THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT
ROGER L. COUCH, CIRCUIT COURT JUDGE

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SC Court of Appeals

Appellate Case No. 2017-001314

Chemgard, Inc.,.....Appellant,

vs.

Darrell Keith Haynes, Chem-Tek, LLC, and Alfred Bell,.....Respondents.

INITIAL BRIEF OF APPELLANT

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2. Did the Circuit Court err in granting summary judgment for Respondents on all of Appellant's claims and holding that "allegations within the complaint and all four causes of action alleged by [Appellant] are predicated on the breach of the non-solicitation provision as stated in Paragraph 9(d) of [Respondent] Haynes Employment Agreement," despite claims made by Appellant regarding Respondent Haynes's breaches of the contract's confidential information provision and the 30-day notice provision?

3. Did the Circuit Court err in granting summary judgment before hearing and ruling on Appellant's Motion to Amend, which alleged newly discovered claims against Respondents Haynes and Bell that were unrelated to the non-solicitation provision of the employment agreement?

STATEMENT OF THE CASE

On June 5, 2015, Appellant Chemgard, Inc. ("Chemgard") filed a verified Summons and Complaint against Respondent Darrell Keith Haynes ("Haynes"). Haynes, a former salesman for Chemgard, had resigned from Chemgard's employ on May 10, 2015 after fifteen years of employment. The heart of Chemgard's original Complaint involved Haynes's breach of his Employment Agreement ("the Agreement"). The Agreement included a non-solicitation provision and a separate provision protecting Chemgard's confidential business information that Haynes had access to during his employment. At the time of filing, Chemgard simultaneously

sought an injunction from the circuit court that would bind Haynes to the terms of his contractual obligations during the ensuing litigation. Chemgard alleged in its Complaint that Haynes was soliciting Chemgard's existing customers and that Haynes was exploiting confidential business information gained during his employment with Chemgard to do so.

On June 25, 2015, Chemgard filed an Amended Complaint, adding Chem-Tek, LLC ("Chem-Tek")—Haynes's new employer—as an additional defendant for tortious interference with a contractual relationship. Chem-Tek is owned by Al Bell, a former employee of Chemgard. On July 6, 2015, Haynes filed a motion to dismiss the Amended Complaint, and Haynes and Chem-Tek filed a memorandum in opposition to Chemgard's motion for a preliminary injunction. Both motions were heard on July 6, 2015 by the Honorable Perry Gravely.

On July 7, 2015, Judge Gravely denied Haynes's motion to dismiss and granted Chemgard's motion for a preliminary injunction, with instructions to Chemgard's counsel to draft an order. On July 17, 2015, Judge Gravely issued a preliminary injunction order against Haynes, which enjoined Haynes from soliciting or calling on any business or entity that was a customer of Chemgard as of May 10, 2015. Haynes and Chem-Tek appealed the court's granting of the preliminary injunction, although they later dismissed the appeal in May 2016.

On September 25, 2015, Chemgard filed a Second Amended Complaint, adding Al Bell as an additional defendant for the tortious interference with contract claim and adding a claim for tortious interference with prospective contractual relations against all defendants.

On April 29, 2016, Haynes, Bell, and Chem-Tek filed a motion to dissolve and vacate the July 2015 preliminary injunction, arguing that the non-solicitation agreement was overbroad and unenforceable. Judge Gravely heard this motion on July 8, 2016 and denied it on August 10, 2016. Haynes, Bell, and Chem-Tek filed a motion to reconsider on August 11, 2016.

On August 12, 2016, Haynes, Bell, and Chem-Tek filed a motion for summary judgment. (Judge Gravely delayed his ruling on their motion to reconsider until the motion for summary judgment was resolved.) On August 23, 2016, Chemgard filed a motion to compel, seeking Defendants' attendance at their depositions after they had refused to appear. On September 22, 2016, Judge Roger Couch held a hearing and heard arguments from all parties on both the motion for summary judgment and the motion to compel. He took the motions under advisement, and he did not ultimately rule until November 8, 2016.

On October 3, 2016, and while Judge Couch was still considering the various motions, Haynes, Bell, and Chem-Tek produced nearly 4,000 never-before-produced emails and documents in response to Chemgard's motion to compel. Haynes, Bell, and Chem-Tek indicated that nearly 6,000 more documents had been unearthed and would be produced within the following week. (These were documents that Chemgard had requested a year earlier.) They also produced updated phone records for Haynes and Bell. At least one of these emails proved that Haynes had sent Bell copies of Chemgard's confidential business information while Haynes was still employed at Chemgard.

On October 5, 2016, Chemgard took the depositions of Haynes and Bell. During these depositions, Bell revealed that he had solicited Haynes to join Chem-Tek in the months leading up to Haynes's resignation from Chemgard, which violated Bell's two-year prohibition on soliciting Chemgard employees to new employment.

On October 10, 2016, and based on the newly produced documents and deposition testimony of Haynes and Bell, Chemgard filed a motion to amend its Complaint to add additional causes of action and allegations. Specifically, Chemgard alleged new breach of contract allegations against Haynes due to (1) his failure to provide the contractually-agreed 30 days'

written notice; (2) his failure to return the confidential pricing sheet and commission sheets that he'd gotten from Chemgard during his employment; (3) and his use of the information contained in the confidential pricing sheet to wrongfully solicit and narrowly undercut Chemgard's pricing, in violation of the confidentiality provision of the Agreement. Chemgard also added a breach of duty of loyalty claim against Haynes based on newly discovered evidence that Haynes had sent confidential business information of Chemgard's to Bell while Haynes was still employed by Chemgard. Finally, based on testimony from Bell during his deposition, Chemgard added a breach of contract claim against Bell due to Bell's wrongful solicitation of Haynes to come work for Bell; Bell was prohibited by his own Employment Agreement with Chemgard from soliciting Chemgard employees for two years after Bell resigned from Chemgard, an agreement which Bell violated by soliciting Haynes to leave Chemgard and come to work for Chem-Tek. (This motion was pending at the time Judge Couch granted summary judgment.)

On November 8, 2016, Judge Couch granted Haynes, Bell, and Chem-Tek's motion for summary judgment and dismissed the case in its entirety. Judge Couch held that the non-solicit was overly broad on its face because it prevented Haynes from soliciting any Chemgard customer, regardless of whether he'd had contact with that customer or not. Judge Couch failed to address or mention Smith's sworn affidavit that presented evidence of Haynes's possession of confidential pricing information about **all** of Chemgard's customers and evidence of Haynes's systematic use of that information to surgically undercut Chemgard's pricing. Judge Couch further held that all of Chemgard's causes of action were "predicated" on the non-solicit clause.

On November 11, 2016, Chemgard filed a motion to alter or amend the court's grant of summary judgment. On May 22, 2017, Judge Couch denied Chemgard's motion to alter or amend. This appeal followed.

STATEMENT OF THE FACTS

A. Chemgard's Confidential Business and Pricing Structure

Chemgard is a Greenville-based business that sells and distributes chemicals, chemical products, water treatment chemicals, and equipment, including water management systems, both at retail or wholesale. (Affidavit of William Smith in Opposition to Defendants' Motion for Summary Judgment, ¶ 3). Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. (*Id.*). Chemgard has business in several states, including South Carolina, North Carolina, Georgia, and Alabama. (*Id.*). Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is that most of the competition in the industry comes down to price, and whether Chemgard or its competitor provides the best and most competitive price. (*Id.* at ¶ 4).

Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Respondent Haynes when he worked for Chemgard. (*Id.* at ¶ 5). This pricing sheet establishes the baseline price for all of Chemgard's products. (*Id.*). This baseline price is reached by taking Chemgard's cost of the product and adding an additional cost to account for Chemgard's overhead. (*Id.*). This overhead figure is critical in the calculation. The cost of the goods and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products. (*Id.*). The same products are offered to all of Chemgard's customers in all of the territories in which Chemgard did business, and all salespeople, including Haynes, were given this sheet for purposes of their sales efforts. (*Id.* at ¶ 6).

Chemgard's sales model was to encourage its salespeople to mark up the baseline price to determine the sales price. This markup provided the additional funds from which each salesperson earned their commission and from which Chemgard earned its profits. (*Id* at ¶ 7).

This pricing sheet constitutes confidential and proprietary information of Chemgard's because if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision. (*Id.*). Haynes possessed Chemgard's confidential business information after he resigned and never returned his commission statements, which also contained confidential pricing information. (*Id.* at ¶14, 17).

B. The Terms and Conditions of Haynes's Employment Agreement

In September 2000, Chemgard hired Haynes to sell its products, equipment, and services, with Haynes's primary focus to be on customers and potential customers in Georgia, although Haynes was free to (and did) makes sales outside of Georgia. (*Id.* at ¶ 8, 13). During the course of his employment, Haynes was the only Chemgard salesman in Georgia. (*Id.* at ¶ 13). Haynes was responsible for promoting sales growth and for regularly servicing the established customer accounts. Part of his mandatory job duties was reporting weekly sales efforts to the Greenville corporate office. (*Id.*).

At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement ("Agreement") with Chemgard. (*Id.* at ¶ 9). In Section 9(d) of the agreement, Haynes covenanted:

> that during the course of his/her employment by the Company and for a period of twenty-four (24) months after termination of his/her employment, he/she will not:
>
> > (i) [s]olicit or call on, either directly or indirectly, any customer of the Company for the purpose of selling any products or services sold by the Company or any products or services similar to those sold by the Company;

Agreement, Section 9(d). Haynes also agreed to the Non-Disclosure Clause of the Agreement, wherein Haynes promised not to use or disclose any confidential information of Chemgard after his resignation or termination. Agreement, Section 9(b). The Agreement defines "confidential

information" to include "**pricing methods and pricing information, costs, profits, [and] profit margins** . . ." Agreement, Section 8(a) (emphasis added).

Because of Haynes's assent to the non-solicitation provisions and other terms of the Agreement, Chemgard provided Haynes with its customer information, business information, and confidential pricing information. (*Id.* at ¶ 14). This information is competitively sensitive information, which is important and kept in confidence by Chemgard, and became known to Haynes through his employment with Chemgard. (*Id.*). Protection of the trade secret and/or confidential information is one reason that all the salespeople agree to the same obligations: to protect sales information.

C. Haynes's Resignation and Immediate Wrongful Solicitation of Chemgard Customers

Haynes voluntarily terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice. (*Id.* at ¶ 17). The next day, Haynes began working for Chem-Tek, LLC, which Al Bell (a former Chemgard employee) formed on May 6, 2015 and which immediately began competing with Chemgard. (*Id.* at ¶ 18-19). Although the extent of the damage done by Haynes was mostly unknown to Chemgard at the time it filed its lawsuit, the newly uncovered phone records and email evidence of Haynes's activity immediately after his resignation paint a clear picture of Haynes calling on and soliciting Chemgard's customers for the benefit of his new employer. (*Id.* at ¶ 20). Haynes continued to call on these Chemgard customers even after he was enjoined. (*Id.*).

On June 5, 2015, after finding evidence of Haynes's misconduct, Chemgard initiated the present lawsuit.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts must apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *See Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard recognizes the seriousness of stripping a party of his or her right to trial by jury, and as such, summary judgment should not be granted lightly. Courts have long warned that "summary judgment is a drastic remedy which 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D. S.C. 1975)). Summary judgment is only appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citation omitted)

Rule 56(c) provides that a trial court may *only grant* a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a **mere scintilla** of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326,

330, 673 S.E.2d 801, 803 (2009) (emphasis added). The trial court in this case failed to apply this standard properly, as will be argued below.

ARGUMENTS

I. Considered in a Light Most Favorable to Chemgard, William Smith's Affidavit Contains More than Enough Evidence for a Reasonable Jury to Conclude that Chemgard has a Legitimate Interest in Protecting its "Confidential Information" and that the Non-Solicitation Clause was Narrowly Tailored to Protect this Interest.

The circuit court failed to mention a single fact from William Smith's Affidavit in Opposition to Summary Judgment when granting summary judgment for Defendants and denying Chemgard's motion to reconsider. Smith's affidavit provides specific fact after specific fact about Haynes's access to Chemgard's confidential and proprietary customer pricing, which was applicable to all of Chemgard's customers across all of its sales territories, as well as Haynes's systematic misuse of that information in surgically undercutting Chemgard's pricing. Haynes, Bell, and Chem-Tek, in turn, did not produce any testimony to refute Smith's affidavit, which means that the true question for this Court is this: Since Haynes unquestionably had full access to confidential pricing information that applies to all of Chemgard's customers in all of Chemgard's sales territories, is the non-solicitation agreement that prohibits Haynes from soliciting any Chemgard customer overly broad in protecting Chemgard's legitimate business interests?

A. Chemgard's efforts to protect its confidential pricing information is a legitimate business interest for Chemgard.

That Chemgard's confidential pricing information is a protectable interest is clear under South Carolina law. "It is widely recognized that an employer may 'restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the

employment relationship.'" *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) (citation omitted). The *Milliken & Co.* court further noted approvingly that:

> **[l]egitimate interests of an employer that may be protected from competition include**: the employer's trade secrets that have been communicated to the employee during the course of employment; **confidential information other than trade secrets communicated by the employer to the employee**, such as information regarding a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer's development of goodwill and a positive image.

399 S.C. at 37, 731 S.E.2d at 295 (citations omitted) (emphasis added). Additionally, the South Carolina District Court has held that the employer's "interests to be protected [were] its existing business contacts, customer goodwill, trade secrets, and proprietary information. These concerns are legitimate business interests that warrant protection." *Hagemeyer N. Am. Inc. v. Thompson*, No. C/A 2:05-3425, 2006 WL 516733, at *4 (D.S.C. Mar. 1, 2006).

Smith's uncontradicted testimony established that Chemgard had disclosed confidential pricing information to Haynes as a result of his employment. (Smith Aff. ¶¶ 5, 6, 14, 15, and 16). Under the standard in *Milliken & Co*, preventing Haynes's use of such confidential information to pirate existing customers was (and is) a legitimate business interest. Smith testified that Chemgard's confidential information, most particularly Chemgard's pricing sheet and pricing formula, could be used to unfairly compete for **any** existing Chemgard customer, not just those customers serviced by Haynes. (Smith Aff. ¶¶ 7, 18). Clearly, an employer has an interest in protecting its confidential information, and non-solicitation provisions are a necessary component to protecting that information from use when pirating existing customers.

Bill Smith, President of Chemgard, stated (among other things) in his affidavit that:

- "Chemgard operates in a highly competitive industry, and although servicing the customers is an important part of the business, the reality is

that most of the competition in the industry comes down to pricing and whether your company can provide the best price."

- "Chemgard's pricing structure is contained in a pricing sheet that is given to all Chemgard salesmen, including Defendant Haynes when he worked for Chemgard. This pricing sheet establishes the baseline price for all of our products. This baseline price is reached by taking our cost of the product and adding an additional cost to account for Chemgard's overhead. The cost of the good and the overhead equals Chemgard's baseline price, which is unique to Chemgard. In essence, it is the breakeven point for Chemgard in selling these products."

- "This pricing sheet constitutes confidential and proprietary information of Chemgard's because, if any other company had access to the sheet or had knowledge of the breakeven point for Chemgard, then that company could undercut Chemgard's pricing with precision.

- "In May 2015, when Haynes quit unexpectedly from Chemgard without giving us the contractually required 30-days' notice, he had possession of that pricing sheet, as well as other Chemgard property."

- "Additionally, as we know now, Haynes began soliciting his Chemgard customers on behalf of Chem-Tek and Bell immediately after resigning from Chemgard. He had possession of Chemgard's confidential and proprietary pricing sheet during those initial solicitations."

- "As we've conducted discovery in this case, we've realized that without fail the prices he charged on behalf of Chem-Tek were less than what Chemgard was charging. Haynes was able to undercut our pricing with absolute precision because he had access to this pricing sheet. And given that these prices were for all products offered by Chemgard to all customers across all of its territories, it's clear that Haynes could use this confidential and proprietary information to unfairly solicit Chemgard's customers in states other than just Georgia and Alabama."

In addition, Haynes attended yearly sales meetings at Chemgard's headquarters, where he had access to information about Chemgard's customers and potential customers across all of its sales territories. (Smith Aff. ¶ 15). He also learned about and received training on new products that Chemgard would be offering, including new technology or new chemicals. (*Id.*). Haynes participated in weekly sales calls with all of the other Chemgard salespeople, and during these

meetings, the sales manager and the salespeople would discuss company-wide sales strategies and new products, as well as strategies for individual customers and potential new customers throughout all of Chemgard's sales territories. (*Id.* at ¶ 16). The existence of this unfair advantage was the basis of Chemgard's narrowly tailored non-solicit to protect its existing customers from pirating by Haynes.

B. Under existing South Carolina law, non-solicitation agreements limited to existing customers of an employer are enforceable.

Our courts have been clear about post-employment non-solicitation restraints, finding that such restrictions should be reasonably limited in time and place and that "prohibitions against contacting **existing customers** can be a valid substitute for a geographic limitation." *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217, 224 (Ct. App. 1992) (emphasis added). Based on these facts, the circuit court's grant of summary judgment on Chemgard's claim for breach of a non-solicitation provision was clear error.

The Orders under appeal are notable because each order fails to analyze or substantively address Chemgard's legitimate business interest protecting its confidential information.[1] In fact, the circuit court does not even mention the existence of Smith's affidavit or any of the facts contained in it in either of its two Orders. Instead, the circuit court implicitly finds that facts do not matter in this context and announces that non-solicitation provisions that prohibit solicitation of existing customers are patently overly broad and as a matter of law unenforceable without regard to a business' interests in protecting confidential information. The holding in the Orders,

[1] The circuit does agree that Chemgard "has a business interest in protecting confidential information in order to prevent improper solicitation," but the court does not make this vague acknowledgement in the context of evaluating the enforceability of the non-solicit. (May 22nd Order, p. 4). And the court fails to even mention what exactly that confidential information is, let alone how Haynes's use of such information in soliciting customers for a competitor would affect the enforceability analysis of the non-solicitation agreement itself.

if upheld, would reverse the holdings in *Oxman v. Proffitt*, 241 S.C. at 33, 126 S.E.2d at 854 (SC 1962); *Caine & Estes Insurance Agency, Inc. v. Watts*, 278 S.C. 207, 293 S.E. 2d 859, 860 (1982); and *Wolf v. Colonial Life & Accident Ins. Co.*, 420 S.E.2d 217, 224 (Ct App. 1992).

Chemgard's contention is simple, supported by South Carolina law, and consistent with the public policy underlying the balance between the right to work and the legitimate business interest of employers: Non-solicitation agreements must be limited as a matter of law to existing customers, and it is a question of fact as to whether the employer's interest extends to all of its customers or only to those customers that the employee sold to or serviced. Questions of fact are to be resolved by the factfinder, and summary judgment should not have been granted based on these facts.

This Court best summarized South Carolina law regarding non-solicitation agreements in *Baugh v. Columbia Heart Clinic, P.A.*:

> "[R]estrictions on competition 'are generally disfavored and will be strictly construed against the employer.'" *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). Hence, they 'must be narrowly drawn to protect the legitimate interests of the employer.' *Faces Boutique*, 318 S.C. at 42, 455 S.E.2d at 708. Such an arrangement is enforceable only if it is (1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy. *Rental Uniform Serv.*, 278 S.C. at 675–76, 301 S.E.2d at 143. The arrangement must be reasonably limited 'with respect to time and place' but an otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction. *Rental Uniform Serv.*, 278 S.C. at 675–76, 301 S.E.2d at 143; *Wolf v. Colonial Life & Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct.App.1992).

402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013).

Dating back to 1962, the South Carolina Supreme Court and the Court of Appeals have been consistent in upholding restrictive covenants that are not limited geographically but instead

prohibit the soliciting of "existing customers." In *Oxman v. Proffitt*, the South Carolina Supreme Court considered the enforceability of a provision "that defendant will not 'induce or attempt to induce *any policyholder of the Company* to terminate his or her insurance with the Company.'" 241 S.C. at 33, 126 S.E.2d at 854 (emphasis added). The Supreme Court, without equivocation, enforced the non-solicitation provision that applied to all of the company's policyholders and not just those sold or serviced by the employee. *Id.*

Likewise, the Court of Appeals in *Caine & Estes Insurance Agency, Inc. v. Watts* upheld the enforcement of a non-solicitation provision that restricted Watt from engaging in "the sale of insurance to any person who was a Caine & Estes customer at the time Watts resigned." 278 S.C. 207, 293 S.E. 2d 859, 860 (1982). And again in *Wolf v. Colonial Life & Accident Ins. Co.*, the Court of Appeals upheld enforcement of a provision restricting solicitation of "existing customers." 420 S.E.2d at 224. Moreover, the South Carolina District Court in *Rockford Mfg. v. Bennet* stated, "[t]he covenants at issue also impose client and employee based restrictions—to wit, Defendants are prohibited from soliciting Plaintiffs' employees or clients—rather than geographical restrictions. While 'the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business . . . prohibitions against contacting existing customers can be a valid substitute for a geographic limitation.'" 296 F. Supp. 2d 681, 689 (D.S.C. 2003) (citing *Watts, Oxman,* and *Wolf*).

Appellees' arguments at the circuit court hearing and in the resulting Orders rely heavily on *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (Judge J. Anderson), and on first glance, the decision appears to lend some support to Appellee's

position.[2] The District Court in *Fournil* did find that the "non-compete provision" in that case was defective because it prohibited the former employee from contacting the employer's "former clients as well as clients with which [the employee] had no direct contact." *Id.* at *4.

However, the District Court clearly indicated that the basis for its ruling was that the former employee did not have access to confidential information that could be used to compete for customers that she did **not** service. *Id.* at *6. Fournil only had access to confidential information about Turbeville's customers that she had serviced. Thus, the information she possessed upon leaving Turbeville's employ was specific to her customers alone and would not be applicable across the board to Turbeville's many other customers. The District Court expressly noted its ruling was based upon the absence of "evidence suggesting that Fournil's employment with Turbeville furnished her with any *other* type of information that would allow Fournil to compete against Turbeville unfairly if she left." *Id.* This decision is more thoughtful than Respondent's version admits and stands in stark contrast to the Orders' conclusory statements that are devoid of any factual analysis and that purport to defend precedent that just simply does not exist. Nonetheless, *Fournil* is factually distinguishable from the present case in the most significant way: Haynes had actually had access to confidential information about competitively sensitive pricing information that could be exploited to underbid all of Chemgard's contracts with its existing customers.

One last decision that this Court should consider is the North Carolina Supreme Court's decision in *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229, 393 S.E.2d 854, 858 (1990). In *Triangle Leasing*, the court examined a non-solicitation provision that read:

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[2] The second case that Respondent relies upon so heavily is *Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003), but it is not helpful to Defendant's position either. The *Rockford* opinion simply reiterates the point just made above about *Watts, Oxman,* and *Wolf.*

> Employee will not . . . within the State of North Carolina or any other state or territory in which the company conducts business, directly or indirectly solicit or attempt to procure the customers, accounts, or business of Company, or directly or indirectly make or attempt to make car or truck-van rental sales to the customers of Company.

327 N.C. at 228, 393 S.E.2d at 857. The defendant-employee, much like Haynes in this case, argued that the agreement was overly broad because it extended to territories and customers with which he'd had no contact. The North Carolina Supreme Court disagreed: "Upon reviewing the record, we find there is ample evidence to support plaintiff's contention that defendant McMahon's access to customer lists, price sheets, and policies affecting company business outside of the Wilmington area would warrant a contractual prohibition against solicitation of Triangle's customers regardless of their location." *Id.* This statement is fully in line with existing South Carolina law and supports Chemgard's attempts to protect its confidential pricing information.

C. Haynes's non-solicitation agreement was limited to current Chemgard customers about whom Haynes had confidential, proprietary pricing information, and the agreement, if enforced, protects a legitimate business interest of Chemgard.

The circuit court's Orders misjudge South Carolina law and ignore the most relevant facts, facts that the courts in *Fournil* and *Triangle Leasing* found determinative. Generally, non-solicitation provisions are more narrowly focused than geographically-based non-competes, which typically prohibit working for a company that solicits for any competitive business of any existing or possible customer. In this case, the non-solicitation provision at issue only seeks to prevent a former salesperson from using the Chemgard's confidential pricing formula to solicit its existing customers by underbidding Chemgard. A non-solicitation provision limited solely to Chemgard customers that Haynes had contact with would be effectively useless in protecting Chemgard's legitimate business interests and its confidential information. An agreement drafted

as required by the circuit court's Orders would have exposed the company to the same risk of losing its other customers to Haynes, customers who would have been just as susceptible to Haynes's precision underbidding using Chemgard confidential pricing as would customers that Haynes had direct contact with.[3]

Put simply, the circuit court completely failed to take into account the specific facts surrounding Chemgard's unique business and pricing methods, and failed to perform even the barest hint of analysis over whether Haynes's possession of the pricing information for all of Chemgard's customers provided Chemgard with the necessary legitimate business interest to prevent Haynes from soliciting any of Chemgard's customers.

In fact, the May 22, 2017 Order simply states that non-solicitation provision is overly broad, yet fails to explain how the court reached that conclusion in light of Smith's testimony (or, it should be noted yet again, without even **mentioning** Smith's affidavit in either Order). Although Defendants have argued that Chemgard could not have any legitimate business interest in preventing Haynes from soliciting its other customers in other sales territory, the evidence suggests just the opposite. During Haynes's tenure with Chemgard, he was exposed to confidential information about Chemgard customers, including potential customers (i.e., businesses that other Chemgard salespeople were seeking to do business with) and the pricing structure and pricing list for all of Chemgard's current customers. Armed with this information, Haynes could readily contact any customer of Chemgard in other sales territories, as well as in his old Georgia territory, and systematically and precisely quote prices *just under* what

[3] As noted above, Haynes participated in sales meetings and sales calls, which discussed opportunities and tactics in all territories. Haynes had access to additional types of confidential information that he has used *against* Chemgard in pirating a number of accounts before and after the lower court issued its injunction. This is not a hypothetical harm, but a real, irreparable, and continuing harm.

Chemgard charges. This is not some flight of fancy or mere hyperbole, because as pointed out above, Haynes has already used the pricing information to undercut Chemgard's pricing in precisely that manner. (Smith Aff. at ¶ 18). Chemgard clearly has a legitimate business interest in keeping Haynes from continuing to do what he's already spent the last two years doing: using information obtained from Chemgard to wrongfully steal Chemgard's customers. The circuit court's refusal to grapple with the implications of Smith's testimony or to consider it in any way in reaching its conclusions is a clear error of law.

II. The Circuit Court Erred in Holding that Granting Summary Judgment on the Non-Solicitation Claim also Mandated Dismissal of Appellant's Entire Second Amended Complaint, which alleged Multiple Causes of Action and Breaches of Multiple Contractual Obligations in Addition to the Non-Solicitation Clause.

As support for its position that Chemgard's entire lawsuit must be thrown out if the non-solicitation agreement was overly broad, the circuit court incorrectly stated that the "allegations within the Complaint and all four causes of action alleged by Plaintiff are predicated on the breach of the non-solicitation provision as stated in Paragraph 9(d) of Haynes Employment Agreement." May 22nd Order, p. 3. This is patently false, as a simple review of Chemgard's Second Amended Complaint leaves no doubt that the circuit court's statement is incorrect. The allegations contained in the below-quoted Second Amended Complaint are not limited to the non-solicitation provision, and, in fact, allege breaches of additional provisions.

Specifically, Chemgard made the following allegations in its Second Amended Complaint, which were all incorporated by reference into each of the causes of action:[4]

> 12. At the inception of the employment relationship and as a condition of being hired by Chemgard, Haynes signed an Employment Agreement. The

[4] After finally appearing to be deposed seven months after first scheduled, Defendants testified to matters not previously disclosed and which were the basis for a motion to amend Chemgard's Complaint, which was pending when summary judgment was granted on November 8, 2016.

Employment Agreement is attached hereto as Exhibit A and is incorporated by reference as if fully and completely contained herein.

16. In consideration of the non-solicitation obligations agreed to by Haynes, Chemgard provided employment and compensation to Haynes, **which was terminable by either party upon 30 days' written notice.**

22. Chemgard has a legitimate business interest in maintaining customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain.

24. Because of Haynes's assent to the non-solicitation provisions, Chemgard provided Haynes with customer information, business information, and confidential information. This information is competitively sensitive information, which is important and kept in confidence by Chemgard, and became known to Haynes through his employment with Chemgard.

25. Haynes voluntarily **terminated employment on or about May 10, 2015 without providing Chemgard with the contractually required 30-days' written notice.**

31. Since his termination, Haynes has engaged in direct solicitation of existing customers on behalf of Chem-Tek and **based upon information and belief, is using competitive, confidential, and important business information,** including Piedmont Hospital System in Fayette, Georgia; Flowers Baking Company in Montgomery, Alabama; Yamaha Motor Manufacturing Company in Newnan, Georgia; and Plastics Omnium Auto Exteriors in Norcross, Georgia. On at least one occasion since Haynes left Chemgard, Haynes has used his old Chemgard business card to gain access to a Chemgard customer's facility (Flowers Baking Company). Regarding Piedmont Hospital System Fayette, within approximately a week of his resignation, Haynes called on the hospital's Director of Engineering while Chemgard's William Smith and Vernon Campbell were already there to visit their customer and were able to observe Haynes's arrival.

32. **These direct solicitations are an appropriation of customer contacts, confidential information, including customer information, pricing,** marketing plans, business development strategies and other information, which provides a competitive advantage if confidentiality is not maintained.

33. **Upon information and belief, Haynes is using confidential business information gained during his employment with Chemgard to compete with Chemgard** on behalf of and with the knowledge and permission of Chem-Tek and Bell, including the customer contact information stored on his cell phone.

These factual allegations form the backbone of Chemgard's causes of action that followed. Those causes of action included Chemgard's tortious interference claim against co-Defendants Chem-Tek and Al Bell, the owner of Chem-Tek and former sales manager for Chemgard, who induced Haynes to terminate his Employment Agreement without giving the 30 days' notice and to immediately begin using confidential information to pirate substantial amount of business before Chemgard could take steps to protect itself. Chemgard's claim against Bell and Chem-Tek for these violations are not predicated solely on Haynes's non-solicit agreement, but are instead based on separate provisions of the Agreement. (*See* ¶¶ 56-64 of Second Amended Complaint). Additionally, under Chemgard's second cause of action for breach of contract against Haynes, Chemgard sought "other equitable and legal remedies" for Haynes's breaches, and in paragraph 53, Chemgard states that it "is entitled to reasonable discovery as to the competitive activities of Haynes and his employer, Chem-Tek and Bell, to determine the scope of such activities, and to determine Chem-Tek's and Bell's knowledge of Haynes's activities and culpability." In Paragraph 54, Chemgard asserted that it was "entitled to damages for any breach [of the Agreement] that resulted in pecuniary gain on behalf of Haynes and/or his employer." The only way to reach to the circuit court's conclusions in dismissing the entire lawsuit would be by failing to read the Second Amended Complaint altogether.

That's a problem, given the applicable legal standard, which requires a court to "review the entire pleading" when "construing a complaint or responsive pleading." *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007). "All pleadings shall be so construed as to do substantial justice to all parties." SCRCP 8(f). In order "[t]o ensure substantial justice to the parties, the pleadings must be liberally construed." *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct.App.2000), *aff'd as modified on other grounds*, 354 S.C.

416, 581 S.E.2d 169 (2003). If you take Rule 8(f)'s "substantial justice" requirement in conjunction with Rule 56's mandate that all facts and inferences must be viewed in the light most favorable to the non-moving party (Chemgard), then it follows that the circuit's decision to dismiss the entire lawsuit was a patently clear error of law. Thus, even if the non-solicitation provision is as "patently overly broad" as the circuit court asserts, then Chemgard's claims for Haynes's breach of the thirty-day notice period provision and of the Confidential Information provision would remain unaffected. Also, Chemgard's claims against Bell for interference with Haynes's contractual obligations would survive.

The circuit court took the opposite position, however, and it further doubled down on that position by incorrectly characterizing Chemgard's claims in this case. The court's May 22nd Order states that Chemgard could not "newly assert[] claims pursuant to the confidentiality provision" in order to help save the non-solicit. (May 22nd Order, p. 4). However, there's nothing new about Chemgard's claims that Haynes breached the confidentiality provision of the Employment Agreement. Chemgard has alleged since the beginning of this lawsuit that Haynes violated the confidentiality provision. That allegation is present in the original Complaint and it is present in the Second Amended Complaint. Specifically, Chemgard alleged in its Second Amended Complaint that Haynes had violated his Employment Agreement by (1) failing to provide 30 days' notice, as required by Paragraph 7(a) of the Employment Agreement (*see* ¶ 25 of Second Amended Complaint); and (2) using "competitive, confidential, and important business information" in violation of the Non-Disclosure of Confidential Information provision found in Paragraph 9(a)-(c) of his Employment Contract (*see* ¶¶ 31, 33, 36, 40, and 44 of Second Amended Complaint). A review of the Employment Agreement and of the Second Amended Complaint clearly disproves the circuit court's assertion.

The circuit court also failed to even mention William Smith's affidavit, in either of its Orders. Smith's affidavit, as Chemgard has explained in more detail above, provides undisputed evidence about Haynes's possession of Chemgard's confidential information, about Haynes's unauthorized use of such information to solicit customers before and after the 30 days' notice period, and about how Haynes's solicitations surgically undercut Chemgard's pricing in each instance of pirating. Smith's affidavit provides more than sufficient facts from which a jury could conclude that Haynes had violated the 30 days' notice provision, as well as used confidential information in breach of the Employment Agreement, especially if the circuit court had viewed even an iota of the evidence present in this case in the light most favorable to Chemgard, as required by Rule 56.

And, in a final attempt to support Haynes, Bell, and Chem-Tek's position that dismissal of the non-solicit provision required dismissal of the entire Second Amended Complaint, the circuit court stated that "[i]t is also undisputed that Plaintiff moved for injunctive relief pursuant to **Section 9(d)(i)** of Haynes Employment Agreement to prevent improper solicitation of customers." May 22, 2017 Order, p. 3 (emphasis added). The circuit court attempts to tie all causes of action solely to the non-solicitation claim. But again, such a claim is easily disproven by a review of Chemgard's Second Amended Complaint. (Also, Chemgard, it should be noted, disputes "it.") In reality, Chemgard moved for injunctive relief pursuant to **Section 9(f)** of the Employment Agreement (*see* ¶¶ 46-48 of Second Amended Complaint), which provides the agreed-upon remedies **for Haynes's breach of the Non-Disclosure and Confidential Information provisions**, as well as the non-solicitation agreement. The circuit court's ruling is premised on an inaccurate understanding of Chemgard's legal claims and constitutes legal error. Even if this Court agrees that the non-solicit was overly broad, then Chemgard should still be

able to pursue the remaining breach of contract claims against Haynes and the interference claims against Bell and Chek-Tek. The circuit court's orders on this point should be overturned.

III. Plaintiff's Rule 59(e) Motion was Proper and Extended the Time to Appeal the Court's November 8, 2016 Order Granting Summary Judgment on All of Plaintiff's Claims.

The purpose of Paragraph C of the circuit court's May 22, 2017 Order is unclear to Chemgard or its counsel. To the extent that Respondent will be arguing that Chemgard's filing of the Rule 59(e) motion was late and did not toll the time period for Chemgard to appeal, then Chemgard will respond to such arguments in its Reply brief.

However, Chemgard will briefly address the circuit court's statements in this Paragraph. Despite the circuit court's assertion otherwise, Chemgard's Rule 59(e) motion was not a rehash of its earlier arguments, but rather was a desperate attempt to get the circuit to even acknowledge the existence of Chemgard's confidential pricing information as a factor in its analysis of the non-solicit's enforceability. The circuit court refused, and neither Order contains a single of mention of William Smith or of his affidavit. None.

Yet the law required Chemgard to file the Rule 59(e) motion in order to protect its rights on appeal. The South Carolina Supreme Court held that it is "incumbent upon [an Appellant] to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to request that the circuit court **provide specific factual findings for its decision.**" *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 652, 661 S.E.2d 791, 795 (2008) (emphasis added). *See also Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue). A party is permitted to file an initial Rule 59(e) motion without unnecessary concern that the repetition of an issue or argument

made in a previous motion will result in a subsequent appeal being dismissed as untimely. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). In this case, Chemgard timely filed its first and only Rule 59(e) motion, and raised many issues and facts that the circuit court failed to acknowledge in its November 8, 2016 Order, as well as sought reconsideration of the circuit court's grant of summary judgment.

Because the November 8, 2016 Order does not deal with a single fact contained in William Smith's affidavit, it seemed to Chemgard that the circuit court had failed to rule on or consider several important issues in reaching its conclusions. Chemgard's counsel were being cautious because the importance of these issues to Chemgard's business would require an appeal. Unfortunately, the circuit court took eight months to rule on Chemgard's motion, but only after Chemgard's repeated requests for a ruling and after the parties each provided a proposed order and one-page summaries of their previous arguments (sent via email to refresh the court's memory).

IV. The Circuit Court's Refusal to Consider the Newly-Discovered Evidential Treasure Trove or to Permit Chemgard to Amend its Complaint Constitutes Errors of Law.

The trial court's May 22, 2017 order, as drafted by Haynes, Bell, and Chem-Tek's counsel and signed without further edit by the court, states that the "Court fully considered the pleadings, evidence and the parties[']arguments," and notes that "a Rule 59(e) motion is simply 'not the proper vehicle to amend' the pleadings to add additional grounds for relief after a judgment and a hearing on the merits of the motion." (May 22, 2017 Order, p. 5). Chemgard agrees, which is why it had already filed a motion to amend its Complaint a month earlier *before* the court had entered its order and which was still pending at the time summary judgment was granted. The point of Chemgard's argument on pages 8 and 9 of its Motion to Alter or Amend was not, as Respondents allege, to raise new claims after summary judgment was granted, but

was instead two-fold: (1) to provide the court with newly uncovered evidence that Haynes had violated the non-disclosure and confidentiality provisions of his Employment Agreement (provisions that were entirely separate from the non-solicit provision that the court based its entire November 8th order on); and (2) to remind the court that Chemgard had already sought a motion to amend its pleadings to account for this new evidence, which should be heard and ruled upon before making any premature rulings on the motion for summary judgment. (*See* Plaintiff's Rule 59 Motion to Alter or Amend Judgment, p. 9).

On October 5, 2016, after eight months of scheduling efforts, Chemgard was finally able to take the depositions of Al Bell and Keith Haynes. Additionally, just days before the depositions took place, Haynes and Bell suddenly found and turned over nearly 10,000 documents that Chemgard had requested ten months earlier but that had never been produced. These documents, along with Haynes's and Bell's damaging deposition admissions, were new information that was not available when Haynes, Bell, and Chem-Tek's motion for summary judgment was filed (August 12, 2016), nor was this information available at the time of the hearing on the summary judgment motion (September 22, 2016). Armed with this newly discovered evidence, Chemgard had filed a motion to amend its Complaint on October 10, 2016, alleging additional common law claims and contract claims against Haynes and new breach of contract claims against Bell. This motion to amend was pending when the circuit court prematurely granted summary judgment on November 8, 2016. The court failed to address both this pending motion to amend and the sworn testimony from William Smith in reaching its conclusions in the November 8th Order or May 22nd Order, rendering its assertion that it had "fully considered the . . . evidence" frankly dubious. At the very least, the circuit court should have stayed its ruling on the motion for summary judgment and permitted Chemgard to amend

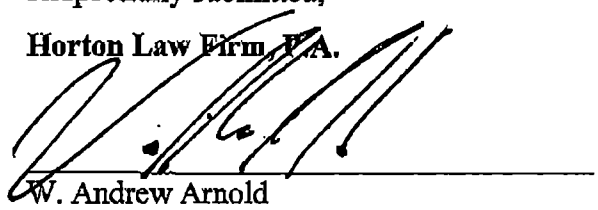
its Complaint to assert the new claims based on the new evidence. Such failure was a clear error of law.

CONCLUSION

For the forgoing reasons, Appellant Chemgard respectfully requests this Court to reverse the judgment of the circuit court and remand this case to the circuit court so that Chemgard can amend its Complaint, continue discovery, and conduct a trial on the merits.

Respectfully submitted,

Horton Law Firm, P.A.



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SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Chemgard, Inc. vs. Darrell Keith Haynes, Chem-Tek, LLC, and Alfred Bell
Case No.: 2015-CP-23-03546
Appellate Case No. 2017-001314

Dear Sir/Madam:

In reference to the above, enclosed for filing are Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal, and Proof of Delivery.

Sincerely,

W. Andrew Arnold

WAA/jdf

cc: William H. Foster, Esquire and Samuel W. Outten, Esquire (with enclosures)

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FACSIMILE TRANSMITTAL SHEET

DATE: August 4, 2017

TO: Clerk of Court

FAX #: 803-734-1839

FROM: W. Andrew Arnold

Number of pages including Transmittal Sheet: 36