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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Opinion No. 2016-5402 (S.C. Ct. App. Filed May 4, 2016)

Palmetto Mortuary Transport, Inc.,..... Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on June 23, 2016.

QUESTION PRESENTED

I. Whether the Court of Appeals erred in reversing the lower court's decision upholding a covenant not to compete against the seller of a business on the ground that the 150-mile territorial restriction was unreasonable.

STATEMENT OF THE CASE

Petitioner initiated this action on October 26, 2011. The case arises out of a dispute regarding post-purchase obligations and covenants contained in an Asset Purchase Agreement (“Agreement”) signed on January 5, 2007 in connection with Respondents’ sale of their mortuary transport business to Petitioner. (R. pp. 372-407.) Petitioner alleged Respondents breached the Agreement by violating both a “Non-Competition Covenant” (“Covenant”) (R. p. 40- 47 at ¶¶ 12, 17-19) and “Exclusivity Provision” in the Agreement. (*Id.* at ¶¶ 11-16, 19, 20-23.) Petitioner sought monetary damages and injunctive relief. (*Id.*)

Respondents claimed the Covenant was unenforceable and void based on an alleged unreasonable geographic scope, unreasonable time restriction, and lack of adequate consideration. (R. pp. 57 at ¶ 36 – p. 58 at ¶ 38 (Appendix).) Respondents asserted a counterclaim for breach of contract and alleged their breaches of the Agreement were justified by Petitioner’s alleged previous breach of the same agreement. (R. p. 58 at ¶¶ 39-43 (Appendix).)

The case was tried on December 18, 2013. On July 22, 2014, the trial court issued an order enforcing the Covenant, finding Respondents breached the Agreement by withdrawing certain body bags from the market in violation of the Exclusivity Provision and submitting a competing response to Richland County’s Request for Proposals (“RFP”) for mortuary transport services, thereby violating the express terms of the Covenant. (R. pp. 3-18.) The trial court concluded Petitioner’s purchases of body bags from other sellers were not material breaches of the Exclusivity Provision justifying Respondents’ repudiation of the Agreement (R. pp. 18-29 at ¶¶ 42-70). Petitioner was

awarded actual damages, injunctive relief, and attorneys' fees and costs. (R. pp. 29-33 at ¶¶ 71-84.)

On August 22, 2014, Respondents filed a Notice of Appeal. The Court of Appeals heard oral argument on February 10, 2016. On May 4, 2016, the Court of Appeals filed a published opinion reversing and remanding the case to the trial court. *Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc.*, -- S.C. --, 786 S.E.2d 588 (Ct. App. 2016). In its Opinion, the Court of Appeals refused to enforce the Covenant, concluding a 150-mile territorial restriction was unreasonable in light of the existing location of Respondents' business at the time of sale, and therefore void as a matter of public policy. The Court declined to address remaining issues on appeal.

On May 19, 2016, Petitioner filed a Motion for Rehearing, seeking to have the Court reconsider applicable law and evidence in the record demonstrating the Covenant was reasonable. The Court of Appeals denied Petitioner's Motion for Rehearing on June 23, 2016.

STATEMENT OF THE FACTS

In October of 2006, Donald and Ellen Lintal met with a broker regarding the purchase of Respondents' mortuary transport business. (R. p. 268, lines 2-9.) Respondents had previously advertised and actively pursued the sale of their mortuary transport business, including three five-year cycle public contracts for transport services. (R. p. 268, lines 2-9; p. 268, lines 17-24; p. 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 Agreement. (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 negotiations, on December 14, 2006, Petitioner's counsel sent a draft covenant not to compete to Respondents' counsel which was intended by both parties to be included in the final Agreement. (R. p. 260, lines 9-12.)

Closing took place on January 5, 2007. (R. pp. 372-407.) Respondent Knight admitted he "appeared at the closing [with his attorney] and . . . read the documents." (R. p. 350, lines 1-6; p. 353, lines 16-19.) Mr. Knight testified "[he] did[] [not] object to . . . any provision of either agreement at the closing." (R. p. 353, lines 20-25.) The parties executed the Agreement and Respondents received \$590,000.00. (R. pp. 372-407; R. p. 128, lines 8-12.)

Pursuant to the Agreement, Petitioner purchased 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 Respondents' mortuary transport business. Three contracts were among the assets transferred to Petitioner pursuant to the Agreement, including one five-year contract with Richland County for body removal services.¹ (R. p. 386 at Exhibit 1.1.1.3.) Petitioner did not purchase any assets associated with Respondents' body bag manufacturing business, which Respondents intended to continue following execution of the Agreement. (R. pp. 372-407.)

Petitioner obtained mutual covenants from Respondents, including a ten-year, 150-mile Covenant, set forth in Exhibit 3.2.6 to the Agreement. (R. p. 394 at Exhibit 3.2.6(2).) The Covenant placed no restrictions or limitations on Respondents' ability to continue their separate body bag manufacturing business. (*See id.*) The Agreement also contained an Exclusivity Provision requiring Petitioner to purchase and Respondents to

¹ A contract with Lexington County for body removal services and contract with the University of South Carolina for cadaver preparation and transportation services were also included in the list of assets sold to Petitioner. (R. p. 386 at Exhibit 1.1.1.3.)

sell four types of body bags from Respondents during the entire term of the Covenant. (R. p. 375 at § 3.4.8 (listing heavy duty body bags, lightweight body bags, odor-proof body bags, and water-retrieval body bags); *see also* R. p. 131, lines 18-22.)

A dispute arose in 2011 when Richland County issued a Request for Proposal (“RFP”) seeking responses for the provision of 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, Petitioner held the mortuary transport services contract with Richland County as a result of the Agreement. (R. p. 162, line 24 – p. 163, line 3; p. 165, line 18 – p. 166, line 5.) Both parties prepared a response to Richland County’s RFP and submitted the responses for consideration. (R. p. 163, lines 4-5; p. 344, line 22 – p. 345, line 11.)

After the RFP closed on June 17, 2011, Respondent Knight emailed the Richland County Procurement Office seeking to have Respondents chosen to provide mortuary transport services because Respondents were the alleged “sole provider” of odor-proof body bags. (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 Richland County required odor-proof bags as part of the RFP. Mr. Lintal testified he was “was [not] aware” at that time that he needed any alternative to an odor proof bag for Petitioner’s response because Mr. Lintal believed the Agreement required Respondents to provide Petitioner with odor proof bags pursuant to the Agreement. (R. p. 240, line 24 – p. 241, line 1-5; R. p. 375 § 3.4.8 (listing “odor-proof body bags” within the Exclusivity Provision).)

It is undisputed Petitioner 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. (R p. 225, lines 1-14; p. 168, lines 14-25; p. 241, lines 2-24.) Nevertheless, Richland County selected Respondents for the five-year contract. (*Id.*) Without Respondent Knight’s assertion that Respondents were the sole provider of odor-proof body bags, the contract would have been awarded to Petitioner. (*Id.*)

ARGUMENT AND CITATION OF AUTHORITY

I. GRANTING CERTIORARI IN THIS CASE IS SUPPORTED BY SPECIAL AND IMPORTANT REASONS UNDER RULE 242(b), SCACR.

A. Decision of Court of Appeals is in conflict with prior decisions of the Supreme Court (Rule 242(b)(3), SCACR).

This Court should grant certiorari because the Court of Appeals’ opinion conflicts with prior decisions of this Court.

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.” *Metts v. Weinberg*, 158 S.C. 411, 155 S.E. 734, 735 (1930). This is consistent with the state’s deep and robust public policy of enforcing private contractual agreements. *See American Bankers Life Assur. Co. of Florida v. Frederick*, 315 S.C. 97, 101, 431 S.E.2d 636, 639 (Ct. App. 1993) (“The duty of this Court is limited to the interpretation of the contract made by the parties, regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their rights carefully.”).

South Carolina law is clear that a non-compete agreement must be “(1) supported by a valuable consideration, (2) . . . reasonably limited as to time, and (3) . . . reasonably restricted as to the place of the territory.” *Somerset v. Reyner*, 233 S.C. 324, 329, 104 S.E.2d 344, 346 (1958). “[I]n all cases it is essential that the restrictive covenant be incidental to another lawful contract of sale involving some interest requiring the

protection of the restraint.” *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184, 188 (1942). “[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.” *Id.* at 494, 21 S.E.2d at 187 (citations omitted).

Decisions of this Court require lower courts to examine multiple factors in evaluating the reasonableness of a non-compete agreement, including (1) the whole subject matter of the contract, (2) the kind and character of the business, (3) location, (4) the purpose to be accomplished by the restriction, and (5) all circumstances which show the intentions of the parties and which must have entered into the making of the contract. *Reeves*, 200 S.C. at 501, 21 S.E.2d at 188. Each case is necessarily decided on its own facts and circumstances. *Id.*

Here, the Court of Appeals erred by solely relying on the analysis as applied to the facts in *Somerset*, and failing to apply and consider all of the factors compelled by this Court in *Reeves*. Instead, the Court of Appeals narrowly focused only on the existing location of the business at the time of contracting, *Palmetto Mortuary*, -- S.C. --, 786 S.E.2d 588, 591-92, an analysis which necessarily ignored other facts and negotiated provisions of the Agreement—including the Exclusivity Provision—demonstrating the geographic restriction protected the rights of the Petitioner in a reasonable manner. Through these shortcomings, the Court of Appeals’ decision conflicts with applicable law and certiorari should be granted.

Undisputedly, the location of the business at the time of execution of a non-compete agreement is one factor to consider. However, it is not the only one. *See*

Reeves, 200 S.C. 494, 21 S.E.2d at 188 (listing “location” as only one of five factors to be applied). Instead, the “whole subject matter” of the parties’ agreements, including the facts and circumstances of the parties, the business to be sold, and the purpose of the sale must be reviewed. *Id.* As described below, the location of the business cannot be dispositive where, as here, the parties negotiated an Agreement requiring Petitioner to support Respondents’ body bag business for the entire term of the Covenant. Application of all five *Reeves* factors to all facts of this case compels a finding that the Covenant is reasonable and should have been upheld by the Court of Appeals.

This case involves the sale of a substantial commercial enterprise between two sophisticated parties who intended to continue operating within their chosen spheres of business. The Agreement was executed after months of Respondents’ advertising the mortuary transport business, soliciting business purchases, and negotiating with Petitioner. (R. p. 260, lines 9-12; p. 268, lines 2-9; p. 269, lines 17-24; p. 269, lines 3-13.) At the time of contracting, both sides were represented by counsel, brokers, and accountants. (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.) Enforcement of all contractual provisions in the Agreement, including the Covenant and Exclusivity Provision, for the duration of the ten-year period, would have financially benefited *both* parties, for the reasons stated below.

The restriction on Respondents’ future ability to provide mortuary transport services arose in connection with Respondents’ sale of a commercial enterprise to Petitioner for a total purchase price of \$590,000.00. (R. p. 372-407; R. p. 128, lines 8-12.) Thus, this is not a case where a non-compete agreement arises within the scope of

an employment relationship. Accordingly, the more rigorous standard in evaluating the reasonableness of a covenant in the employment context is not applicable.² In exchange for the Covenant, Respondents not only received a generous payment of money from Petitioner, but the right to continue to operate their existing body bag manufacturing business without any limitation whatsoever. (R. pp. 372-407.)

Moreover, in order to ensure Respondents' continued body bag manufacturing business would be successful (thereby ensuring the continued livelihood of the Respondents over and above the \$590,000 they received at closing), the parties negotiated an Exclusivity Provision compelling a ten-year commitment from Petitioner to purchase body bags from Respondents for use in conjunction with Petitioner's transport business. (R. p. 375 at § 3.4.8.) It was reasonably foreseeable at the time of contracting that Petitioner would be required to purchase a substantial portion of its body bags from Respondents given Respondents' years of prior experience in the business.

Not only did the Exclusivity Provision guarantee sizeable future profits to Respondents and their continued manufacturing enterprise, but evidence at the time of trial bore out such a promise. Petitioner paid Respondents more than \$45,000.00 for body bags manufactured by Respondents from the time of contracting, in January 2007, to the initiation of the subject litigation, in October 2011. (R. p. 160, lines 10-20; pp. 408-448.) Benefits from the Exclusivity Provision—a contractual term tied specifically to the Covenant—that the Respondents bargained for and received in exchange for their

² 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 the sale of a business than in the employment context.”) (citation omitted); *American Hot Rod Ass'n, Inc. v. Carrier*, 500 F.2d 1269, 1277 (4th Cir. 1974) (holding “restrictive covenants not to compete in employment contracts ... are scrutinized more rigorously than similar covenants incident to the sale of a business”).

agreement to the Covenant, demonstrate in part the “rational basis” for the terms of the Covenant.

The kind and character of the parties’ business interests, including the potential for future expansion of Petitioner’s business operations and location, as well as the Respondents’ continued operation of their body bag business and the benefits they gained (and stood to gain) from the Exclusivity Provision based upon the growth of Petitioners’ business, further supports enforcement of the Covenant. The Court of Appeals unreasonably focused on the existing location of Respondents’ business at the time of the sale—characterizing the purchased business as “a small business located in Lexington County at the time of the sale” and “only engaged in the mortuary transport business in Richland and Lexington counties.” *See Palmetto Mortuary*, -- S.C. --, 786 S.E.2d at 592.

The Court of Appeals refused to give weight to evidence in the record of Petitioner’s stated “desire to expand its business throughout the state,” requiring Petitioner to have come forward with “more evidence of definitive planning, acquisitions, or other overt acts” in support of its goal. *Id.* In so ruling, the Court added additional factors or considerations to this Court’s standard for enforcement of non-compete agreements, compelling purchasers of businesses to take active or overt steps toward expanding the business prior to purchase, in order to justify a territorial non-compete area beyond the existing customer base. There are no South Carolina case decisions supporting such an expanded test.

Moreover, the Court failed to acknowledge the evidence in the Record of supporting Petitioner’s active or overt steps to expand the business. Respondent Knight confirmed he provided Petitioner with the “contact names of funeral homes that I did

business for.” (R. p. 304, lines 13-15.) In the Agreement’s Statement of Agreement, Section 1.1.1.3, Petitioner purchased all customer records, customer lists, customer information, general business records and data, including clients outside of Richland and Lexington Counties. Petitioner’s efforts to obtain this information from Respondents and were significant to its decision to purchase Respondents’ business and should have compelled a conclusion that the geographic scope of the Covenant was reasonable.

In addition, Respondent Knight stated a clear intention to get out of the mortuary transport business (R. p. 308, lines 7-8), in favor of continuing to run his existing body bag business, rendering the Covenant, including the 150-mile radius, reasonable in light of the intentions of the parties at the time of contracting. This evidence, combined with Mr. Lintal’s testimony of Petitioner’s intention to expand the mortuary transport business throughout the state (R. p. 208, line 12 – p. 209, line 13; p. 209, line 25 – p. 210, line 10), and the benefits that would accrue to Respondents pursuant to the Exclusivity Provision as any such expansion occurred, justified a larger territorial restriction in this case. Evidence in the record shows Petitioner has since the time of contracting added customers that Respondents did not serve prior to the Agreement and that Petitioner currently does business outside the area encompassed by the contracts purchased in January 2007. (R. p. 551, line 16 – p. 552, line 10.)

The Court of Appeals’ Opinion states “[a]s suggested in *Somerset*, we do not believe [Knight’s] intention of not returning to the mortuary transport business is a relevant factor for analyzing whether a territorial restriction is reasonable.” *Palmetto Mortuary*, -- S.C. --, 786 S.E.2d at 592. However, as *Reeves* makes clear, such an

intention must be reviewed under the applicable factors, including “the purpose to be accomplished by the restriction.” *Id.* at 494, 21 S.E.2d at 188.

The combined evidence of Petitioner’s intention to expand Respondents’ prior mortuary transport business throughout the state, Respondent Knight’s intention to get out of the mortuary transport business while specifically continuing to operate Respondents’ body bag business, and Petitioner’s obligation to sell bags to Respondents pursuant to the Exclusivity Provision for the term of the Covenant and throughout whatever territory Petitioner provided mortuary transport services during that term, supports enforcement of the Covenant. Knight’s stated intention of leaving the mortuary transport business was bolstered by his desire and overt steps to continue and expand his body bag manufacturing enterprise.³ Knight’s admission that he read and understood both the Exclusivity Provision and Covenant, and did not object to either provision before signing, reflects Respondents’ willingness to be bound by the provisions’ terms. (R. p. 353, line 16 – p. 354, line 13; p. 349, lines 9-19.)

The intentions of the parties at the time of entering the Agreement were clear: Respondents intended to cede their mortuary transport service business to Petitioner for a sizeable profit (\$590,000.00) in order to continue in their existing body bag manufacturing business. In order to incentivize Respondents to covenant not to compete in the mortuary transport business, Petitioner guaranteed a future revenue stream for Respondents’ body bag business for as long as the Covenant existed, promising to purchase certain body bags solely from Respondents. The symbiotic relationship

³ For these reasons, the subject case is dissimilar from those where concerns regarding an employee’s future livelihood override private contractual agreements. *See, e.g., Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012) (stating a non-compete agreement should be “no greater than necessary to protect the employer’s legitimate business interests” and “not unduly harsh in that it curtails the employee’s ability to earn a living.”).

between the Covenant and the Exclusivity Provision could not be more clear: Petitioner received assurance that Respondents would not compete in the business for mortuary transport services and Respondents, in exchange, received a ten-year guarantee of profit for its body bag manufacturing enterprise based on any territory in which Petitioner provided mortuary transport services during that term.

The Court of Appeals failed to uphold the intentions of the parties at the time of contracting, failed to recognize the purpose of the restrictions in the Agreement, and failed to consider the substantial benefits all parties received as a result of the Agreement, the Covenant, and the Exclusivity Provision. The Court of Appeals erred in restricting the applicable factors for enforcement of non-compete agreements solely to existing business location.

The Court of Appeals applied a rigid public policy analysis that wholly failed to consider specific and material aspects of this particular business transaction. “[T]he use of public policy to void written contracts is dangerous because public policy is often a two-edged sword.” *Westvaco Corp. v. United Paperworkers Intern. Union, AFL-CIO ex rel. Local Union 676*, 171 F.3d 971 (4th Cir. 1999). *See Reeves*, 200 S.C. 494, 21 S.E.2d 184 (“Certainly it is not going too far to say that there can be no sound public policy which operates to give countenance to the open disregard and violation of personal contracts entered into in good faith and upon valid consideration.”).

In considering and applying only one of the five factors, the location of Respondents’ existing business at the time of sale, and failing to consider the parties’ intentions, the Covenant’s purpose, and the other contractual provisions, the Court of

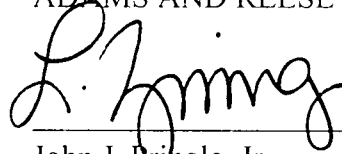
Appeals created precedent which conflicts with decisions of this Court and hurts business interests in this state.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue an order granting the petition for writ of certiorari in this case.

Respectfully submitted,

ADAMS AND REESE LLP

A handwritten signature in black ink, appearing to read "J. Pringle", written over a horizontal line.

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July 25, 2016.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James Randall Davis, Special Master/Referee

Opinion No. 2016-5402 (S.C. Ct. App. Filed May 4, 2016)

Palmetto Mortuary Transport, Inc.,..... Petitioner,

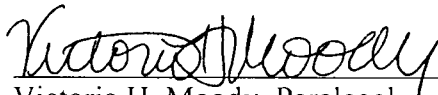
v.

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

PROOF OF SERVICE

I hereby certify I served the Petition for Writ of Certiorari and Appendix upon Knight Systems, Inc., and Robert L. Knight, by depositing copies of the documents in the United States Mail, postage prepaid, on July 25, 2016, addressed to its attorney of record, Reginald I. Lloyd, Esquire, The Lloyd Law Firm, LLC, Post Office 1555, Camden, South Carolina 29021.

I hereby further certify I served the Petition for Writ of Certiorari upon the Clerk of the South Carolina Court of Appeals by placing a copy in the United States mail, postage prepaid, to The Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals, P.O. Box 11629, Columbia, South Carolina 29211, on July 25, 2016.


Victoria H. Moody, Paralegal

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