for a period of eighteen (18) months after termination of his employment;
- The Non-Solicitation and Non-Compete Agreement contains two options for relief from the non-competes provision, neither of which were exercised by Sims: (1) the opportunity to request a release in writing, and (2) the option of paying a lump sum "buy-out" amount;
- Sims resigned his employment with MUSC Health on May 1, 2019 and, within two-weeks, he was operating a competing clinic within two-tenths (.2) of a mile from MUSC Health's Great Falls Clinic;
- Two of Sims' former co-workers resigned their employment with MUSC Health on May 15, 2019, to work with Sims at his competitive clinic;

- MUSC Health received notice from multiple patients that they received a call reminding them of appointments scheduled with Sims during his employment with MUSC Health and advising them that the location of the appointment was now at Sims' competitive clinic;
- As of the date of MUSC Health's motion for preliminary injunctive relief, Sims' violation of the terms of the Non-Solicitation and Non-Compete Agreement, including opening his Great Falls Clinic within walking distance of MUSC Health's Great Falls clinic, had already resulted in the loss of approximately 400 patients;
- Since May 15, 2019, and thereafter, Sims has been providing medical services substantially similar to and in competition with the services he provided in the course of his employment with MUSC Health in violation of the terms of the Non-Solicitation and Non-Compete Agreement.
- As of the date of the motion for preliminary injunction MUSC Health was continuing to lose patients to Sims' competitive clinic on a daily basis.

MUSC Health respectfully requests the Court reverse and remand the Order of the Circuit Court on the basis that it is not supported by the undisputed evidence and the decision was controlled by a clear error of law.

III. Factual Background

A. Sims' Employment with MUSC Health

The Medical University of South Carolina and its affiliated health system entities employ physicians, advanced practice providers (e.g., nurse practitioners and physician assistants) and other medical professionals throughout the state of South Carolina to work at its medical clinics and facilities. In March of 2019, MUSC Health acquired from Community Health Systems, Inc.

("CHS") substantially all of the assets of four regional hospital systems, including Chester Regional Medical Center, Lancaster Medical Center, and their affiliated practices. (MIS Ex. 1- Affidavit of Terrence E. Steyer M.D ¶ 5; Ex. 4- Offer Letter to Terry Sims.) Great Falls Family Medicine, a family practice clinic located at 308 Chester Avenue, Great Falls, South Carolina, was one of the assets acquired by MUSC Health. (MIS Ex. 1 ¶ 6.) Great Falls Family Medicine employed Sims as a nurse practitioner. (MIS Ex. 3- Verified Counterclaim ¶ 6.)¹ Chester Medical Group employed Sims pursuant to an Advanced Practice Provider Employment Agreement which contained non-competition and non-solicitation provisions designed to protect its most valuable assets---the same assets for which MUSC Health paid good and valuable consideration to CHS; namely, the confidential information, patients and employees of Great Falls Family Medicine and the goodwill established between them.²

On February 19, 2019, MUSC Health offered Sims employment at Great Falls Family Medicine.³ (Ex. 4.) The offer was contingent on Sims executing a Consent to Assignment and Amendment ("the Contract"). (MIS Ex. 6- Consent to Assignment and Amendment; Ex. 3 Counterclaim ¶ 7.) The Contract assigned Sims' employment agreement with Chester Medical

¹ An "advanced practice registered nurse" is defined under South Carolina law as a registered nurse who is prepared for an advanced practice registered nursing role by virtue of additional knowledge and skills gained through an advanced formal education program of nursing in a specialty area that is approved by the Board of Nursing. S.C. Code Ann. § 44-33-20(5). A nurse practitioner is a subset within the professional license category of advanced practice registered nurse. *Id.*

² Sims was the only provider who could render care, including writing prescriptions for patients, at the clinic. As a licensed nurse practitioner, Sims is legally authorized to provide medical care to patients under the supervision of a physician who holds a South Carolina medical license and is actively practicing in South Carolina, and with whom the nurse practitioner has a "practice agreement"; however, the physician need not be physically co-located with the nurse practitioner. *See* S.C. Code Ann. §§40-33-20, 40-33-34, and 40-47-20(12).

³ After the acquisition was complete, the name of the facility was changed to MUSC Health-Great Falls Primary Care.

Group to MUSC Health, with several substantive modifications. (MIS Ex. 6.) Sims executed the Contract and each of the attached exhibits prior to, and as a condition of, beginning his employment with MUSC Health on March 1, 2019. (MIS Ex. 6; Ex. 3 Counterclaim ¶¶ 10, 12.) From February 19, 2019 through May 1, when Sims resigned, no changes were made to the Contract and no allegations of wrongdoing, including fraud in the inducement, were raised by Sims with respect to the execution thereof. Exhibit B of the Contract contains the restrictive covenants now in issue (i.e., the “Non-Solicitation and Non-Compete Agreement”). (Ex. 6; Ex. 3 Counterclaim ¶ 12.)

B. Terms of Non-Compete Agreement Between Sims and MUSC Health

The purpose of the Non-Solicitation and Non-Competition Agreement is to protect MUSC Health’s confidential information, as well as patients and employees of the practice and the goodwill existing between them. (Steyer Aff. ¶ 8.) In the Non-Solicitation and Non-Compete Agreement, Sims expressly acknowledges that his employment with MUSC Health gave him access to “Confidential Information belonging to MUSC Health Health.” (Ex. 6; Ex. 3 Counterclaim ¶ 13.) Confidential Information expressly includes but is not limited to, “patient lists and patient contact information, contracting processes and terms, and financial information.” (*Id.*) Sims further acknowledges that MUSC Health will “suffer damages” if he terminates his employment and uses or divulges Confidential Information or competes with MUSC Health. (Ex. 6; Ex. 3 Counterclaim ¶ 13.)

The following provisions in the Non-Solicitation and Non-Competition Agreement applied during Sims’ employment with MUSC Health and for a period of 18 months following the resignation of his employment:

I will not, directly or indirectly, on my own behalf or on behalf of any physician or clinical practice, hospital, health care provider or facility, or third party other than MUSC Health, and regardless of whether I am acting as a private practitioner, shareholder, director, officer, employee, consultant, agent, or contractor:

- (i) Engage in advanced practice registered nursing within the “Restricted Area” (as such terms are defined below);
- (ii) Solicit any MUSC Health physician or non-physician to terminate their employment with MUSC Health for any employment or personal services arrangement other than with MUSC Health;
- (iii) Solicit any patient to whom I provided clinical services on behalf of MUSC Health during the 18-month period Immediately prior to termination of my employment by MUSC Health, for the purpose of providing clinical services; however, it is understood that nothing in this agreement shall limit any patient’s rights to select a practitioner of their choosing, including the undersigned, to provide clinical services, or limit any patients ability to obtain their medical records from MUSC Health as provided for pursuant to applicable state law,
- (iv) Solicit any referral source on whose behalf I provided clinical services during the 18-month period immediately prior to my Termination, for the purpose of providing clinical services;
- (v) Use MUSC Health's Confidential Information for any purpose other than the performance of my duties on behalf of MUSC Health or disclose Confidential Information to any other person or entity, except as required by law or professional ethics;
- (vi) Take any action that would interfere with, diminish, or impair the valuable relationships that MUSC Health has with referral sources, patients, hospitals, or health care providers.

(Ex. 6; Ex. 3 Counterclaim ¶ 14.) The “Restricted Area” is defined as “the geographic area within a twenty (20) mile radius of the MUSC Health facility/location where [Sims] provided the majority of [his] services . . . during the 18-month period immediately preceding Termination.” (Ex. 6; Ex. 3 Counterclaim ¶ 15.) Sims agreed that the geographic scope was reasonable based on the scope of his practice and mutually beneficial for himself and other providers. (Ex. 6.) Sims also agreed that the 18-month period is automatically tolled and extended for any time he is in breach of the Contract. (Ex. 6; Ex. 3 Counterclaim ¶ 16.)

MUSC Health provided Sims with valuable consideration for the Non-Solicitation and Non-Compete Agreement, including employment with MUSC Health and base compensation of \$135,000. (Ex. 6; Ex. 3 Counterclaim ¶ 16.) The Circuit Court found Sims would not have received employment with MUSC Health but for signing the Non-Solicitation and Non-Compete Agreement. (MIS Ex. 6; Ex. 3 Counterclaim ¶ 18; Order at 4.) The Non-Solicitation and Non-Compete Agreement contains two possible avenues of relief from the obligations therein. First, Sims could request relief in writing from the President of MUSC Health's community practices. (Ex. 6.) Second, Sims could elect to pay a lump sum amount equal to his compensation paid in the final twelve months of his employment. (Ex. 6.) Sims did not elect exercise either avenue of relief. (Ex. 1 ¶¶ 16-17.)

C. Sims' Resignation and Establishment of Competing Practice Two-Tenths of a Mile from MUSC Health's Clinic

On May 1, 2019, Sims resigned from MUSC Health without notice. (MIS Ex. 2- Affidavit of Missy Hendrix ¶ 7; Sims' Aff ¶20.) The following day, Sims registered "Great Falls Family Medicine, LLC" with the South Carolina Secretary of State. (MIS Ex. 7- South Carolina Secretary of State Entity Profile for Sims Family Medicine LLC; Sims' Aff ¶ 22.) Great Falls Family Medicine was the trade name used by CHS for the facility where Sims worked when it was purchased by MUSC Health. (Counterclaim ¶ 23.) The trade name was among the assets purchased by MUSC Health. (MIS Ex. 1 ¶ 7; Sims' Aff ¶22.) Sims posted a sign on the front of a building located at 503 Chester Avenue (a short walk from MUSC Health's facility) announcing that a competitive clinic, Great Falls Family Medicine, LLC, was opening at that location on Monday, May 13, 2019. (MIS Ex. 3 Counterclaim ¶ 24).

On May 8, MUSC Health reminded Sims of his obligations under the Non-Competition and Non-Solicitation Agreement. On Friday, May 10, 2019, after learning of Sims' use of its trade

name for his competitive clinic, MUSC Health also instructed Sims to cease the unauthorized use of the trade name. (Counterclaim ¶ 25.) On Monday, May 13, 2019, Sims amended the Articles of Organization to change the name of his competitive clinic to “Sims Family Medicine, LLC.” (“SFM”) (Counterclaim ¶ 26; MIS Ex. 7.) However, notwithstanding the restrictions in the Non-Competition and Non-Solicitation Agreement and MUSC Health’s reminder of his obligation to comply with such obligations, Sims commenced practicing at SFM. (Counterclaim ¶ 28; Sims’ Aff ¶ 21.)

After opening SFM for business on May 13, Sims also hired two key MUSC Health employees with whom he had worked at MUSC Health’s Great Falls clinic: Pamela Rape, a Licensed Practical Nurse, and Joyce Wright, a Medical Assistant. (Counterclaim ¶ 30.) Pamela Rape resigned her employment effective May 15, 2019. (MIS Ex. 8- Rape Resignation Letter and Email.) (*Id.*) On May 14, 2019, Rape emailed a vendor representative that she was leaving MUSC Health the following day. (MIS Ex. 9- Email Exchange between Rape and Radi Simpson.) After receiving a response from the vendor representative, Rape informed the vendor that she was “relaxing” for a “couple of weeks” and would then “be going with Terry Sims....” *Id.* Rape noted that Sims’ office was “right beside” the pharmacy at Chester Avenue and encouraged the vendor to stop by SFM and “take [Sims] some info on referrals please.” (*Id.*) Joyce Wright also resigned effective Wednesday, May 15, 2019 to work with Sims at SFM. (MIS Ex. 10- Wright Resignation Letter and Email; MIS Ex. 3 Counterclaim ¶ 30).

From the opening of SFM on May 13, 2019, through the date of the Circuit Court’s hearing on the preliminary injunction on June 26, 2019, over 350 patients contacted MUSC Health and requested that their medical records be transferred to SFM. (Counterclaim ¶ 31; MIS Ex. 2 ¶ 11.) MUSC Health continued to receive record transfer requests on a daily basis. (MIS Ex. 2 ¶ 12.)

Also beginning on May 13, 2019, and continuing thereafter, MUSC Health experienced numerous appointment cancellations and no-shows by patients---often the same day that MUSC Health received a request to transfer a patient's records to SFM. (Counterclaim ¶ 31; MIS Ex. 2 ¶ 11.) The transfer requests were generally sent by facsimile to MUSC Health from SFM. (MIS Ex. 2 ¶ 13.) MUSC Health's patients reported receiving a call "reminding" them of their appointment and advising them that the location of the appointment had changed.⁴ (MIS Ex. 2 ¶ 15.) The new location was identified as SFM's office, is located approximately two-tenths of a mile away from the facility at which Sims worked with MUSC Health. (MIS Ex. 2 ¶ 10, 15.) The Circuit Court found that as of June 26, MUSC Health had already lost approximately 400 patients to Sims. (Order at 6.)

IV. STANDARD OF REVIEW

“An order granting or denying an injunction is reviewed for abuse of discretion.” *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (quoting *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006)). “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.” *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012) (*Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005)). An interlocutory order by a court “granting, continuing, modifying, or refusing an injunction” is immediately appealable. S.C. Code Ann. § 14-3-330; *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 280 n.1, 531 S.E.2d 518, 519 (2000).

⁴ It is reasonable to infer from these facts that Sims has copies of MUSC's patient identities, contact information, and schedules.

V. ARGUMENT

The Circuit Court erred by denying MUSC Health's motion for preliminary injunction. A preliminary injunction should be issued when it is necessary "to preserve the status quo ante." *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012). Under South Carolina law, to obtain a preliminary injunction, a moving party must show: (1) irreparable harm; (2) a likelihood success on the merits; and (3) an inadequate remedy at law. *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018) (citing *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010)).⁵ MUSC Health made this showing. Despite there being no dispute that Sims is currently practicing in violation of the Agreement and MUSC Health's resulting loss of employees and numerous patients, the Circuit Court denied MUSC Health's motion for a preliminary injunction to enforce the Non-Solicitation and Non-Compete Agreement to preserve the *status quo* and prevent further irreparable harm. In doing so, the Circuit Court failed to consider the undisputed evidence of irreparable harm submitted by MUSC Health, applied the wrong standard to assess whether MUSC Health was likely to succeed on the merits, and misstated the nature and extent of the relief sought by MUSC Health. For these reasons, the Court should reverse and remand the Order to prevent further irreparable harm to MUSC Health and to preserve the status quo.

⁵ Although an additional requirement of "balancing the equities" appears in some South Carolina jurisprudence, the Supreme Court has held that "the 'balancing the equities' requirement is neither necessary nor appropriate in a preliminary injunction case," where, as here, the other three requirements are well established. *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010). That said, the equities clearly weigh in favor of MUSC in view of Sims' abject disregard of his contractual obligations to MUSC and his transparent efforts to convert MUSC's assets for his personal benefit by establishing a competing clinic under MUSC's trade name a mere .2 miles down the street within days of resigning his employment with MUSC.

A. The Circuit Court Erred by Concluding MUSC Health Did Not Demonstrate Irreparable Harm in Denying Entry of a Preliminary Injunction Because It Mischaracterized the Relief Sought by MUSC Health and Did Not Account for the Loss of Approximately 400 Patients and Attendant Good Will.

The purpose of an injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001); *MailSource, L.L.C. v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003). In assessing a motion for injunctive relief, the trial court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. *MailSource*, 356 S.C. at 368, 588 S.E.2d at 638. Here, the undisputed facts in the record support a finding that MUSC Health has and will continue to suffer irreparable harm from Sims' breach of his contractual obligations to MUSC Health if an injunction is not granted.

South Carolina courts have long recognized, "A business is built upon the confidence of its customers and the employee gains acquaintances and sells the customers by using the good will of the employer. The employer's dealings with his costumers through the employee gives the employee confidential knowledge that should not be divulged or used for his own benefit. It is by reason of this personal, if not confidential, relationship which the parties sustain that contracts to protect the employer by restriction of subsequent employment within reasonable limits of time and of space are permitted and sanctioned, and equity will enjoin the employee from competing in violation of his covenant. *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 62-63, 119 S.E.2d 533, 537-38 (1961). Consistent with the recognition of these facts, an "employer may enjoin the ex-employee from working along his old route [i.e., setting up a competing clinic down the street] just as soon as the ex-employee starts working there for a rival, and that the employer does not have to wait until the ex-employee starts picking off his old customers. He doesn't have to wait for

the inevitable. Irreparable injury is impending and threatening.” *Id*) Similarly, here, it is without dispute that Sims, despite being subject to restrictive covenants that prohibited him from opening a competing business down the street and “picking off” former patients, he did exactly that. In doing so, Sims caused irreparable injury to MUSC Health. Moreover, allowing the Circuit Court’s judgment to stand will call into question negotiated and agreed upon contracts in the medical community across the state because parties cannot rely on the court to enforce the terms of the contracts through a preliminary injunction due to the significant loss of patients. The Circuit Court’s decision would set a precedent undermining negotiated, restrictive covenants in the medical community and beyond.

1. The Circuit Court’s conclusion that MUSC Health did not allege irreparable harm is a misstatement of the relief sought by MUSC Health.

The Circuit Court’s Order is based on an inaccurate characterization of MUSC Health’s request for relief. The Order states: “In its Motion for Preliminary Injunction, Defendant has simply alleged monetary damages and loss of goodwill.” (Order at 8.) The Order thereafter concludes “Because Defendant has only alleged a monetary loss and an allegation of loss of goodwill which is a factual issue yet to be determined, Defendant’s argument that it will suffer irreparable harm absent and injunction is without merit.” (Order at 9.)

In actuality, MUSC Health’s Motion for Preliminary Injunction, its Memorandum in Support of its Motion for Preliminary Injunction, and in its Answer and Verified Counterclaims are clear that its damages are not limited to monetary loss and loss of goodwill. In the Motion for Preliminary Injunction, MUSC Health argued the following:

The actions of Sims, as set forth [in the Verified Counterclaims], have caused and will continue to cause, [MUSC Health] irreparable injury to its business and reputation by the continued loss of patients and occupational medicine customers, loss of employees, loss of revenue, and loss of goodwill. [MUSC Health] has no adequate remedy for these irreparable injuries.

(Motion for Preliminary Injunction at X). Likewise, in its Memorandum in Support of its Motion for Preliminary Injunction, MUSC Health argued, “If Sims is permitted to compete within the 20-mile radius, [MUSC Health] will suffer irreparable damages due to the unfair competition and loss of patients, goodwill, and revenue.” (MIS PI at 9.) Further, in its Answer and Verified Counterclaims, MUSC Health alleged irreparable harm as a result of the loss of patients to Sims and the loss of goodwill in paragraphs 45 and 47. (Answer ¶¶ 45, 47) Additionally, the first relief requested in the Answer and Counterclaims is injunctive relief, explicitly including a preliminary injunction, to enforce the restrictive covenants. (Answer and Counterclaims at 16-17.) Collectively, MUSC Health’s allegations demonstrate both that it has sustained irreparable harm in the substantial loss of patients and that such harm is continuing in the absence of injunctive relief. Thus, the Circuit Court’s conclusion that MUSC Health did not allege irreparable harm and that MUSC Health “simply alleged monetary damages and loss of goodwill” is clearly erroneous.

Even if this were not the case, the Circuit Court erred in finding that the loss of goodwill sustained by MUSC Health is insufficient to support a finding of irreparable harm. This Court has repeatedly recognized that the loss of goodwill can cause irreparable harm. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455 n.2, 626 S.E.2d 34, 37 (Ct. App. 2005) (noting “Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill.”) (citing *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex. App. 2005) (“Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.”)); *see also Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017) (noting the “the legitimate interest of a business in protecting its clientele and goodwill”) (quoting *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013)).

2. The Circuit Court failed to consider the undisputed evidence that MUSC Health sustained irreparable harm, including loss of patients, employees, and good will.

Courts in South Carolina and throughout the United States have held that the loss of customers and/or patients constitutes irreparable harm. *Vessel Med., Inc. v. Elliott*, Civil Action No. 6:15-cv-00330-MGL, 2015 U.S. Dist. LEXIS 122436, at *24 (D.S.C. Sep. 15, 2015) (citing *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 & n. 2 (Ct. App. 2005)); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.”); *Kennedy v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (2003) (“Plaintiff also established irreparable harm through a showing that a substantial portion of its patients have followed [departing physicians] to the new practice.”); *David Kindred Integrated Med., P.C. v. Snider*, 2014 IL App (3d) 130937-U, ¶ 19 (finding irreparable harm where “the harm to plaintiff from defendant's violation of the noncompete agreement is obvious: the loss of patients for plaintiff's medical business.”). Here it is undisputed that Sims established a competitive clinic only two tenths of a mile from MUSC Health's Great Falls clinic, hired MUSC Health's employees, and notified MUSC Health's patients of the competing clinic. (MIS Ex. 2 ¶ 15, Counterclaim ¶ 24, 30.) It is also undisputed that hundreds of patients have transferred from MUSC Health to SFM. Indeed, MUSC Health had lost approximately 400 patients to Sims as of the hearing on June 26 and the losses were continuing. (Order at 6; June 26, 2019 hearing 6:8-14). Terrence E. Steyer M.D., one of two appointed Managers of MUSC Health (AFF Steyer), affirmed that MUSC Health's “most valuable assets” are the relationships between MUSC Health and its patients and employees. (AFF. Steyer ¶ 8.) Dr. Steyer unequivocally stated, the loss of patients

“irreparably harms” MUSC Health because the “loss of goodwill and future revenue are unquantifiable and are difficult to accurately calculate in monetary damages.” (AFF. Steyer ¶ 8.) Thus, MUSC Health has both alleged and demonstrated that it has and will continue to suffer irreparable harm in the absence of a preliminary injunction. Notwithstanding these undisputed facts and clear precedent to the contrary, the Circuit Court did not even consider the intentional harm caused by Sims to MUSC Health and MUSC Health’s significant loss of patients in assessing whether it established irreparable harm. Because the Circuit Court’s failed to consider the pleadings and undisputed evidence of irreparable harm presented by MUSC Health in contravention of established precedent, the decision should be reversed. (When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present “a fair question to raise as to the existence of such a right.”) *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912).

B. The Circuit Court Erred by Failing to Apply the Proper Test to Determine the Likelihood of MUSC Health’s Success on the Merits.

1. The Circuit Court committed an error of law by improperly relying on speculative determinations not relevant to whether MUSC Health established a prima facie case.

In South Carolina, “[i]t is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made.” *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969); *see also Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011) (“In evaluating whether a plaintiff is entitled to a preliminary injunction, the Court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient *prima facie*

showing of entitlement to relief.”). “When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) (citing *Alderman & Sons Co. v. Wilson*, 69 S.C. 156, 158, 48 S.E. 85, 85-86 (1904) (holding it was “not proper for a Circuit Judge to consider the merits of a case of this kind at chambers on a motion for a temporary injunction, exception so far as they may enable him to come to a proper conclusion as to whether a *prima facie* showing has been made.”)). Accordingly, if a *prima facie* showing is made, a court should grant the temporary injunction without considering a final determination of the case on the merits. *Helsel v. City of Myrtle Beach*, 413 S.E.2d 824, 826 (S.C. 1992) (citing *Columbia Broadcasting System, Inc. v. Custom Recording Co., Inc.*, 189 S.E.2d 305, 308 (S.C. 1972)).

The Circuit Court’s Order is based on improper speculation as to whether a final determination on the merits might be impacted by Sims’ affirmative defenses. The Circuit Court’s Order recognizes that Sims stipulated that he entered an employment contract with MUSC Health (i.e., the “Contract”), which contained a Non-Solicitation and Non-Competition Agreement. (Order at 9.) Nor is there a factual dispute that either Sims acted in violation of the Contract by establishing a competitive clinic two tenths of a mile from MUSC Health’s Great Falls clinic, or that MUSC Health has lost and continues to lose patients as a result of Sims’ competitive activity. Yet, in denying MUSC Health’s motion for injunctive relief, the Circuit Court states that Sims argued “as a defense” that he allegedly “left his employment as a result of fraudulent inducement into his contract and impossibility to engage in his job duties due to a hostile work environment.” (Order at 9-10.) The only indication as to what evidence the Court relied on to reach its conclusion as to the viability of a Sims’ affirmative defense is passing mention that Sims “has made specific

allegations regarding his contract with [MUSC Health], which when developed and considered by the trier of fact, could be valid defenses....” (Order at 15.)

On the issue of fraudulent inducement, the Order does not identify any factual findings to support fraudulent inducement and makes no findings as to the nine required elements.⁶ The Circuit Court’s Order respecting Sims’ defense of “impossibility to engage in his job duties due to a hostile work environment” is equally unsupported. (Order at 10.) “A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party.” *V.E. Amick & Assocs., LLC v. Palmetto Envtl. Grp., Inc.*, 394 S.C. 538, 546, 716 S.E.2d 295, 299 (Ct. App. 2011) (quoting *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997).⁷ South Carolina does not recognize impossibility as a defense to breaching an employment contract because of a “hostile work environment.” Nevertheless, the Court found that Sims’ “specific allegations regarding his contract with [MUSC Health],...when developed and considered by the trier of fact, could be valid defenses and could arguably support his causes of action.” (Order at 10.) (emphasis added) The Circuit Court’s Order contravenes well established case law and specifically considers the merits

⁶ “In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury.” *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

⁷ None of these circumstances exist here. Sims averred that the alleged hostile work environment was “fostered by MUSC Heath and [Missy] Hendrix.” (Sims Affidavit ¶ 20.) To the extent Sims argues that Hendrix is a “third party” to the contract who rendered performance impossible, Sims has already recognized that Hendrix was acting as an MUSC employee and would not be a third party. (Sims Affidavit ¶ 12.) To the extent Sims argues that the alleged hostile work environment was a breach by MUSC, Sims had a duty under the contact to allow MUSC to cure the breach. (Motion to Reconsider Attachment 1 ¶ 4-4.)

of the case and what “could” be found to be a defense by the “trier of fact.” Instead of determining if MUSC Health made a *prima facie* showing as required by the law, the Circuit Court speculatively weighed the ultimate merits of the parties’ claims and defenses and speculated as to what a trier of fact could find.

2. The Circuit Court erred in failing to determine whether MUSC Health made a *prima facie* case.

“When [a *prima facie*] showing is made, a temporary injunction will be granted without regard to how the case may terminate on the hearing on the merits.” *Porter*, 252 S.C.at 481, 167 S.E.2d at 315 (citing *Alderman & Sons Co. v. Wilson*, 69 S.C. 156, 158, 48 S.E. 85, 85-86 (1904)). Yet, not only the did Circuit Court improperly consider the ultimate merits of the case by relying on Sims’ assertion of affirmative defenses to find that a trier of fact might ultimately find in Sims’ favor, it failed to determine if MUSC Health made a *prima facie* showing—its primary, if not sole obligation. Indeed, the Order does not cite any law regarding the well-established *prima facie* standard, or otherwise apply that standard to the evidence in the record. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013) (A restrictive covenant is enforceable when: “it is (1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee’s legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy.” Additionally, “the arrangement must be reasonably limited with respect to time and place, but an otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction.” (quotation and citation omitted)). The Circuit Court did not rule on whether the Non-solicitation and Non-Compete Agreement was necessary to

support MUSC Health's legitimate interests or was unduly harsh or oppressive.⁸ Instead without any explanation, the Circuit Court ruled only that Sims' public policy argument regarding the enforceability of his non-compete agreement did "not need to be addressed in at this time." (Order at 7 footnote 5). Because it did not make the required factual findings, MUSC Health respectfully requests the Court reverse and remand the Order of the Circuit Court.

C. The Circuit Court erred by holding that MUSC Health has an adequate remedy at law.

"An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) (quoting *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)). The purpose of a preliminary injunction is to preserve the *status quo*. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 466, 626 S.E.2d 38, 42 (Ct. App. 2005) (citing *Mailsorce v. M. A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003)). The loss of goodwill is not easily calculated as damages, and injunctive relief is proper to prevent the loss of the patients and goodwill. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465 n.3 626 S.E.2d 38 (Ct. App. 2005); *Peek.*, 367 S.C. at 455 n.2, 626 S.E.2d at 37); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985); *Vessel Med., Inc. v. Elliott*, No. 6:15-cv-00330-MGL, 2015 U.S. Dist. LEXIS 122436, at *18 (D.S.C. Sep. 15, 2015) (granting motion for preliminary injunction on non-competition agreement to prevent the of loss of client relationships and goodwill); *Indus. Packaging Supplies, Inc. v. Martin*, No. 6:12-713-HMH, 2012

⁸ Notably, Sims does not allege that the Non-Solicitation and Non-Compete provisions are facially improper; rather, Sims summarily contends that he was fraudulently induced to agree to the restrictive covenants and subject to a hostile work environment.

U.S. Dist. LEXIS 43580, at *18 (D.S.C. Mar. 29, 2012) (holding a preliminary injunction was proper to maintain the status quo where plaintiff could “potentially lose customers” and “goodwill.”).

1. The Circuit Court improperly held that MUSC Health has a remedy at law because it brought counterclaims and is seeking both monetary damages and equitable relief.

The Circuit Court erred by finding that MUSC Health “has an adequate remedy—its counterclaims.” (Order at 10.) The mere fact MUSC Health brought counterclaims seeking monetary damages, in addition to injunctive relief, in no way supports a finding that it has an adequate remedy at law and is not entitled to injunctive relief. The imposition of injunctive relief is intended to retain the status quo; typically pending a determination on the merits of any underlying claims raised by the parties. *See e.g., Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411 (4th Cir. 1999); *Allegro, Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012). Sims’ contract with MUSC Health provides for injunctive relief and monetary damages. (Exhibit 6 at pages B-2 and B-3 to Memorandum in Support of its Motion for Preliminary Injunction.) Additionally, MUSC Health’s Counterclaims specifically allege that MUSC Health suffered irreparable harm through the loss patients and loss of goodwill and that the resulting damages cannot be easily calculated. (*Id.* ¶ 47.)

The Circuit Court relied on *Mailsource v. M. A. Bailey & Assocs.*, 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003) for the proposition that the denial of a preliminary injunction is proper as to a non-competition agreement if the plaintiff seeks to recover money damages. (Order at 10.) The court’s reliance on *Mailsource* is misplaced. In *Mailsource*, the plaintiff purchased a direct mail processing business named “Mail Right” and retained the sellers as consultants subject to non-compete agreements. 356 S.C. at 365. The sellers retained an affiliated business, named “List

Right.” *Id.* at 366. The sellers then sold a mailing list and related services through List Right to a church. *Id.* The plaintiff alleged that the sellers’ sale to the church violated the non-compete agreement. *Id.* The alleged damages arose from the single transaction consisting of the sale of the mailing list and attendant services to the church. *Id.* at 366. The Court in *Mailsorce* held that a preliminary injunction was not warranted because the plaintiff could prove money damages arising from the sole sale and transaction in issue. *Id.* at 369.

The case at bar is incomparable to *Mailsorce*. MUSC Health has lost approximately 400 patients to Sims and the loss of patients is ongoing. (Order at 6; June 26, 2019 hearing 6:8-14.) Unlike the sale of a single mailing list, the loss of a patient by a medical provider is not an isolated, easily quantifiable transaction. MUSC Health established that it was losing patient relationships and attendant goodwill on a daily basis. (Steyer Aff. ¶ 8.) Given the ongoing nature of patient physician relationships and unpredictable nature of medical treatment, it would be impossible to calculate damages based on the loss of patients and goodwill. *See Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985) (holding that loss of customer relationships can “irreversibly alter the status quo” and award of money damages would be “impossible ... because the prevailing party’s damages may be too speculative.”).

In short, money damages will simply not make MUSC Health whole for ongoing damages caused by the loss of both its goodwill and patients or prevent future breaches by other similarly situated employees who seek to convert MUSC Health’s assets for their personal benefit.

2. The Circuit Court improperly found that MUSC Health’s allegations of loss of goodwill and impaired patient relationships were “not fully enough developed.”

The Order states that MUSC Health has “not fully...developed” its allegations of loss of goodwill and impaired patient relationships. (Order at 11.) This finding is contrary to the

undisputed facts. As of June 26, MUSC Health had lost approximately 400 patients due to Sims undisputed breach of the Non-Solicitation and Non-Compete Agreement and was continuing to lose patients. (MIS Ex. 2 ¶ 11-12.) Thus, the *status quo* has been and continues to be permanently altered by MUSC Health's loss of patients to Sims.

The Court's failure to consider these undisputed facts further damages MUSC Health because of the nature of the provider-patient relationship. As acknowledged by the Court during the June 26, 2019 hearing, a patient's relationship with a medical provider is ongoing and lasts years. (6/26/19 Hearing Transcript Page 8:22-9:16.) Depending on the patient's conditions, a patient's medical needs change over time, often in unpredictable ways. As a necessary corollary, it is not possible to calculate the damages arising from the permanent loss of a patient relationship to another medical practice. MUSC Health requests this Court reverse the Circuit Court's ruling that merely bringing counterclaims and seeking money damages bar injunctive relief.

VI. CONCLUSION

This Court should reverse the Circuit Court's denial of MUSC Health's motion for a preliminary injunction because, as discussed above, the Circuit Court overlooked or misapprehended several matters of fact and law in denying MUSC Health's motion for preliminary injunction when it:

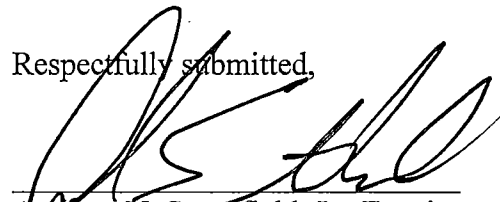
1. Improperly concluded MUSC Health did not demonstrate irreparable harm by misstating the relief sought by MUSC Health and failing to consider the loss of approximately 400 patients.
2. Applied an incorrect legal standard to determine MUSC Health's likelihood of success on the merits by considering the ultimate merits of MUSC Health's claims as determined by the trier of fact and failing to make any findings on

whether MUSC Health made a *prima facie* showing.

3. Improperly concluded MUSC Health has an adequate remedy at law because it brought counterclaims and erroneously held that MUSC Health had not developed the loss of goodwill and damage to patient relationships.

As a result, this Court should reverse the Circuit Court's denial of entering a preliminary injunction enforcing Sims' non-competition agreement with MUSC Health.

Respectfully submitted,



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December 18, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2019-CP-12-00308

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SC Court of Appeals

Terry D. Sims,Respondent,

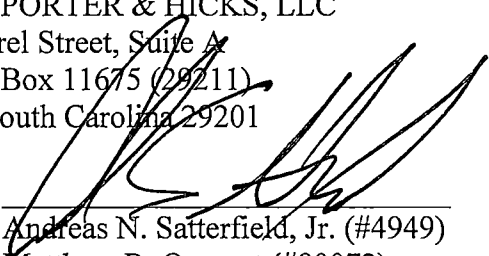
v.

Carolina Primary Care Physicians, LLC, d/b/a MUSC Health Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellant this 18th day of December 2019, on counsel for Terry D. Sims in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

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December 18, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

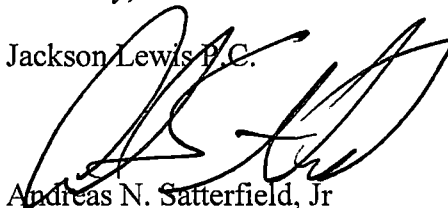
Re: Terry D. Sims v. Carolina Primary Care Physicians,
LLC d/b/a MUSC Health,
Appellate Case No. 2019-001515

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Sincerely,

Jackson Lewis P.C.



Andreas N. Satterfield, Jr

ANS/bra

Enclosures

CC (w/enclosures): Lewis Cromer, Esquire
Creighton Segars, Esquire

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Day 2-Day Mature ODP

PO ZIP Code: 90024 Scheduled Delivery Date (LOCALITY): 10-19-19

Rate: \$2.50

Date Accepted (LOCALITY): 10/18/19 Scheduled Delivery Time: 10:30 AM 3:00 PM 12:00 PM

Time Accepted: 4:07 PM Insurance Fee: \$ COD Fee: \$

Special Handling Charge: \$ Return Receipt Fee: \$ Lost Annual Transaction Fee: \$

Weight: 1.5 lbs. Accuracy: Y PAID 25.50

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (SUCCESSFUL): Yes No

Delivery Attempt (UNSUCCESSFUL): Yes No

Signature: Michael Goldberg

MAIL: 11-0, OCTOBER 2013 P51 7690-02 000-9990

* Money Back Guarantee for U.S. destinations only.

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