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.

BRIEF OF PETITIONER

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QUESTION PRESENTED

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

STATEMENT OF THE CASE

This case arises out of a contractual dispute between the parties regarding post-purchase obligations and covenants contained in an Asset Purchase Agreement ("Agreement") executed on January 5, 2007. The Agreement arose out of Respondents' sale of their mortuary transport business to Petitioner. (Appx. pp. 386-421.)

In its complaint, Petitioner alleged Respondents breached the Agreement by violating a "Non-Competition Covenant" which restricted Respondents' ability to provide mortuary transport services following the closing for a period of ten years and within a 150-mile radius of the business. (Appx. p. 63-68 at ¶¶ 12, 17-19.) Petitioner also asserted Respondents separately violated an "Exclusivity Provision" through which Respondents were obligated to sell, and Petitioner was required to buy, expressly-listed types of body bags manufactured by Respondents through a separately-operated body bag manufacturing business which was not purchased by Petitioner. (*Id.* at ¶¶ 11-16, 19, 20-23.) Petitioner sought monetary damages and injunctive relief arising out of Respondents' contractual breaches. (*Id.*)

In their Answer, Respondents alleged the Covenant was unenforceable based on an alleged unreasonable geographic scope, unreasonable time restriction, and lack of adequate consideration. Respondents also asserted a counterclaim for breach of the Exclusivity Provision arising out of Petitioner's purchases of body bags from sources other than Respondents. Respondents claimed their breaches of the Covenant were justifiable.

The case was tried on December 18, 2013 before a special referee. 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. (Appx. pp. 26-40.) Petitioner was awarded actual damages, injunctive relief, and attorneys' fees and costs. (Appx. pp. 51-55 at ¶¶ 71-84.)

Respondents timely filed a Notice of Appeal from the trial court's order. The Court of Appeals heard oral argument on February 10, 2016. On May 4, 2016, the Court published an opinion reversing and remanding the case to the trial court. *Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc.*, 416 S.C. 427, 786 S.E.2d 588 (Ct. App. 2016) ("Opinion"). In the Opinion, the Court of Appeals reversed the trial court's order and 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. *Id.* The Court of Appeals declined to address the remaining appellate issues.

On May 19, 2016, Petitioner filed a Motion for Rehearing, seeking to have the Court of Appeals reconsider applicable law and evidence in the record demonstrating the Covenant was reasonable. The Court denied Petitioner's Motion for Rehearing on June 23, 2016, and Petitioner timely filed a Petition for Writ of Certiorari by this Court which was granted on May 2, 2017.

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 of 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.*

"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).

STATEMENT OF FACTS

In October 2006, Donald and Ellen Lintal met with a broker regarding the purchase of Respondents' mortuary transport business. (Appx. p. 283, lines 2-9.) Respondents had previously advertised and actively pursued the sale of their business, including three five-year cycle contracts for mortuary transport services. (Appx. p. 283, lines 2-9; p. 283, lines 17-24; p. 284, lines 3-13.) From November 2006 to January 5, 2007, the parties and their agents, including brokers, accountants, and attorneys for both sides, negotiated the terms of the Agreement. (Appx. p. 254, line 11 – p. 255, line 15; p. 259, line 4 – p. 260, line 14; p. 317, lines 5-9; p. 364, line 20 – p. 368, line 19.)

Closing took place on January 5, 2007. Respondent Knight admitted he "appeared at the closing [with his attorney] and . . . read the documents." (Appx. p. 365, lines 1-6; p. 368, lines 16-19.) Knight testified "[he] did[] [not] object to . . . any provision of either agreement at the closing." (Appx. p. 368, lines 20-25.) The parties executed the Agreement and Respondents received $590,000.00 at closing. (Appx. pp. 386-421; p. 143, lines 8-12.)

Pursuant to the Agreement, Petitioner purchased tangible assets (Appx. p. 386 at Section 1.1.1.1); goodwill (Appx. p. 386 at Section 1.1.1.6); and customer records, lists, and contracts (Appx. p. 386 at Section 1.1.1.3) associated with Respondents' mortuary transport business. Three contracts were among the assets transferred to Petitioner, including one five-year contract with Richland County for mortuary transport services. (Appx. p. 400 at Exhibit 1.1.1.3.) A contract with Lexington County for body removal services and a contract with the University of South Carolina for cadaver preparation and transportation services were also included in the list of assets sold to Petitioner. (Appx. p.

400 at Exhibit 1.1.1.3.) Petitioner did not purchase, and Respondents did not sell, any assets associated with Respondents' body bag manufacturing business, which Respondents intended to continue following execution of the Agreement. (Appx. pp. 386-421.)

Respondents executed a ten-year, 150-mile non-compete agreement prohibiting the provision of mortuary transport services following closing ("Covenant"). (Appx. p. 408 at Exhibit 3.2.6(2).) The Covenant placed no restrictions or limitations on Respondents' ability to continue their body bag manufacturing business. Moreover, the Agreement contained an Exclusivity Provision requiring Petitioner to purchase, and Respondents to sell, four types of body bags during the entire term of the Covenant. (Appx. p. 389 at § 3.4.8 (listing heavy duty body bags, lightweight body bags, odor-proof body bags, and water-retrieval body bags); *see also* Appx. p. 146, 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. (Appx. p. 175, lines 5-9; p. 176, lines 16-22; p. 178, lines 4-7; p. 180, lines 6-8, 21-24.) At that time, Petitioner held the mortuary transport services contract with Richland County as a result of Respondents' assignment through the Agreement. (Appx. p. 177, line 24 – p. 178, line 3; p. 180, line 18 – p. 181, line 5.) Although Petitioner contended Respondents were contractually bound not to do so, both parties prepared separate responses to the RFP and both parties submitted the responses for consideration. (Appx. p. 178, lines 4-5; p. 359, line 22 – p. 360, 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. (Appx. p. 181, line 6 – p. 183, line 13; p. 256, lines 14-24; p. 361, line 14 – p. 362, line 25.) Respondents alleged they were the "sole provider" of odor-proof body bags which were required by the RFP. Because the parties' Agreement required Respondents to provide Petitioner with odor proof bags pursuant to the Exclusivity Provision (*see* Appx. p. 389 § 3.4.8 (listing "odor-proof body bags" within the Exclusivity Provision)), Mr. Lintal testified he was "was [not] aware" he needed any alternative for Petitioner's response to Richland's RFP. (Appx. p. 255, line 24 – p. 256, line 1-5.)

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. (Appx. p. 240, lines 1-14; p. 183, lines 14-25; p. 256, lines 2-24.) Nevertheless, Richland County selected Respondents for the five-year contract, presumably based on Respondent Knight's inaccurate assertion that Respondents were the "sole provider" of odor-proof body bags. (*Id.*)

ARGUMENTS

Certain facts presented in this case are textbook elements of a classic breach of non-compete agreement dispute. First, the sale of an ongoing business. Second, the inclusion of a non-compete covenant in the parties' purchase agreement to protect the purchaser's business interests by preventing the seller from reopening a competing business. Third, a resulting contract dispute occurring post-closing, involving issues of contract interpretation and enforcement.

However, this case also involves unique facts not previously at issue in non-compete cases considered by this Court. First, arms-length negotiations between two sophisticated parties, each with their own independent counsel and financial advisors. Second, explicitly negotiated protection of sellers' separate business and exclusion from the assets transferred pursuant to the Agreement. Third, carefully crafted and specific ongoing obligations which required the purchaser to financially support the sellers' separate business. Fourth, a significant contract price. The Court of Appeals completely ignored these facts in analyzing the Covenant, and the resulting Opinion creates financial uncertainty for businesses seeking to relocate, operate, and expand in South Carolina.

Unfortunately, by disregarding the intentions of the parties through their carefully designed and closely negotiated Agreement, (which clearly benefitted and protected the legitimate and ongoing business interests of *both* the selling and purchasing parties), the Court of Appeals failed to decide this case on its "own facts." By selectively analogizing parts of this case to the facts of a single prior non-compete case, *Somerset v. Reyner*, 233 S.C. 324, 329, 104 S.E.2d 344, 346 (1958), and ignoring principles and the factors set out in other decisions, including *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942), the

Court of Appeals arrived at a decision which gives Respondents an unfair and unjustified windfall. As a result, the Court of Appeals' Opinion should be reversed and the trial court's order, which is supported by reasonable evidence in the record and not controlled by an error of law, should be affirmed.

I. THE COURT OF APPEALS DISREGARDED THE STRONG PUBLIC POLICY OF ENFORCING CONTRACT TERMS NEGOTIATED BY SOPHISTICATED PARTIES.

As described herein, the Agreement was negotiated at arms-length with both parties represented by independent accountants, financial advisors, and legal counsel. Moreover, the Agreement contained provisions that benefitted and protected the ongoing business interests of both parties. As a result, the Covenant represents a "reasonable protection of the rights of" the purchaser (Petitioner) and is enforceable simply because the Covenant resulted from negotiation between sophisticated parties who received independent advice. Put another way, Petitioner is entitled to the benefit of its bargain that resulted in the Covenant, particularly in view of what it gave Respondents in exchange: $590,000.00, the right for Respondents to maintain their body bag manufacturing business, and a promise, through the Exclusivity Provision, to support Respondents' ongoing body bag manufacturing business.

However, even if the provisions of the Agreement are objectively unreasonable (and they are not), courts regularly enforce even "grossly unreasonable" contract terms which have been negotiated by sophisticated parties. The Court of Appeals has gone so far as to say its "duty . . . is limited to the interpretation of the [parties'] contract . . . regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to

guard their rights carefully." *American Bankers Life Assur. Co. of Florida v. Frederick*, 315 S.C. 97, 101, 431 S.E.2d 636, 639 (Ct. App. 1993).

For example, in *South Carolina Electric & Gas Co. v. Combustion Engineering, Inc.*, 283 S.C. 182, 332 S.E.2d 453 (Ct. App. 1984), the Court of Appeals enforced the language of an exculpatory clause in a contract for the sale of a boiler, finding the parties were both "commercially-sophisticated" and "possess[ed] relatively equal bargaining strength." *Id.* at 189, 332 S.E.2d at 457. The transaction was valued at more than $12 million dollars and negotiated for approximately nineteen months. *Id.* The Court held "it would strain 'credulity to hold that a business like [SCE&G] was not, or should not have been, aware of the language disclaiming implied warranties.'" *Id.* at 189, 332 S.E.2d at 457 (quotation omitted).

In *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), this Court enforced a limitation of liability clause between an individual home purchaser, Mrs. Gladden, and a self-employed contractor retained for a home inspection. Evidence in the record demonstrated Mrs. Gladden directly engaged in "sophisticated negotiations throughout the process of buying the home, even urging the seller to forego the use of a real estate agent." *Id.* at 146, 739 S.E.2d at 885. "Mrs. Gladden had sought out this particular inspector's services, declining to employ a different home inspector who had been described to her as 'harder but best.'" *Id.* at 146, 739 S.E.2d at 885. This Court concluded "the evidence . . . fails to support an inference that Mrs. Gladden lacked meaningful choice" and was bound by the terms of the agreement. *Id.* at 146, 739 S.E.2d at 885.

In *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 606 S.E.2d 752 (2004), this Court considered the enforceability of an arbitration clause in a

contract between a health maintenance organization and a health service provider. In deciding to uphold the contractual clause, the Court recognized that "[b]oth parties were sophisticated entities and . . . [were] represented by independent counsel." *Id.* at 555, 606 S.E.2d at 758.

Moreover, our courts have routinely refused to find evidence of liability for negligent misrepresentation in contract negotiations between sophisticated parties. For example, in *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992), the Court of Appeals outlined the following factors relevant to its conclusion:

> AMA is a sophisticated corporate lender with expert knowledge in managing and financing large business corporations. It was engaged in arm's length bargaining in which it was the initiating party, it was acting with professional legal advice, it understood that each party was seeking its own commercial advantage, it knew that each party was expected to act with due diligence to protect its own interests, and it knew that each party must make its own calculations of risk.

Id. at 224-25, 420 S.E.2d at 875.

The courts' enforcement of covenants not to compete arising out of the sale of a business should present no exception to the general rule that contractual terms negotiated by sophisticated parties are enforceable, regardless of their wisdom or folly. In *Metts v. Weinberg*, 158 S.C. 411, 155 S.E. 734, 735 (1930), this Court pronounced that non-compete agreements "will, in conformity with the just and equitable principles of the common law, be generally upheld and enforced." *Id.* at 158 S.C. 411, 155 S.E. at 735. This is especially so for non-compete agreements arising out of contracts ancillary to the sale of a business, as in this case. *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").[1]

Ample evidence supports the trial court's findings that the Covenant restricting Respondents' ability to perform mortuary transport services is enforceable and does not violate South Carolina public policy. The trial court took into consideration the state's strong public policy of enforcing contract terms negotiated by sophisticated parties bargaining at arms' length. The Court of Appeals erred in failing to consider this policy consideration and erred in reaching the conclusion that the trial court's order was controlled by an error of law. It should be reversed.

II. THE COURT OF APPEALS FAILED TO APPLY THE FACTORS SET FORTH IN *REEVES V. SARGEANT.*

As has been clearly articulated by this Court, a sale of business non-compete agreement will be enforced if "(1) supported by a valuable consideration, (2) if reasonably limited as to time, and (3) if reasonably restricted as to the place of territory,

[1] 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)).

that is, where the time is not more extended or the territory more enlarged than essential for a reasonable protection of the rights of the purchasing party." *Somerset*, 233 S.C. at 330, 104 S.E.2d at 347. "The reason why such covenants are held to be unenforceable is that unless they meet certain criteria, they constitute a restraint upon trade which is against public policy." *Id.* at 330, 104 S.E.2d at 347.

In *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942), this Court required lower courts to consider multiple factors in evaluating the reasonableness of a sale of business non-compete agreement "in partial restraint of trade," 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. *Id.* at 501, 21 S.E.2d at 188. As pronounced in *Reeves*, each case is necessarily decided on its own facts and circumstances. *Id.* The Court of Appeals erred in failing to apply and consider the *Reeves* factors to the facts of this case.

The Court of Appeals' analysis completely ignored the benefits Respondents obtained through the Agreement, including the ability to retain their body bag business and obligating Petitioner, through the Exclusivity Provision, to buy body bags for the ten-year term of the Covenant. The Court of Appeals erred by narrowly focusing only on the existing location of the business at the time of contracting, *Palmetto Mortuary*, 416 S.C. at 433-436, 786 S.E.2d at 591-92, an analysis which necessarily ignored the other four factors in the *Reeves* test and the entirety of facts and circumstances of this case. As a result, the Court of Appeals failed to consider those provisions in the Agreement, as well

as other evidence in the record, that show how the Covenant protected the rights of Petitioner in a reasonable way.

As described below, the location of the existing business cannot be dispositive where, as here, the parties negotiated an Agreement requiring the purchaser of the business to financially support the seller's separate business for the entire term of the non-compete agreement. Application of all five *Reeves* factors to the facts of this case compels a finding that the Covenant is reasonable and should have been upheld by the Court of Appeals.

A. *"All Circumstances Which Show the Intention of the Parties and Which Must Have Entered into the Making of the Contract".*

The Agreement involved the sale of a substantial commercial enterprise between sophisticated parties who intended to operate within their chosen spheres of business following closing: Petitioner in the mortuary transport business and Respondents in the body bag manufacturing business. The Agreement was executed after months of Respondents' advertising the sale of their mortuary transport business, soliciting potential business purchasers, and negotiating contractual terms with Petitioner. (Appx. p. 275, lines 9-12; p. 283, lines 2-9; p. 284, lines 17-24; p. 284, lines 3-13.)

At the time the Agreement was negotiated and executed, both sides were represented by counsel, brokers, and accountants. (Appx. p. 254, line 11 – p. 255, line 15; p. 259, line 4 – p. 260, line 14; p. 317, lines 5-9; p. 264, line 20 – p. 368, line 19.) The contractual provisions in the Agreement, including the Covenant and the Exclusivity Provision, placed ongoing obligations on *both* parties and were negotiated specifically to benefit all parties following closing.

The Court of Appeals did not consider these facts in its analysis of the Covenant and therefore failed to consider all circumstances which show the intention of the parties and which must have entered into the making of the Agreement.

B. *"The Whole Subject Matter of the Contract"*

The Covenant's 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. (Appx. p. 386-421; p. 143, lines 8-12). In exchange for the Covenant, Respondents not only received a generous payment of money from Petitioner, but also the right to continue to operate their existing body bag manufacturing business without any limitation whatsoever. (Appx. pp. 386-421.) Therefore, to the extent the Covenant operated as a "partial restraint of trade" (limiting Respondents' ability to provide mortuary services), the Agreement specifically preserved Respondents' right to operate an existing body bag manufacturing business.

Moreover, to ensure Respondents' continued body bag manufacturing business would be successful (thereby ensuring the continued livelihood of the Respondents over and above the $590,000.00 received at closing), the parties negotiated an Exclusivity Provision compelling a ten-year commitment (equal to the term of the Covenant) from Petitioner to purchase body bags from Respondents for use in conjunction with Petitioner's transport business. (Appx. p. 389 at § 3.4.8.). Any "partial restraint of trade" imposed by the Covenant on Respondents was negotiated in exchange for the benefits to Respondents' body bag manufacturing business secured by the Exclusivity Provision. The Court of Appeals did not consider the effect of the Exclusivity Provision in its analysis of the Covenant, specifically the fact that Respondents received the benefits of

the Exclusivity Provision in exchange for undertaking certain obligations pursuant to the Covenant.

Not only did the Exclusivity Provision guarantee sizeable future profits to Respondents and their body bag 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. (Appx. p. 175, lines 10-20; pp. 422-462.) Benefits from the Exclusivity Provision—a contractual term tied specifically to the ten-year term of the Covenant that Respondents bargained for and received in exchange for the Covenant—demonstrate the "rational basis" for the terms of the Covenant.

Reading all provisions of the Agreement together, it is clear the partial restraint of trade embodied in the Covenant was counterbalanced by the encouragement of trade found in provisions allowing Respondents to keep their body bag manufacturing trade and the Exclusivity Provision. The Court of Appeals failed to consider the whole subject matter of the contract, including the carefully negotiated and specifically drafted benefits Respondents received from the Exclusivity Provision, in its analysis of the Covenant.

C. *"Kind and Character of Business," "The Purpose to Be Accomplished by the Restriction," and the "Intention of the Parties"*

The potential for future expansion of Petitioner's business operations and location and the positive financial effect the growth of Petitioner's mortuary transport business would have on Respondents' operation of their body bag manufacturing business further support enforcement of the Covenant. The Court of Appeals unreasonably limited its focus 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" which "only engaged in the mortuary transport business in Richland and Lexington counties." *See Palmetto Mortuary*, 416 S.C. at 435, 786 S.E.2d at 592.

The Court of Appeals refused to give weight to evidence 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.* at 435, 768 S.E.2d at 592. In so ruling, the Court of Appeals added additional factors to this Court's standard for enforcement of non-compete agreements, compelling purchasers of businesses to take active or overt steps toward expansion *prior* to purchase, to justify a territorial non-compete area beyond the existing customer base. There are no South Carolina decisions supporting such a test. And, as described above, the Court refused to consider the reciprocal benefits that Respondents would receive (as a result of the Exclusivity Provision) in the event Petitioner expanded its business.

Moreover, the Court of Appeals failed to acknowledge the evidence 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 [he] did business for." (Appx. p. 319, 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 were significant to its decision to purchase Respondents' business and should have compelled a conclusion that the geographic scope of the Covenant was reasonable.

Respondent Knight stated a clear intention to get out of the mortuary transport business (Appx. p. 323, lines 7-8) in favor of continuing to run his body bag manufacturing 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 (Appx. p. 223, line 12 – p. 224, line 13; p. 224, line 25 – p. 225, line 10), and the benefits that would accrue to Respondents pursuant to the Exclusivity Provision as any such expansion occurred, justified the territorial restriction in this case. Evidence in the record shows Petitioner has 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 at the closing. (Appx. p. 563, line 16 – p. 564, line 10.)

The Court of Appeals' Opinion states: "As 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*, 410 S.C. 435, 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." *Reeves*, 200 S.C. at 494, 21 S.E.2d at 188. The purpose of the restriction, as shown by the plain language of the Agreement, statements of the parties, and actions following closing, was to allow Respondents to get out of the mortuary transport business (in exchange for a large sum of money) but continue their existing body bag manufacturing business (with Petitioner's help).

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. (Appx. p. 368, line 16 – p. 369, line 13; p. 364, lines 9-19.) More particularly, Knight's execution of the Agreement demonstrated he believed he would *benefit* from the provisions therein. *Compare Reeves*, 200 S.C. at 494, 21 S.E.2d at 88 ("He realized a large sum of money, and presumably he considered it to his advantage to make the sale."). The Court of Appeals also attached undue significance to Petitioner's testimony that it "included the 150-mile restriction in the Covenant." *Palmetto Mortuary*, 410 S.C. 435, 786 S.E.2d at 592. Whether or not Petitioner included the particular restriction or not is of no consequence given the arms-length negotiations that resulted in the Agreement.

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 sum ($590,000.00) in order to continue operating their existing body bag manufacturing business. 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 between the Covenant and the Exclusivity Provision could not be clearer and should not have been ignored by the Court of Appeals. Through the Agreement, Petitioner received assurance that Respondents would not compete in the business of mortuary transport services and Respondents, in exchange, received a ten-year guarantee of profit for their body bag

manufacturing enterprise in *any* territory where 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's Opinion should be reversed.

III. THE COURT OF APPEALS FAILED TO DECIDE THE SUBJECT CASE ON ITS OWN FACTS.

Despite its own recognition that each non-compete agreement case must be "decide[d] . . . on its own facts," *Palmetto Mortuary*, 416 S.C. at 434, 786 S.E.2d at 591, the Court of Appeals erred by comparing certain facts (those that putatively matched) with those set forth in *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344, as if using a template. In doing so, the Court of Appeals pre-determined the outcome, resulting in prejudice to Petitioner. As set forth above, application of the *Reeves* factors demonstrates the reasonableness of the restrictions in the Covenant.

Somerset involved a covenant against competition arising out of the sale of a "comparatively small retail store" whose "trade came almost entirely from the area of Greater Columbia." *Somerset* at 330, 104 S.E.2d at 346. As the facts revealed, the seller, Mr. Somerset, had virtually no choice but to sell his jewelry business "[i]n order to raise funds to pay losses sustained in" a separate, unsuccessful restaurant venture, "which was wholly unrelated to the retail silver and jewelry business." *Id.* at 328, 104 S.E.2d at 346.

Although Mr. Somerset's jewelry business grossed nearly $90,000.00 each year, he sold it, including its goodwill, merchandise, fixtures, and all other assets, to his

competitor for merely $30,000.00. *Id.* Accounts receivable were separately sold for a purchase price of $7,500.00. *Id.* at 329, 104 S.E.2d at 346.

The non-compete agreement drafted by the purchaser's legal counsel contained a twenty-year, statewide restriction against Mr. Somerset's engaging in retail sales of jewelry, silverware, or similar items. *Id.* at 328, 104 S.E.2d at 346. At the time of contracting, Mr. Somerset indicated his intention not "to engage in this form of business" in the future, however, he was "employed [by Mr. Reyner] as manager of Reyner's, Inc." for "a few days." *Id.* at 329, 104 S.E.2d at 346. He "was discharged about three months later." *Id.* There was apparently no agreement that guaranteed his employment for any length of time. Ultimately, Mr. Somerset complained to Mr. Reyner "that the [non-compete] agreement [essentially] put him in 'bondage.'" *Id.* at 347, 104 S.E.2d at 346. Mr. Reyner conceded as much at trial. *Id.*

Notably, "[a]t no time was [Mr. Somerset] or The Sterling Shop represented by counsel." *id.* at 329, 104 S.E.2d at 346, although clearly the purchaser was represented by counsel, who drafted all of the contract documents at issue. *Id.* at 328, 104 S.E.2d at 346.

Although *Somerset* is significantly distinguishable on its facts, the Court of Appeals used it as the foundation for its analysis for the facts presented here. By listing the *Somerset* facts and ticking off which of the perceived negative qualities of the Covenant in this case aligned with *Somerset*, the Court failed to decide this case "on its own facts" as required.[2] This Court's *Somerset* decision should not have led the Court of Appeals to a reversal of the trial court's decision. Rather, by applying the *Reeves* factors

[2] Curiously, the Court of Appeals expended a significant amount of effort refusing to apply the "blue pencil" doctrine, rejected by this Court in *Somerset*, to redraw the scope of the restriction. *Palmetto Mortuary*, 416 S.C. at 435, 786 S.E.2d at 592. The Court failed to acknowledge that no party in this case was asking for a redrawing of the contractual restrictions at issue.

as argued above, the Court of Appeals would have found distinguishing characteristics demonstrating the reasonableness of the subject Covenant and supporting of the parties' legitimate business interests, in contrast to what took place in *Somerset*.[3]

In *Somerset*, this Court found unpersuasive the fact that Mr. Somerset had, at the time of contracting, indicated his intent to get out of the retail jewelry business. *Somerset* at 330-331, 104 S.E.2d at 327. Although Petitioner cited similar facts here, with Mr. Knight indicating his intention to leave the mortuary transport business (to focus on his separate, already-existing body bag manufacturing business), the vastly different reasons for leaving the business show that the two cases are wholly distinguishable. As this Court noted in its *Somerset* decision, Mr. Somerset was essentially forced to sell his retail jewelry business because he needed the capital "to pay losses sustained in" a separate, obviously unsuccessful restaurant venture, "which was wholly unrelated to the retail silver and jewelry business." *Id.* at 328, 104 S.E.2d at 346. In this case, Mr. Knight's decision to leave the mortuary transport business was not precipitated by financial distress, but came about as the result of advance planning and an arms-length, negotiated transaction where he protected his current and future business interests. Respondents advertised the sale of their mortuary transport business, negotiated the maintenance of their pre-existing, successful body bag manufacturing business, and negotiated an Exclusivity Provision in the parties' Agreement such that Petitioner would be obligated to financially support Respondents' ongoing business.

In addition to these significant differences between the facts of the subject action and *Somerset*, numerous facts present in this case are missing from *Somerset*, including:

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[3] It is clear that *Somerset* would have resulted in the same outcome had this Court applied the *Reeves* factors in that case.

- evidence of arms-length negotiations by counsel and financial advisors for both sides of the transaction[4];

- Petitioner's expressly-stated intention to expand Respondents' prior mortuary transport business throughout the state[5];

- Respondents' intention to leave the mortuary transport business[6] while continuing to operate an existing body bag manufacturing business;

- Petitioner's obligation to buy body bags from Respondents pursuant to the Exclusivity Provision for the ten-year term of the Covenant,[7] and throughout whatever territory Petitioner provided mortuary transport services during the term; and

- Petitioner's actual expansion of mortuary transport services following execution of the Agreement.[8]

These facts support enforcement of the Covenant in this case.

IV. THE COURT OF APPEALS' SO-CALLED "PUBLIC POLICY" CONSIDERATIONS RESULT IN AN UNJUSTIFIABLE WINDFALL TO RESPONDENTS.

The Court of Appeals applied a rigid "public policy" analysis that wholly failed to consider not only the specific and material aspects of this particular business transaction that benefitted the Respondents, but also the fact that Respondents used the Agreement as a "sword" to compete unfairly with Petitioner. "[T]he use of public policy to void written contracts is dangerous because public policy is often a two-edged sword." *Westvaco*

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[4] (Appx. p. 254, line 11 – p. 255, line 15; p. 259, line 4 – p. 260, line 14; p. 317, lines 5-9; p. 364, line 20 – p. 368, line 19.)

[5] (Appx. p. 223, line 12 – p. 224, line 13; p. 224, line 25 – p. 225, 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.").)

[6] (Appx. p. 323, lines 7-8.)

[7] (Appx. p. 389 at § 3.4.8.)

[8] (Appx. p. 563, line 16 – p. 564, 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.").)

Corp. v. United Paperworkers Intern. Union, AFL-CIO ex rel. Local Union 676, 171 F.3d 971 (4th Cir. 1999).

As the record shows, Respondents not only violated the Exclusivity Provision as a means to compete with Petitioner in clear violation of the Agreement, but they began competing with Petitioner (in violation of the Covenant) in Richland County and for the exact same contract Respondents had sold to Petitioner. *See Reeves*, 200 S.C. at 494, 21 S.E.2d at 88 ("A re-entrance by [seller] would almost certainly deprive the [purchaser] of all benefit from his contract, and the purchase money which he paid to the defendant would go for naught.") Put simply, Respondents received all the benefits from the Agreement (the purchase price and revenues from the Exclusivity Provision), and renounced any obligations it owed under the Agreement. Respondents should not be permitted to receive such a windfall.

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 Agreement's purpose, and other contractual provisions, the Court of Appeals created precedent which conflicts with decisions of this Court and hurts business interests in this state.

CONCLUSION

"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." *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942). Similarly, here, no public policy of the State

supports the Court of Appeals' conclusion that Respondents, a sophisticated business and its owner, could

1. advertise and actively pursue the sale of their mortuary transport business, including three five-year cycle contracts for services (Appx. p. 283, lines 2-9; p. 283, lines 17-24; p. 284, lines 3-13);

2. negotiate a complex asset purchase Agreement (including the Covenant) while represented by an attorney and financial advisors (Appx. p. 254, line 11 – p. 255, line 15; p. 259, line 4 – p. 260, line 14; p. 317, lines 5-9; p. 364, line 20 – p. 368, line 19);

3. bargain for the ability to retain their body bag manufacturing business and continue use of their business' trade name (Appx. pp. 386-421);

4. negotiate a requirement that Petitioner purchase body bags exclusively from Respondents in order to sustain Respondents' ongoing manufacturing business (Appx. p. 389 at § 3.4.8);

5. receive $590,000.00 from the above-referenced transaction (Appx. p. 386-421); and later

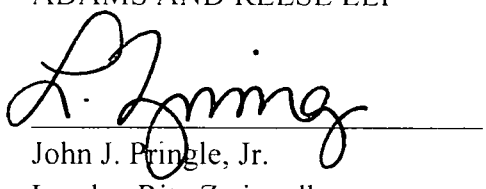
6. bid on (and win) one of the five-year cycle mortuary transport contracts transferred to Petitioner as a part of the Agreement by breaching its agreement to sell body bags to Petitioner (Appx. p. 408 at Exhibit 3.2.6; p. 359, line 22 – p. 360, line 11; p. 181, line 6 – p. 183, line 13; p. 256, lines 14-24; p. 361, line 14 – p. 362, line 25), and

7. actively seek to regain the two other five-year cycle contracts transferred to Petitioner as a part of the Agreement (Appx. p. 370, lines 19-21).

By selectively comparing this case to the facts of one prior case, the Court of Appeals failed to apply the required *Reeves* factors and to consider the subject case on its own facts. The Court of Appeals' decision gives an unreasonable and unjustified windfall to Respondents at Petitioner's expense and should be reversed.

Respectfully submitted,

ADAMS AND REESE LLP



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June 1, 2017.

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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 Brief of Petitioner upon Knight Systems, Inc. and Robert L. Knight, by depositing copies of the documents in the United States Mail, postage prepaid, on June 1, 2017, addressed to its attorney of record, Reginald I. Lloyd, Esquire, The Lloyd Law Firm, LLC, Post Office 1555, Camden, South Carolina 29021.

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