

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2019-001415  
Case No. 2018-CP-23-05985

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**RECEIVED**

**Jun 09 2020**

**SC Court of Appeals**

W. Clark Jernigan, M.D. ....Respondent,

v.

St. Francis Physician Services, Inc. ....Appellant.

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**CONSENT MOTION FOR LEAVE TO FILE  
CONFIDENTIAL DOCUMENTS UNDER SEAL**

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Pursuant to Rule 240, SCACR, and Supreme Court Order 2014-04-15-02, Appellant St. Francis Physician Services, Inc. ("St. Francis"), by and through its undersigned counsel, moves for entry of an order sealing a small number of sensitive and confidential documents pertaining to the above-referenced appeal. A non-confidential, descriptive list of the documents for which sealing is requested is attached hereto as **Exhibit A**. The proposed sealed volume of the Record on Appeal is filed herewith UNDER SEAL as **Exhibit B**.

Counsel for St. Francis has consulted with counsel for Respondent W. Clark Jernigan ("Dr. Jernigan") regarding of this motion, and is authorized to state that Dr. Jernigan consents to the relief requested herein.

In support of this Motion, St. Francis would show as follows:

## BACKGROUND

St. Francis is appealing the circuit court's orders granting Dr. Jernigan's motion for partial summary judgment with respect to his claims for breach of his employment agreement and violation of the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10, *et seq.*, and denying St. Francis's motion for reconsideration. The parties' designations to the record on appeal include the documents listed in Exhibit A ("the Documents"), all of which were filed under seal in the lower court. Document 1 was filed under seal as Exhibit A to the complaint and also as Exhibit A to Dr. Jernigan's affidavit in support of his motion for partial summary judgment. Documents 2-5 were filed under seal as Exhibits E-H to Dr. Jernigan's affidavit. Additionally, Documents 1, 2, and 3 were designated "confidential" pursuant to the Confidentiality Order entered by the circuit court.

## ARGUMENT

### I. STANDARD FOR SEALING DOCUMENTS ON APPEAL

The requirements for sealing documents on appeal were established by the South Carolina Supreme Court in Order No. 2014-04-15-02, *Revised Order Concerning Personal Identifying Information And Other Sensitive Information In Appellate Court Filings* (S.C. Apr. 15, 2014), which provides in pertinent part:

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Order, at 2.

The sealing of records is within a court's "supervisory power over its own records and files." *Ex Parte Capital U-Drive-It*, 369 S.C. at 9, 630 S.E.2d at 469 (internal quotation marks omitted). In exercising this power, however, a court must not lose sight of the core principle that "[j]udicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution." *Id.* at 10, 630 S.E.2d at 469. The ultimate question is whether, under the particular circumstances, the need for privacy outweighs the interest in public access. *See id.*

In *Capital U-Drive-It*, the Supreme Court held that when ruling on a motion to seal:

The court must consider the following factors ... (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (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; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

*Id.* at 12, 630 S.E.2d at 470. The court, in its discretion, may also consider:

(8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; (12) whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors.

*Id.*

## II. ANALYSIS OF *CAPITAL U-DRIVE-IT* FACTORS

As explained below, two of the twelve mandatory and permissive factors are inapplicable and thus do not weigh either for or against granting the Motion. All of the other factors weigh in favor of granting the Motion.

1. Need to ensure a fair hearing.

Granting the Motion will not deprive either party of a fair hearing in this appeal. Even if the Documents are filed under seal, the parties and the Court will still have access to them for purposes of resolving the appeal. Therefore, this factor weighs in favor of granting the Motion.

2. Need for Witness Cooperation

This factor is inapplicable because the appellate process does not involve witness testimony.

3. The Parties' Reliance on Expectations of Confidentiality

The parties have reasonably relied on their mutual expectations that the Documents would be kept confidential. All of them were filed under seal in the circuit court, based on the mutual understandings of the parties and the presiding judge. Additionally, Documents 1, 2, and 3 have been designated "confidential" under the Confidentiality Order that governs this litigation in the circuit court. The Confidentiality Order requires any party wishing to file a document that has been designated "confidential" to take appropriate steps to protect the document from public disclosure, which may include filing the document *in camera*. Therefore, this factor weighs in favor of granting the Motion.

4. Public or Professional Significance of the Lawsuit

This appeal concerns a dispute between a private employer and a single employee in the context of an ongoing employment relationship. While it is significant to the parties involved, it has no public significance. Therefore, this factor weighs in favor of granting the Motion.

5. The Perceived Harm to the Parties from Disclosure

In *Capital U-Drive-It*, the Supreme Court recognized that sealing is proper to protect "legitimate trade secrets." *Id.* at 10, 630 S.E.2d at 469. Here, St. Francis seeks to file under seal

Dr. Jernigan's employment agreement; internal communications, memoranda, and meeting minutes concerning the highly sensitive topic of physician compensation; and discovery responses containing information about Dr. Jernigan's employment and compensation. Given the nature of the Documents, disclosure would harm Dr. Jernigan by exposing details of his employment and compensation to unwarranted scrutiny by the public and St. Francis employees, including other members of his practice. Therefore, this factor weighs in favor of granting the Motion.

6. Why Alternatives to Sealing Are Inadequate

The only alternative to filing the Documents under seal is to redact them. While it was possible to publicly file Dr. Jernigan's affidavit after making limited redactions, this is not a realistic option for the Documents, which are permeated with sensitive and confidential information. Any attempt to at redaction would render them incomprehensible. Therefore, this factor weighs in favor of granting the Motion.

7. The Public Interest, Including Public Health and Safety

Granting the Motion would not pose any concerns related to public health and safety. Moreover, given that the documents at issue contain information regarding a private employment arrangement, there is no other applicable public concern. Therefore, this factor weighs in favor of granting the Motion.

8. Public Interest in the Proceeding

There is no notoriety surrounding this case, nor has there been any particular expression of interest from members of the public or the media. Therefore, this factor weighs in favor of granting the Motion.

9. The Private or Public Status of the Litigants or the Case

As St. Francis explained in reference to the fourth factor (public or professional significance of the lawsuit), this is an employment dispute between private parties. St. Francis is not a public entity, and Dr. Jernigan is not a public figure. Therefore, this factor weighs in favor of granting the Motion.

10. Whether Release Would Enhance the Public's Understanding of an Important Historical Event

This factor is irrelevant. Therefore, it weighs neither for nor against granting the Motion.

11. Whether the Public Already Has Access to the Information

To the best of St. Francis's knowledge, the information in the Documents is not available to the public. Therefore, this factor weighs in favor of granting the Motion.

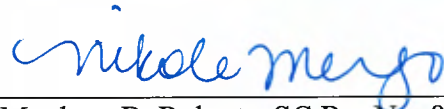
12. Whether a Particular Decision Will Sustain or Offend Fundamental Interests in Public Access

For all the reasons previously discussed, the interest in public access to documents will not be meaningfully affected if this Court grants the Motion. Therefore, this factor weighs in favor of granting the Motion.

### CONCLUSION

WHEREFORE, St. Francis, with the consent of Dr. Jernigan, moves for entry of an order granting leave to file the documents listed in Exhibit A under seal.

Respectfully submitted,



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*St. Francis Physician Services, Inc.*

June 9, 2020

Columbia, South Carolina

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing *Consent Motion for Leave to File Confidential Documents Under Seal* has been served upon Respondent's counsel pursuant to the Supreme Court's Order *Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)*, by electronic mail, on the 9th day of June, 2020, addressed as shown below:

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June 9, 2020  
Columbia, South Carolina

## **EXHIBIT A**

### *Non-Confidential List of Documents Subject to Motion to Seal*

1. Employment Agreement Between Dr. Jernigan and St. Francis
2. Memorandum to Bon Secours Medical Group Physicians dated April 14, 2016
3. Clinical Operations Group Minutes dated July 7, 2016
4. May 9, 2006 Letter and Attachments from Nancy Graebner of St. Francis
5. St. Francis Responses to Plaintiff's Second Set of Interrogatories

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