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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

C. A. NO. 2006CP32-0371

J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. ..... Petitioners,

v.

Columbia Heart Clinic, P.A. ..... Respondent.

MOTION TO RECONSIDER DENIAL OF PETITION FOR WRIT OF CERTIORARI

April 21, 2014

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ATTORNEYS FOR THE PETITIONERS

IF THE DECISION IS ALLOWED TO STAND AS WRITTEN, THE RESULT WILL BE A DRAMATIC EXPANSION OF TRADE RESTRICTIONS. AT THE VERY LEAST, THIS CASE MUST BE DISTINGUISHED FROM PRIOR DECISIONS TO PREVENT MAJOR UPHEAVAL IN THIS AREA OF THE LAW.

Allowing the Court of Appeals decision to stand unaltered is going to create a major upheaval in non-compete law in South Carolina. At a minimum, this Court should better distinguish the non-compete in this case from those struck down in prior cases so as to prevent a major expansion of trade restrictions in South Carolina.

South Carolina Appellate courts have clearly prohibited employers from restricting former employees from going subsequently working in a different capacity from the work the employee did for the employer. *Faces Boutique v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995).

The *Faces* decision struck a non-compete that stated:

> the Employee will not, . . ., directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces]. It is understood and agreed that this prohibition applies to FACIALS, SELLING OF COSMETICS, AND ALL COSMETIC APPLICATION OR FACIAL SPA RELATED SERVICES.

Because Gibbs only performed facials for Faces Boutique, the court held it was improper to ban her from working in a different capacity for an employer that provided facials as part of its services.

The Columbia Heart non-compete prohibits:

> . . . **directly or indirectly**, on his own behalf or on behalf of any other Person, . . . (A) organizing or owning any interest in a business which engages in the [practice of cardiology medicine] in the Territory; (B) engaging in the Business in the

> Territory; or (C) **assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise)** to engage in the [practice of cardiology medicine] in the Territory.

(R. p. 1289) (P. Ex. 1 Articles 5.1, 5.2 page 10) (emphasis added).

Contrary to the Court of Appeals decision which misunderstood "Person" to mean only a human person, "**Person** means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization, or government unit." (R. 1289) (*Id.* at *§ 5.2(ii))* (emphasis added).

One need only substitute "facials" for cardiology to see that the Columbia Heart non-compete would not survive scrutiny under *Faces Boutique*.

> [Employee may not]. . . **directly or indirectly**, on his own behalf or on behalf of any other Person, . . . (A) organizing or owning any interest in a business which engages in [facials or cosmetics] in the Territory; (B) engaging in [facials or cosmetics]; or (C) **assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise)** to engage in [facials or cosmetics] in the Territory.

Although the Court of Appeals distinguished *Faces* from this case because of the "assisting" language, this is not a distinction at all because "assisting" is defined extremely broadly to include being an "employee," "lendor," "lessor," or "agent." In particular, the "lendor" and "lessor" restrictions make clear that Columbia Heart is trying to preclude any connection to cardiology—even extremely remote and tenuous involvement.—not just direct assistance. Being a janitor would be assisting under this definition. The Columbia Heart restriction would have prevented Gibbs from being employed in a different capacity just as effectively as the Faces Boutique non-compete.[1]

[1] Even if the language could be read less restrictively, such a reading ignores the clear rule that non-competes are construed strictly against the employer. See, e.g.,

If the decision is allowed to stand as-is, employers will be able to accomplish what they previously could not. Trade restrictions will be dramatically increased in South Carolina. At a minimum, the decision is going to create much uncertainty and if there is a distinction from prior law, it must be clarified to avoid confusion and giving a "green light" to employers to dramatically limit fair and free trade by former employees.

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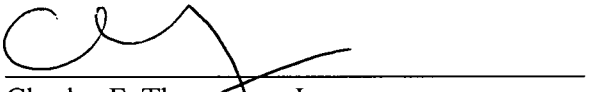
PROOF OF SERVICE

I certify that Petitioners Motion for Reconsideration was served this day upon counsel for the Appellant, Keith Babcock, PO Box 11208, Columbia, SC 29211and filed with the South Carolina Supreme Court.



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