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THE STATE OF SOUTH CAROLINA
In the Supreme Court

AUG 03 2017

S.C. 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.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents continue to repeat various arguments about “public policy,” but never once have addressed the windfall such a “public policy” would create for them.

There is simply no public policy in the State of South Carolina that allows Respondents to:

1. advertise and actively pursue the sale of their mortuary transport business, including the Richland County contract for body transport 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 Petitioner at the closing table (Appx. p. 386-421), and more than \$45,000 from Petitioner after closing pursuant to the Exclusivity Provision (Appx. p. 175, lines 10-20; p. 422-462);
6. surreptitiously tape a conversation with Mr. Lintal of Petitioner on the day before the bid for the Richland County contract for mortuary transport services was due (Appx. p. 178);
7. confront Mr. Lintal for the first time about alleged breaches of the Exclusivity Provision in that conversation (Appendix p. 179), despite knowing about those alleged breaches for several years before the conversation took place (Appendix p. 358);
8. bid on (and win) the Richland County body transport contract, (one of the mortuary transport contracts transferred to Petitioner as a part of the Agreement), in violation not only of the Covenant, but also the Exclusivity Provision by refusing 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

9. actively see two regain the other contracts transferred to Petitioner as part of the Agreement (Appx. p. 370, lines 19-21).

Frankly, the only argument that Respondents have not made before in this case is that Mr. Lintal “lied.” (Respondent’s Brief, p. 3). Respondents are seemingly unaware of the irony in making such accusations that putatively took place in conversation *taped by Respondent Knight without Mr. Lintal’s knowledge.*

ARGUMENTS

I. THE “LEGITIMATE INTERESTS” AND “RIGHTS” OF PETITIONER WERE NOT LIMITED TO ITS CUSTOMER BASE OR LOCATION, AND ITS LEGITIMATE INTERESTS AND RIGHTS NEGOTIATED AS PART OF THE AGREEMENT DEMONSTRATE THE RATIONAL BASIS FOR THE COVENANT’S RESTRICTIONS

This case hinges on whether, with respect to the Covenant at issue “the time is not more extended or the territory more enlarged than essential *for the reasonable protection of the rights of the purchasing party.*” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 347 (1958) (“*Somerset*”) (emphasis added). As Petitioner has argued time and time again, the question of what constitutes a “reasonable protection of the rights of” Petitioner requires an application of the five factors set out in *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184 (1942) (“*Reeves*”), of which the location of Petitioner’s business and customers is but one such factor. The proposition that a court must consider the *Reeves* factors and apply them to the facts of this case is only “directly opposed to the Court’s holding in *Somerset*” (Respondents’ Brief at p. 10)¹ insofar as this case has additional (and different) material facts that were not before the Court in *Somerset*. Accordingly, this case requires consideration of all the *Reeves* factors simply because a

¹ *Reeves* also makes clear that each sale of business covenant not to compete case is necessarily decided on its own facts. As such, a holding in one case is often “directly opposed” to the holding in another case simply because each such case is decided on its own facts.

narrow focus on any one factor ignores the unique facts of this case addressed by the other factors.

Respondents (and the Court of Appeals) ignore the *Reeves* factors because addressing these factors would force them to acknowledge all the relevant facts in this case. (Petitioner's Brief pp. 17-23). The "rational basis" for the Covenant's territorial restriction and the "reasonable protection of the rights of" Petitioner is found in the plain language of the Agreement, wherein Petitioner (unlike any case cited by Respondents in support of their position) agreed to 1) exclude the assets of Respondents' separate and existing body bag manufacturing business from the sale (Appx. p. 387); 2) allow Respondent to continue to perform its body bag manufacturing business without restriction (Appx. pp. 375, 387); and 3) to buy body bags from Respondents for the time period of the Covenant (Appx. p. 375).

Moreover, the "rational basis" for the Covenant (both territory and time) has been borne out by sums paid by Petitioner pursuant to the Exclusivity Provision (more than \$45,000) (Appx. p. 175, lines 10-20; p. 422-462), over and above what Petitioner paid Respondents pursuant to the Agreement (\$570,000) (Appx. pp. 386-421; p. 143, lines 8-12). In sum, Petitioner provided a great deal to Respondents in exchange for the restrictions in the Covenant. No case cited by the Respondents has these facts, where Petitioner's "legitimate interests" were negotiated in exchange for corresponding obligations and concessions to Respondents.

As a result, Respondents' extended discussion of *Somerset*, cases addressing covenants not to compete in the employment context, and cases decided outside South Carolina are not applicable to the facts of this case, because none of those cases involved

even a purchaser's obligation to allow a seller to continue a particular line of business, much less a purchaser's obligation to support that business for the term of the covenant not to compete at issue.

II. PETITIONER'S ARGUMENT THAT THE EXCLUSIVITY PROVISION EVIDENCES THE PARTIES' INTENTIONS AND REASONABLY SUPPORTS A 150-MILE TERRITORIAL RESTRICTION IN THE COVENANT IS NOT NEW

Respondents do not address the merits of Petitioner's argument—that the Exclusivity Provision (and all the relevant facts surrounding the Agreement) support the 150-mile territorial restriction in the Covenant. Instead, Respondents claim (again) that Petitioner's argument is new and made for the first time to this Court. (Respondents' Brief p. 15). To the contrary, Petitioner specifically argued to the Court of Appeals:

Knight received a financial benefit of \$590,000.00 as a result of entering into the APA and the Non-Compete Agreement, retained the specific right to continue to conduct his body bag business, and through the Exclusivity Provision required Respondent to purchase certain bags from Knight for the 10-year term of the Non-Compete Agreement.

...

Knight negotiated the Exclusivity Provision requiring Palmetto Mortuary to purchase body bags from Knight for ten years—the duration of the Non-Compete Agreement. (R. p. 375 at § 3.4.8.) (The ongoing business relationship between Palmetto Mortuary and Knight is in sharp contrast to the facts in *Somerset*, 233 S.C. 324, 104 S.E.2d 344, where the plaintiff was discharged as manager of the defendant's business following the sale of plaintiff's business to defendant after merely three months on the job. *Id.* at 329, 104 S.E.2d at 346.) The Exclusivity Provision (R. p. 375 at § 3.4.8) conferred a significant financial benefit upon Knight. Prior to Knight's breach of the Non-Compete Agreement and the Exclusivity Provision, Palmetto Mortuary paid Knight more than \$45,000 for body bags purchased pursuant to the Exclusivity Provision. (R. p. 160, lines 10-20; R. pp. 408-448.) As such, while the APA placed reasonable limitations on Knight's ability to perform mortuary transport services, the same APA allowed and enhanced Knight's ancillary body bag business.

(Appendix at p. 803, p. 808).

III. THE COVENANT DOES NOT UNREASONABLY RESTRAIN COMPETITION FOR PUBLIC CONTRACTS.

Respondents' argument that the Covenant was void against public policy because it unreasonably restrained competition for public contracts (Respondents' Brief at pp. 15-18.) is baseless. Respondents have failed to come forward with any case from South Carolina or any other jurisdiction holding that a *covenant not to compete* was void based on public policy where the effect of such covenant was to restrict bidding on public contracts. Even the cases cited by Respondents do not support their position that the Covenant violates public policy for that reason. More bluntly, *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), a case about whether Greenville County could award contracts outside its competitive sealed bid procedure, has absolutely nothing to do with covenants not to compete and the issues in this case.

Likewise, each additional case cited by Respondents deals with agreements between parties to stifle competition (by other parties) in the public bidding process, and evidence of collusion and fraudulent activity in connection with a specific contract or bidding opportunity. The facts and circumstances of this case demonstrate conclusively that Petitioner and Respondents never colluded or otherwise undertook any act in concert to affect the public procurement process.

IV. PETITIONER'S CONDUCT DID NOT CONSTITUTE A MATERIAL BREACH OF THE PARTIES' AGREEMENT SUCH THAT RESPONDENTS WERE EXCUSED FROM PERFORMANCE OF THEIR CONTRACTUAL OBLIGATIONS.

Respondents attempt to justify their breaches of the parties' Agreement by asserting that they were entitled to rescission of the entire Agreement based on Petitioner's purchases of body bags from manufacturers other than Respondents.

(Respondents' Brief pp. 18-24). The trial court ruled against Respondents on this issue, and Petitioner briefed this issue in full before the Court of Appeals. (Appendix pp. 819-828). Petitioner will not repeat that analysis here. Suffice it is to say that Respondents' contention that "Knight had the right to terminate" the Covenant after Petitioner "breached the Agreement by purchasing bags from sources other than Knight" is simply wrong under South Carolina law.

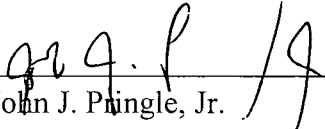
Petitioner's acts of purchasing body bags from other sources (in the amount of \$478.50) did not constitute *material* breaches of the Agreement which would excuse Respondents' performance under the Agreement or otherwise justify Respondents' rescission of the Agreement. Nor did those bag purchases "defeat the purpose of the" Agreement or "the objective of the contracting parties" as argued by Respondents. (Respondents' Brief at p. 20). One of many factors defeating Respondents' argument is the fact that Petitioner purchased more than \$45,000 of body bags from Respondents both before and after Petitioner's purchases from body bags from sources other than Knight Systems. (Appendix pp. 174-175). Another is the windfall Respondents would receive and the forfeiture Petitioner would suffer if Respondents could terminate the Agreement for breaches totaling \$478.50 after receiving more than \$615,000 from Petitioner. And finally, contrary to Respondents' contention (Respondent's Brief pp. 20-21), the Lintals' "comments and actions following the June 16, 2011 conversation with Knight" showed that the Lintals believed Knight considered the Exclusivity Provision material. Of course, the Lintals' suspicions were confirmed the next day when Knight bid on the Richland County RFP in violation of the Covenant.

CONCLUSION

The Court of Appeals' decision gives an unreasonable and unjustified windfall to Respondents at Petitioner's detriment and should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify I served the Reply 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 August 3, 2017, addressed to its attorney of record, James Edward Bradley, Esquire, Moore Taylor Law Firm, P.A., Post Office 5709, West Columbia, South Carolina 29171.


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