

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

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Appellate Case No. 2017-001391

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**RECEIVED**

JUL 28 2017

**S.C. SUPREME COURT**

Joshua Fay,.....Respondent,

v.

Total Quality Logistics, LLC, ..... Petitioner,

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REPLY TO RESPONDENT'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI

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Robert D. Moseley, Jr. (SC Bar #05526)  
Emily I. Bridges (SC Bar #102199)  
SMITH MOORE LEATHERWOOD LLP  
2 West Washington Street, Suite 1100 (29601)  
P.O. Box 87  
Greenville, SC 29602  
(864) 751-7600; (864) 751-7800 (Fax)  
rob.moseley@smithmoorelaw.com  
emily.bridges@smithmoorelaw.com  
Attorneys for Petitioner

Other Counsel of Record:

Alice F. Paylor  
Rene S. Dukes  
ROSEN ROSEN & HAGOOD, LLC  
151 Meeting Street, Suite 400  
Charleston, SC 29401  
(843) 577-6726  
Attorneys for Respondent

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## ARGUMENT

Respondent spends his entire brief arguing the merits of the case and provides the Court not one bit of information about the factors to be considered under S.C. R. App. P. 242. Accordingly, the Argument in TQL's petition and this reply stand unopposed.

### 1. THE PROPER SCOPE OF A SEPARATE CONFIDENTIALITY PROVISION WITHOUT A GEOGRAPHIC OR TIME LIMITATION IS A MATTER OF FIRST IMPRESSION.

This Court may grant a petition for certiorari when there are novel questions of law. S.C. R. App. P. 242(b)(1). The question regarding the proper scope of a confidentiality provision which does not include a temporal or geographic limit is a matter of first impression. See Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288 (2012) (noting that the confidentiality provision at issue includes a temporal limitation). Further, the scope of S.C. Code Ann. § 39-8-30(D) has not been articulated by the Court. The addition of subsection (D) to this provision of the South Carolina Code was intended to permit employers and business entities to protect their proprietary information following the termination of an employee. Since subsection (D) became effective in 1997, there has not been a definitive statement from the Court regarding the scope of a distinct confidentiality provision without a time or geography limitation. While this Court and the Court of Appeals have set forth guidelines regarding *non-compete* provisions, there has been no such direction regarding separate *confidentiality* provisions.<sup>1</sup>

No South Carolina court has ruled that a distinct confidentiality provision must be judged by the same standards as a non-compete clause. While this Court in dicta has stated such circumstances may arise, no specific factors have been set forth. See Morin, 399 S.C. at 33 n.4,

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<sup>1</sup> Respondent attempts to blur various sections of the Agreement, specifically the separate non-compete provision and confidentiality provision. The distinct non-compete provision does include a time limitation of one year in accordance with the law governing non-competes. It is the proper scope of the confidentiality provision that is at issue, not the separate non-compete, and Respondent's attempt to blur these provisions is inappropriate.

731 S.E.2d at 293 n.4. Moreover, similar provisions to those in the agreement have already been found to be valid under Ohio law, the choice of law to which the parties agreed and which the majority of the Court of Appeals failed to consider. See, e.g., Jeffrey A. Dangelo v. Total Quality Logistics, Case No. 1:09cv512 (S.D. Ohio 2009); Total Quality Logistics, LLC v. Michael Siano, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio Jan. 4, 2011).

2. THE DECISION BY THE COURT OF APPEALS IS IN CONFLICT WITH THE EXISTING DECISIONS OF THIS COURT.

Additionally, the Court may grant a petition for certiorari where the decision of the Court of Appeals is in conflict with prior decisions of this Court. S.C. R. App. P. 242(b)(3). While there are no prior decisions in which a South Carolina court has converted a separate confidentiality provision to a non-compete provision, the Court of Appeals decision is in conflict with the existing law regarding confidentiality provisions. The South Carolina General Assembly has made clear its intention that confidentiality provisions are not required to include either a geographic or temporal limitation, which signifies a desire for such provisions to not be considered under the same standards as non-compete agreements. This Court has acknowledged this legislative intent. See Morin, 399 S.C. at 37, 731 S.E.2d at 295.

Here, the decision by the Court of Appeals is in clear contradiction of the statutory law and this Court's prior decisions. The Court of Appeals erroneously read the language of the contractual provision to be so broad as to encompass all forms of employment in the motor carrier industry. However, the plain language of the confidentiality provision focuses on the confidential information Fay learned while an employee, a proper provision under the public policy of South Carolina. See S.C. Code Ann. § 39-8-20(5) (discussing the definition of a trade secret). This decision by the Court of Appeals contradicts the statutory law regarding the construction of confidentiality provisions.

3. THE ERRONEOUS DECISION OF THE COURT OF APPEALS WILL IMPACT THE PUBLIC.

The erroneous decision by the Court of Appeals has created intense public interest and impacted the public. In the five months since the decision was published, there have been numerous internet articles and questions by the South Carolina legal and business community. A simple Google search for “SC Court of Appeals Fay v. TQL” brings up over four thousand results, many of which are articles and blog posts commenting on the decision by the Court of Appeals. Businesses who likely believed their confidentiality provisions were valid without a time or geographic limit now may be questioning whether these critical agreements will still be enforced by South Carolina courts. For example, the confidentiality of trade secret and other proprietary information is likely no longer capable of protection in perpetuity under the interpretation of the statute set forth by the Court of Appeals. Should this interpretation be permitted to stand, these confidentiality provisions are liable to be challenged by disgruntled former employees who wish to work for competitors or harm their former employers’ businesses.

The proper scope of a separate and distinct confidentiality provision is a critical question with an enormous impact on the public. Given that the issues arising from the instant case involve novel questions of law, a Court of Appeals decision in conflict with existing law, and a large impact on the public, Respondent would request the Court grant its petition for a writ of certiorari.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully Submitted,



Robert D. Moseley, Jr. (SC Bar #05526)  
Emily I. Bridges (SC Bar #102199)  
SMITH MOORE LEATHERWOOD, LLP  
2 West Washington Street, Suite 1100 (29601)  
Greenville, SC 29602  
(864) 751-7600; (864) 751-7800 (Fax)  
rob.moseley@smithmoorelaw.com  
emily.bridges@smithmoorelaw.com  
Attorneys for Petitioner

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JOSHUA FAY.....Respondent,

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

**PROOF OF SERVICE**

The undersigned of the law offices of Smith Moore Leatherwood LLP, attorneys for Appellant, does hereby certify that service of the Reply to Respondent’s Return to Petition for Writ of Certiorari was made on counsel for Respondent, specified below, by sending a copy via US Postal Service, Priority Mail Express, on **July 27, 2017**, to the following address:

Alice F. Paylor, Esq.  
Rene S. Dukes, Esq.  
ROSEN ROSEN & HAGOOD, LLC  
151 Meeting St #400  
Charleston, SC 29401  
*Counsel for Respondent Joshua Fay*

Date: July 27, 2017

Emily I. Bridges

Robert D. Moseley, Jr. (SC ID: 05526)

Emily I. Bridges (SC ID: 102199)

SMITH MOORE LEATHERWOOD LLP

2 West Washington Street, Suite 1100 (29601)

P.O. Box 87

Greenville, South Carolina 29602

Telephone: (864) 751-7600

Facsimile: (864) 751-7800

rob.moseley@smithmoorelaw.com

emily.bridges@smithmoorelaw.com

*Counsel for Petitioner Total Quality Logistics, LLC*