THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Appellate Case No. 2014-001819

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

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case was initiated by Palmetto Mortuary Transport, Inc. ("Palmetto Mortuary") on October 26, 2011 against Knight Systems, Inc. ("Knight Systems") and Robert L. Knight (Knight Systems and Knight collectively referred to as "Knight"). The case arises out of Knight's sale of its mortuary transport business to Palmetto Mortuary pursuant to an Asset Purchase Agreement ("APA") executed on January 5, 2007. (R. pp. 372-407.)

Palmetto Mortuary claimed that Knight breached the APA in the following ways: (i) violating the "Non-Competition Covenant" (the "Non-Compete Agreement") contained in the APA at Exhibit 3.2.6 by submitting a response to a request for proposal ("RFP") for body removal services issued by Richland County, South Carolina (R. p. 40-47 at ¶¶ 12, 17-19); (ii) violating Section 3.4.8 (the "Exclusivity Provision") of the APA by refusing to sell certain body bags to Palmetto Mortuary and preventing Palmetto Mortuary from satisfying the RFP's requirement to provide "odor-proof body bags." (*Id.* at ¶¶ 11-16, 19, 20-23.) Palmetto Mortuary sought monetary damages and injunctive relief as provided by the APA. (*Id.*)

Knight asserted in its Answer that the Non-Compete Agreement was unenforceable due to an alleged unreasonable geographic scope and time length and lack of adequate consideration. (R. pp. 57 at ¶ 36 – p. 58 at ¶ 38 (Appendix).) Knight also asserted a counter-claim for breach of contract. (*Id.* at ¶¶ 39-43.) At trial, Knight also claimed that the Non-Compete Agreement violated public policy as it placed an unreasonable restraint on competition for public contracts. (R. p. 66-82 (Proposed Order submitted by Knight).) Knight furthermore alleged that its breaches of the APA were

justified by Palmetto Mortuary's alleged previous breaches of the Exclusivity Provision because Palmetto Mortuary purchased body bags from sellers other than Knight Systems. (R. p. 58 at ¶¶ 39-43 (Appendix) ("Plaintiff's breach of the agreement with Defendants negated all terms, conditions and responsibilities of the Defendants under the Asset Purchase Agreement and the Non-Compete Agreement").)

By consent of the parties, the case was referred to a court-appointed Special Referee/Master, James Randall Davis ("Special Referee" or "trial court"). The case was tried on December 18, 2013. Both parties submitted proposed orders following the trial. On July 22, 2014, the Special Referee held that the Non-Compete Agreement was not unreasonably expansive in time or scope and was supported by adequate consideration. (R. pp. 3-15 at ¶¶ 1-31.) The Special Referee concluded that Knight breached the APA by withdrawing odor-proof body bags from the market in violation of the Exclusivity Provision and by submitting a response to an RFP for mortuary transport services with Richland County, thereby violating the express terms of the Non-Compete Agreement (R. pp. 15-18 at ¶¶ 32-41); that Palmetto Mortuary's purchases of body bags from other sellers was not a material breach justifying Knight's repudiation of the APA (R. pp. 18-29 at ¶¶ 42-70); and that Palmetto Mortuary was entitled to actual damages, injunctive relief, and attorneys' fees and costs as provided by the APA (R. pp. 29-33 at ¶¶ 71-84).

STATEMENT OF FACTS

A. THE ASSET PURCHASE AGREEMENT ("APA")

In October of 2006, Donald and Ellen Lintal met with a broker regarding the purchase of Knight's mortuary transport business which had been advertised by Knight for sale. (R. p. 268, lines 2-9.) Shortly after meeting with their broker, in November of

2006, Mr. and Mrs. Lintal visited with Knight and looked at Knight System's business location for the purpose of informing the Lintals' final valuation of the business. (R. p. 268, lines 17-24; page 269, lines 3-13.) From November of 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the APA. (R. p. 239, line 11 – p. 240, line 15; p. 244, line 4 – p. 245, line 14; p. 302, lines 5-9; p. 349, line 20 – p. 353, line 19.) During that time, on December 14, 2006, Palmetto Mortuary's counsel sent a draft ten-year covenant not to compete to Knight's counsel which was intended by both parties to be included in the final APA. (R. p. 260, lines 9-12.)

Closing took place on January 5, 2007. (R. pp. 372-407.) At the closing, the parties for the first time allocated dollar amounts to each of the APA's provisions, including the Non-Compete Agreement. (R. p. 202, lines 5-13; p. 202, line 25 – p. 203, line 10.) Mrs. Lintal testified that prior to closing, she "had discussions with our attorney and we were working with [Knight's attorney] to get an allocation of assets, because that was never put in the document prior to closing. [I] wanted it in . . . because I wanted to review it. It never got accomplished until we sat down at closing." (R. p. 261, lines 3-8.) There is no dispute that until closing no dollar figure was specifically assigned to the Non-Compete Agreement. (R. p. 260, lines 13-22.)

Mrs. Lintal testified, and Mr. Knight conceded, that the $1,000 allocation ultimately attributed to the Non-Compete Agreement was primarily driven by Knight at the instruction of its accountant. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-15.) Both Mrs. Lintal and Mr. Knight testified that Mr. Knight wanted to allocate $1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize

their potential capital gains tax. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)[1] After collectively determining what allocation was best for the parties, following the advice of their agents, the parties executed the APA. (R. p. 286, lines 13-16 (Mrs. Lintal testified that negotiations were "a give and take"); R. p. 306, lines 4-20 (Mr. Knight testified that "there was some discussion" regarding negotiating the amount allocated to the Non-Compete Agreement, but that he did not remember what it was); R. p. 354, lines 1-13 (same).)

Knight admitted that he "appeared at the closing [with his attorney] and . . . read the documents at closing." (R. p. 350, lines 1-6; p. 353, lines 16-19.) Mr. Knight further testified that "after th[e] discussion about the $1,000 that's mentioned as the consideration for the covenant not to compete, [he] did[] [not] object to that provision or any provision of either agreement at the closing." (R. p. 353, lines 20-25.) The parties executed the APA on January 5, 2007 at the closing. (R. pp. 372-407.)

Pursuant to the final version of the APA, Palmetto Mortuary purchased, among other assets specified in Section 1: tangible assets (R. p. 372 at Section 1.1.1.1), goodwill (R. p. 372 at Section 1.1.1.6), and customer records, lists, and contracts (R. p. 372 at Section 1.1.1.3) associated with Knight's mortuary transport business (the "Business"). Three contracts were among the assets transferred to Palmetto Mortuary pursuant to the APA: (1) Contract with Richland County for body removal services; (2) Contract with Lexington County for body removal services; (3) Contract with the University of South Carolina for cadaver preparation and transportation services. (R. p. 386 at Exhibit 1.1.1.3). Palmetto Mortuary did not purchase any assets associated with Knight's body

[1] Mrs. Lintal testified that part of Palmetto Mortuary's goal was to minimize the amount allocated to goodwill for the same reason. (R. p. 283, line 10 – p. 285, line 1.)

bag business (the "Related Business"). (R. pp. 372-407.) Palmetto Mortuary also obtained mutual covenants from Knight, including a ten-year Non-Compete Agreement which is set forth in Exhibit 3.2.6 to the APA. (R. p. 394 at Exhibit 3.2.6.) The Non-Compete Agreement placed no restrictions or limitations on Knight's body bag business.

In exchange for the assets and other contractual terms specified in the APA, including the Non-Compete Agreement, Palmetto Mortuary was obligated to and did pay Knight a purchase price of Five Hundred and Ninety Thousand Dollars ($590,000.00). (R. pp. 372-407; R. p. 128, lines 8-12.)

Additionally, the APA obligated Palmetto Mortuary to purchase four types of body bags from Knight Systems. (R. p. 375 at § 3.4.8.) The types of bags identified in Section 3.4.8 of the APA (the "Exclusivity Provision") include: (1) heavy duty body bags, (2) lightweight body bags, (3) odor-proof body bags, and (4) water-retrieval body bags. (*Id.*) Plaintiff agreed to purchase the four stated body bags from Defendants for the ten-year term of the Non-Compete Agreement. (*Id.*; *see also* R. p. 131, lines 18-22.)

B. THE DISPUTE

The subject dispute began in early 2011, when Richland County issued a Request for Proposal ("RFP") seeking responses to an RFP to provide mortuary transport services for a period of five years. (R. p. 160, lines 5-9; p. 161, lines 16-22; p. 163, lines 4-7; p. 165, lines 6-8, 21-24.) At that time, Palmetto Mortuary held the mortuary transport services contract with Richland County as a result of the APA. (R. p. 162, line 24 – p. 163, line 3; p. 165, line 18 – p. 166, line 5.) The deadline for submission of responses to an RFP to Richland County was June 17, 2011 at 3:00pm. (R. p. 162, lines 12-22).

Palmetto Mortuary prepared a response to an RFP and timely submitted it for the County's consideration. (R. p. 163, lines 4-5.)

On June 16, 2011, one day before the responses to the RFP were due, Mr. Knight tape-recorded a conversation he had with Mr. Lintal ("Tape Recording"). (R. p. 163, line 8 – p. 164, line 7; p. 315, line 18 – p. 316, line 15.) At the time of the conversation, Mr. Lintal was not aware that he was being recorded. (R. p. 163, line 17.) Throughout the tape-recorded discussion, Mr. Knight repeatedly referenced "infant body bags" that Palmetto Mortuary had allegedly purchased from another vendor in 2008, nearly three years prior to the tape-recorded conversation. (R. p. 164, line 14 – p. 165, line 5; p. 324, line 14 – p. 325, line 12.) In response to the allegations, Mr. Lintal stated that he did not believe his purchases of body bags from other manufacturers were "significant," specifically stating that he was "not trying to breach" the parties' Agreement. (R. p. 325, lines 11-14, 19; p. 327, lines 5-9; p. 327, line 19 – p. 328, line 9; p. 329, lines 18-24.)

Palmetto Mortuary's previous purchases of body bags from manufacturers other than Knight can be summarized as follows:

1. Palmetto Mortuary purchased one infant body bag from Southland Medical Corporation on or about April 3, 2008 for the purchase price of $5.25, and on April 9, 2008 purchased one case containing thirty infant bags for a total price of $187.50. (R. p. 149, line 22 – p. 150, line 12; *see also* R. p. 449.)

2. Mr. Lintal testified that after receipt of the first infant body bag (a "pediatric" size bag) and demonstration to the Lexington County Coroner, he purchased thirty of the larger sized infant bags. "[W]e, being Randy Martin and myself, [determined] that the larger size would be more versatile for [our] use." (R. p. 153, lines 7-13.)

3. On March 6, 2009, Palmetto Mortuary purchased six water-retrieval bags from Evident at a purchase price of $45.00 a piece, for a total of $270.00. (R. p. 153, line 25 – p. 154, line 5; p. 154, line 24 – p. 155, line 23.)

4. On July 14, 2010, Palmetto Mortuary purchased a total of ten body bags from Medical Products Limited, including four extra-large body bags, and six heavy-duty body bags. (R. p. 156, lines 2-11.) The total purchase price for the bags from Medical Products Limited was $208.50. (R. p. 157, line 21 – 158, line 1.)

The amount of bags purchased by Palmetto Mortuary from sources other than Knight Systems totaled Eight Hundred and Eighty-Four Dollars and Ninety-Seven Cent ($884.97). (R. p. 158, lines 9-17.) This amount includes thirty-one (31) infant bags at a total price of 192.75, four (4) extra-large body bags at a price of $213.72, six (6) heavy duty body bags at a total price of $208.50, and six (6) water-retrieval bags at a total price of $270.00. (R. p. 152, lines 5-25; p. 153, line 21 – p. 154, line 6; p. 156, lines 4-23.) Because infant and extra-large body bags are not within the types of bags that Palmetto Mortuary was required to purchase from Knight pursuant to Section 3.4.8 of the APA, Palmetto Mortuary's purchases of such bags did not breach the contract. The total amount Palmetto Mortuary paid for bags that were included in the Exclusivity Provision was Four Hundred Seventy-Eight Dollars and Fifty Cents ($478.50). (R. p. 153, line 21 – p. 154, line 10; p. 156, lines 4-23.)

During the recorded conversation, Mr. Lintal assured Mr. Knight: "If you're willing to make [infant body bags], I'm going to order them." (R. p. 329, lines 18-24.) Mr. Knight responded: "I can make them." (R. p. 329, line 25.) It is undisputed that from January 2007 to June 2011, Palmetto Mortuary purchased more than $45,000.00 worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-448.) These purchases from Knight were before, during, and after, Palmetto Mortuary's alleged purchases from other manufacturers. After Palmetto Mortuary purchased body bags from other manufacturers, Palmetto Mortuary continued to purchase body bags from Knight Systems. (*Id.*)

At no point during the tape recorded conversation did Knight inform Mr. Lintal that he intended to submit a response to the RFP in competition with Palmetto Mortuary. (R. p. 335, lines 1-6, 18-23.) Following the parties' conversation on June 16, 2014, Mr. Knight met with his attorney and prepared a response to the Richland County RFP. (R. p. 336, lines 4-22.) Mr. Knight testified that he felt that if he did not submit a competing response against Palmetto Mortuary he would be "left out in the cold." (R. p. 337, lines 6-22.) Knight submitted a competing response on June 17, 2011. (R. p. 344, line 22 – p. 345, line 11.)

After the RFP closed on June 17, 2011, Mr. Knight emailed Ms. Christie Swofford at the Richland County Procurement Office, seeking a determination that Knight Systems be chosen to provide mortuary transport services because Knight System was the alleged "sole provider" of odor-proof body bags required by the RFP. (R. p. 166, line 6 – p. 168, line 13; p. 241, lines 14-24; p. 346, line 14 – p. 347, line 25.) There is no dispute that Richland County required odor-proof bags as part of the RFP.

Mr. Knight stated in his email to Richland County that he was taking all of his odor-proof bags off of the market, despite the Exclusivity Provision's requirement in the APA that Knight Systems provide "odor-proof body bags" to Palmetto Mortuary. (R. p. 375 at § 3.4.8.) At that time, Mr. Lintal, "was [not] aware of" needing any alternative to an odor proof bag for his response to Richland County "[b]ecause [he] still was under the existing contract . . . with Knight Systems." (R. p. 240, line 24 – p. 241, line 1.) The referenced contract, the APA, gave Palmetto Mortuary "the rights to buy th[e] odor proof bag [from Knight], as well as these other[] [types] of bags" in Section 3.4.8 of the Agreement. (R. p. 241, lines 2-5.)

Palmetto Mortuary submitted a response to the RFP with the lowest price for services and received the highest total of points from the Richland County Procurement Office as part of the review of the RFP. (R p. 225, lines 1-14; p. 168, lines 14-25; p. 241, lines 2-24.) Nevertheless, Richland County selected Knight Systems for the five-year contract. (*Id.*) There is evidence in the record supporting the contention that without Knight's assertion to Ms. Swofford that Knight Systems was the sole provider of odor-proof body bags, the Richland County contract would have been awarded to Palmetto Mortuary. (*Id.*)

STANDARD OF REVIEW

"A breach of contract is an action at law." *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 464, 688 S.E.2d 597, 599 (Ct. App. 2010) (citations omitted). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors at law." *Id.* (*quoting Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009)). Therefore, an appellate court should "not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.*

This action does not involve a request for "specific performance." (*See* Appellant's Brief at p. 9.) Rather this action only involves causes of action for (1) breach of contract and (2) breach of contract accompanied by a fraudulent act.[2] (R. pp. 40-47.) Palmetto Mortuary's claim to entitlement to both monetary damages and injunctive relief is based on explicit remedies provided by the parties' Agreement. (R. p. 375 at § 3.2.6 (3).) "The character of an action at law is not changed by the fact that a plaintiff also

[2] Palmetto Mortuary did not proceed with its third cause of action for tortious interference with prospective contractual relationship.

seeks relief by injunction, merely as an ancillary remedy . . . ." 1A C.J.S. *Actions* § 183 (citations omitted).[3]

"The remedy of injunction rests in the sound discretion of the trial court." *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993). Such relief should "not be overturned unless the order is clearly erroneous." *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 824 (2007) (citations omitted). "Clearly erroneous" is the hallmark of the "abuse of discretion" standard of appellate review. *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470, 471 (1913). The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. *Gilley v. Gilley*, 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *Mailsource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003). An abuse of discretion occurs in one of two circumstances: "(1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

The standard of review allowing this Court to "find facts based on its own view of the preponderance of the evidence," (*see* Appellant's Brief at pp. 9-10) is not applicable in this case because the case involves only an action at law.

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[3] The Special Referee ruled: "In this case, the award of a permanent injunction is necessary to give the Plaintiff the benefit of its bargain and to ensure Defendants' compliance with the Non-Compete Agreement. Although monetary damages are sufficient to put Plaintiff in the position it would have been in had Plaintiff held the Richland County contract for a five-year term, enforcement of the restrictive covenant is necessary to enforce the remaining term of the Non-Compete Agreement and to avoid a forfeiture of the contract as a whole." (R. p. 32 at ¶ 80.)

ARGUMENTS

The Special Referee concluded that Knight breached the terms of the Agreement in two manners: (1) by refusing to make odor-proof bags available to Palmetto Mortuary in violation of Section 3.4.8 of the APA, and (2) by violating the Non-Compete Agreement in Section 3.2.6 of the APA. (R. pp. 15-18 at ¶¶ 32-41.) Knight does not dispute that it withdrew odor-proof bags from the market after the close of the Richland County deadline for submission of responses to the RFP for mortuary transport services. (R. p. 346, line 14 – p. 347, line 25.) Knight also does not dispute that by submitting a response to the Richland County RFP he competed against Palmetto Mortuary for "mortuary transport services" in violation of the clear and unambiguous terms of the Non-Compete Agreement. (R. p. 349, lines 9-19.)

Knight's submission of a response to Richland County's RFP for mortuary transport services, less than five years following the sale of its business to Palmetto Mortuary, including its good will, was a direct violation of the Non-Compete Agreement contained in Section 3.2.6 of the Agreement. (R. p. 394 at Exhibit 3.2.6.) Knight also breached the APA by refusing to sell odor-proof body bags to Palmetto Mortuary as required by Section 3.4.8 of the APA. (R. p. 375 at § 3.4.8.) A more deliberate breach of contract is difficult to imagine.

Knight argues that he was justified in submitting a competing response to Richland County's RFP against Palmetto Mortuary on June 17, 2011 and withdrawing odor-proof bags from the market because (1) the Non-Compete Agreement was unenforceable as it was in violation of public policy, and (2) that rescission of the Agreement was available to Knight based on Palmetto Mortuary's previous purchases of

body bags from manufacturers other than Knight Systems. For the following reasons Knight's arguments are without merit and this Court should affirm the trial court's order.

I. THE PARTIES' NON-COMPETE AGREEMENT IS ENFORCEABLE.

The Non-Compete Agreement provides in relevant part:

> For a period of ten (10) years after the date hereof:
>
> A. **Customers, etc.** Seller shall not, directly or through Affiliate, (i) call upon or contact (or assist another person(s) or business entity to call upon or contact) any Customer for the purpose of furnishing the same or similar services provided or offered at any time by the Business to any Customer, or (ii) solicit or divert (or assist another person(s) or business entity to solicit or divert) any Customer from purchasing or using any of the Buyer's services, or (iii) provide or attempt to provide (or assist another person(s) or business entity to provide or attempt to provide) to any Customer the same or similar services provided or offered by the Business. For purposes of this Section 2(A), the term "Customer" shall mean any customer or client of the Business and shall include (without limitation) every such person(s) to which the Business or Seller has provided services prior to the date hereof.
>
> B. **Territory**. In addition to (but not in limitation of) the restrictions of Section 2(A), Seller shall not, directly or through an Affiliate engage in, or assist another person or entity to engage in, providing services similar to those furnished by the Business or Seller at any time prior to Closing (as such term is defined in the Purchase Agreement) in competition with Buyer anywhere within 150 miles of the present location of the Business (the "Territory").

(R. p. 394 at Exhibit 3.2.6.)

A. *The Non-Compete Agreement Was Negotiated by the Parties as Part of the Sale of a Business—Not in an Employment Context.*

The Non-Compete Agreement at issue arises out of the sale of a business, and not in connection with an employment contract. In general, a covenant not to compete will be upheld if (1) supported by valuable consideration, (2) reasonably limited as to time, and (3) reasonably restricted as to the place or 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. *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 381, 548 S.E.2d 207, 209 (2001) (citation omitted). Cases concerned with the enforceability of covenants not to compete must be decided on their own facts. *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).

The more rigorous standard in evaluating the reasonableness of covenants not to compete contained in employment contracts[4] is not applicable in reviewing covenants ancillary to the sale of a business. *See Hagemeyer North America, Inc. v. Thompson*, 2:05-3425, 2006 WL 516733, *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.") (*citing* 54A Am. Jur. *Monopolies and Restraints of Trade* § 247 (2005)). As the Fourth Circuit has recognized, "restrictive covenants not to compete in employment contracts . . . are scrutinized more rigorously than similar covenants incident to a sale of business." *American Hot Rod Ass'n, Inc. v. Carrier*, 500 F.2d 1269, 1277 (4th Cir. 1974) (noting that this is the "general trend of modern authority").[5]

In South Carolina, the applicable standard in reviewing the reasonableness of a covenant not to compete ancillary to the sale of a business is stated in *South Carolina*

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[4] Where an employment contract contains a non-compete agreement, the courts strictly construe the terms of the covenant not to compete against the employer. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011) ("Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer.") (*quoting Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983)).

[5] In *Alston Studios, Inc. v. Lloyd v. Gress and Associates*, 492 F.2d 279 (4th Cir. 1974), the Fourth Circuit held: "In all events, the law applicable when the sale of a business is involved and that when only an employee is involved, as here, is different. 'The scope of permissible restraint is more limited between employer and employee than between seller and buyer, and the covenant is construed favorably to the employee.'" *Id.* at 284 (*quoting Richardson v. Paxton Co.*, 127 S.E.2d 113 (Va. 1962)). "Conversely, greater latitude is allowed in determining the reasonableness of a restrictive covenant when the covenant relates to the sale of a business than in those ancillary to an employment contract." *Id.* (*citing Day Companies v. Patat*, 403 F.2d 792 (5th Cir. 1968)).

Finance Corp. of Anderson v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960). In that case, the Supreme Court held that such a covenant is "enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession, is reasonably limited as to time and territory, and is supported by a valuable consideration." *Id.* at 120, 113 S.E.2d at 334 (*citing* 36 Am. Jur., *Monopolies, Combinations, and Restraints of Trade*, §§ 52, 53, 54, 55, 56; *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930); *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942); *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958)).

In this case, the Special Referee considered and applied the applicable standard for enforcing covenants not to compete ancillary to the sale of a business and was not controlled by an error of law. The trial court's order is supported by evidence in the record and should be affirmed.

B. *The Non-Compete Agreement is supported by valuable consideration.*

The clear and unambiguous language of the Non-Compete Agreement provides that valuable consideration was exchanged between the parties. The Non-Compete Agreement states:

> Now, therefore, in consideration for the following premises, the promises set forth herein, the consideration of $1,000 specifically allocated to this Agreement in the Purchase Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller and Buyer, intending to be legally bound, hereby agree and covenant as follows: . . . .

(R. p. 394 at Exhibit 3.2.6.) Like other contracts, a covenant not to compete must be supported by valuable consideration. *See Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (citations omitted). The trial court concluded that the $1,000 consideration constituted

"valuable consideration." The trial court's conclusion is supported by evidence in the record and should be affirmed by this Court.

Knight has not, and cannot, attack the "valuable consideration" in the Non-Compete Agreement. The Agreement was negotiated by Knight with the assistance of legal counsel, read by him prior to closing, and executed without objection. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-25; p. 306, lines 4-20; p. 350, lines 1-6; p. 353, lines 16-25.) Consideration is generally considered a bargained for gain or advantage to the promise or a bargained for detriment or disadvantage to the promisor. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 464 (N.Y. 1982) (citation omitted). Consideration is present when the parties exchange something to which they attach value. "It matters not from whom the consideration moves or to whom it goes. If it is bargained for as the exchange for the promise, the promise is not gratuitous." *Shayne of Miami, Inc. v. Greybow, Inc.*, 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957) (citation omitted); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

Absent a claim of fraud or unconscionability, a court will not concern itself with whether there was adequate consideration. *Campbell v. Carr*, 361 S.C. 258, 265, 603 S.E.2d 625, 628 (Ct. App. 2004). In *Lowery v. Callahan*, 210 S.C. 300, 42 S.E.2d 457 (1947), the South Carolina Supreme Court stated: "When the consideration agreed upon . . . is something of value, the courts will generally, in the absence of fraud, coercion, and undue influence, and if the parties are competent, not avoid the [contract] on the ground of the inadequacy of the consideration . . . , for the contracting parties, and not the courts, must determine the quid pro quo." *Id.* at 304, 42 S.E.2d at 458. "The inadequacy of

price is determined at the date the contract was entered." *Campbell*, 361 S.C. at 264, 603 S.E.2d at 628 (citations omitted).

Knight's references to pre-contract negotiations cannot be used as evidence to demonstrate a lack of consideration for the Non-Compete Agreement. *See Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning.") (quotation omitted).

In considering the adequacy of consideration, the Court must look to the four corners of the document, and cannot consider parol evidence to construe the agreement unless its terms are ambiguous. *See Park Regency, LLC v. R&D Development of the Carolinas, LLC*, 402 S.C. 401, 412, 741 S.E. 528, 534 (Ct. App. 2012) ("the intention of the parties . . . [is] gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument") (citation omitted); *Koontz v. Thomas*, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999) (only if a contract is ambiguous will parol evidence be admissible to ascertain the true meaning and intent of the parties). There is no ambiguity with respect to the consideration stated on the face of the Non-Compete Agreement, and even Knight does not make such an assertion.

Additionally, Knight neither alleged nor proved fraud, unconscionability, coercion, or undue influence in connection with the APA or the Non-Compete Agreement that was part of the APA. There is no contention that there was unequal bargaining power or oppressive circumstances. To the contrary, the record amply demonstrates that Mr. Knight was at all times a sophisticated party who pursued and

secured his interests (and those of Knight Systems) in negotiating and executing the APA. From November of 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the APA. (R. p. 239, line 11 – p. 240, line 15; p. 244, line 4 – p. 245, line 14; p. 302, lines 5-9; p. 349, line 20 – p. 353, line 19.) Knight's own attorney assisted in the drafting of the Agreement and there is evidence that Knight's attorney received drafts of the Non-Compete Agreement prior to closing. (R. p. 260, lines 9-12.) Knight admitted that he "appeared at the closing [with his attorney] and . . . read the documents at closing." (R. p. 350, lines 1-6; p. 353, lines 16-19.)

More particularly, Mr. Knight did not object to the $1,000 allocated to the Non-Compete Agreement, testifying that "after th[e] discussion about the $1,000 that's mentioned as the consideration for the covenant not to compete, [he] did[] [not] object to that provision or any provision of either agreement at the closing." (R. p. 353, lines 20-25.) Further, there is evidence in the record that the $1,000 in valuable consideration allocated to the Non-Compete Agreement in the APA was placed there at the insistence of Knight. Mrs. Lintal testified, and Mr. Knight conceded, that the $1,000 allocation ultimately attributed to the Non-Compete Agreement was primarily driven by Knight at the instruction of his accountant. (R. p. 264, lines 1-24; p. 265, lines 4-19; p. 305, lines 8-15.) Both Mrs. Lintal and Mr. Knight testified that Mr. Knight wanted to allocate $1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize their potential capital gains tax. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)

Knight cannot now complain that $1,000 was "inadequate" to support the terms of the Non-Compete Agreement when he previously insisted that the value exchanged was reasonable and benefitted him and his business financially. "It is not the business of courts to protect parties from the consequences of bad contracts, but to protect them from the consequences of either legal or moral fraud and imposition." *Jackson v. Carter*, 128 S.C. 79, 121 S.E. 559, 563 (1924) (*quoting Goree v. Wilson*, 17 S.C. L. 597 (S.C. Eq. 1830)). Knight received a financial benefit of $590,000.00 as a result of entering into the APA and the Non-Compete Agreement, retained the specific right to continue to conduct his body bag business, and through the Exclusivity Provision required Respondent to purchase certain bags from Knight for the 10-year term of the Non-Compete Agreement. Further, Knight realized a financial benefit by allocating only $1,000 to the Non-Compete Agreement in order to allow him and Knight Systems to minimize their potential capital gains tax from the transaction. "Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say he got no consideration." *Jackson v. Carter*, 128 S.C. 79, 121 S.E. at 563 (citation omitted).

The cases cited by Knight do not support the proposition that the Non-Compete Agreement was not supported by "valuable consideration." Knight's comparison of this case to *Newman v. Sablosky*, 407 A.2d 448 (Pa. 1979), is without merit because in that case there was no consideration for the covenant not to compete. *See id.* at 450. Instead, the plaintiff in *Sablosky* argued that the covenant not to compete was supported by his previous agreement to purchase real property from the defendant in conjunction with the sale of defendant's equipment, medical supplies, and furniture. *Id.* at 450. The Court rejected the plaintiff's position as "wholly without merit." *Id.* The instant case is

distinguishable from *Sablosky* on the facts. Here, the covenant not to compete stated a $1,000 payment as consideration and such consideration was stated on the face of the covenant. Palmetto Mortuary is not asserting that some *previous exchange* or agreement constitutes adequate consideration.

For the same reasons, *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), an employment case cited by Knight (Appellants' Initial Brief at p. 30), is inapposite.[6] In that case, various physician-employees signed an employment agreement upon their initial date of employment at Columbia Heart Clinic. *Id.* at 8, 738 S.E.2d at 484. The original employment agreements did not contain any covenant not to compete. *Id.* Later, after substantial investments made by Columbia Heart to expand its business and a departure of a large number of physicians, Columbia Heart "sought to bind" its physician-employees "more tightly" and asked that they sign two separate non-compete agreements. *Id.* The Court recognized that "[n]o separate monetary consideration was paid to any [physician-employees] to sign the Agreements, nor did the Agreements change the compensation system established by . . . the prior agreements." *Id.* at 9, 738 S.E.2d at 485. The Court concluded that the physician-employees "executed the [covenants] after they became employed . . . , and the Agreements did not change the general compensation system agreed to by the parties under their prior employment contracts. . . ." *Id.*

The *Baugh* Court cited applicable law in South Carolina relevant to covenants not to compete entered into after the inception of employment. *Id.* at 9, 738 S.E.2d at 489

[6] Additionally, Appellants misstate the holding in that case. *See id.* at 18, 738 S.E.2d at 489-90 (concluding that subject agreements were "supported by new consideration.") (emphasis added).

(quotation omitted) ("[W]hen a covenant [not to compete] is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.")). "There is no consideration when the contract containing the covenant is exacted after several years' employment and the employee's duties and position are left unchanged." *Id.* Nevertheless, the Court upheld the covenants not to compete on the basis that a provision in the new agreements provided that Columbia Heart would pay each physician-employee a total of $60,000 over twelve months after termination so long as they did not violate the non-compete provision. *Id.* at 18, 738 S.E.2d at 490.

Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999), *aff'd* 345 S.C. 378, 548 S.E.2d 207 (2001) (still another employment case) is also distinguishable on the same bases as *Baugh*. In *Poole*, an employee of a travel agency began working in 1992. *Id.* at 273, 525 S.E.2d at 899. Four years later, her employer asked her to sign a non-compete agreement. *Id.* "Poole allege[d] that she was told she had to sign the agreement in order to remain employed, and she was offered no other compensation or consideration in exchange for signing . . . ." *Id.* The Court held "under South Carolina law, if an at-will employment relationship already exists without a covenant not to compete, any future covenant must be based upon new consideration." *Id.* at 275, 525 S.E.2d at 900.

The covenant not to compete in this case was not executed by an employee but rather, by a sophisticated seller (Knight) ancillary to his sale of a business (Knight Systems). More significantly, the covenant was executed by Knight at the time of closing and was supported by independent consideration of $1,000. Had Palmetto Mortuary

purchased Knight's business and then subsequently asked that Knight execute a non-compete agreement, *Baugh* and *Poole* may be analogous, but given the facts in this case, and especially considering that the covenant not to compete is supported, on its face, by consideration, *Baugh* and *Poole* are not applicable.

Based on the foregoing, evidence in the record reveals that the Non-Compete Agreement was supported by valuable consideration. Knight has adduced no evidence of fraud, coercion, undue influence, or incompetence. Therefore, based on the evidence before the court, the Special Referee's order, concluding that the Non-Compete Agreement is supported by "valuable consideration," should be affirmed.

C. *The Non-Compete Agreement is reasonably limited in time and geographic scope.*

Evidence in the record supports the trial court's finding that the Non-Compete Agreement was reasonably limited in time and geographic scope. In South Carolina, covenants not to compete arising out of the sale of a business "will, in conformity with the just and equitable principles of the common law, be generally upheld and enforced . . . if reasonably limited as to time, and . . . if reasonably restricted as to the place of the 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." *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930) (citations omitted); *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960). "[T]he restraint must be reasonable, not oppressive, or out of proportion to the benefits which the vendee may in reason expect to follow from the restrictive features of the contract, and not injurious to the interests of the public." *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942) (citations omitted).

"In determining whether a contract in partial restraint of trade is reasonable, the court will look to the *whole subject matter of the contract, the kind and character of the business, its location, the purpose to be accomplished by the restriction, and all circumstances which show the intentions of the parties* and which must have entered into the making of the contract." *Reeves*, 200 S.C. 494, 21 S.E.2d at 188 (emphasis added). "It naturally follows that each case must be governed in the main by its own facts." *Id.*

The facts of this case—and in particular the APA and the circumstances showing the intention of the parties executing the APA—demonstrate the reasonableness of the Non-Compete Agreement. The APA involved a transaction between sophisticated business entities. In particular, and unlike the plaintiff in *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958), who was never represented by counsel (*id.* at 329, 104 S.E.2d at 346), Knight was represented by an attorney in the negotiation of the APA, including specifically the Non-Compete Agreement, and Knight's attorney was present at the closing that took place on January 5, 2007. Knight also received advice from his accountant with respect to the APA and the Non-Compete Agreement. (R. p. 266, line 20 – p. 267, line 2; p. 305, lines 6-15.)

In exchange for the Non-Compete Agreement, Knight received not only a substantial payment of money from Palmetto Mortuary, but the right to continue his existing body bag manufacturing business, and a substantial financial commitment from Palmetto Mortuary in furtherance of Knight's existing business. (R. p. 375 at § 3.4.8.) In addition to receiving $590,000 in exchange for the assets transferred, Knight also

negotiated for and obtained the right to continue to operate Knight Systems' body bag business without any limitation whatsoever.

Moreover, Knight negotiated the Exclusivity Provision requiring Palmetto Mortuary to purchase body bags from Knight for ten years—the duration of the Non-Compete Agreement. (R. p. 375 at § 3.4.8.) (The ongoing business relationship between Palmetto Mortuary and Knight is in sharp contrast to the facts in *Somerset*, 233 S.C. 324, 104 S.E.2d 344, where the plaintiff was discharged as manager of the defendant's business following the sale of plaintiff's business to defendant after merely three months on the job. *Id.* at 329, 104 S.E.2d at 346.) The Exclusivity Provision (R. p. 375 at § 3.4.8) conferred a significant financial benefit upon Knight. Prior to Knight's breach of the Non-Compete Agreement and the Exclusivity Provision, Palmetto Mortuary paid Knight more than $45,000 for body bags purchased pursuant to the Exclusivity Provision. (R. p. 160, lines 10-20; R. pp. 408-448.) As such, while the APA placed reasonable limitations on Knight's ability to perform mortuary transport services, the same APA allowed and enhanced Knight's ancillary body bag business.

Similarly, the 150 mile radius contained in the Non-Compete Agreement was supported by legitimate business interests stated in the record and was reasonable based on the facts of this case. Mr. Lintal testified that he believed Palmetto Mortuary would expand its business throughout other counties in the State of South Carolina. (R. p. 208, line 12 – p. 209, line 13; p. 209, line 25 – p. 210, line 10 ("We did not know, but we did not want to limit our options if it was available to us. At the time it did not seem to be an issue on their part. I don't recall any objections to that.").

During his deposition, Mr. Lintal testified further that Palmetto Mortuary has added customers that Knight did not serve and does business outside the area encompassed by the contracts purchased from Knight. (R. p. 551, line 16 – p. 552, line 10 ("Q: Since the purchase of Mr. Knight's business, have you added customers that he didn't have already? A: Yes . . . we get calls on occasion from out of town customers that – out of the Columbia/Lexington area that use you on occasion.")) Such evidence is in addition to testimony by Knight that he intended to get out of the mortuary transport business following the sale to Palmetto Mortuary. (R. p. 299, line 25 - p. 300, line 6; p. 308, lines 1-8 (Mr. Knight testified that he "expressed [his] desire to [Mr. Lintal] how much I wanted to get out of the business."))

No South Carolina court has stricken a non-compete agreement because of a statewide geographic reach as Knight would have this Court hold. *See Hagemeyer North America, Inc. v. Thompson*, 2006 WL 516733 at *5 ("The restriction's statewide geographic reach does not automatically render it void."). Mr. Knight, a sophisticated business person, made no objection "to [the non-compete] provision or any provision of [the] agreement at the closing." (R. p. 353, lines 20-25.) Indeed, the specific and ongoing benefits Knight received as a result of the APA and the Non-Compete Agreement help demonstrate the reasonableness of the restrictions placed on Knight.

Additionally, Palmetto Mortuary provided testimony regarding the importance of the Non-Compete Agreement to its decision to buy the business. Mr. Lintal testified that the ten-year term of the Non-Compete Agreement was significant to Palmetto Mortuary's decision to purchase Knight's business. (R. p. 178, line 25 – p. 179, line 12.) The ten year period was intended by both parties to protect Palmetto Mortuary from competition

with Appellants for two five-year contract cycles with the University of South Carolina, and Richland and Lexington Counties' Coroners' Offices, contracts which were previously held by Knight for more than fifteen years. (*See id.*)

The Lintals wanted a ten year period to allow Palmetto Mortuary "to get through at least two cycles" of five-year contracts with the Richland and Lexington Coroner's Offices. (R. p. 207, lines 16-25.) "The contracts were the whole value to this business in regards to what types of guaranteed revenues that we were going to be able to generate. So we wanted at all costs to try to protect that for as long as we could." (R. p. 590, lines 2-10.) "[T]he value of th[e] contracts made up [the Lintals'] ultimate purchase price" of the business. (R. p. 590, lines 11-18.) Mr. Lintal testified that the Non-Compete Agreement "was very important to [Palmetto Mortuary's evaluation] because without the non-compete we wouldn't have bought the business." (R. p. 592, lines 6-10.)

The applicable standard of review of a covenant not to compete is whether the limitations are "no more restrictive than reasonably necessary to protect [the] legitimate interest[s]" of the purchaser, not whether the restrictions only cover the "customer or clientele area actually purchased in a business sale transaction" as Knight would have this Court rule. (*See* Appellant's Brief at pp. 20-21.) Based on the applicable reasonableness standard, evidence in the record supports the Special Referee's determination that the territorial restrictions were reasonable.

Knight would have this Court adopt the standard as set forth in *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 762 S.E.2d 316 (N.C. 2014), which requires:

> to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located

> and that the geographic scope of the covenant is necessary to maintain those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* its customers.

Id. at 321 (citation omitted).[7] In *Beverage Systems*, the North Carolina appellate court concluded that because the subject non-compete agreement was not limited to areas where the sellers had former customers, the scope of the non-compete agreement was unreasonable. *Id.* Such a showing is not required in South Carolina.

In South Carolina, evidence of the location of a business' customers or clientele is only one factor to consider in examining the reasonableness of a restraint as to territory. In *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961), the South Carolina Supreme Court noted: "The general rule is that restraint as to territory, in order to be reasonable, must be necessary in its full extent for the *protection of some legitimate interest of the employer*." *Id.* at 66, 119 S.E.2d at 539 (emphasis added). "Stated negatively, the territorial scope renders the restraint unreasonable if it covers an area broader than necessary to protect the legitimate interest of the employer." *Id.*

The South Carolina Supreme Court in *Standard Register* listed "the most important single asset of most business[es]" as "their stock of customers," but it did not limit an employer's "legitimate business interests" to that factor alone. *Id* at 66, 119 S.E.2d at 539. Palmetto Mortuary maintains that its interest in expanding the mortuary transport business is reasonable in light of the fact that Knight stated his intent to "get out of the business" entirely, maintained his body bag business, and required Palmetto Mortuary to buy bags from Knight for the term of the Non-Compete Agreement.

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[7] Appellants assert that because the Special Referee "failed to properly compare the express statewide, and beyond, territorial non-compete with the existing customer base of Knight Systems," the Special Referee erred and should be reversed. (*See* Appellant's Brief at p. 22.)

D. *The Non-Compete Agreement is not void against public policy.*

In *South Carolina Finance Corp. of Anderson*, 236 S.C. 109, 113 S.E.2d 329, the South Carolina Supreme Court stated that a covenant not to compete which is ancillary to the sale of a business or profession "is enforceable if it is not detrimental to the public interest." *Id.* at 119, 113 S.E.2d at 334. In this case, there is no detriment to the public interest in enforcing the subject Non-Compete Agreement.

The court did not err in rejecting Knight's argument that the subject Non-Compete Agreement was void against public policy because it unreasonably restrained competition for public contracts. A contract in restraint of trade may be in violation of public policy where the restraint is unreasonable. *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996); *Almers v. S.C. Nat. Bank of Charleston*, 265 S.C. 48, 217 S.E.2d 135 (1975). With regard to covenants not to compete, this standard is typically used to evaluate the reasonableness of the restraint as to time and territory. *See id.*; *see also Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

Knight asks this Court to recognize another factor to be determined in evaluating the "reasonableness" of a restraint, and that is whether the restraint has a "direct tendency to prevent bidding or competition for public contracts." (Appellant's Brief at p. 32.) Knight recognizes that this "issue has not been . . . addressed by South Carolina courts." (*Id.*) Knight relies on *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), stating that this Court has recognized "the importance of a public policy upholding free and open competition for public contracts." (Appellant's Brief at p. 33.) Knight's reliance on *Sloan* is misplaced for the following reasons.

Sloan was procedurally and factually different from the case at bar. In *Sloan*, the plaintiff-taxpayer brought a declaratory judgment action against the Greenville County School District asserting that certain contracts entered into by the District were *ultra vires* to the District's procurement code, invalid, and illegal. *Id.* at 516, 537 S.E.2d at 300. The trial court dismissed Sloan's action, finding that Sloan did not have standing. *Id.* at 518, 537 S.E.2d at 300. This Court reversed the trial court, finding that Sloan, as a taxpayer, had standing to challenge the District's award of allegedly illegal contracts, based on his "direct interest in the proper use and allocation of tax receipts." *Id.* at 522, 537 S.E.2d at 303.

In addition, this Court found that Sloan also had standing based on the significant public importance of the issue before the Court. *Id.* (*citing Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) ("a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance"). This Court recognized the great public importance of "prevent[ing] . . . the unlawful expenditure of money raised by taxation." *Id.* at 523, 537 S.E.2d at 303. This Court cited the intent of the General Assembly in adopting its own procurement code. *Id.* (citation omitted). This Court held that standing could be conferred on Sloan based on the "immense public importance" of "expenditure of public funds pursuant to a competitive bidding statute." *Id.* at 524, 537 S.E.2d at 303-304.

Standing to sue is a fundamental requirement for instituting an action. *See Brock v. Bennett*, 313 S.C. 513, 443 S.E.2d 409 (Ct. App. 1994) (holding no justiciable controversy is presented unless the plaintiff has standing to maintain an action). The importance of standing cannot be overstated. An order or judgment in favor of a plaintiff without standing is void. *See Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 328 (1994) ("In view of

our finding that the respondents were without standing to intervene, the resulting restraining order is rendered void."). This Court's discussion of the importance of standing in *Sloan* renders the holding in *Sloan* distinguishable from this case. In *Sloan* this Court applied the "public importance" exception to general standing requirements. Such doctrine "necessitates a cautious balancing of the competing interests presented." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008).

Knight's standing is not at issue in this case. Moreover, Knight is not bringing an action on behalf of citizens of this State for violations of public policy. There is moreover no issue before this Court as to whether a public body acted in violation of its procurement code or statute such that the significant public policy rationale in *Sloan* should be analyzed in this case. The case at bar does not require a "cautious balancing of . . . competing interests." *See Sloan*, 380 S.C. at 198, 669 S.E.2d at 341. The only issue before the Special Referee was whether Knight, the sole provider of odor-proof bags, violated the terms of the private contract with Palmetto Mortuary, not only by withdrawing their odor-proof body bags from the market but also in competing against Palmetto Mortuary in violation of the clear and unambiguous language of the parties' non-compete agreement.

Section 3.4.8 of the parties' Agreement required Knight to provide odor-proof body bags to Palmetto Mortuary for a price of $50.00 per bag. (R. p. 375 at § 3.4.8.) The "shall provide" language in the Exclusivity Provision required Knight to provide Palmetto Mortuary with odor-proof body bags at the time of the parties' submission of bids to Richland County and throughout the duration of the ten-year Non-Compete Agreement. (*Id.*) There is evidence in the record that Palmetto Mortuary submitted the lowest bid and

should have won the contract with Richland County had Knight not withdrawn their odor-proof bags from the market. (R. p. 168, lines 14-25; p. 241, lines 2-24.)

The facts of this case present the opposite issue than those considered and addressed by the cases cited in Appellant's Brief. If there is any unreasonable restriction on bidding for a public contract in this case, it is Knight's breach of the Agreement that unreasonably restricted Palmetto Mortuary's right to compete for the mortuary transport services through Richland County. By withdrawing odor-proof bags from the market, which Knight was obligated to sell to Palmetto Mortuary, pursuant to Section 3.4.8 of the APA, Knight succeeded in winning a public contract with Richland County even though he was not the lowest bidder. Such a situation enabled Knight, the higher bidder, to successfully receive the public contract with the County.

Knight cited a string of cases standing for the proposition that agreements to "chill or suppress bidding [are] void." (*See* Appellant's Brief at pp. 34-35.) However, Knight has failed to come forward with any case from South Carolina or any other jurisdiction holding that a *covenant not to compete* was void based on public policy where the effect of such covenant was to restrict bidding on public contracts. Even the cases cited by Knight do not support his position that the Non-Compete Agreement in this case is violative of public policy for that reason.

In *Spokane Sav. & Loan Soc. v. Park Vista Imp. Co.*, 294 P. 1028 (Wa. 1930), cited by Appellants (*see* Appellant's Initial Brief at p. 34) the Supreme Court of Washington held that an agreement between lienors and a mortgagee not to bid at a sheriff's sale was not void as against public policy. The court specifically noted:

> In the case at bar there is no evidence that the property was sold for less than its value and that there was a chilling of bids; in fact, the court expressly found that the price was adequate. . . .
>
> There is nothing in the contract or the court's findings of fact from which we may infer that the parties agreed to exclude the general public or that the general public was excluded from bidding. That the lienors entered into an agreement with the mortgagee not to bid at the sheriff's sale would not bring the contract within the ban of the rule as to the chilling or expressing of bidding.

Id. at 1036-37. The *Spokane* court concluded that the private contract between the lienor and the mortgagor was enforceable even though the two parties agreed not to submit competing bids at the judicial sale of the real property. *Id.* As stated by the court,

> [P]ersons may combine together for the protection of their interests. They may even expressly agree not to bid against each other, in furtherance of a plan mutually agreed upon as calculated to conserve their rights. But in doing so, their activities must not operate to exclude any part of the general public . . . .

Id. at 1037 (quotation omitted). Likewise, the parties in this case should be free to combine together for the protection of their business interests.

Other cases cited by Knight are distinguishable on factual grounds. In *City Nat. Bank of Corpus Christi v. City of Corpus Christi*, 233 S.W. 375 (Tex. App. 1921), the court found evidence of "a tacit agreement between the parties to obtain the use of the public funds for a less sum than would have been bid if such agreement had not been made." *Id.* at 378. There is no such evidence before the Court in this case.

In this case, Knight has failed to submit any evidence that the Non-Compete Agreement stifles competition for public contracts even though the effect of the agreement was to preclude *Knight* from competing. The private covenant not to compete executed by the parties did not unreasonably restrict the general public's ability to bid on public contracts for mortuary transport services. *See Spokane*, 294 P. at 1037. There is

no evidence that Palmetto Mortuary's response to the Richland County RFP was unreasonably high or above market value. *See City of Corpus Christi*, 233 S.W. at 378. The private covenant not to compete entered into between the parties does not fall within other jurisdictions' public policy grounds for voiding a covenant not to compete and should not be voided on such ground in this case where there is no South Carolina precedent for doing so.

Moreover, the Non-Compete Agreement did not, in any way, guarantee that Palmetto Mortuary would win every public contract in the State for mortuary transport services. Mr. Lintal acknowledged during trial that after Palmetto Mortuary purchased Knight's business it lost the public contract for mortuary transport services through the Lexington County Coroner's Office. (R. p. 218, lines 15-24.) Palmetto Mortuary's ability to be shielded from certain competition by Knight did not secure its position as the *only* mortuary transport services company in the State as it lost a public contract to another bidder after the time of the subject transaction. (*See id.*)

The only reported decision that comes close to finding a covenant not to compete void on the basis of public policy where such covenant restricted a competitor's right to compete for a public contract is *Laidlaw, Inc. v. Student Transp. of America, Inc.*, 20 F.Supp.2d 727 (D.N.J. 1998). In *Laidlaw*, the buyer of a school bus company, Laidlaw, brought an action to enforce noncompetition agreements entered into by seller, Student Transportation of America ("STA"). *See id.* The issue before the court was whether Laidlaw was entitled to a preliminary injunction prohibiting STA from competing for a public bid with the area school district. *Id.* at 731. The court refused to issue a preliminary injunction prohibiting STA from competing because it found that Laidlaw

had not adequately proven "likelihood of success on the merits." *Id.* at 761 (concluding "Laidlaw no longer has a protectable interest in [the] non-compete . . . [and] do not have a likelihood of success in enforcing . . . [the] non-compete").

The *Laidlaw* court refused to issue a preliminary injunction based on a finding that the public interest would be "adversely affected by putting them out of business pending final adjudication of the merits," especially where the moving party did not show a likelihood of success on the merits. *Id.* at 769. In doing so, the court did not hold that as a matter of law, the non-compete agreement was void because it stifled the defendant's ability to submit a bid for a public contract. *See id.* Instead, it held that because Laidlaw had not adequately proven likelihood of success on the merits, the public's interest in competition for public contracts outweighed Laidlaw's private contract rights. *Id.*; *see also Norlund v. Faust*, 675 N.E.2d 1142, 1153 (Ind. App. 1997) ("the public's general interest in medical services is subservient to the public interest in the freedom of individuals to contract") (citation omitted). These cases infer that where a party does show a likelihood of success on the merits, or where, as in this case, the moving party succeeds on the merits, the public's interest in the freedom of individuals to contract may outweigh competing public policy interests.

Palmetto Mortuary's legal right to have its purchase of the good will of Knight's business protected through this Court's enforcement of the covenant not to compete is reasonable. The covenant does not restrict the public's ability to bid on public contracts. There is no evidence in this case that would support Knight's position that the private covenant not to compete entered into between the parties should be held to be in violation

of the public's interest in competition for public contracts. Accordingly, the Special Referee's order enforcing the covenant should be affirmed.

II. PALMETTO MORTUARY'S CONDUCT DID NOT CONSTITUTE A MATERIAL BREACH OF THE PARTIES' AGREEMENT SUCH THAT KNIGHT WAS EXCUSED FROM PERFORMANCE OF ITS CONTRACTUAL OBLIGATIONS.

A. *The Special Referee's interpretation of the Exclusivity Provision in the parties' Agreement was reasonable and should be upheld.*

Knight attempts to justify its breaches of the parties' Agreement by asserting that he was entitled to rescission of the entire contract based on Palmetto Mortuary's purchases of body bags from manufacturers other than Knight Systems. (R. p. 58 at ¶ 42 (Appendix) ("Plaintiff's breach of the agreement with Defendants negated all terms, conditions and responsibilities of the Defendants under the Asset Purchase Agreement and the Non-Compete Agreement.").)

Knight relies on Section 3.4.8 of the Agreement ("Exclusivity Provision") which provides:

> Knight, through his related body bag business (the "Related Business"), shall provide to Buyer body bags at a discounted rate and buyer shall for the term of the non-compete agreement buy all of their body bags from the Seller. Below are the current charges for different types of body bags. The prices cited below shall not be increased by more than ten percent (10%) in any calendar year.
>
> | | |
> |---|---|
> | Heavy Duty body bags: | $20.00 |
> | Lightweight body bags: | $8.00 |
> | Odor-Proof body bags: | $50.00 |
> | Water-Retreival body bags: | $30.00 |

(R. p. 375 at § 3.4.8.)

In construing the Agreement, the Special Referee concluded that the Exclusivity Provision obligated Palmetto Mortuary to buy only those categories of bags listed in Section 3.4.8 of the Agreement from Knight (heavy duty bags, lightweight bags, odor-

proof bags, and water-retrieval bags). The Special Referee concluded that the Exclusivity Provision did not *prevent* Palmetto Mortuary from buying any other body bag from sources other than Knight. (R. p. 19 at ¶ 45.)

The Special Referee's ruling is supported by the evidence and is based on a reasonable interpretation of the plain language of the parties' Agreement. Accordingly, the Special Referee's interpretation should be affirmed by this Court. "An action to construe a contract is an action at law." *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings. *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008).

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted). The Special Referee gave reasonable effect to all of the provisions in Section 3.4.8 of the Agreement. Accordingly, the Special Referee's interpretation of the parties' contract should be affirmed.

B. *Palmetto Mortuary's breaches of the Exclusivity Provision were not material.*

Palmetto Mortuary's acts of purchasing body bags from other sources do not constitute *material* breaches of the Agreement which would excuse Knight's performance under the Agreement or otherwise justify Knight's rescission of the Agreement. Rather, as a result of Palmetto Mortuary's minor breaches, Knight is entitled only to monetary damages which are proximately caused by the breach, a total damages found by the Special Referee to equal $478.50. (R. pp. 22-29 at ¶¶ 54-70.)

A breach of contract by nonperformance gives rise to merely a cause of action for damages. Monetary damages in a breach of contract action are intended to place the non-breaching party in the position he would have been in had there been no breach and the contract was performed. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875, 879 (Ct. App. 1997). The proper measure of compensation is the loss actually incurred as the result of the breach. *Willms Trucking Co., Inc. v. JW Construction Co., Inc.*, 314 S.C. 170, 442 S.E.2d 197, 202 (Ct. App. 1994) (*citing In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 897 (1937)).

Typically the non-breaching party is *not* automatically excused from the future performance of contract obligations every time the other party commits a breach. Rescission or repudiation may only be granted when there is a breach which is so fundamental and substantial that it defeats the purpose of the contract. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). If the breach is relatively minor and not of the essence, the non-breaching party is still bound by the contract and may not abandon performance and obtain damages for a total breach by the defendant. *Williston on Contracts* § 63:3. "Otherwise stated, a nonperforming party is liable for any breach of

contract, but the other party is discharged from further performance, and is entitled to substantial damages only when there is a material breach." *Id.* (*citing In re Krueger*, 192 F.3d 733 (7th Cir. 1999)). The determination of whether a material breach has occurred is generally a question of fact.

Under South Carolina law, "[i]n order to warrant a *repudiation*, a breach must be so fundamental and substantial as to defeat the purpose of the contract." *Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 620-21 (Ct. App. 1994) (*citing Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993)) (emphasis added). "Where the breach is not so material as to defeat the purpose of the contract, the non-breaching party is compensated by damages." *Ackerman* at 271, 442 S.E.2d at 620 (citing *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957)). Similarly, "[a] breach of contract warranting *rescission* of the contract must be so substantial and fundamental as to defeat the purpose of the contract." *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (*citing Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989)) (emphasis added). "Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." *Brazell* at 517, 682 S.E.2d at 826 (citation omitted).

The Restatement (Second) of Contracts sets forth "circumstances significant in determining whether a failure is material" in Section 241. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981) (adopted by South Carolina Supreme Court in *Kiriakides v. United Artists Comm'n*, 312 S.C. 271, 276, 440 S.E.2d 364, 367 (1994), in the context of breach of a commercial lease); *see also Ellie, Inc. v. Miccichi*, 358 S.C. at 96, 594 S.E.2d at 494.

The first element regards ensuring the parties' reasonable expectation of an exchange of performances. In determining whether a failure is material, a court must consider the extent to which the non-breaching party will be deprived of the benefit which was reasonably expected from the exchange. In this case, Knight obtained his reasonable expectations from the contract, including the total purchase price and his ability to continue his body bag manufacturing business without limitation. Additionally, it is undisputed that from January 2008 to June 2011, Palmetto Mortuary purchased more than forty five thousand dollars' ($45,000) worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-449.) These purchases from Knight Systems occurred both before and after Palmetto Mortuary's purchases of body bags from sources other than Knight Systems. (*Id.*)

Under the second element, Knight is adequately compensated for Palmetto Mortuary's breaches by the receipt of the monetary damages. Knight is entitled to the monetary benefit of the body bags Palmetto Mortuary purchased from other vendors but

should have purchased from Knight Systems. Rescinding the entire Agreement, valued at $590,000 plus those revenues from the sale of body bags pursuant to the Exclusivity Provision, due to Palmetto Mortuary's purchases of body bags from manufacturers other than Knight Systems, totaling $478.50, would result in a windfall to Knight.

The third Restatement element is the extent to which the party failing to perform or make an offer to perform will suffer forfeiture if the failure is treated as material. The South Carolina Supreme Court has made abundantly clear that "in the liberally related rule of contracts . . . the law abhors a forfeiture and . . . contractual provisions of forfeiture are looked upon with disfavor by the Courts." *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 287, 701 S.E.2d 742, 748 (2010) (citation omitted). For this reason a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance.

In this case, Palmetto Mortuary will suffer a significant forfeiture if Knight is entitled to repudiate the remaining five years and seven months of the Non-Compete Agreement. Under the terms of the Non-Compete Agreement, Knight was prohibited from competing against Palmetto Mortuary for a period of ten years that began on January 5, 2007. (R. p. 394 at Exhibit 3.2.6.) At the time of Knight System's breach in June of 2011, five years and seven months remained on the Non-Compete Agreement. Additionally, at that time Palmetto Mortuary had significantly complied with the terms of the parties' Agreement, paying the full purchase price, $590,000.00, and purchasing significantly all of its body bags from Knight Systems pursuant to the Exclusivity Provision, a total amount of more than $45,000.00. (R. p. 160, lines 10-20; pp. 408-448.)

A material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances. *See* 14 Williston on Contracts § 43:5 (4th ed.). To the extent that the expectation is already reasonably secure, in spite of the failure, there is less reason to conclude that the failure is material. Here, Knight already had security for Palmetto Mortuary's performance; in fact, Knight was already paid the full purchase price for their mortuary transport business. (R. p. 341, lines 9-20.)

Additionally, Knight had reasonable assurances of performance given by Palmetto Mortuary after its non-performance. On June 16, 2011, one day before the Richland County bid was due, Mr. Knight tape-recorded a conversation he had with Mr. Lintal ("Tape Recording"). (R. p. 163, line 8 – p. 164, line 2; p. 315, line 18 – p. 316, line 15.) At the time of the conversation, Mr. Lintal was not aware that he was being recorded. (R. p. 163, line 17.) Throughout the tape-recorded discussion, Mr. Knight repeatedly references infant body bags Palmetto Mortuary purchased from another vendor in 2008, nearly three years prior to the conversation. (R. p. 164, line 14 – p. 165, line 5; p. 324, line 14 – p. 325, line 12.) In response to the allegations, Mr. Lintal stated that he did not believe his purchases of body bags from other manufacturers were "significant," specifically stating that he was "not trying to breach" the parties' Agreement. (R. p. 325, line 19; p. 327, lines 5-9.)

Mr. Lintal assured Mr. Knight during the tape recorded conversation in July of 2011: "If you're willing to make them, I'm going to order them." (R. p. 329, lines 18-24.) Mr. Knight responded: "I can make them." (R. p. 329, line 25.) After Palmetto Mortuary purchased body bags from other manufacturers, Palmetto Mortuary continued

to purchase body bags from Knight Systems. It is undisputed that from January 2007 to June 2011, Palmetto Mortuary purchased more than $45,000.00 dollars' worth of body bags from Knight Systems pursuant to Section 3.4.8 of the Agreement. (R. p. 160, lines 10-20; pp. 408-448.)

Moreover, "[a] party's adherence to standards of good faith and fair dealing will not prevent his failure to perform a duty from amounting to a breach" entitling the non-breaching party to damages, but "[t]he extent to which [his] behavior . . . comports with standards of good faith and fair dealing is a significant circumstance in determining whether the failure is material." Restatement (Second) of Contracts § 241, cmt. f. Here, Palmetto Mortuary adhered to standards of good faith and fair dealing. There is testimony in the record that before each occasion when Palmetto Mortuary purchased bags from other sources, Mr. Lintal spoke with Mr. Knight about Knight System's ability to sell certain bags when it needed them for business. (R. p. 150, line 25 – p. 152, line 9; p. 154, lines 9-23; p. 157, lines 1-20.)

Moreover, considering the context in which the Tape Recording took place and the timing of the Richland County contract bid, the evidence in the record suggests that Mr. Knight knew or should have known more than three years prior to the Tape Recording that Palmetto Mortuary previously purchased body bags from other manufacturers. However, instead of bringing the breaches to Mr. Lintal's attention when he was aware of such allegations[8], Knight held onto the information until a time that was

[8] Mr. Knight admitted at trial that he heard from at least one other person as early as 2009 or 2010 that Plaintiff was purchasing body bags from other sources, but did not bring the rumors to Plaintiff's attention until June of 2011. (R. p. 343, lines 9-22; p. 361, line 23 – p. 362, line 25; p. 363, line 11 – p. 365, line 6 (p. 364 in Appendix).)

beneficial to him.[9] (R. p. 343, line 9 – p. 344, line 21.) Additionally, Mr. Knight's conduct on June 16, 2011, including surreptitiously tape-recording Mr. Lintal, bringing up Palmetto Mortuary's purchases of body bags from other manufacturers after more than three years after the purchases, and immediately placing a bid for the Richland County contract one day following the parties' discussion, evidences something less than good faith with respect to adhering to the terms of the APA.

Rescission and restitution are equitable remedies which will not be provided when another party has acted in bad faith. A court of equity, in applying the principle of "unclean hands," will not lend its aid to a litigant who has been guilty of any reprehensible conduct directly connected with the subject-matter of the litigation before the court. *See Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943); *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000); *Aaron v. Mahl*, 381 S.C. 585, 674 S.E.2d 482 (2009); *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.2d 35 (2013). Here, Knight requested the right of rescission and/or repudiation of his obligations under the Non-Compete Agreement and Exclusivity Clause as a result of Plaintiff's alleged wrongful purchases of bags from other manufacturers. Based on the evidence in the record, the Special Referee did not err in finding that Knight was not entitled to any equitable relief as a result of his actions.

Based on the evidence presented, Palmetto Mortuary's purchases of bags from sources other than Knight did not constitute material breaches of the APA. As a result,

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[9] Mr. Knight testified that sometime in 2009 and 2010 he was informed by a competitor that Palmetto Mortuary had purchased body bags from another source. (R. p. 314, line 12 – 315, line 17. Mr. Knight testified that he did not take any action or discuss the allegations with Mr. Lintal, despite the fact that he may have believed such purchase would have been in violation of the parties Agreement. (*Id.*)

Knight was not excused from performance under the Agreement, including the Non-Compete Agreement. Knight is only entitled to monetary damages that naturally flow from Palmetto Mortuary's breaches. As the Special Referee concluded, the monetary damages owed to Knight totals Four Hundred Seventy Eight Dollars and Fifty Cents ($478.50). (R. p. 22 at ¶ 53.) Such a ruling is based on evidence in the record and was not controlled by any error of law. Accordingly, this Court should affirm the Special Referee's Order filed July 22, 2014.

CONCLUSION

For the foregoing reasons, the Special Referee did not err in concluding that the Non-Compete Agreement was supported by valuable consideration, reasonable in time and scope and did not violate public policy. The Special Referee's findings that Knight and Knight Systems were not entitled to rescission of the contract based on Palmetto Mortuary's previous non-material breaches should likewise be affirmed. All of the Special Referee's rulings were based on evidence in the record and were not controlled any error of law.

Palmetto Mortuary respectfully requests that this Court affirm the Special Referee's Order for the foregoing reasons, or on the basis of any grounds appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

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February 19, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
James Randall Davis, Special Master/Referee

Appellate Case No. 2014-001819

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

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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February 20, 2015.

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PROOF OF SERVICE

I, the undersigned paralegal of the law offices of Adams and Reese LLP, attorneys for Palmetto Mortuary Transport, Inc., do hereby certify that I have served all counsel in this action with a clocked copy of Respondent's Final Brief first-class mail service this 20th day of February, 2015.

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