

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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DEC 08 2014

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

James Randall Davis, Special Master/Referee

Case No. 2014-001819

Palmetto Mortuary Transport, Inc., .....Respondent,

v.

Knight Systems, Inc. and Robert L. Knight, .....Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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## APPELLANTS' ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their Initial Brief, the Appellants offer the following brief points of clarification and reply to the arguments raised by the Respondent.

### **I. The South Carolina Supreme Court has Previously Held that a Statewide Covenant Not To Compete is Per Se Unreasonable When the Existing Customers of a Purchased Business are Contained within a Significantly Smaller Geographic Region.**

Respondent's Initial Brief, like the Order of the Special Referee in this matter, erroneously concludes that the general more rigorous standard applied when evaluating the reasonableness of covenants not to compete in employment contracts negates the precedent set by the South Carolina Supreme Court in a case invalidating overly broad territorial restrictions in covenants not to compete which are ancillary to the sale of a business. See e.g., *Hagemeyer North America, Inc. v. Thompson*, 2:05-3425, 2006 WL 516733, p.4 (D.S.C. Mar. 1, 2006) ("As a general rule, such covenants are given greater deference in the context of a sale of business than in the employment context.") (citations omitted). In *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958), the South Carolina Supreme Court ruled invalid a **statewide** geographic restriction in a covenant not to compete that was ancillary to the sale of a Columbia jewelry business. The material terms of the *Somerset* covenant not to compete and that Court's holding are indistinguishable from this dispute between Appellants and Respondent.<sup>1</sup>

The Somerset Court stated that "[i]t is well settled that a restrictive covenant not to compete, ancillary to the sale of a business and its good will, will be upheld and

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<sup>1</sup> As discussed throughout both parties' briefs, at the time that Respondent purchased Appellants' mortuary transport business, nearly all of Appellants' business clients were located in Lexington or Richland Counties.

enforced if '(1) supported by a valuable consideration, (2) if reasonably limited as to time, and (3) **if reasonably restricted as to the place of territory, that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party.**'” *Somerset*, 104 S.E.2d at 346 (citations omitted) (emphasis added). In striking down the statewide covenant not to compete in *Somerset*, the Supreme Court noted that it “shall first determine whether the covenant under consideration is necessary in its full extent for the protection of the covenantee’s business or good will. If not, the territorial scope of the restraint is unreasonable and no inquiry need be made as to the presence or absence of other necessary requirements.” *Id.*, *citing*, Annotation in 46 A.L.R.2d. 119.

Respondent attempts to distinguish the patently clear holding in *Somerset* by arguing that the *Somerset* plaintiff was not represented by counsel while the Appellant in this case was represented by an attorney. Further, Respondent argues that Appellant never objected to the inclusion of a statewide ban on competition and the Respondent anticipated future expansion of its business beyond the territory of business purchased from Appellant. None of Respondent’s arguments negate the express holding of *Somerset*. Finding such specious justifications for an overly broad non-compete, the *Somerset* Court held that it could “find no rational basis for the [statewide] extent of the territorial restraint.” *Id.* at 347. “Obviously, it was unnecessary to the protection of the business sold, or that later operated . . . that plaintiff be prohibited from engaging in a

similar business in Charleston, Spartanburg, Greenville or numerous other cities in South Carolina.” *Id.* at 346.<sup>2</sup>

Respondent contends that evidence of the location of a business’ customers or clientele is only one factor which should be considered by courts in examining the reasonableness of a covenant not to compete’s territorial restriction. Respondent’s contention is without merit when examined under the facts, analysis, and holding of *Somerset*. Further, this Court has relied on the holding in *Somerset*, even in cases involving overly broad geographic restrictions in employment contracts, to hold that if a covenant not to compete’s territorial prohibition is facially invalid, then no other consideration is necessary by a reviewing court. In *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct.App. 1992), the South Carolina Court of Appeals held that a territorial restriction of fifteen (15) miles surrounding three veterinarian practice locations in Anderson County, South Carolina, which had the practical affect of proscribing the competition of a former employee in “nearly all of Anderson County, parts of Abbeville, Greenville, Pickens, and Oconee Counties, and indeed a small part of Georgia,” was facially invalid.

Citing *Somerset*, the *Stringer* Court held that its “focus here need only be upon the question of whether, as a matter of law, the covenant in issue is reasonably limited in its operation with respect to place.” *Stringer*, 424 S.E.2d at 548. Further, *Stringer* noted that no other factors need to be considered once a court determines that the

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<sup>2</sup> The defendant in *Somerset*, much like the Respondent in the case at bar, argued that the overly broad non-compete should be upheld, in part, because the plaintiff suggested that the non-compete could include the whole state; that the plaintiff stated that he had no intention of going back into this particular business; and that the statewide restriction was necessary for the protection of the defendant’s purchase of the business. *See, Id.* at 346-47.

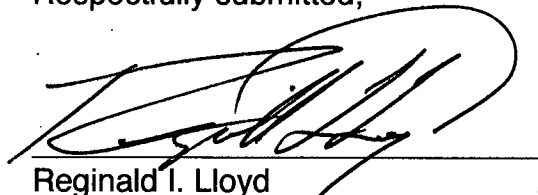
territorial restriction is unreasonable. *Id.*, citing, *Somerset*, 104 S.E.2d at 346 (“If . . . the territorial scope of the restraint is unreasonable . . . no inquiry need be made as to the presence or absence of other necessary requirements.”) “If a covenant not to compete is defective in one of the [required elements], the covenant is totally defective and cannot be saved.” *Faces Boutique, LTD v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707, 709 (Ct.App. 1995), citing, *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22, 24 (1972) (The court “cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.”); *Somerset*, 104 S.E.2d at 346. Both Respondent and the Special Referee attempt to dodge the applicable holding in *Somerset* by justifying the overly broad territorial restriction imposed upon the Appellants based upon irrelevant factors, such as Appellants’ failure to object to the terms of the non-compete or because Appellant Knight indicated that he planned to get out of business. Such arguments were rejected by the *Somerset* Court and are contrary to the precedent determining reasonableness based upon the territorial reach of the client or customer base of a business at the time it is purchased. *See, Somerset, supra.*

### **CONCLUSION**

Based on the foregoing, and in addition to the arguments set forth in Appellants’ Initial Brief, Appellants respectfully submit that this case should be decided in accordance with the holding set forth in *Somerset* and the non-compete at issue declared invalid. Respondent’s types of proffered justifications for the geographic component of the non-compete, outside the express terms of the overly broad territorial radius, were rejected by the *Somerset* Court as improper considerations. Thus, based

upon the foregoing, the Appellants respectfully request that the Orders of the Special Referee be reversed and vacated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Reginald I. Lloyd', written over a horizontal line.

December 8, 2014

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APPEAL FROM LEXINGTON COUNTY  
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James Randall Davis, Special Master/Referee

Case No. 2011-CP-32-04051

Palmetto Mortuary Transport, Inc., .....Respondent,

v.

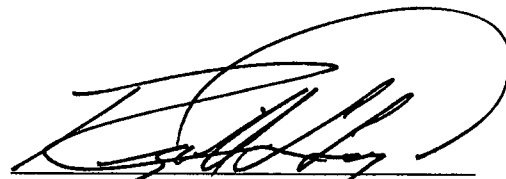
Knight Systems, Inc. and Robert L. Knight, .....Appellants.

PROOF OF SERVICE

I certify that I have served the counsel for Respondent, Palmetto Mortuary Transport, Inc., with a clocked copy of Appellant's Initial Reply Brief via electronic and first-class mail service this 8th day of December, 2014.

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Hon. Jenny Abbott Kitchings  
Clerk of Court  
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Robert L. Knight, Appellants, Appellate Case No. 2014-001819.

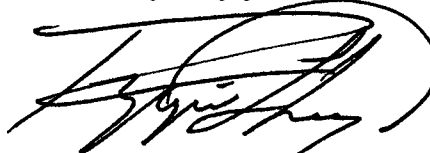
Dear Ms. Kitchings:

Enclosed for filing, please find the original and two copies of Appellants' Initial Reply Brief, in the above referenced matter. Please file the original and return two clocked copies to me via our courier.

Thank you for you assistance. If you should have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,



Reginald I. Lloyd

Enclosures

cc: John J. Pringle, Jr., Esquire (via electronic and regular mail)