

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 15 2017

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY.....Appellant-Respondent,

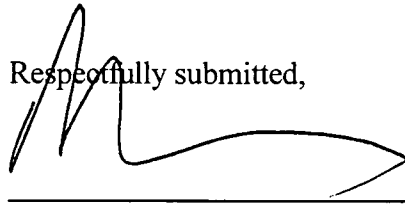
vs.

TOTAL QUALITY LOGISTICS, LLC.....Respondent-Appellant.

PETITION FOR REHEARING

Appellant-Respondent respectfully submits this Petition for Rehearing and accompanying Memorandum in Support of Petition for Rehearing regarding the Court's decision reversing the lower Court's partial grant of summary judgment to Appellant-Respondent to South Carolina Appellate Court Rule 221. Joshua Fay v. Total Quality Logistics, #5471, filed March 1, 2017.

Respectfully submitted,



Date: March 14, 2017

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The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

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JOSHUA FAY.....Appellant-Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC.....Respondent-Appellant.

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

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TABLE OF AUTHORITIES

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CASES

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Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) 1

Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288 (2012)..... 1, 2

STATUTE

S.C. Code Ann. § 39-8-30..... 1, 2

ARGUMENT

Respondent-Appellant Total Quality Logistics, LLC (“TQL”) respectfully submits this Memorandum in Support of its Petition for Rehearing. For the following reasons, the Court should grant the Petition for Rehearing.

The Court’s holding in this case departs from the language and legislative intent of S.C. Code Ann. § 39-8-30. The confidentiality provision at issue was not so broad as to render it a non-compete clause. Appellant-Respondent (“Fay”) is still be able to find alternative employment without violating the terms of the confidentiality agreement. Further, a confidentiality provision need not contain either a geographic or temporal limitation in order to be valid.

The Court mischaracterizes the confidentiality provision of Fay’s agreement as being so broad that it operates a non-compete. Fay v. Total Quality Logistics, No. 5471, slip op. at 7-8 (S.C. App. March 2, 2017). The Court found that the confidentiality provision has the same effect as a non-compete provision and was thus subject to the same scrutiny as a non-compete provision. *Id.* The Court cites particularly to Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) and Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288 (2012) as support for this proposition. However, South Carolina’s General Assembly amended the South Carolina Trade Secrets Act in part in response to the decision in Muckenfuss in the following manner:

(D) A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographic limitation.

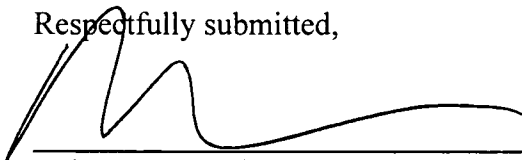
S.C. Code Ann. § 39-8-30.

Although Morin confirmed the theory that a confidentiality provision could be so broad as to become, in essence, a non-compete, the Court misinterpreted TQL's confidentiality provision. This provision is not so broad as to restrict Fay's ability to earn a living; the information defined as confidential is limited to those trade secrets of TQL that Fay learned through his employment with TQL. The South Carolina General Assembly has made clear through its amendments to the South Carolina Trade Secrets Act its intention that confidentiality provisions should not to be treated as non-compete provisions and are not subject to the same geographic and temporal restrictions. Should this interpretation prevail, nearly all confidentiality and non-disclosure agreements would become subject to the same requirements as non-compete provisions regardless of the intention of the parties or the nature of the information. For example, the confidentiality of trade secret information, such as product recipes or proprietary methods of conducting business, would be incapable of protection in perpetuity, which is not the intent of the statute passed by South Carolina legislature. By broadly construing the confidentiality provision and narrowly construing the statute, the Court mistakenly concludes the confidentiality provision of Fay's agreement is expansive enough to be considered a non-compete provision.

Accordingly, S.C. Code Ann. § 39-8-30 applies, and a temporal limitation for the confidentiality provision is unnecessary. Further, the confidentiality provision properly defines confidential information to include only that information necessary for the protection of TQL's business interests. The Court therefore erred when it determined the confidentiality provision was so broad that it must be judged by the same standard as a non-compete provision and required a time limitation to be included.

For these reasons, TQL respectfully requests that the Court grant the Petition for Rehearing in this matter.

Respectfully submitted,



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March 13, 2017

IN THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Roger M. Young, Circuit Court Judge

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JOSHUA FAY.....Appellant-Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC.....Respondent-Appellant.

PROOF OF SERVICE

The undersigned of the law offices of Smith Moore Leatherwood LLP, attorneys for Respondent-Appellant, does hereby certify that service of the Petition for Rehearing and Memorandum in Support of Petition for Rehearing was made on all counsel of record, specified below, by sending a copy via FedEx, on **March 14, 2017**, to the following address:

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Date: March 14, 2017



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March 14, 2017

Via Federal Express

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SOUTH CAROLINA COURT OF APPEALS

Re: Joshua Fay v. Total Quality Logistics
C.A. No. 2012-CP-10-5579

Dear Ms. Kitchings:

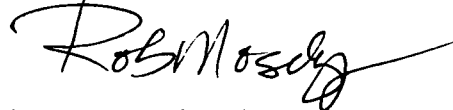
Enclosed please find original and six copies of Petition for Rehearing, Memorandum in Support and Proof of Service of the same in the above matter. Also enclosed is our firm check in the amount of \$25.00.

By copy of this letter, I am enclosing a copy of the same on the attorneys for the Appellant-Respondent.

Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,

SMITH MOORE LEATHERWOOD LLP



Robert D. Moseley, Jr.

Enclosures

cc: Via Federal Express
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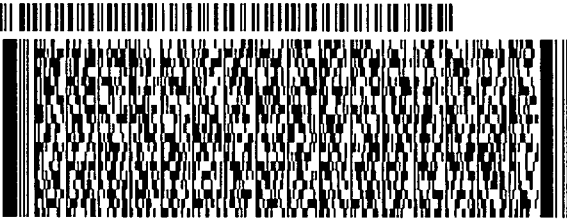
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