THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-002318

Millennium Health, LLC, ... Appellant,

v.

Kyle B. Crawford and Unidentified John Does, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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Introduction

Kyle Crawford seeks for this court to ignore his unlawful conduct and breach of the terms of his agreement with Millennium Health, LLC ("Millennium"). Rather than denying his unlawful acts, he wants this court to look the other way. Instead, Crawford asks this court to excuse his behavior and uphold the trial court's decision by reading the non-solicitation agreement to be broader than its plain terms and pointing to allegedly fraudulent conduct by Millennium toward third parties in matters wholly unrelated to this case. This court should reject Crawford's arguments and decide this case based on the plain meaning of the non-solicitation agreement and South Carolina precedent.[1]

Argument

I. The non-solicitation agreement protects a legitimate business interest of Millennium, and South Carolina law does not support Crawford's position.

Millennium fully explained in its primary brief the long-standing South Carolina precedent in favor of non-solicitation agreements that protect customer contacts—including potential customers—and confidential information. (App. Br. 12-29). Crawford fails to refute Millennium's argument. Instead, Crawford urges this court to impose limitations on non-solicitation agreements that do not exist under South Carolina law, and he improperly attempts to

[1] Crawford states in his brief that this appeal will persist long after the restrictive period in the non-solicitation agreement has expired. Crawford is incorrect. The non-solicitation agreement provides that the one-year period is tolled during the time that Crawford is in breach of the agreement. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) ("Should Employee breach or violate this paragraph . . . of this Agreement, the one (1) year period of Employee's obligations specified in this paragraph of this Agreement will be extended by the period of time for which Employee was in breach or violation so that [Millennium] is provided with the benefit for the full one (1) year period."). Crawford's attempt to avoid his contractual obligation is not permitted by the express terms of the agreement.

expand the non-solicitation agreement beyond its plain terms in an effort to make it seem too broad. This court should reject Crawford's argument.

A. South Carolina precedent does not limit non-solicitation agreements to existing customers.

Crawford's arguments are based on a misinterpretation of South Carolina precedent. Crawford assumes that because South Carolina courts have enforced restrictions on the solicitation of existing customers, any other restrictions must be invalid. (Resp. Br. 11-12). However, the analysis conducted by our appellate courts in prior cases is deeper than a superficial survey of whether a restriction applies to existing customers. Instead, courts have engaged in a principled analysis of the purpose of the restriction and whether the method of imposing the restriction is reasonable.

The purpose of the non-solicitation agreement between Millennium and Crawford is to protect the contacts Crawford developed using Millennium's resources and the information Millennium made available to Crawford during his employment. Our appellate courts have long recognized the importance to businesses of protecting client contacts and confidential information. *See Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961) (recognizing the "principle of customer-contact protection"); *Caine & Estes Insurance Agency, Inc. v. Watts*, 278 S.C. 207, 209, 293 S.E.2d 859, 860 (1982) (upholding the validity of a non-solicitation agreement based on "the necessity for an employer to protect himself where the nature of the employment brings the employee in personal contact with the customers of the employer"); *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 16, 738 S.E.2d 480, 488 (Ct. App. 2013) (finding an agreement enforceable because the agreement protected a former employer's referral sources and goodwill and the contacts developed by a group of cardiologists during their employment with the former employer); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 241, 717 S.E.2d 103, 104-05 (Ct. App.

2011) (upholding an agreement similar to the one in this case); *see also Vessel Med., Inc. v. Elliott*, No. 6:15-CV-00330-MGL, 2015 WL 5437173, at *5 (D.S.C. Sept. 15, 2015) ("[T]hat the non-solicitation provision also extends to prospective clients of Plaintiffs would not render it void automatically, given that the restrictions are limited in scope and duration."). Thus, a non-solicitation agreement is enforceable if it protects customers, contacts, referral sources, confidential information, or goodwill. This court should apply these well-settled principles and find that the non-solicitation agreement is reasonable and enforceable on its face. *See Milliken & Co. v. Morin*, 399 S.C. 23, 32-33, 731 S.E.2d 288, 293 (2012) (providing non-solicitation agreements that are not restraints of trade are "subject to judicial review for reasonableness").

B. The non-solicitation agreement properly restricts Crawford from soliciting or accepting business from contacts he developed using Millennium's resources.

The non-solicitation agreement protects two categories of customers: (1) Millennium's existing customers, and (2) potential customers contacted by Crawford during the final eighteen months of his employment at Millennium. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91). South Carolina law allows a non-solicitation agreement to cover both categories.

First, Crawford acknowledges that non-solicitation agreements properly apply to existing customers. (Resp. Br. 11); *see also Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 109-10, 420 S.E.2d 217, 222 (Ct. App. 1992). Second, the "potential customers" limitation is narrowly drawn to comply with South Carolina precedent. Regardless of whether a particular customer may be characterized as a potential customer, a former customer, or a former potential customer, the analysis is the same—Crawford developed these contacts, and his relationships with those contacts, during his employment at Millennium by using Millennium's resources and goodwill. Millennium is therefore entitled to protect them from unfair competition. *See Standard Register*, 238 S.C. at 66, 119 S.E.2d at 539; *Watts*, 278 S.C. at 209, 293 S.E.2d at 860; *Baugh*, 402 S.C. at

16, 738 S.E.2d at 488; *Team IA*, 395 S.C. at 241, 717 S.E.2d at 104-05; *Vessel*, 2015 WL 5437173, at *5. Millennium's relationship with those customers is immaterial.

Crawford relies primarily on an unpublished federal district court order to support his argument that Millennium has no legitimate business interest in applying the non-solicitation agreement to potential customers. *See Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261 (D.S.C. Mar. 2, 2009). *Fournil* does not affect the analysis of the non-solicitation agreement in this case. The district court in *Fournil* recognized that "[w]hen insurance agents learn . . . customer information, they acquire it for their employer." *Id.* at *5. If a former employee uses customer information that she would not have learned but for her employment to compete with her former employer, the former employee would be engaging in unfair competition by "siphoning [the employer's] goodwill." *Id.* (alteration in original) ("Were she to use this information to compete with Turbeville, Fournil would be taking information she compiled for Turbeville, information which was not available to the general public, and using it to her advantage and Turbeville's detriment."). Crawford has taken and is continuing to take contacts and information he obtained and developed through Millennium's resources and use them to his advantage and Millennium's detriment. Therefore, he is engaging in unfair competition and violating his agreement.

Crawford's brief attempts to deflect this court's focus away from an analysis of his contacts with potential customers and his use of Millennium's resources to develop those contacts. Crawford argues that a current business relationship "is the first building block of a legitimate business interest" and, because Millennium did not have an existing relationship with some potential customers protected by the non-solicitation agreement, the agreement must be overly broad. (Resp. Br. 13). Crawford cites no authority in support of this assertion because there is no

authority that supports it. South Carolina law focuses on the former employee's contacts with customers and potential customers, not the employer's relationship with them. *See Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983) (finding a restriction reasonable because it was "limited to the territory in which the *employee was able*, during the term of his employment, *to establish contact with his employer's customers*" (emphasis added)). Crawford also misstates the terms of the non-solicitation agreement when he argues the agreement extends to "those businesses or entities that have had at least one contact with Millennium within the last eighteen months." (Resp. Br. 13). The agreement unambiguously states that it applies to "customers or potential customers with whom *Employee* worked or directly contacted during the eighteen (18) months directly preceding Employee's termination." (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) (emphasis added). Crawford's analysis would allow him to develop substantial relationships with potential customers using Millennium's resources and, so long as he left Millennium before they became existing Millennium customers, take those potential customers with him to a new employer. South Carolina law allows Millennium to enforce his agreement not to take those potential customers.

A proper interpretation of South Carolina law and the non-solicitation agreement focuses on the contacts Crawford developed during his employment with Millennium. Crawford asks this court to determine whether the non-solicitation agreement applies to existing customers via a geographic restriction and end its analysis there. South Carolina precedent requires a deeper analysis—one which leads to a conclusion that the non-solicitation agreement is reasonable and enforceable. The purpose of the agreement is to protect Millennium's resources and the contacts and information Crawford developed using Millennium's resources—what the *Fournil* court called "goodwill." *Fournil*, 2009 WL 512261, at *5. This purpose is valid. *See Baugh*, 402 S.C.

at 16, 738 S.E.2d at 488; *Team IA*, 395 S.C. at 241, 717 S.E.2d at 104-05. This court should reject Crawford's attempt to expand the agreement beyond its plain terms. The agreement is not overly broad, and it comports with South Carolina precedent.[2]

II. South Carolina law and the facts of this case support a finding that Millennium will suffer irreparable harm in the absence of a preliminary injunction, and Millennium has no adequate remedy at law.

Crawford argues, in effect, that Millennium must be required to meet a heightened pleading standard to demonstrate irreparable harm. (Resp. Br. 14-15). No such heightened pleading standard exists. Millennium adequately pled facts and offered sufficient evidence—in the form of a verified complaint and supporting affidavits—that support a finding of irreparable harm.[3] *See* (Verified Compl., R. 12-28; Aff. of Natalie Brown ¶¶ 23-41, R. 75-78).

South Carolina courts have recognized "the loss of a business or business goodwill," economic loss that threatens the existence of a plaintiff's business, and "loss that is not easily calculated in pecuniary terms" as examples of irreparable harm. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456 n.2, 626 S.E.2d 34, 37 n.2 (Ct. App. 2005), *holding modified*

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[2] Crawford also implies throughout his brief that because the customers "voluntarily" left Millennium and took their business to his new employer, he has "done nothing wrong." (Resp. Br. 5-6, 17). Whether the customers stopped doing business with Millennium voluntarily is irrelevant. Crawford agreed when he signed the non-solicitation agreement that, for one year after leaving Millennium, he would not "directly or indirectly[] solicit, *accept, or service* the business of any customers or potential customers" with whom he had contact during the final eighteen months of his employment. (Non-Solicitation Agreement ¶ 3(b)(i), R. 91) (emphasis added). Thus, the agreement requires Crawford to separate himself from Millennium's customers for one year upon leaving Millennium so that Millennium has an opportunity to preserve those customers. Crawford has admitted accepting the business of several Millennium customers before the one-year non-solicitation period expired. (Aff. of Kyle Crawford ¶ 10, R. 102). Therefore, he has admitted breaching the non-solicitation agreement.

[3] Crawford quotes Rule 65(b), SCRCP, in his argument regarding the required showing for a preliminary injunction. (Resp. Br. 14). Rule 65(b) addresses the requirements for granting a temporary injunction without notice to the opposing party and, therefore, is inapplicable to this case. Nevertheless, Millennium adequately supported its motion with specific facts.

by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010); *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465 n.3, 626 S.E.2d 38, 42 n.3 (Ct. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). Millennium has offered substantial evidence of its loss of business and customers, and Crawford admitted taking Millennium's customers and continues to accept the business of Millennium's customers. (Aff. of Natalie Brown ¶¶ 27-37, 41, R. 76-78; Aff. of Kyle Crawford ¶ 10, R. 102). Natalie Brown—a Millennium territory manager—stated in her sworn affidavits that at least three customers have left Millennium and taken their business to Crawford's new employer, and Millennium is in immediate jeopardy of losing all other customers serviced by Crawford during his final eighteen months as a Millennium employee. (Aff. of Natalie Brown ¶¶ 27-40, R. 76-78; Second Aff. of Natalie Brown ¶ 16, R. 84). Therefore, Millennium has established that it will suffer irreparable harm if Crawford is not enjoined from breaching the non-solicitation agreement.

Crawford also argues Millennium has not been irreparably harmed by a loss of goodwill because Millennium had no goodwill to lose. (Resp. Br. 15). Crawford's fraud allegations against Millennium are fully discussed in part III, below. For purposes of irreparable harm, there is no evidence that Millennium lost any goodwill in Crawford's territory due to allegations that it engaged in fraudulent activity. To the contrary, Millennium offered evidence that the fraud allegations did not have a negative impact on its goodwill, and Crawford has presented no evidence of loss of goodwill other than the mere allegation that Millennium is guilty of fraud. (Second Aff. of Natalie Brown ¶¶ 10-14, 17, R. 82-85).

Further, the harm suffered by Millennium is incalculable and cannot be completely remedied by money damages. Crawford's statement that "Millennium's only alleged damages are

pecuniary" is inaccurate. (Resp. Br. 16). Rather, in its verified complaint, Millennium specifically alleged the ongoing loss of business to a competitor and loss of goodwill as the harm caused by Crawford's breach. (Verified Compl. ¶ 65, R. 24). Crawford's actions rob Millennium of continuing opportunities with its existing customers and opportunities for growth. For example, if Millennium loses too many customers within Crawford's sales territory, it will lose the opportunity to grow within that territory. The consequences of Crawford's breach cannot be easily quantified. Therefore, damages cannot be accurately calculated and will not completely compensate Millennium for this ongoing irreparable harm, and Millennium is entitled to an injunction. *See Z-Man Fishing Prod., Inc. v. Renosky*, 790 F. Supp. 2d 418, 422 (D.S.C. 2011) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." (alteration in original)).

Finally, Crawford fails to address his prior agreement that "monetary damages at law will be an insufficient remedy in view of the irreparable harm which will be suffered by [Millennium] if [Crawford] should breach" the agreement. (Non-Solicitation Agreement ¶ 6, R. 93). Crawford is bound by that agreement and cannot argue now that money damages are a sufficient remedy. *See Hagemeyer N. Am. Inc. v. Thompson*, No. C/A 2:05-3425, 2006 WL 516733, at *5 (D.S.C. Mar. 1, 2006).

Millennium has satisfied its burden to show that it will be irreparably harmed in the absence of a preliminary injunction and that it has no adequate remedy at law.

III. Crawford's fraud allegations are irrelevant to the issue of whether he should be enjoined from continuing to breach the non-solicitation agreement.

Crawford spends a significant portion of his brief emphasizing prior allegations that Millennium engaged in fraudulent activity unrelated to this case.[4] (Resp. Br. 4-5, 13-14, 15, 16-18). Millennium denies the allegations, and the court should reject Crawford's attempt to tarnish the court's view of Millennium. Moreover, the allegations are irrelevant and—contrary to Crawford's assertions—there is no evidence that the allegations cost Millennium any goodwill with regard to Crawford's sales territory. There is also no precedent requiring the invalidation of a non-solicitation agreement simply because a company settles claims with the government. By Crawford's logic, Millennium's settlement with the government bars it from seeking equitable relief in any court.

Even assuming—for the sake of argument—Millennium defrauded physicians through an illegal kickback scheme, that fraud would not be a basis to deny Millennium's request for an injunction. The doctrine of unclean hands, as Crawford explains in his brief, precludes a party from recovering in equity if it "acted unfairly *in a matter that is the subject of the litigation to the prejudice of the defendant*." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000) (emphasis added). Crawford alleges Millennium is seeking an injunction "to protect

[4] Millennium was accused of billing federal health care programs for medically unnecessary testing and providing free items to physicians in exchange for their laboratory testing business. (Second Aff. of Natalie Brown ¶ 6, R. 82). Millennium has always contested liability for the allegations, and it entered into a voluntary settlement agreement with the Department of Justice that was silent as to liability. (Second Aff. of Natalie Brown ¶ 6, R. 82). In a press release, the Department of Justice acknowledged that "[t]he claims resolved by the settlement are allegations only, and there has been no determination of liability." Press Release, U.S. Dep't of Justice, Millennium Health Agrees to Pay $256 Million to Resolve Allegations of Unnecessary Drug and Genetic Testing and Illegal Remuneration to Physicians (Oct. 19, 2015), *available at* https://www.justice.gov/opa/pr/millennium-health-agrees-pay-256-million-resolve-allegations-unnecessary-drug-and-genetic.

business it obtained and bilked unlawfully." (Resp. Br. 17). Millennium was not accused of "bilking" any customers. Moreover, even if the allegations against Millennium were true, it would not bar Millennium's request to enjoin Crawford from breaching the non-solicitation agreement and stealing those customers. Millennium's alleged fraud is not the subject of this litigation, Crawford suffered no prejudice from the alleged fraud, and Millennium has not acted unfairly toward Crawford. None of Millennium's allegedly fraudulent conduct was directed toward Crawford. Therefore, Crawford cannot satisfy a single element of the affirmative defense of unclean hands. *See Ingram*, 340 S.C. at 107, 531 S.E.2d at 292 (finding a party had unclean hands because it misled the opposing party and acted with an ulterior motive in exercising an option pursuant to a contract); *Williams v. Riedman*, 339 S.C. 251, 278, 529 S.E.2d 28, 42 (Ct. App. 2000) ("[A] restrictive clause in an employment or business sale contract preventing future competition by the employee . . . may not be enforced by the employer or a purchaser *where there has been a breach by the latter of his own obligations under the contract*." (emphasis added)); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 978 (D.S.C. 1976) (noting cases addressing the unclean hands defense "require that the inequitable conduct by the plaintiff of which defendant complains must have occurred in connection with the transaction at issue"). Millennium's hands are clean in its dealings with Crawford.

Further, there is no evidence that the allegations cost Millennium any business or goodwill within Crawford's territory. Natalie Brown stated in an affidavit that she personally witnessed Millennium's competitors employing tactics designed "to use the litigation [regarding the fraud allegations] to their advantage and persuade Millennium customers to cease doing business with Millennium." (Second Aff. of Natalie Brown ¶ 8, R. 82). However, none of those customers were successfully persuaded to cease or reduce their business with Millennium. (Second Aff. of Natalie

Brown ¶¶ 10-14, 17, R. 82-85). Therefore, the fraud allegations have not affected Millennium's goodwill in Crawford's territory.

Crawford's fraud allegations are irrelevant, and this court should not allow Crawford to inject irrelevant matters into this appeal for the purpose of coloring the court's opinion of Millennium.

Conclusion

This court should reverse the circuit court's decision and find that Millennium is entitled to a preliminary injunction.

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The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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