THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2017-001391

JOSHUA FAY, ...Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC,.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF CASE

Contrary to the statement of Petitioner, the decision of the Court of Appeals is not in conflict with any of this Court's prior decisions and certiorari is not appropriate with regard to the facts and issues in this case.

Respondent Fay began working for Petitioner Total Quality Logistics, LLC ("TQL") in December, 2012, as an assistant to a freight broker. He signed an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement ("Agreement"). On June 17, 2013, TQL terminated Fay. The Brandt Companies ("Brandt"), a customer and not a competitor of TQL, hired Plaintiff, through his solely owned business, JF Progressions, LLC, to work as Brandt's exclusive shipping agent. On or about August 27, 2013, TQL notified Fay that it intended to pursue legal action against him for violating the Agreement if he did not immediately cease working as a freight broker. ROA, pp. 181-184.

The Agreement set forth a number of Whereas clauses, which defined certain terms, including: "Business," which is "motor transport and related services, including third-party logistic services, motor freight brokerage services and supply-chain management services"; "Industry," which is "organizations providing services competitive to the Business"; and "Confidential Information," which "include[s] but [is] not limited to, its operating policies and procedures; computer databases; computer software; methods of computer software development and utilization; computer source codes; financial records, including but not limited to, credit history and information about Customers, potential Customers, Motor Carriers, and suppliers; information about transactions, pricing, the manner and mode of doing business, and the terms of business dealings and relationships with Customers and Motor Carriers, and financial and operating controls and procedures; contracts and agreements of all kinds, including those with

Customer, Motor Carriers, and vendors; pricing, marketing and sales lists and strategies; Customer lists and Motor Carrier lists including contact names, addresses, telephone numbers, and other information about them; trade secrets; correspondence; accounts; business policies; purchasing information; functions and records; logistics management; and data, processes, and procedures ...[;] any information described above which TQL obtains from another company and which TQL treats as proprietary or designates as Confidential Information, whether or not owned or developed by TQL. [Confidential Information] may be in tangible written form, computer databases, or it may be represented and communicated solely by oral expressions or business activities which are not reduced to written form." These and other "Recitals" were incorporated by reference in Paragraph 1 of the Agreement. ROA, pp. 23-29.

Paragraph 4 provides in pertinent part that "Employee shall not at any time during the course of his or her employment by TQL, and at all times thereafter, use for any purpose ... any Confidential Information" and that "all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information..." ROA, p. 25.

Paragraph 6 provides in pertinent part that "Employee's engaging in an employment relationship with a Competing Business ... in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee ... using TQL's Confidential Information to unfairly compete with TQL." ROA, p. 25.

Paragraph 11 provides that the Agreement shall be interpreted and enforced under the laws of the State of Ohio. ROA, p. 28.

Paragraph 12 provides that, if any provision(s) of the Agreement are declared to be illegal or invalid, the validity of the remaining parts shall not be affected and shall remain in full force and effect and that "there shall be added automatically as a part of this Agreement provisions as similar in terms to such illegal, invalid or unenforceable provision as may be possible and still be legal, valid and enforceable." ROA, p. 28.

Fay initiated this action asking that the Court declare the Agreement purporting to prohibit him from ever working in the motor carrier industry again to be invalid and unenforceable. TQL then brought an action in Ohio against the Brandt Companies, which ceased doing business with Fay. Fay then amended his Complaint to seek damages from TQL for intentional interference with his contractual relationship with Brandt. Both parties moved for summary judgment as to the validity and enforceability of the Agreement, and TQL also moved for summary judgment that Fay had breached the Agreement. Judge Roger Young found that Ohio law applied and that the Agreement was valid and enforceable under Ohio law but did not find that Fay had breached the Agreement.

On appeal, the Court of Appeals held that the Agreement was not valid or enforceable, because the confidentiality and nondisclosure provisions of the Agreement "operated as noncompete provisions and did not contain a reasonable time restriction, which violated the public policy of South Carolina." The Court relied on South Carolina precedent in making its decision and further determined that, under this precedent, it did not have to look to Ohio law when the agreement violated the public policy of South Carolina. However, Judge Geathers issued a concurring opinion, in which he looked to the law of Ohio and determined that, under that law, the Agreement was not valid or enforceable.

TQL asked the Court of Appeals to reconsider, and the Court denied that request. TQL has now petitioned this Court for certiorari

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN FAILING TO CONSTRUE THE AGREEMENT UNDER OHIO LAW BECAUSE THE AGREEMENT WAS PERFORMED IN SOUTH CAROLINA, IS INVALID UNDER SOUTH CAROLINA LAW, AND IS CONTRARY TO THE PUBLIC POLICY OF SOUTH CAROLINA.

Regardless of any choice of law provision, if a contract that is to be performed in South Carolina is invalid under South Carolina law and contrary to the public policy of South Carolina, it cannot be enforced in South Carolina. See Standard Register Co. v. Kerrigan, 238 S.C. 54, 70, 119 S.E.2d 533, 541–42 (1961) ("The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but if it is invalid under the law of the State where it is to be performed and contrary to our public policy, we will not enforce it.") (quoting Wiggins v. Postal Telegraph Co., 130 S.C. 292, 125 S.E. 568, 569 (S.C. 1924) ("We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void.")).

Here, the Court of Appeals correctly determined that the absence of any temporal limitations on the restrictive covenants rendered the Agreement, which was performed in this state, invalid and unenforceable under the law of South Carolina. As such, assessment of the Agreement under the law of Ohio was not required.

II. THE COURT OF APPEALS' FAILURE TO SPECIFICALLY APPLY OHIO LAW IN ITS ASSESSMENT OF THE ENFORCEABILITY OF THE AGREEMENT IS IMMATERIAL BECAUSE SUCH AN ASSESSMENT WOULD YIELD THE SAME CONCLUSION: THE AGREEMENT IS UNENFORCEABLE IN SOUTH CAROLINA.

Terms in a non-compete agreement may be construed according to the law of another state. Standard, 238 S.C. at 70-71, 119 S.E.2d at 541-42. But if the resulting agreement is invalid

as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement. Id. Here, there is no scenario in which application of Ohio law would result in an enforceable agreement. On one hand, the law of Ohio dictates that the restrictive covenants at issue here, due to the lack of temporal limitations, are invalid. While Ohio law permits the reformation of such covenants in some situations, it is unlikely that an Ohio court would exercise its discretion to make such a reformation in this situation because it would require the court to entirely rewrite the Agreement. On the other hand, if the Agreement was reformed under Ohio law, the resulting agreement would be unenforceable in South Carolina as a matter of public policy because it would require binding the parties to a term that was not negotiated nor intended. The Court of Appeals correctly explained the futility of an analysis under Ohio law and committed no error in declining to conduct such an analysis.

A. APPLICATION OF OHIO LAW RESULTS IN A DETERMINATION THAT THE AGREEMENT IS UNENFORCEABLE AND NOT CAPABLE OF BEING REFORMED.

The restrictive covenants at issue here have no temporal limitations. On its face, the Agreement is unenforceable under Ohio law. For a covenant not to compete to be enforceable in Ohio, its restrictions must be no greater than that which is required to protect the employer, it must not impose an undue hardship on the employee, and it cannot be injurious to the public. Prof'l Investigations & Consulting Agency, Inc. v. Kingsland, 591 N.E.2d 1265, 1269 (Ohio Ct. App. 1990); Rogers v. Runfola & Assoc., Inc., 565 N.E.2d 540, 543 (Ohio 1991) (an agreement not to compete is enforceable only to the extent it (1) is necessary to protect the company's legitimate interest; (2) does not impose undue hardship on the employee; and (3) is not adverse to public interest).

In Kingsland, the court found that the lack of temporal or geographical limitations on the restrictive covenants at issue rendered them unduly restrictive and unenforceable. Id. at 1269 ("This lack of temporal limitation gives the covenant a greater restraint than necessary to protect PICA and imposes an undue hardship on Kingsland. Furthermore, the non-competition clause has no geographic restrictions, making it unduly restrictive.").

As noted by Judge Geathers in his concurring opinion in this matter, the prohibition in the Agreement on Fay working in a similar position to the one he held at TQL without a time limitation would not pass Ohio's "reasonableness" test because it is more restrictive than necessary to protect TQL and imposes an undue hardship on Fay. See Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App. 1987) (We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere in the world and at any time in the future, was reasonably necessary to protect the covenantee's legitimate business interests, and no such showing has been made."); Segal v. Fleischer, 113 N.E.2d 608, 611 (Ohio Ct. App. 1952) (a covenant without geographic limitation fails to meet the requirement of being reasonably limited); MP TotalCare Servs., Inc. v. Mattimoe, 648 F. Supp. 2d 956, 964 (N.D. Ohio 2009) (finding a geographic limitation of the entire United State to be unreasonably broad and unreasonable); Emler v. Ferne, 155 N.E. 496 (Ohio Ct. App. 1926) (invalidating a restrictive covenant because it had no geographic limit).

Additionally, due to the total lack of any temporal limitation in the Agreement's restrictive covenants, it is not subject to modification under Ohio law. Unlike in South Carolina, Ohio courts have the discretion to modify or amend employment agreements to render restrictive covenants reasonable. Raimonde v. Van Vlerah, 325 N.E.2d 544 (Ohio 1975). However, that

discretion is not unlimited. Rather, any such modifications must be done in accordance with the intentions of the parties at the time of contracting. Id. As explained by the court in Kingsland, a court has no obligation to modify restrictions where to do so would require it to "totally rewrite a provision in order to carry out its discretionary powers. 591 N.E.2d 1269-1270. The Kingsland court determined that amending the restrictive covenants at issue there to add temporal and geographic limitations, where before there were none, would amount to the court rewriting the entire agreement. Id.; see also LCP Holding Co. v. Taylor, 817 N.E.2d 439, 447 (Ohio Ct. App. 2004) (finding no abuse in discretion if lower court's refusal to modify restrictive covenants where the "modifications requested by appellant would entail substantial changes to the agreement.").

Here, modifying the restrictive covenants at issue to comport with Ohio's reasonableness standards would require, at a minimum, the insertion of temporal limitations where there currently are none. Not only would this amount to a substantial change to the Agreement neither negotiated by, nor in accordance with the intentions of, the parties at contracting, it would require the court to rewrite the Agreement. As such, modification pursuant to Ohio law would be inappropriate, even if the Court of Appeals had evaluated the Agreement under Ohio law.

B. EVEN IF THE AGREEMENT WAS CAPABLE OF BEING REFORMED SUCH THAT IT WOULD BE VALID UNDER OHIO LAW, IT WOULD NONETHELESS BE UNENFORCEABLE IN SOUTH CAROLINA AS AGAINST PUBLIC POLICY.

Even if the Agreement at issue was modified under Ohio law by the addition of temporal limitations that would satisfy Ohio's reasonableness standard, the resulting agreement would be invalid as against the public policy of South Carolina and therefore unenforceable. See Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 159, 621 S.E.2d 352, 353 (2005) ("Terms in a non-compete agreement may be construed according to the law of another state. But

if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement.") (citations omitted). This is because any such modification would necessarily result in the addition of terms which were not agreed to by the parties. Id. at 161, 621 S.E.2d at 354 (concluding that even if an agreement could be reformed to insert a geographical limitation under the law of another state, the resulting agreement would be unenforceable in South Carolina "because the very act of adding a term not negotiated and agreed upon by the parties violates public policy."); Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 587–88, 694 S.E.2d 15, 17 (2010) ("this Court has held that it would violate public policy to allow a court to insert a geographical limitation where none existed").

The Court of Appeals correctly determined that the result it reached, i.e., that the Agreement is unenforceable, would be the same whether or not it specifically analyzed the Agreement under Ohio law and it committed no error in finding such analysis unnecessary.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CONFIDENTIALITY PROVISIONS OF THE AGREEMENT AMOUNTS TO A NON-COMPETE THAT HAS NO TIME RESTRICTIONS AND IS, THEREFORE, INVALID.

Petitioner's argument that, following the enactment of S.C. Code Ann. § 39-8-30 in 1997, confidentiality agreements are not required to be limited by time or geography ignores the finding of the Court of Appeals that, not only did the Agreement at issue prohibit the use of confidential information by Fay, it prohibited him from ever being employed in the freight brokerage business in the future. Petitioner's argument is based on a self-serving affidavit from a TQL employee that there were certain jobs in the freight brokerage business that Fay could perform. However, the Agreement controls, and the Agreement, in Paragraph 4, clearly states that "all information disclosed to Employee or to which Employee has access during the period

of his or her employment shall be presumed to be Confidential Information." ROA, p. 25. In addition, Paragraph 6 provides that "Employee's engaging in an employment relationship with a Competing Business ... in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee ... using TQL's Confidential Information to unfairly compete with TQL." ROA, p. 25.

Because the definition of Confidential Information in the Agreement includes everything that Fay learned or could have learned about the motor carrier industry and Paragraph 4 prohibits Fay from ever using this "Confidential Information," the Agreement effectively barred Fay from ever doing work in the motor carrier industry. The Court of Appeals correctly determined that the confidentiality provisions "were so broad they effectively became a non-compete provision and required a reasonable time restriction" and "paragraphs 4 and 6 conspired to restrict Fay's employment activities after leaving TQL, rather than merely prohibiting Fay from revealing TQL's trade secrets or Confidential Information." See Milliken & Co. v. Morin, 399 S.C. 23, 33 n.4, 731 S.E.2d 288, 293 n.4 (2012) (if a confidentiality provision is so broad as to effectively become a non-compete agreement, then it is subject to the same judicial scrutiny as a non-compete agreement).

As the Court of Appeals found, if the confidentiality provisions related only to protecting confidential information, there would be no requirement for a time restriction, but, because they restricted Fay's right to future employment, they effectively became a non-compete restriction requiring a reasonable time restriction.

CONCLUSION

The Court of Appeals correctly determined that the Agreement is unenforceable. This

Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 19, 2017

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PROOF OF SERVICE

I certify that I have served the **Return to Petition for Writ of Certiorari** by depositing a copy of it in the United States Mail, postage prepaid on July 19, 2017 addressed to attorney of record as follows:

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