THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2017-001314

Chemgard, Inc., ... Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

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Counter-Statement Of The Case

Respondents Darrell Keith Haynes, Chem-Tek, LLC and Alfred Bell ("Respondents") hereby file its initial respondent's brief in connection with the notice of appeal filed by Appellant Chemgard, Inc. ("Chemgard" or "Appellant") arising out of the circuit court's order granting summary judgment in favor of Respondents and denying Appellant's motion to alter or amend judgment.

This action was commenced by Chemgard on June 5, 2015, through the filing of the Verified Complaint and Motion for Preliminary Injunction against Haynes for Breach of Contract in violation of Haynes' "narrowly tailored non-solicitation provisions." (Compl., CA-2015-CP-23-03546 at ¶¶ 8-15; R. __.) Chemgard requested preliminary injunctive relief to enjoin Haynes from soliciting customers for the purpose of selling any products or services sold by the Company. (Prelim. Inj. at p. 2; R. __.) On June 25, 2015, Chemgard filed its Verified Amended Complaint, adding Chem-Tek, LLC as a party and adding a claim for Tortious Interference with Contractual Relations for allegedly procuring Haynes' breach of the non-solicitation provision. (Am. Compl., at ¶¶ 25, 56; R. __.)

On July 6, 2015, the Honorable Perry Gravely heard Haynes' motion to dismiss and Chemgard's motion for preliminary injunction. On July 7, 2015, Judge Gravely denied Haynes' motion and granted Chemgard's motion for a preliminary injunction, with instructions to Chemgard's counsel to draft an order. (July 17, 2015, Form 4; R. __.) On July 17, 2017, Judge Gravely issued a preliminary injunction order against Haynes, enjoining him from soliciting or calling on any business or entity that was a customer of Chemgard as of May 10, 2015. (July 17, 2015, Order; R. __.)

On September 25, 2015, Chemgard filed its Second Amended Complaint adding Alfred Bell and alleging Haynes breached "narrowly tailored non-solicitation provisions" within his Employment Agreement. (Sec. Am. Comp., at ¶¶ 13-19, R. __.) The Second Amended Complaint further alleged tortious interference with contractual relations and prospective contractual relations because Chem-Tek and Albert Bell "had knowledge of Haynes' non-solicitation agreement" and despite that knowledge assisted in Haynes' "knowing violation of his non-solicitation agreement." (Sec. Am. Comp. at ¶¶ 28, 34-35, 60, 70; R. __.)

On April 29, 2016, Respondents moved to vacate the preliminary injunction order based on the overbreadth of the non-solicitation provision. (Motion to Vacate, R. __.) On June 28, 2016, Chemgard filed a Memorandum in Opposition to the Motion to Vacate the Preliminary Injunction and on July 6, 2016, Respondents filed a memorandum in support of their motion to vacate. (Motion to Vacate; R. __.) On July 8, 2016, the Honorable Judge Gravely heard Respondents' Motion to Vacate and Dissolve the Preliminary Injunction. On August 10, 2016, Judge Gravely denied the motion stating that the trial court had no authority to entertain Respondents' Motion and that Respondents had not set forth a basis for dissolving its previous Order. (August 10, 2016 Order; R.__.) On August 11, 2016, Respondents filed Motion to Reconsider and Expedite Reconsideration of Judge Gravely's decision to deny Respondents' Motion to Vacate and Dissolve the Preliminary Injunction. (Motion to Reconsider; R. __.)

On August 12, 2016, Respondents filed a Motion and Memorandum of Law in Support of Summary Judgment with respect to the patently overbroad non-solicitation clause and requested the dismissal of *all* claims asserted against Respondents in Appellant's Second Amended Complaint. (Motion for Summary Judgment; R. __.) On August 23, 2016, Chemgard filed a motion to compel discovery. On September 19, 2016, Judge Gravely informed the parties' counsel

that he would delay ruling on Appellant's Rule to Show Cause and Respondents' Motion for Reconsideration pending the decision on the Respondents' motion for summary judgment. (September 19, 2016, Correspondence; R.__.) On September 22, 2016, the Honorable Roger Couch heard arguments for Respondent's motion for summary judgment and Appellant's motion to compel. (September 22, 2016, Hearing Transcript; R. __.) The lower court asked Appellant's counsel to draft a proposed order granting Chemgard's motion to compel discovery. (*Id.* at 39:18-22.) However, Chemgard's counsel then stated "the motion to compel, [let's] forget it to the motion for summary judgment. Let it stand on its own." (*Id.* at 39:24-40:17.) Judge Couch agreed to let the parties resolve discovery on their own and no ruling was filed on the motion. (*Id.*) On October 7, 2016, Judge Couch advised the parties in writing of his ruling that the covenant not to compete was patently overbroad and unenforceable as a matter of law, and asked Respondents' counsel to draft and submit a proposed order. (October 7, 2016, Correspondence; R. __.)

On October 10, 2016, Chemgard sought to amend its complaint for the third time by filing a motion to amend its Second Amended Complaint to add new causes of action for breach of contract against Haynes for violation of Section 3 and 7(a) notice provision and Sections 9(a)-(c) Non-Disclosure and Confidentiality provision of Haynes' Employment Agreement and an additional claim against Bell for violating his own Employment Agreement. (Motion to Amend Complaint at Ex. A; R. __.) On November 8, 2016, Judge Couch issued the Order dismissing Appellant's Second Amended Complaint. (Nov. 8, 2016, Order; R. __.) On November 10, 2016, the Greenville County Clerk of Court set a hearing on Appellant's Motion to Amend Complaint for December 5, 2016, and later cancelled that hearing from Judge Verdin's docket due to Judge Couch's ruling. (November 10, 2016, Correspondence; R. __.) On November 11, 2016, Chemgard filed a Rule 59(e) motion to alter or amend the lower court's grant of summary

judgment. (Rule 59(e) Motion to Alter/Amend; R. __.) On November 15, 2016, the Clerk of Court formally cancelled the December 5, 2016, hearing scheduled for Appellant's Motion to Amend Complaint. (November 15, 2016, Correspondence; R. __.) On November 28, 2016, Respondents filed a Memorandum in Opposition to Plaintiff's Motion for Reconsideration. (Memo. In Opp. Pl. Rule 59(e) Motion; R. __.) On May 22, 2017, Judge Couch denied Chemgard's motion to alter or amend its Order granting summary judgment in favor of Respondents. (May 22, 2017, Order; R. __.) Chemgard filed its Notice of Appeal on June 9, 2017.

Statement of Facts

Chemgard hired Darrell Keith Haynes on September 15, 2000, and Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard. (November 8, 2016, Order p. 1.) The Agreement states that Haynes was employed as a salesman for the territory of Georgia and Alabama. (*Id.*; *see also* September 22, 2016, Hearing Transcript 17:18-18:11.) During the course of his employment, Haynes was the only salesman in Georgia. (November 8, 2016, Order p. 1.) Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. (*Id.*; *see also* September 22, 2016, Hearing Transcript 17:18-18:11.) On May 10, 2015, Haynes voluntarily resigned from Chemgard. (*Id.* at p. 1-2.) On May 11, 2015, Haynes began working for ChemTek, a competitor of Chemgard. (*Id.*)

On June 25, 2015, Chemgard moved for injunctive relief to enforce Haynes' Agreement. (November 8, 2016, Order p. 2.) The portion of the Agreement which Chemgard relied on in seeking injunctive relief from this Court provides as follows:

> (d) Accordingly, Employee agrees 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) Solicit 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 similar to those sold by the Company

(Agreement at ¶ 9(d)(i); R. __) (emphasis added.)

The Court heard oral arguments on July 6, 2015, and issued a Temporary Injunction Order (the "Order") on July 17, 2015, stating:

> Defendant Haynes is enjoined from soliciting or calling on, either directly or indirectly *any* business or entity that was *a customer of Chemgard as of May 10, 2015*, for the purpose of selling any products or services sold by Chemgard or any products or services similar to those sold by Chemgard for a period of two years from the date of May 10, 2015 or until trial can be had on the merits, whichever is earlier.

(July 17, 2015, Order at p. 8) (emphasis added).

On August 12, 2016, Respondents filed a Motion and Memorandum of Law in Support of Summary Judgment as a matter of law with respect to the patently overbroad non-solicitation clause and requested the dismissal of *all* claims asserted against Respondents in Appellant's Second Amended Complaint. (Motion for Summary Judgment; R. __.) On September 22, 2016, the Honorable Roger Couch heard arguments for Respondent's motion for summary judgment and Appellant's motion to compel. (September 22, 2016, Hearing Transcript; R. __.) For the purposes of summary judgment, the only issue before the trial court was a question of law—whether the non-solicitation agreement was enforceable. (*Id.* at 18:12-19.) Accordingly, any factual allegations and the extent of Haynes' breach was irrelevant to the legal question of the enforceability of the agreement. *Id.*

On November 8, 2017, Judge Couch found that the covenant not to compete was patently overbroad and unenforceable as a matter of law, and asked Respondents' counsel to draft and submit a proposed order. (October 7, 2016, Correspondence; R. __; November 8, 2016, Order at

p. 6.) Therefore, the new evidence produced during discovery conducted *after* the September 22, 2016, hearing was inapplicable to the trial court's analysis when considering the merits of Appellant's Rule 59(e) Motion to Alter/Amend and was improperly submitted for its review. (June 8, 2017, Order at p. 4-5.) Accordingly, the lower court properly denied Appellant's Motion to Alter/Amend on June 8, 2017. (*Id.*)

Standard of Review

"An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, (S.C. Sup. Ct. filed Jan. 21, 2015) (Shearouse Adv. Sh. No. 3 at 59) (quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). "Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (citing Rule 56(c), SCRCP). "In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party." *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014) (citing Rule 56(c), SCRCP).

Argument

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN HOLDING THAT THE NON-SOLICITATION CLAUSE WAS PATENTLY OVERBROAD AND UNENFORCEABLE PURSUANT TO SOUTH CAROLINA LAW.

Appellant claims the trial court erred by granting Respondents' motion for summary judgment without addressing the fact that Haynes had full access to all of Appellant's confidential pricing information or fully considering William Smith's Affidavit. Specifically, Appellant posed the following question to this Court in its brief: "Since Haynes 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?" (App. Brief at p. 9; R. __) (emphasis added). For the reasons discussed below, the lower court properly held that Haynes' non-solicitation clause was overbroad as a matter of law in granting summary judgment as to all of Appellant's claims.

South Carolina law is clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A covenant not to compete must be reasonable in its restrictions or it will not be upheld. *Reeves v. Sargeant*, 200 S.C. 494, 498-99, 21 S.E.2d 184, 186 (1942) (general restraint of trade is against public policy and void). Therefore, if a covenant not to compete is deemed overbroad and unenforceable, there can be no genuine issue of material fact as to whether an employee breached the employment contract and a former employer cannot base their claims upon the invalid provision. *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman,* 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

It is equally well established that to be enforceable, a customer non-solicitation provision must limit its scope to the customers a former employee *actually* serviced or encountered during

his or her employment. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit new customers to which he had not been assigned while in Collins' employ").[1] The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717 S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

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[1] *See e.g.*, *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, *to establish contact with his employer's customers*.") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling *to eighteen certain accounts* in the Greenville area of South Carolina, *formerly assigned to the respondent* while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group*, LLC, C/A No. DKC 11–0380, 2011 WL 3608227, at *4–5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of *any* of the employer's customers, not just the ones the former employee had personally serviced).

Generally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Cafe Assocs. v. Gerngross,* 305 S.C. 6, 406 S.E.2d 162 (1991). When a contract is clear and unambiguous, the construction of the contract is a question of law for the court. *Conner v. Alvarez,* 285 S.C. 97, 328 S.E.2d 334 (1985). In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract. *Id.* at 101, 328 S.E.2d at 336. "When a court construes an employment contract, as with any contract, resort is first made to the language of the contract in issue, and if the language is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties." *Holden v. Alice Mfg., Inc.,* 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) (emphasis added) (citing *Stuckey v. University of South Carolina,* 284 S.C. 295, 325 S.E.2d 709 (Ct.App.1985)).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction, this allowance does not diminish the fundamental requirement that the resulting restriction must be as narrowly tailored as possible to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee). Based on Appellant's arguments, the purpose of the non-solicitation within Haynes' Agreement is Chemgard's interest in protecting all customer relationships gained while Haynes worked for Chemgard. (App. Brief p. 9-12; R. __.) It is in this critical regard that the non-solicitation provision fails as a matter of law. (November 8, 2016, Order p. 6; R. ___.)

In the case at bar, no amount of factual representations or evidence can change that Chemgard sought to prevent the solicitation of *all of its customers*, not simply those with whom Haynes had involvement or contact. (Agreement at ¶ 9(d)(i); R. ___; Appellant Brief 12-16; R.__.) The lower court properly held that the Agreement's customer non-solicitation provision is not limited as required by South Carolina law to customers which Haynes had contact with during the term of the Agreement. (November 8, 2016, Order p. 6; R.__.) In fact, throughout this case Appellant has maintained an even broader interpretation of this fatally overbroad restriction, that Haynes would be in violation of the restriction merely for *responding* to a customer's unilateral request for services, providing services to a customer whom Haynes had not solicited in the first instance, or even continuing his personal friendships with employees of customers. (Motion for Summary Judgment at p. 5; R. __.) In so doing, Chemgard champions a restrictive covenant so overbroad as to capture and bind customers to a contract to which they have never joined nor been paid consideration, and Chemgard seeks to dictate to these non-parties who they may or may not conduct business regardless of any actual solicitation by Haynes. (*Id.*)

This representation of the egregious scope of Chemgard's restrictive covenant is not hyperbole but fact, given that Chemgard's counsel admitted on the record that Haynes' customers represented no more than thirty-one percent (31%) of Chemgard's total sales of $1.6 million dollars. (July 6, 2015, Transcript of Hearing at 30:24-31:7.) Yet in spite of this admission, Appellant bases the entirety of its case upon a restriction that applies to 100% of Chemgard's customers and, as explained above, to prevent and punish Respondents for even responding to unilateral requests for service by 100% of Chemgard's customers, from providing services to customers who came to Respondents unilaterally, or from even having any communication with 100% of these customers, regardless of whether such communication is related to the pursuit of

business. (Motion for Summary Judgment p. 5; R. __; September 22, 2016, Hearing Transcript 16:10-18:19; R. __.)

Nevertheless, Chemgard now argues that due to Haynes' alleged exposure to Appellant's confidential pricing information, the non-solicitation clause is enforceable to prohibit him from using confidential pricing information to solicit *any* customer or prospective customer for a period of two years, whether Haynes had contact with such customer or not. (App. Brief p. 9-12; R. __; September 22, 2016, Hearing Transcript 30:1-23.) William Smith's affidavit likewise contends that, like many other company in South Carolina, Chemgard has protectable interests in its confidential business information, including pricing sheets that were disclosed to Haynes during his employment. (App. Brief at pp. 5-6.) Appellant's recitation of its otherwise legitimate interest in protecting confidential information, however, simply cannot excuse its fundamental obligation to narrowly tailor the actual restrictive covenant in question such that it meets all the requirements of enforceability under the law. *Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009) ("Under South Carolina law, whether a covenant not to compete is enforceable depends on whether the covenant (1) is necessary for the protection of the employer's legitimate interest; (2) is reasonably limited in operation with respect to time and space; (3) is not unduly harsh and oppressive in limiting the legitimate efforts of the employee to earn a living; (4) is reasonable from the standpoint of public policy; and (5) is supported by valuable consideration.")

Respondents acknowledge that South Carolina law recognizes confidential business information as a legitimate interest of the employer that may be protected through a *validly* non-solicitation agreement. (September 22, 2016, Hearing Transcript at 12:16-13:6); *see Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). The law in Appellant's argument

is that it failed to make any effort to *narrowly* tailor the non-solicitation provision to any legitimate interest, confidential information or otherwise, and Appellent is essentially now attempting to champion a provision much different than the one actually in question. (App. Brief at pp. 9.) However, South Carolina disfavors restraints on trade as a matter of public policy. *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 9894350, at *16 (D.S.C. Mar. 14, 2008) (citing *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533, 536 (1961); *Reeves v. Sargeant*, 200 S.C. 494, 21 S.E.2d 184, 187–88 (1942); *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 292–93, 471 S.E.2d 721, 723 (Ct.App.1996)). Appellant cannot use an employee's general exposure to confidential pricing information to circumvent the legal requirement that such restrictive covenants be narrowly tailored to protect such business interests. A contract must be legal and enforceable before courts can enforce against any alleged breach. Appellant's grossly-overbroad non-solicitation clause renders the agreement unreasonable and unenforceable as a restraint on trade.

Critically, Appellant's argument that its interest in protecting customer information and Haynes' alleged exposure to pricing information for all of its customers misses the mark and fails for the simple reason that Appellant is arguing for the enforcement of a non-solicitation provision far different from the one it drafted. As argued by Respondents in the September 22, 2016, hearing before Judge Couch, the provision in question doesn't purport to restrict Haynes from soliciting customers "for whom he had confidential information" nor from "using confidential information to solicit customers"; although it could. (September 22, 2016, Hearing Transcript 31:23-33:2.) Instead, it simply and unequivocally prohibits Haynes from soliciting any and all customers – regardless of whether Haynes had any involvement, contact or confidential information regarding

that customer. For that reason, the covenant is patently overbroad and unenforceable as a matter of law. (*Id.*)

As written and as interpreted by Appellant, the Agreement's customer non-solicitation provision also prohibits Haynes from responding to a customer's unilateral request for services or even continuing his personal friendships with employees of customers. (November 8, 2016, Order p. 6; R. __.) In so doing, the restrictive covenant is patently overbroad, as it captures and binds customers to a contract to which they have never joined nor been paid consideration. (*Id.*) Therefore, on its face, Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. (November 8, 2016, Order p. 6.) Indeed, Haynes is prohibited from soliciting Chemgard customers that he may literally not even know were customers of the company at the time of his termination. (*Id.* at 7.)

The trial court properly viewed an unambiguous contract through the lens of South Carolina's standard for non-solicitation agreements and made a determination on whether the covenant at issue was enforceable as a matter of law, for no amount of discovery or factual elaborations can salvage an overly broad provision. (September 22, 2016, Hearing Transcript 16:10-18:19; R. __; November 8, Order; R. ___; June 8, 2017, Order; R. __). As written, the non-solicitation clause is not reasonably limited in operation to protect Chemgard's legitimate business interests. (November 8, 2016, Order pp. 6-7; R. __.) For these reasons, the lower court properly held that this is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. (*Id.*)

Accordingly, summary judgment was properly granted in Respondents' favor.

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR RESPONDENTS ON ALL OF APPELLANT'S CLAIMS WHICH WERE CLEARLY PREDICATED ON THE PATENTLY OVERBROAD NON-SOLICITATION PROVISION.

The trial court provided substantial justification for dismissing each of Appellant's causes of action, justifying dismissal of the entire lawsuit, and did not abuse its discretion in doing so. (November 8, 2016, Order at p. 7-8; June 8, 2017, Order at pp. 3-4; R. ___.) The trial court properly granted summary judgment on Chemgard's claims for: (1) Breach of Contract for Injunctive Relief against Defendant Haynes; (2) Breach of Contract (Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes); (3) Tortious Interference with Contractual Relations (Against Defendants ChemTek and Mr. Bell); and (4) Tortious Interference with Prospective Contractual Relations (Against All Defendants). (*Id.*)

As explained above, "an agreement's enforceability depends on whether it is necessary for the protection of the legitimate interest of the employer, is reasonably limited in its operation with respect to time and place, is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, is reasonable from the standpoint of sound public policy, and is supported by a valuable consideration." *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 630, 799 S.E.2d 318, 323 (Ct. App. 2017), reh'g denied (May 26, 2017) (quoting *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983)). A review of the entire Second Amended Complaint and construing the pleading "to do substantial justice to all parties" plainly establishes Appellant sued Respondents for Haynes' alleged breach of the non-solicitation provision and Respondents' alleged actions in soliciting Chemgard's customers. *Parish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007); *see also* Rule 8(f), SCRCP. The trial court properly held that "only a valid agreement can support claims" for breach

of contract and tortious interference with a contract. *See Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman,* 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

Appellant's Second Amended Complaint states factual allegations which specifically list and quote Sections 9(d) and 9(f), as related to the claimed enforceability of the non-solicitation clause. (Second Am. Comp. ¶¶ 13-15; R. __.) In fact, Appellant's Complaint describes the consideration offered to Haynes in acceptance of the agreement and states that the "legitimate business interest in maintaining customer relationships and protecting confidential business information, in which Chemgard invests considerable resources to develop and maintain." (*Id.* at ¶¶ 17-19; 22; R. __.) The paragraph that immediately follows states, "*Because Haynes' assent to the non-solicitation provisions*, Chemgard provided Haynes with customer information, business information, and confidential information." (*Id.* at ¶ 24) (emphasis added). Similarly, Paragraphs 28, 29 and 31-35 all definitively refer to the non-solicitation provision, wrongful solicitation, solicitation and direct solicitation. (*Id.* at ¶¶ 28, 29, 31-35; R. __.) A review of the Appellant's other causes of action show a similar and exclusive reliance on the non-solicitation provision.[2] (*Id.* at ¶¶ 50, 53, 60; R. __).

[2] It is important to note, that the Motion for the Injunctive Relief and the Court's July 17, 2015 Order, refer solely to the non-solicitation clause.

Chemgard brought claims for breach of the non-solicitation clause because it had a legitimate business interest in protecting confidential business information. (App. Brief at p. 9-12; R. __.) However, Appellant's allegations of "legitimate protectable business interests" plainly fail to articulate a cause of action for breach of the confidentiality provision as suggested. (App. Brief at p. 9-12; R. __.) Appellant nevertheless brazenly asserts Chemgard's Second Amended Complaint included claims against Haynes for using "competitive, confidential, and important business information" in violation of the Non-Disclosure of Confidential Information provision found in Paragraph 9(a)-(c) of Haynes' Employment Contract. (App. Brief at p. 21; R. ___.) However, Appellant clearly did not include a cause of action for breach of Sections 9(a) or 9(b) of Haynes' Agreement in the Second Amended Complaint, nor did Appellant request the Court for a preliminary injunction to prohibit the violation of Section 9(a) and 9(b) Confidential Information and Nondisclosure provision. (Second Amended Complaint; R. __; Motion for Injunction; R__.)

In fact, Appellant's Statement of the Case within its Initial Brief establishes that the Second Amended Complaint did ***not*** in fact include claims for breach of the confidentiality and notice provisions of Haynes' Employment Agreement. The Initial Brief states:

> On October 10, 2016,[3] and based on the *newly* produced documents and deposition testimony of Haynes and Bell, Chemgard filed a motion to amend its [Second Amended] 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.

[3] Notably, Appellant filed to amend its Second Amended Complaint (seeking what would have been a fourth go at its Complaint) only *after* the lower court's hearing on Respondent's Motion for Summary Judgment on September 22, 2016, and its receipt of Judge Couch's ruling issued on October 7, 2016.

(App. Brief at pp. 4, 20-22; R. __.) Per SCACR 208(b)(1)(C), "any matters stated or alleged in appellant's statement shall be binding on appellant."[4] Accordingly, Chemgard admittedly failed to allege a breach of the 30-day notice provision or the non-disclosure and confidentiality provision in its Second Amended Complaint, and attempted to do so in its Third Amended Complaint. (App. Brief at pp. 4, 20-22; R. __.)

As discussed above, there is no question that Chemgard's restrictive covenant, as written, is patently over broad and unenforceable. (November 8, 2016, Order p. 6; R. __.) Appellant simply cannot shelter its invalid non-solicitation clause under the pretense that the allegations of a "protectable business interest" were somehow meant to establish a claim for breach of the confidential information provision. (App. Brief at p. 9-12; R. __.) Accepting the allegations of the Second Amended Complaint as framed and the evidence in the Record in light most favorable to Chemgard, as the circuit court did, the lower court appropriately held the Appellant's claims all arise solely from, and are thus dependent upon, an alleged breach of the patently overbroad non-solicitation provision of Haynes' Agreement.

[4] Appellant presumptively avoided bringing the breach of Sections 9(a)-(b) of the Confidential Information clause of Haynes' Agreement because the clauses have no reasonable time restriction as required by South Carolina law. *See Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 632, 799 S.E.2d 318, 324 (Ct. App. 2017), reh'g denied (May 26, 2017) (Because the nondisclosure provisions had the effect of a covenant not to compete, they required a reasonable time restriction like any other non-compete agreement.) Moreover, had Appellant initially filed for breach of Haynes' confidential information provision, Respondents would have timely filed for summary judgment as to Section 9(a), (b) in conjunction with the motion for summary judgment on Section 9(d) of Haynes' Agreement as it is void pursuant to South Carolina law

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S RULE 59(e) MOTION.

Appellant claims that the lower court's failure to provide specific factual findings and its refusal to consider newly discovered evidence, in deciding Chemgard's Rule 59(e) motion, constitutes error of law. (App. Brief at pp. 24-25.) Appellant further claims that the Rule 59(e) motion was meant to "remind the court that Chemgard had already sought a motion to amend its pleadings to account for new evidence" and that 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" and such failure was a "clear error of law." (App. Brief at p. 25-26; R. __.)

As stated by the lower court, a Rule 59(e) motion is "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. *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992); *see generally* James F. Flanagan, South Carolina Civil Procedure, at 493-95 (3d. Ed. 2010) (the motion to amend cannot be used to raise an issue not previously before the court and must specifically raise the issue on which a ruling is sought). The purpose of Rule 59(e), to alter or amend the judgment is to request the trial judge to "*consider matters properly encompassed in a decision on the merits.*" *Arnold*, 309 S.C. at 172-73, 420 S.E.2d at 842 (emphasis added).

For the purposes of granting summary judgment as to all of Appellant's claims, the only issue before the trial court at the September 22, 2016, hearing was a question of law – whether the non-solicitation agreement was enforceable. (September 22, 2016, Hearing Transcript 17:18-18:11; R. __). *See also Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *4 (D.S.C. Mar. 2, 2009) (determining whether the language of a contract is ambiguous

and construing an unambiguous contract are questions of law for the court). Accordingly, allegations of breach, the trial court's consideration of William Smith's Affidavit, or consideration of any of the newly discovered "treasure trove of evidence" was wholly unnecessary as there was no genuine dispute of material fact to preclude summary judgment as a matter of law as to the unenforceability of the contract. (App. Brief at pp. 23-25; R. __; September 22, 2016 Hearing Transcript, 21:24-23:24; R. __.)

Moreover, a Rule 59(e) motion cannot be used to bring forth additional evidence not considered by the lower court in ruling and is the improper vehicle to avoid prejudice. In order to avoid summary judgment because further discovery is needed to defend a motion, the non-moving party must both make a formal motion for continuance, including a good reason why the time for discovery was insufficient, and point out in a specific manner how the non-moving party will be prejudiced if summary judgment is granted. *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 244 (2002); *Guinan v. Tenet Health Systems*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009); *CEL Products v. Rozelle*, 357 S.C. 125, 130-31, 591 S.E.2d 643, 645-46 (Ct. App. 2004); *Middleborough Property Regime v. Montedison*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771-72 (Ct. App. 1996). Further, the non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

In a recent concurrence where the Court of Appeals found that the lower court acted within its discretion in refusing to continue a summary judgment hearing to allow for additional discovery, Justice Few specifically noted that "[w]hen a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court

should be very hesitant to say the trial court abused its discretion in denying the request." *In re: Estate of Eris Singletary Smith*, App. Case No. 2013-002810 (S.C. Ct. App. December 21, 2016) (Few, J., concurring). Therefore, if Appellant felt that it would be prejudiced by a ruling of the summary judgment motion, then it should have timely filed a motion for continuance or the suggested motion to stay. (*See* September 22, 2016, Hearing Transcript 30:3-20.)

Here, the Appellant moved to compel additional discovery[5] but did not move for a continuance or make a motion to stay the decision on the summary judgment motion in order to conduct additional discovery. (September 22, 2016, Hearing Transcript 4:2-21; R. __.) In fact, Appellant expressly asked that Respondent's motion for summary judgment proceed and stand on its own. (*Id.* at 39:24-40:2.) Appellant dismissed its motion to quash at the September 22, 2016, hearing and the parties agreed to proceed with discovery without the lower court's guidance on the motion to compel. (September 22, 2016, Hearing Transcript, at 4:2-21, 18:25-40:15; R. __.) Appellant never specified how it would be prejudiced if summary judgment was granted before it could complete discovery. (*Id.* at 30:13-20; 33:18-34:9; R. __.) Appellant then improperly used its Rule 59(e) motion to argue that the discovery conducted *after* the summary judgment hearing provided evidence of Haynes' alleged breach of the non-disclosure and confidentiality provisions of Haynes' Employment Agreement. (App. Brief at pp. 24-26; R. __; Rule 59(e) Motion to Alter/Amend at pp. 8-9; R. __.) Appellant cannot now fault the circuit court for moving forward on Respondents' motion for summary judgment given its own lack of objection simply because Appellant disagrees with the result.

[5] This Motion to Compel was heard the same day as the Motion for Summary Judgment on September 22, 2016. (September 22, 2016, Hearing Transcript 4:2-21.)

In any event, it is clear that no amount of discovery or additional evidence would have salvaged the overly broad non-solicitation clause. (September 22, 2016, Hearing Transcript, at 33:18-34:9; R. __.) Appellant's argument that there is "plenty" of evidence for a jury to conclude that Respondents improperly solicited customers using confidential information, was not before the lower court as the agreement first has to be enforceable as a matter of law to proceed to the jury. (*Id.*) Accordingly, the lower court had no reason to delay deciding the motion for summary judgment, it properly granted the motion as a matter of law, and it properly denied Appellant's motion to alter/amend its decision. Moreover, since Appellant never made any motion to stay or for continuance, such issue is not properly preserved for appeal. SCACR 201.

The court fully considered the record and South Carolina law in rendering its judgment granting summary judgment to Respondent as a matter of law and denying Appellant's Rule 59(e) Motion to Alter/Amend.

IV. SECTION III AND IV OF APPELLANT'S BRIEF HAVE NOT BEEN PROPERLY PRESERVED FOR THE COURT'S CONSIDERATION ON APPEAL AS EACH ARGUMENT FAILS TO MEET THE REQUIREMENTS OF SCACR 201 AND 208.

Appellant makes three deficient arguments in Section III and IV of its Initial Brief which should not be considered as they were not preserved for appeal. The South Carolina Rules of Appellate Practice require an order, judgment, sentence or decision in order for an appeal to be taken and require Appellant's Argument section to include the particular issues to be addressed by the Court, "followed by discussion and citations of authority." SCRAR 201(b), 208(b)(1)(D).

First, Section III of Appellant's Brief was not listed as an issue on appeal pursuant to SCACR 208(b)(1)(B), which requires a statement as to each issue presented for review and should not be considered on appeal. Second, Section IV of Appellant's Brief fails to include any legal

support as required by SCACR 208(b)(1)(D) and should not be considered on appeal. (App. Brief at pp. 24-26; R. __.) In Section IV, Appellant alleges that, had the lower court considered its October 10, 2016, motion to amend its Second Amended Complaint before granting Respondents' motion for summary judgment or considered newly discovered evidence brought to light in its November 11, 2016, 59(e) Motion to Alter/Amend, then the Court would not have granted Respondents' motion for summary judgment. (*Id.*) In making inapposite assertions, Appellant cites no authority supporting its position that the lower court was tasked with considering a motion to amend after it had already decided the motion for summary judgment. (App. Brief at pp. 24-26; R. __.) This argument is wholly inadequate to support a reversal on appeal and is not properly preserved for appeal. SCACR 208(b)(1)(D).

Further, Appellant's "short conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Mead v. Beaufort Cnty. Assessor*, App. Case No. 2014-02355 (S.C. Ct. App. December 21, 2016) (quoting *Glasscock Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)) (internal quotations omitted). Accordingly, "[w]hen an appellant provides no legal authority regarding a particular argument, the argument is abandoned and the court can decline to address the merits of the issue." *Id.* (citing *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)). Because Appellant has provided no legal authority to support its proposition that the lower court should have addressed his motion to amend or newly discovered evidence prior to granting Respondents' motion for summary judgment, it has abandoned this argument and it is not presented for review. Thus, this Court need not address the merits of the issue.

Third, Appellant's arguments regarding the lower court's consideration of its October 10, 2016, motion to amend the Second Amended Complaint for a third time should not be considered

by the Court of Appeals as there is no ruling, final judgment or decision by the lower court for this Court to properly review on appeal. (App. Brief at pp. 25-26; SCACR 201.)

The South Carolina Rules of Appellate Practice require a final judgment, appealable order or decision in order for an appeal to be taken. SCRAR 201(a). Accordingly, "only a party aggrieved by an order, judgment, sentence or decision may appeal." SCACR 201(b). Appellant's October 10, 2016, motion to amend is Second Amended Complaint for a third time is not preserved for review. *Broom v. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at *1 (S.C. Sept. 30, 2015) (finding Court of Appels erred in remanding the case because respondent did not seek a ruling on the motion to amend, the Court of Appeals should not have addressed the motion, even if only for the sole purpose of remanding for a ruling); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting that in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court); *Noisette v. Ismail*, 304 S.C. 56, 58, 304 S.E.2d 122, 124 (1991) (finding the issue was not properly before the Court of Appeals and should not have been addressed where the record reflected the circuit court did not explicitly rule on the argument and the petitioner failed to show it made a Rule 59(e), SCRCP, motion to amend or alter the judgment on that ground).

Appellant erroneously argues that the lower court "failed to address both the 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." (App. Brief at p. 25; R. __.) Appellant further contends that the lower court "should have stayed its ruling on the motion for summary judgment and permitted Chemgard to amend its Complaint to assert new claims based on new evidence" and that "such

failure was a clear error of law." (App. Brief at p. 25-26; R. __.) Appellant's arguments are misguided.

The lower court notified the parties of its decision to grant summary judgment to Respondents on October 7, 2016. (October 7, 2016, Correspondence; R. __.) Appellant's motion to amend its complaint was filed on October 10, 2016, *after* receiving notice from the lower court. (October 10, 2016, Motion to Amend Complaint; R. __.) Chemgard's Rule 59(e) Motion to Alter/Amend request Judge Couch's reconsideration of the November 8, 2016 Order granting summary judgment was not the proper vehicle to request the court's consideration of the amended complaint, which was not before the lower court on September 22, 2016. *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992); *see generally* James F. Flanagan, South Carolina Civil Procedure, at 493-95 (3d. Ed. 2010) (the motion to amend cannot be used to raise an issue not previously before the court and must specifically raise the issue on which a ruling is sought). Accordingly, it would have been implausible for the Judge Couch to *sua sponte* "stay its ruling on the motion for summary judgment" to permit Chemgard's amendment before Judge Couch, let alone the Appellant, knew the motion to amend was not going to be considered by Judge Verdin on December 5, 2016. (App. Brief at pp. 25-26.) This is particularly true when the record clearly shows Appellant did not ask Judge Couch to stay his consideration of Respondents' motion for summary judgment at the September 22, 2016, hearing, and only raised these alleged issues after receiving notice that it did not receive the result it perhaps expected.

The Clerk of Court did not remove the Appellant's motion to amend its second amended complaint from Judge Verdin's December 5, 2016, docket until after Judge Couch's November 8, 2016, order was entered and even *after* Appellant's Rule 59 Motion to Alter/Amend Judge Couch's Order filed on November 11, 2016. (November 15, 2016, Correspondence; R. __.) After receiving

notice from the Clerk of Court, Appellant failed to request a ruling on its Motion to Amend Second Amended Complaint. Appellant simply cannot rely on Judge Couch's Order filed on May 22, 2016, as the vehicle to appeal the lower courts lack of decision or lack of consideration of a motion to amend without having first requested a ruling or determination from which to appeal. (App. Brief at p. 25; R. __.) Accordingly, since Appellant failed to seek a ruling from the lower court this issue is not properly preserved for this Court's review pursuant to SCACR 201.

Likewise, Appellant's notice of appeal requests this Court to review Judge Couch's November 8, 2016, Order and May 22, 2017, Order granting summary judgment, not Judge Verdin's decision on or even her failure to consider Appellant's motion to amend on December 5, 2016. SCACR 208(b)(1)(B).

Pursuant to Rules 201(a) and 208 of the South Carolina Appellate Court Rules, Appellant has not preserved these issues for appeal and should not be considered as these issues have been abandoned.

V. CONCLUSION

Based on the above, this Court should affirm the circuit court's order granting Respondent's motion for summary judgment. The trial court properly held that Haynes' non-solicitation provision is patently overbroad as a matter of law and that Chemgard's Second Amended Complaint was wholly predicated upon the invalid and void non-solicitation, and therefore subject to dismissal. This Court should not consider Appellant's arguments not properly preserved for appeal and affirm the trial court's holding in granting summary judgment and denying Appellant's 59(e) motion to alter/amend.

(Signature on next page)

Respectfully submitted,

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Columbia, South Carolina
September 5, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001314

Chemgard, Inc., ... Appellant,

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Initial Brief of Respondents

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September 5, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: Chemgard, Inc. v. Darrell Keith Haynes, Chem-Tek, LLC and Albert Bell
Case No.: 2015-CP-23-03546
Appellate Case No. 2017-001314
Our File No.: 46641/01500

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondents and Respondents' Designation of Matter to be Included in the Record on Appeal. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of the brief and designation.

Very truly yours,

Matt Bogan

A. Mattison Bogan

AMB:lpw
Enclosures
cc: W. Andrew Arnold, Esquire
Jeremy R. Summerlin, Esquire