THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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

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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STATEMENT OF THE CASE

This is an appeal from an order denying a motion for a temporary injunction. Appellants Medical University of South Carolina (MUSC) and University Medical Associates of the Medical University of South Carolina (UMA), collectively referenced herein as Plaintiffs, sought an injunction against Respondents Trident Medical Center, LLC (Trident) and HCA Healthcare, Inc. (HCA), collectively referenced herein as Defendants. The basis for the requested injunction was that Defendants wrongfully possessed, should return, and should not use Plaintiffs' confidential and proprietary materials, hereinafter referenced as the Property.

Plaintiff MUSC is a state agency created for the public service missions of providing comprehensive health care to South Carolina's citizens while educating and training future healthcare professionals. S.C. Code Ann. §§ 59-123-10 *et seq.* Plaintiff UMA is a South Carolina 501(c)(3) corporation that promotes and supports the missions of MUSC by *inter alia* providing patient care in MUSC's clinics through its physician members, who also are employed by MUSC as medical school faculty. (Cawley Aff. at ¶¶ 5, 9; DuBois Aff. at ¶¶ 7, 11).

The individual defendants were physician and dental employees of MUSC and members of UMA, jointly referenced herein as the physician defendants. They were the principal healthcare providers for Plaintiffs' nationally recognized Head and Neck Oncology Division of the Otolaryngology Department (the HNO Division), which provided highly specialized care and surgery to patients with head and neck cancer. They were also the principal faculty for Plaintiff's nationally accredited head and neck cancer surgery fellowship program (the Fellowship). Trident is a privately owned, for-profit

hospital located in North Charleston, South Carolina, less than 20 miles from MUSC. HCA is a private, for-profit corporation headquartered in Tennessee that owns Trident.

The Complaint alleged that Defendants conspired with the physician defendants to raid the HNO Divison and the Fellowship for physicians, other personnel, and materials for the establishment of a competing head and neck cancer practice at Trident, while simultaneously injuring Plaintiffs' continuing ability to provide that same care in the same market. (See Cmplnt. at ¶¶ 43-113, 121-133 and Exhs. cited therein). While still Plaintiffs' employees but after having agreed to accept employment with Trident, the defendant physicians engaged in numerous unlawful acts in furtherance of the conspiracy. These acts included soliciting other employees to leave the HNO Divison and accept employment at Trident's new head and neck cancer practice, soliciting the current and incoming Fellows in the Fellowship to leave the Fellowship and join the new practice at Trident, and gathering physical and electronic copies of the Property for delivery to Defendants. (Cmplnt. at ¶¶ 43-113, 121-133). This confidential and proprietary Property consists of the following:

1. Physician preference cards.

2. Instrument lists.

3. Financial materials showing the amount of revenue generated by four of the physician defendants during their employment with MUSC.

4. Financial materials showing the salaries of four of the physician defendants received while employed by MUSC.

5. Case logs for physician defendant Day, and salaries for MUSC's residents and signed contracts for incoming fellows in the Fellowship Program.

6. Any other property belonging to Plaintiffs and possessed by Defendants, including but not limited to any materials pertaining to Plaintiffs' Fellowship program.

(Cawley Aff. at ¶¶ 17-20, 30-37; DuBois Aff. at ¶¶ 19-22, 32-39; Brendle Aff. at ¶¶ 5-6). Physician preference cards catalogue the specific tools, supplies, and room setup for a particular type of surgery. (Cawley Aff. at ¶ 17; DuBois Aff. at ¶ 19). Instrument lists identify the instruments needed to perform certain procedures. (Cawley Aff. at 18; DuBois Aff. at ¶ 20. Physician preference cards and instrument lists are extremely important and valuable materials in performing the complicated, multi-phase head and neck cancer surgical procedures. (Cawley Aff. at ¶ 19; DuBois Aff. at ¶ 21; Brendle Aff. at ¶ 5).[1]

Plaintiffs sought a temporary injunction ordering Defendants to return the Property to Plaintiffs, to not use the Property, to destroy and delete any copies of the Property, and to submit an affidavit to the court that they have complied with these orders. (See generally Temp. Inj. Motion; Temp. Inj. Memo.). Before the temporary injunction hearing, Plaintiffs settled with the physician defendants, who agreed to pay Plaintiffs $1.7 Million Dollars, to destroy all Property in their possession, including any copies, and to not use the Property in the future. (Settlement Agmt. at ¶ 2). Defendants, however, refused (and continue to refuse) to return Plaintiffs' Property in their possession, even though the defendant physicians cannot use that Property in the future.

The circuit court summarily denied the temporary injunction motion in a Form 4 Order with no analysis or factual findings. The order noted that a party seeking a temporary injunction must demonstrate irreparable harm, likelihood of success on the merits, and an inadequate remedy at law. The order summarily stated that Plaintiffs "have not sufficiently demonstrated" irreparable harm or an inadequate remedy at law, but the order was silent

[1] As shown later, this Property qualified as "trade secrets" under South Carolina law, and the defendant physicians violated their duty of loyalty to Plaintiffs by delivering this property to Defendants for Defendants to use in competing with Plaintiffs. See Arg. III, *infra.*

on the likelihood of success on the merits. (Order Denying Temp. Inj.). Thus, the court refused the injunction and allowed Defendants to retain and use Plaintiffs' Property during the litigation, even though the physician defendants cannot use the Property in the future.

The order did not make specific findings of fact as required by Rule 52(a), SCRCP. (Order Denying Temp. Inj.). Plaintiffs timely moved to alter or amend the order, seeking *inter alia* compliance with Rule 52(a), a ruling on the "likelihood of success" issue, and an amended order granting the requested temporary injunction. (Motion to Alter or Amend). The circuit court summarily denied the motion in another Form 4 Order that made no factual findings. (Order Denying Motion to Alter or Amend). Plaintiffs timely appealed.

STANDARD OF REVIEW

Injunctions are matters in equity. *Denman v. City of Columbia,* 691 S.E.2d 465, 470 (S.C. 2010). "In appeals from *all equity actions* . . ., the appellate court has authority to find facts in accordance with its own view of the preponderance of the evidence." *Dearbury v. Dearbury*, 569 S.E.2d 367, 369 (S.C. 2002) (emphasis added). This is true even if the appealed matter is within the trial court's discretion. *Lewis v. Lewis*, 709 S.E.2d 650, 651-655 (S.C. 2011) (family court factual findings reviewed *de novo* for matters within the court's discretion); *Belle Hall Plantation Homeowner's Ass'n v. Murray*, 799 S.E.2d 310, 15 (S.C. App. 2017) (applying *Lewis, supra* to hold that, despite master's discretion in setting a foreclosure sale, appellate courts take their own view of the evidence on factual matters). Thus, the appellate court may take its own view of the evidence on factual issues in appeals from injunction orders and, as in all appeals, questions of law are reviewed *de novo*. *E.g., Denman,* 691 S.E.2d at 470*; Grosshuesch v. Cramer*, 623 S.E.2d 833, 834 (S.C. 2005); *Brown v. County of Berkeley*, 622 S.E.2d 533, 536 (S.C. 2005); *Scratch Golf Co. v.*

Dunes West Residential Golf Props., 603 S.E.2d 905, 907 (S.C. 2004); *Stecker v. TALX Corp.*, 681 S.E.2d 890, 891, 893 (S.C. App. 2009). Here, as discussed in Argument I, *infra*, the trial court did not make any factual findings. *Id.*[2]

ARGUMENT

The quintessential purpose of an injunction is to preserve the property at issue until the matter has been adjudicated, particularly when, as here, the issue is ownership of the property. *Grosshuesch v. Cramer*, 623 S.E.2d 833, 834-835 (S.C. 2005). To obtain an injunction, the plaintiff must show irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. *Id.*

Two conditions are essential to granting a temporary injunction. First, the plaintiff must allege facts sufficient to set forth a cause of action for an injunction. Second, it must appear that "the injunction is *reasonably necessary* to protect the legal rights of the plaintiff pending the litigation." *CBS v. Custom Recording Co.*, 189 S.E.2d 305, 308 (S.C. 1972) (emphasis added); *accord Knohl v. Duke Power Co.*, 196 S.E.2d 115, 116 (S.C. 1973).

The plaintiff need not prove an absolute legal right and need only "present a *reasonable* question as to the existence of such a right." *AJG Holdings, LLC v. Dunn*, 674 S.E.2d 505, 508-509 (S.C. App. 2009) (emphasis added); *Peek v. Spartanburg Reg'l Healthcare Sys.*, 626 S.E.2d 34, 37 (S.C. App. 2005) (plaintiff need only present "a *fair*

[2] Some cases hold that the standard of review is "abuse of discretion," which arises when the appealed decision is controlled by an error of law (reviewed *de novo* on appeal) or when the court's factual findings are "without evidentiary support" or "unsupported by the evidence." *E.g., Greenville Bistro, LLC, v. Greenville County*, 866 S.E.2d 562, 569 (S.C. 2021); *Strategic Res. Co. v. BCS Life Ins. Co.*, 627 S.E.2d 687, 689 (S.C. 2006). These cases, however, do not explain how the appellate courts determine whether the appealed order is "supported" by the evidence. Based on the cases cited in the appended text, particularly *Lewis* and *Belle Hall*, the appellate courts review factual issues by taking their own view of the evidence.

question to raise as to the existence of such a right.") (emphasis added).[3] The court may consider the merits of the case but only to the extent necessary to determine whether a temporary injunction is appropriate. *Id.* The plaintiff need only make a prima facie showing and, once made, the court will grant a temporary injunction without regard to the ultimate determination of the case on the merits. *Id.*; *CBS v. Custom Recording Co.*, 189 S.E.2d 305, 308 (S.C. 1972).

I. The trial court erred in failing to make specific findings as required by Rule 52(a), SCRCP.

Rule 52(a), SCRCP, requires the court to set forth findings of fact and conclusions of law in support of its decision to grant or deny an injunction.[4] The court need not set forth findings on all the myriad factual questions arising in a particular case, but it must make factual findings that allow the appellate court to ensure the law is faithfully executed. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). The absence of factual findings makes the appellate task of reviewing a circuit court order impossible, because it leaves the reasons underlying the decision to speculation. *Id.*

Here, the trial court issued a Form 4 Order summarily denying Plaintiffs' motion for temporary injunction without the factual findings required by Rule 52(a) to support its decision. (See Order Denying Temp. Inj.). Plaintiffs moved to alter or amend the Form 4

[3] In *Poynter v. Invs. v. Century Bldrs. of Piedmont*, 694 S.E.2d 15, 17 (S.C. 2010), the Supreme Court modified *AJG* and *Peek* in part to clarify that the balancing of the equities is not an independent element in deciding whether an injunction should be issued. Rather, the "the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." *Id.* *AJG* and *Peek* otherwise remain good law.

[4] Rule 52(a) states: "In all actions tried upon the facts without a jury or with an advisory jury, the court *shall find the facts specially* and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and *in granting or refusing interlocutory injunctions* the court *shall similarly set forth the findings of fact* and conclusions of law which constitute the grounds of its action." (Emphasis added).

Order and requested the findings required by Rule 52(a). (Motion to Alter or Amend at 3-4). The circuit court refused to correct this error and instead issued a second Form 4 Order denying the motion, again with no factual findings.

As a general rule, 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*, 568 S.E.2d at 342-344. Here, the is no compliance with Rule 52(a), substantial or otherwise. Plaintiffs submit that the record demonstrates that Plaintiffs established all three elements for a temporary injunction and, therefore, this Court should reverse the trial court's denial of the requested injunction. If this Court disagrees that the record does so, then it should vacate the appealed order and remand for compliance with Rule 52(a), SCRCP.

II. The trial court erred in denying the temporary injunction.

The most important facts are undisputed. Prior to developing a relationship with the physician defendants, Defendants did not possess Plaintiffs' Property. As a result of developing that relationship, the physician defendants acquired the Property and delivered it to Defendants, who continue to possess and use the Property. Defendants have never denied this, nor have they denied that the physician defendants delivered the Property to them while the physician defendants were employees of Plaintiffs. Defendants have not asserted any right entitling them to possess the Property, nor any right to retain it after a demand for the return of the Property. These undisputed facts, standing alone, conclusively demonstrate that Plaintiffs are entitled to the immediate return of the Property.

At the very least, these undisputed facts establish that Plaintiffs are entitled to a temporary injunction that orders Defendants to surrender the Property to Plaintiffs or a

third-party for safekeeping during the litigation, and to not use the Property for any purpose during the litigation. Doing so cannot possibly harm Defendants, particularly since the physician defendants cannot use the Property in the future. Thus, the only plausible reason that Defendants could have for refusing to return Plaintiffs' Property is that they intend to otherwise use it for their own economic gain, including competition with Plaintiffs.

Moreover, doing so would only require Defendants to return Property that does not belong to them. Two federal district courts in South Carolina have found that defendants will suffer no harm at all when an injunction is issued protecting the confidential and proprietary materials of the former employer, because all the injunction does is prevent the defendants from using information that does not belong to them in the first place. *Boone Ins. Agency, Inc. v. Lloyd*, No. 3:20-CV-02980-JMC, 2020 WL 5052956 at *6 (D.S.C. Aug. 27, 2020); *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681, 685 (D.S.C. 2003).

Reversing the appealed order and protecting Plaintiffs' Property preserves the status quo. *See Peek*, 626 S.E.2d at 36-37 ("The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation."); *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) ("status quo" refers to "the last uncontested status between the parties which preceded the controversy."). Plaintiffs are the rightful and sole owners of the Property, and Defendants have no right to the Property. Defendants never had access to, possession of, or any claim of right to the Property prior to the misappropriation by the physician defendants that precipitated the lawsuit. Thus, allowing Defendants to retain and use the Property upsets rather than preserves the status quo.

III. Plaintiffs demonstrated a likelihood of success on the merits in support of the requested injunction that Defendants return and not use Plaintiffs' Property.

The trial court did not rule on the "likelihood of success" element for temporary injunctions – rather, the court denied the motion based solely on the other two elements, to-wit: irreparable harm and inadequate remedy at law. (Order Denying Temp. Inj.) Plaintiffs sought a specific ruling on the "likelihood of success" element in their motion to alter or amend, but the trial court denied the motion without any ruling on the "likelihood of success." (Motion to Alter or Amend; Order Denying Motion to Alter or Amend).

The trial court necessarily concluded Plaintiffs had shown a likelihood of success on the merits, because the court did not deny the injunction on that basis and did not rule on this issue when requested by Plaintiffs in their motion to alter or amend. Plaintiffs' motion specifically stated that the trial court's failure to rule on the "likelihood of success" issue must mean that the court found Plaintiffs had satisfied this element. (Motion to Alter or Amend). The trial court did not disagree with or disavow this view of its order when denying the motion to alter or amend. (Order Denying Motion to Alter or Amend).

In any event, as shown throughout this brief, the record before the trial court and this Court establishes a prima facie case of "likelihood of success on the merits," as well as "irreparable harm" and an "inadequate remedy at law." Therefore, the trial court erred in not issuing the injunction. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1991) ("Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate [determination] of the case on the merits.").

A. Plaintiffs demonstrated a prima facie case under the South Carolina Trade Secrets Act.

When considering a temporary injunction, courts examine the merits of the underlying claims only to the extent necessary to determine whether the plaintiff has made

a prima facie showing for relief. *Peek*, 626 S.E.2d at 37 ("The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made."). "Prima facie evidence is evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *LaCount v. Gen. Asbestos & Rubber Co.*, 192 S.E. 262, 266 (S.C. 1937).

Under the South Carolina Trade Secrets Act (SCTSA), material qualifies as a trade secret if it "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." S.C. Code Ann. § 39–8–20(5)(a). The court "must consider the extent to which the information is known outside of [the plaintiff] business and the ease or difficulty with which the information could be properly acquired or duplicated by others." *Wilson v. Gandis*, 844 S.E.2d 631, 649 (S.C. 2020).

Plaintiffs made the required prima facie showing under the SCTSA. The affidavits of Dr. Cawley and Dean DuBois identify the materials that belong to Plaintiffs and qualifies as trade secrets under the SCTSA. The physician preference cards and instrument lists are in the hands of the Defendants. (Cawley Aff. at ¶¶ 23, 25; DuBois Aff. at ¶¶ 25, 27; Exhibit #7). The remaining trade secret materials are, upon information and belief, in the hands of the Defendants. (Cawley Aff. at ¶¶ 31, 33, 35-36; DuBois Aff. at ¶¶ 33, 35, 37-38; Exhibits #9-#10, #14-#15.).[5]

[5] See n.1 and accompanying text, *supra*.

Plaintiffs benefit greatly from the fact that its Property is not generally known to the public. These materials enable Plaintiffs to perform complex, multi-faceted head and neck procedures to treat patients suffering from head and neck cancer. (Cawley Aff. at ¶ 55; DuBois Aff. at ¶ 56). Plaintiffs' financial materials, both the amount of revenue generated by the physician defendants over the past ten (10) years and the salaries paid to them during this time, derives economic value from not being generally known. Likewise, the salaries of residents and the signed contracts of the fellows in the Fellowship Program also derive economic value from not being generally known for the same reasons. The secrecy of these materials allows Plaintiffs to be competitive against other hospitals and to compete against other accredited fellowship programs for residents and fellows.

Plaintiffs take reasonable steps to protect their confidential and proprietary materials. It is not available in the public domain, and Plaintiffs limit access to only those individuals who have a legitimate need to access it. (Cawley Aff. at ¶¶ 20, 21, 28, 30, 32, 37; DuBois Aff. at ¶¶ 22, 23, 30, 32, 34, 39). Plaintiffs also maintain policies and procedures to protect these materials from disclosure to unauthorized persons. (Cawley Aff. at ¶¶ 21-22; DuBois Aff. at ¶¶ 23-24; Exhibit #5). For persons attempting to access Plaintiffs' these materials remotely, Plaintiffs use a two-factor authentication system to further protect it. (Cawley Aff. at ¶ 21; DuBois Aff. at ¶ 23). In addition, Plaintiffs contractually prohibit faculty members, including the physician defendants, from disclosing the materials and prevent them from using them for their own benefit. (Exhibit #5). Under these facts, Plaintiffs established a prima facie violation of the SCTSA.

B. Plaintiffs demonstrated a prima facie case on their breach of duty of loyalty cause of action.

In any event, and even if Plaintiffs' confidential and proprietary materials are not a trade secret under the SCTSA (which they are), the materials still belong to Plaintiffs. The physician defendants took materials that belong to Plaintiffs (the Property) and delivered these materials to Defendants for their use in competing with Plaintiffs. This is a manifest breach of the physician defendants' duties of loyalty to Plaintiffs.

To establish a claim for breach of duty of loyalty, a plaintiff must show the existence of a duty of loyalty, a breach of that duty by the defendant, and damages caused by the wrongful conduct of the defendant. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 732 S.E.2d 166, 173 (S.C. 2012). An employee owes a duty of loyalty to his employer to remain faithful to the employer's interests throughout the term of employment, to abide by his employer's instructions and policies, and to carry out those instructions and policies. *Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon*, 715 S.E.2d 331, 334 (S.C. 2011); *Young v. McKelvey*, 333 S.E.2d 566, 567 (S.C. 1985); *Berry v. Goodyear Tire and Rubber Co.*, 242 S.E.2d 551 (S.C. 1978); *Lowndes Products, Inc. v. Brower*, 191 S.E.2d 761 (S.C. 1972); see also *Nucor Corp. v. Bell*, 482 F.Supp.2d 714, 727 n.9 (D.S.C. 2007). An employee is disloyal when he "acts adversely to the interest of his employer." *Berry*, 242 S.E.2d at 551.

Here, the physician defendants clearly breached their duties of loyalty to Plaintiffs. While still working for Plaintiffs, they took valuable materials belonging to Plaintiffs (the Property) and delivered it to Defendants for Defendants' use in competing with Plaintiffs. These facts establish a prima facie case for breach of the duty of loyalty. Furthermore, when a new employer obtains confidential and proprietary materials from a new employee belonging to the former employer, or gains an advantage 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 any profits it received from the employee's wrongful conduct as it relates to his former employer. *Lowndes*, 259 S.C. at 337-38, 191 S.E.2d at 769-70. Based on the evidence described above in support of Plaintiffs' SCTSA claim, Plaintiffs made a prima facie showing of success on the merits on the joint and several liability of Defendants for the physician defendants' breach of their duties of loyalty.

IV. The trial court erred in finding there was no irreparable harm and that an adequate remedy existed at law.

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 these questions under narrow and artificial rules. *CBS v. Custom Recording Co.*, 189 S.E.2d 305, 311-312 (S.C. 1972); *accord Peek*, 626 S.E.2d at 36, *citing Kirk v. Clark*, 4 S.E.2d 13, 16 (S.C. 1939). Rather, courts proceed realistically, and uncertainty in fixing the measure of damage to the injured party, as here, may itself be sufficient to justify an injunction. *Peek*, 626 S.E.2d at 36. Likewise, if the available legal remedy is impracticable because, as here, the threatened acts may continue during the progress of the litigation, the legal remedy does not preclude an injunction. *Id.*

Plaintiffs spent two decades of time and resources to develop the confidential and proprietary Property and the HNO Division. (Cawley Aff. at ¶¶ 6-7; DuBois' Aff. at ¶¶ 8-9). MUSC receives a great benefit from its prestigious and highly regarded head and neck cancer team. It is integral to the success and good reputation that MUSC enjoys.

It would have taken Defendants eight to ten years to develop independently the type of head and neck cancer practice developed by Plaintiffs. (Brendle Aff. at ¶ 7). By

acquiring Plaintiffs' Property through the physician defendants, Defendants avoided the time and expense necessary to do it on their own. The benefit of this "jump-start" to Defendants is multi-faceted, including but not limited to saving the time and resources necessary to first develop the program independently, including the type of Property taken by the physician defendants and delivered to Defendants. This enabled Defendants to "hit the ground running" and enter the market in competition with Plaintiffs sooner, cheaper, and more effectively. The resulting harm to Plaintiffs is also multi-faceted, including but not limited to the loss of its competitive advantage (and loss of business) for the time it would have taken Defendants to develop their head and neck cancer practice at Trident without Plaintiffs' Property.

Money alone cannot replace the loss of Plaintiffs' Property. The value of such property to Plaintiffs is its confidentiality and exclusive use in the marketplace. The value of such property to Defendants 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 of the Property. If Defendants are allowed to use the Property, there is no way to make Plaintiffs whole for the damage they would sustain. The only way to protect the Property fully is to enjoin the Defendants to return it and not use it in the future.

Defendants have no right to possess or use the Property, nor do they claim any such right. Nevertheless, they refuse to surrender the Property with no plausible reason except to use the Property for their own economic gain, including competition with Plaintiffs in the highly specialized practice of head and neck cancer care and surgery. Refusing to

enjoin this type of conduct will encourage competitors to obtain and use misappropriated materials to save time and money on research and development, and get to market sooner.

An injunction is appropriate if no legal remedy exists, 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*, 626 S.E.2d at 36 and 37 n.2; *MailSource, LLC v. M.A. Bailey & Assocs.*, 588 S.E.2d 635, 639 (S.C. App. 2003). Quantifying the ongoing damage to Plaintiffs creates the difficulty and uncertainty that warrants a temporary injunction. Thus, the trial court erred in not finding there was an inadequate remedy at law in this case and in not finding irreparable harm in this case.

Irreparable harm does not mean that the harm is beyond the possibility of compensation in damages. *Peek*, 626 S.E.2d at 36, citing *Bethel M.E. Church v. City of Greenville*, 45 S.E.2d 841, 845 (S.C. 1947). Economic harm becomes irreparable when it is not easily calculated in pecuniary terms. *Peek*, 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. *E.g., Milliken & Co. v. Morin*, 31 S.E.2d 288, 295 (S.C. 2012); *Boone*, 2020 WL 5052956 at *6; *Indus. Packaging Supplies, Inc. v. Martin*, No. CA 6:12-713-HMH, 2012 WL 1067650 (D.S.C. Mar. 29, 2012); *Rockford*, 296 F.Supp.2d at 685.

Research does not reveal any South Carolina case that denies an injunction when a competitor acquires confidential property belonging to another and seeks to use those materials to compete with the true owner of the property. To the contrary, courts view this particular circumstance—a competitor acquiring possession of materials that belong to another—as grounds for an injunction because of the unique damage caused by the

possession and use of such materials. *See Milliken*, 731 S.E.2d at 295 ("[A]n employer may restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employee relationship.").

Defendants undeniably possess the Property and undeniably have no right to possess it or use it. Their continued retention and use of the Property will cause ongoing damage to Plaintiffs throughout the litigation. Accordingly, the trial court erred in not finding that there was irreparable harm and an inadequate remedy at law in this case.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the appealed orders should be reversed and Respondents should be ordered to return the Property to Appellants and to refrain from using the Property in the future.[6]

Respectfully Submitted,

/s/ Robert L. Widener

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[6] This is identical to what the physician defendants agreed to do with respect to the Property. (Sttlmt. Agmt).