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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 28 2017
SC Court of Appeals

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

Appellate Case No. 2017-001314

Chemgard, Inc.....Appellant,

vs.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The current case law in South Carolina does not require that a non-solicitation agreement be limited to customers formerly serviced by the employee.

Respondents argue that it is “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.” (Respondents’ Initial Brief, p. 8). Respondents cite *Collins Music Co. v. Parent* for such a proposition, going on to parenthetically summarize the case by stating that the case held that “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.’”

Yet in *Collins Music Co. v. Parent*, the court was analyzing a non-compete agreement, which the court held was actually more like a non-solicitation agreement. The court clearly does not hold as Respondents’ parenthetical summary says it does; instead, the court specifically held that “[a] restriction which allows the former employee to sell anywhere else, **subject only to the employer's protection of his own clients**, is valid.” 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (emphasis added). The court does not hold that the employer’s clients are protectible only if the employee serviced those same clients. Instead, the court holds that the non-solicit, which applies to all of the employer’s clients, is valid.

Respondents also include a long set of citations to other South Carolina and district court cases to support this same point. (Respondents’ Initial Brief, p. 8, fn.1). However, these cases do not support Respondents’ contentions and are again contravened by the text and holdings of the cases themselves.¹ Respondents state that *Rental Uniform Service of Florence, Inc. v. Dudley*,

¹ Appellants have already dealt with the *Fournil v. Turberville Ins. Agency, Inc.* decision, 2009 WL 512261 (D.S.C. Mar. 2, 2009) in much detail already (see Appellant’s Initial Brief, pp. 14-15) and will not belabor that point again.

278 S.C. 674, 301 S.E.2d 142 (1983), provides a “critical factor” in the analysis of restrictive covenants, which is “whether [the restrictive covenant] 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.” (Respondents’ Initial Brief, p. 8, fn.1, citing *Rental Uniform* (emphasis in original)). However, even a cursory reading of *Rental Uniform* reveals that the court there was analyzing the geographic scope of a non-compete agreement, which is a wholly separate issue from the customer-based restriction for the non-solicitation agreement that is present in our case. While *Rental Uniform* does stand for the proposition that the geographic area covered by a non-compete agreement should be limited to the geographic area in which the employee had contact with the employer’s customers, it does not stand for the proposition that a non-solicitation must, in order to be enforceable, be limited to customers with whom the employee had contact. That conclusion is simply not in the text.

Respondents also cite to *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961), in support of its argument that a non-solicit is only enforceable if limited to the customers serviced by the former employee. The non-compete at issue in *Standard Register* is, however, specifically drafted to cover just eighteen out of hundreds of the employer’s customers, which is wholly unlike the restrictive covenant in the instant case. Most importantly, the court does not state anywhere in that opinion that a non-solicitation agreement must be limited as Respondents’ demand. Such a holding is simply not present.

Yet *Standard Register* does have some relevance to Appellant’s argument that the non-solicitation it seeks to enforce against Respondent Haynes is designed to protect Appellant from Haynes’s misuse of confidential pricing information that is applicable to all of Appellant’s customers. The *Standard Register* court notes that:

the most important single asset of most business is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. **A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.** Hence, if the employer can show a need of protection against unfair appropriation of his customers by his employee, the negative restrictive covenant is reasonable as to the employer.

238 S.C. at 66, 119 S.E.2d at 539 (emphasis added). As William Smith's affidavit shows in detail, the non-solicitation signed by Respondent Haynes covers all of Appellant's customers because Haynes had access to (and current possession of) Appellant's confidential pricing information, not just for the customers that Haynes serviced, but for *all of Appellant's customers*. Haynes's access to the pricing information for all of Chemgard's customers is not, as Respondents breezily put it, a "general exposure to confidential pricing information," Respondents' Initial Brief, p. 12, but rather a specific exposure to the proprietary formula that governs Appellant's pricing of all of its products for all of its customers.

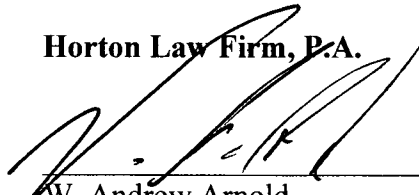
Nonetheless, Respondents argue that the non-solicitation provision applicable to Haynes is overly broad as a matter of law, regardless of what the facts are as relayed in Smith's affidavit. (Respondents' Brief, p. 13). However, no court simply looks at the wording of the restrictive covenant in isolation to determine enforceability. Rather, the courts must look to the context of the case and the facts surrounding the employee's employment in order to determine enforceability. The context in this case is provided by Smith's affidavit, which neither Respondent nor the trial court have ever truly engaged with, and which provides the substance to support Appellant's arguments that the non-solicitation is both narrowly tailored and necessary to protect a legitimate business interest of Appellant.

II. Appellant's Rule 59(e) Motion to Reconsider was not a motion to amend, despite Respondent's mischaracterization.

Respondents have mischaracterized Appellant's Rule 59(e) motion in Paragraph III of their Initial Brief. Appellant's Rule 59(e) motion was not a motion to amend the complaint, as Respondents indicate, nor was it predicated solely on "the court's failure to make specific factual findings and its refusal to consider newly discovered evidence." (Respondents' Initial Brief, p. 18). Rather, Appellant's Rule 59(e) motion sought to get Judge Couch to reconsider his ruling in light of William Smith's affidavit, which did not appear to have been reviewed or considered by the judge in reaching his original decision (primarily because the judge never mentioned the affidavit or its contents in his order). As argued above, Smith's affidavit provided the sole factual context for evaluating the enforceability of the non-solicit agreement, and Judge Couch did not even mention it. It was Judge Couch's failure to consider the affidavit that provided the primary impetus for Appellant's motion, not an attempt to amend the pleadings, as Respondents' allege.

Respectfully submitted,

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September 27, 2017

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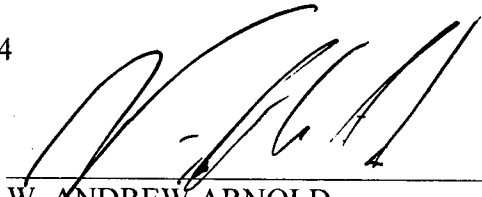
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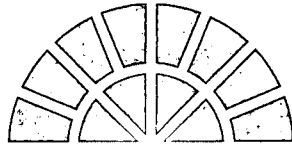
PROOF OF DELIVERY

I certify that I have served the Reply Brief of Appellant by overnight delivery service, by shipping the documents on September 27, 2017, addressed to the attorneys of record as follows:

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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 the Reply Brief of Appellant and Proof of Delivery. I have enclosed one copy of each document and request that you return a stamped copy of the documents to me in the enclosed self-addressed stamped envelope.

Sincerely,

W. Andrew Arnold

WAA/jdf

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

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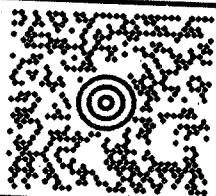
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Reference#1: Andy Arnold
Reference#2: Chemgard Appeal

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