

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAR 02 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2017-001391
Opinion No. 5471

Joshua Fay, Respondent,

v.

Total Quality Logistics, LLC, Petitioner,

BRIEF OF PETITIONER

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

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

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case2

Facts3

Arguments.....8

 1. THE COURT OF APPEALS ERRED IN ITS FAILURE TO APPLY
 OHIO LAW TO THE AGREEMENT BASED ON A VALID CHOICE
 OF LAW PROVISION WHEN THE AGREEMENT WOULD BE
 VALID UNDER OHIO LAW.8

 2. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE
 STANDARDS BY WHICH TO JUDGE THE ENFORCEABILITY OF A
 NON-COMPETE PROVISION TO A CONFIDENTIALITY
 PROVISION.13

Conclusion20

TABLE OF AUTHORITIES

Cases:

<u>Carolina Chem. Equip. Co. v. Muckenfuss,</u> 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996).....	14, 16
<u>GTI Corp. v. Calhoon,</u> 309 F. Supp. 762 (S.D. Ohio 1969)	14, 18
<u>Jeffrey A. Dangelo v. Total Quality Logistics,</u> 2009 WL 10679469 (S.D. Ohio Aug. 24, 2009).....	9, 12, 13
<u>Marlite, Inc. v. America Canas,</u> 453 Fed. Appx. 938 (N.D. Ohio 2009)	9, 12
<u>Milliken & Co. v. Morin,</u> 399 S.C. 23, 731 S.E.2d 288 (2012)	14, 15, 18, 19
<u>Oxman v. Profit,</u> 241 S.C. 28, 126 S.E.2d 852, (1962)	8, 11
<u>Raimonde v. Van Vlerah,</u> 42 Ohio St.2d 21, 325 N.E.2d 544 (1975)	8
<u>Standard Register Co. v. Kerrigan,</u> 238 S.C. 54, 119 S.E.2d 533 (1961)	8
<u>Stonhard, Inc. v. Carolina Flooring Specialists, Inc.,</u> 366 S.C. 156, 621 S.E.2d 352 (353)	8
<u>Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.,</u> 401 F. Supp. 1102 (E.D. Mich. 1975).....	9
<u>Team IA, Inc. v. Lucas,</u> 395 S.C. 237, 717S.E.2d 103 (Ct. App. 2011).....	8
<u>Total Quality Logistics, LLC v. Justin Moritz, et al.,</u> Case No. 2017-CVH-00261 (Ct. of Common Pleas, Clermont County, Ohio 2011)....	9, 13
<u>Total Quality Logistics, LLC v. Michael Siano,</u> 2010 WL 5583333 (Court of Common Pleas, Clermont County, Ohio 2011).....	9, 13
<u>Total Quality Logistics, LLC v. Ryan Burke, et al.,</u> Case No. 2017-CVH-00881 (Ct. of Common Pleas, Clermont County, Ohio 2017)....	9, 13

Vessel Medical, Inc. v. Elliott,
2015 WL 5437173 (D.S.C. Sept. 15, 2015).....18

Wolf v. Colonial Life and Accident Ins. Co.,
309 S.C. 100, 420 S.E.2d 217 (Ct. App. 1992).....11

Statutes:

S.C. Code Ann. § 39-8-20.....13, 14, 15
S.C. Code Ann. § 39-8-30.....2, 14, 15, 19

Other Authorities:

South Carolina Legislative Update, 1997 Reg. Sess. 4/29/1997.16

South Carolina Senate Journal, 1997 Reg. Sess. 1/30/1997.16

STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in refusing to apply Ohio law to the confidentiality agreement at issue despite the valid and unambiguous choice of law provision?
2. Did the Court of Appeals err in its holding that, under the South Carolina Trade Secrets Act, a confidentiality provision is required to meet the same standards as a covenant not to compete?

STATEMENT OF THE CASE

This appeal asks two questions: (1) whether a non-compete and non-disclosure agreement must first be considered pursuant to a choice of governing law provision; and (2) whether a confidentiality provision is required to include a time or geographic restriction despite the language of S.C. Code Ann. Section 39-8-30.

Petitioner Total Quality Logistics, LLC (“TQL”) is an Ohio limited liability company providing logistics services, including third-party logistics services and motor freight brokerage services, throughout the continental United States, Mexico, and Canada. Respondent Joshua Fay (“Fay”) was previously employed by TQL as a Logistics Account Executive. (App. at 83). Following his termination on June 17, 2013, Fay immediately began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality, and Non-Solicitation Agreement (the “Agreement”) by providing to a TQL customer, the Brandt Companies (“Brandt”), the same services that he had provided to Brandt while employed by TQL. (App. at 80). In fact, Fay established and directly competed through his own brokerage company, JF Progressions, following his employment with TQL. (App. at 260-61; 267).

Fay brought this action on September 23, 2013, alleging violations of the Fair Labor Standards Act and seeking a declaratory judgment that the Agreement is invalid and unenforceable. Fay amended his Complaint on November 12, 2013, to add a claim for intentional interference with contract, after Brandt ceased its dealings with him as a result of litigation TQL filed against Brandt to enforce its rights under the Agreement. (App. at 20-25).

The parties filed cross-motions for summary judgment. Fay filed his motion for judgment on the pleadings, or for summary judgment in the alternative, to ask the lower court to rule that his Agreement is unenforceable. Fay also asked the circuit court—prematurely, without the

benefit of any discovery—to rule against TQL on its counterclaims for conversion and misappropriation of confidential information and trade secrets, arguing that he had not in fact violated the Agreement.

By order dated April 14, 2014, the circuit court correctly held that the Agreement is enforceable under Ohio law and could be enforced in South Carolina because it does not violate the public policy of South Carolina. (App. at 7-19). The court also correctly denied Fay’s motion for summary judgment on TQL’s claims for breaches of contract, and in so doing, implicitly found that he had violated his Agreement. However, in response to Fay’s motion for partial reconsideration, by order dated August 4, 2014, the lower court revoked its finding that Fay had breached the Agreement, upheld its ruling that the Agreement is enforceable, and certified the issue for immediate appeal. (App. at 4-6).

The South Carolina Court of Appeals heard oral arguments on November 17, 2016. On March 1, 2017, the Court of Appeals issued an opinion reversing the trial court’s order finding the Agreement enforceable. (App. at 351-65). Judge John D. Geathers concurred in a separate opinion, stating he believed the Court of Appeals was required to first consider the Agreement under Ohio law based on the enforceable choice of law provision. The Court of Appeals denied TQL’s Petition for Rehearing on May 26, 2017. (App. at 375). TQL submitted its Petition for Certiorari on June 21, 2017. Following the Respondent’s Return and Petitioner’s Reply, this Court granted the Petition for Writ of Certiorari on February 1, 2018.

FACTS

TQL is an Ohio limited liability company that provides logistics services, including third-party logistic services, and motor freight brokerage services throughout the continental United States, Mexico, and Canada. (App. at 37, 190). TQL offered Fay employment as a Logistics

Account Executive by email dated November 20, 2012. (App. at 193). The offer of employment specifically disclosed to Fay that: “You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer.” (App. at 197-98).

TQL employed Fay beginning on December 10, 2012. (App. at 37). At the start of his employment, and as an inducement to TQL’s employing him, Fay entered into the Agreement. (App. at 38-42; 190). Fay admits he signed this Agreement on his first day of employment. (App. at 38; 184-85).

Section 9 of the Agreement focuses on the restrictions of competition following Fay’s employment with TQL. The provision provides as follows:

9. Covenants and Remedies.

...

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee’s employment with TQL), and for a period of one (1) year after termination or cessation of Employee’s employment for any reason (the “Restricted Period”):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venture or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL’s Confidential Information; and

(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any

business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(App. at 100-01).

The Agreement also contains separate and distinct confidentiality provisions. The parties agreed that “All Confidential Information as described herein is proprietary and the sole property of TQL.” (App. at 99). The Agreement prohibits Fay from “us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information.” (App. at 99). Fay agreed that “engaging in an employment relationship with a Competing Business . . . in a position similar to Employee’s position at TQL or in any other position in which the knowledge or use of TQL’s Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL’s Confidential Information to unfairly compete with TQL.” (App. at 99). Fay further agreed that “TQL’s trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable,

special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder" (App. 99-100).

As a Logistics Account Executive, Fay's job included developing his own book of business through the pursuit of new customers as well as selling to existing TQL customers. (App. at 190-91). As part of his job, Fay would obtain freight orders from these customers and arrange for transportation of the freight. (App. at 190-91). Fay's job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues or problems that arose. (App. at 190-91).

Fay participated in a six month, intensive training program and was entrusted with a range of confidential information and materials, such as detailed expense information, pricing, profitability and margin information, industry knowledge, strategies for obtaining customers and expanding business with customers, how to negotiate effectively with customers and carriers, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (App. at 191). As part of his training and throughout his employment, Fay had access to TQL's proprietary software system, known as "Load Manager," which contained much of TQL's Confidential Information as well as marketing and business strategies for TQL's sales employees. (App. at 191).

Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he have any familiarity with TQL's pricing, profitability, and margin information. (App. at 191). Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers or their contact information. (App. at 191). In fact, at the time of his hiring,

Fay had previously worked for his parent's company, T. Mark Fay Consulting, which was not in the transportation or logistics industry. (App. at 191).

Although Fay has attempted to re-characterize his work through his competing brokerage company, JF Progressions, Inc., as work that does not compete with TQL and is not a violation of the Agreement, it clearly is. Fay did through JF Progressions exactly what he did with TQL, and he provided these services for Brandt, a former TQL customer. (App. at 184-87). Fay admits that he created JF Progressions and entered into a contract with Brandt "to provide qualified carriers, manage logistics, provide support, and handle claims and documentation." (App. at 186). This violates his Agreement. Fay initiated the declaratory judgment action in the circuit court with the hope that it would be declared invalid, giving him the authority to continue competing with TQL.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN ITS FAILURE TO APPLY OHIO LAW TO THE AGREEMENT BASED ON A VALID CHOICE OF LAW PROVISION WHEN THE AGREEMENT WOULD BE VALID UNDER OHIO LAW.

This Agreement must first be considered under Ohio law based on the valid choice of law provision. “Choice of law clauses are generally honored in South Carolina.” Team IA, Inc. v. Lucas, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011). The Court of Appeals failed to give effect to the enforceable choice of law provision, under which the provisions of the Agreement are valid.

The Agreement includes a choice of law provision which states as follows:

11. Governing Law. This Agreement is made and entered into in the State of Ohio. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without regard to its conflict of law principles.

(App. at 102).

“Terms in a non-compete agreement may be construed according to the law of another state.” Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 159, 621 S.E.2d 352, 353 (citing Standard Register Co. v. Kerrigan, 238 S.C. 54, 70-71, 119 S.E.2d 533, 541-41 (1961)). Assuming the resulting agreement is valid as a matter of law and comports with public policy in South Carolina, our courts will enforce it. Id. The restrictive covenants in the Agreement are valid under Ohio law, and they comport fully with South Carolina’s public policy, which generally requires the enforcement of contracts entered into freely. Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962) (applying this principle to a covenant not to compete). Under Ohio law, the provisions in the Agreement are no greater than that which is required for TQL; they do not impose undue hardship on Fay; and they are not injurious to the public. Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544, 547 (1975).

Moreover, Ohio “permits its courts to enforce covenants not to use or disclose confidential information” Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F. Supp. 1102, 1114 (E.D. Mich. 1975). There is no Ohio case law that permits a court to construe an explicit confidentiality provision as a non-competition provision. In fact, Ohio courts have granted requests for preliminary injunctions or temporary restraining orders based on a confidentiality provision without a temporal or geographic limitation. See, e.g., Marlite, Inc. v. America Canas, 453 Fed. Appx. 938 (N.D. Ohio. July 22, 2009); Jeffrey A. Dangelo v. Total Quality Logistics, Case No. 1:09cv512, 2009 WL 10679469 (S.D. Ohio Aug. 24, 2009); Total Quality Logistics, LLC v. Michael Siano, Case No. 2010-CV-2731, 2010 WL 5583333 (Court of Common Pleas, Clermont County, Ohio Jan. 4, 2011); Total Quality Logistics, LLC v. Ryan Burke, et al., Case No. 2017-CVH-00881 (Court of Common Pleas, Clermont County, Ohio July 24, 2017); see also Total Quality Logistics, LLC v. Justin Moritz, et al., Case No. 2017-CVH-00261 (Court of Common Pleas, Clermont County, Ohio, May 15, 2017).

The majority opinion’s failure to consider the Agreement under Ohio law was in error. In his concurring opinion, Judge Geathers agreed that the Court of Appeals was required to first examine the Agreement under Ohio law because of the valid choice of law provision. (App. at 361-65). Many employment agreements, confidentiality agreements, and other contracts utilize choice of law provisions, and these are generally considered valid under South Carolina law. The majority’s failure to consider the choice of law provision calls into question contractual agreements’ respective choice of law provisions, and is an erroneous interpretation of current South Carolina law.

The Agreement is enforceable under the law of Ohio, the law upon which the parties agreed. The Agreement includes a separate and distinct non-compete provision with a one year limitation. This provision provides as follows:

9. Covenants and Remedies.

...

(b) Covenants. Employee agrees that, during the course of his or her employment (except as required in the course of Employee's employment with TQL), and for a period of one (1) year after termination or cessation of Employee's employment for any reason (the "Restricted Period"):

(i) Employee will not, directly or indirectly, own, operate, maintain or have any other interest (whether as an owner, shareholder, officer, director, partner, member, joint venture or any other interest) in any Competing Business (as defined below); except that nothing in this subsection prohibits Employee from owning less than 1% of the outstanding equity securities of any publicly-held corporation or entity; and

(ii) Employee will not, directly or indirectly, (whether as an employee, agent, consultant, contractor or otherwise), become employed by or engaged in a Competing Business (as defined below), in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information; and

(iii) Employee will not, directly or indirectly, solicit any Customer or Motor Carrier (as defined below) for any business purpose in competition with or in conflict with the Business of TQL; and

(iv) Employee will not, directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer, Motor Carrier, client, consultant, supplier, vendor, lessee, or lessor of TQL, or otherwise take any action to divert Business from TQL; and

(v) Employee will not, directly or indirectly, recruit, solicit or assist others in recruiting or soliciting any person who is an employee of or consultant with TQL.

(vi) It is further understood and agreed that the running of the one (1) year set forth in this Paragraph shall be tolled during any time period during which Employee violates any provision of this Agreement.

(App. at 100-01).

This separate and distinct provision of the Agreement imposes both time and geographic limits—the restrictive covenants run for one year after Fay’s employment ends and are limited to the Continental United States. (App. at 100-02). Fay was able to establish contact with TQL’s customers and prospects across the United States and Canada, and TQL’s records show Fay contacted customers in five Canadian provinces and forty-four states, the District of Columbia, and Puerto Rico. (App. at 196-200). Thus, the geographic and temporal scope of the non-compete provision of the Agreement is enforceable under Ohio law.

Further, the non-compete provisions of the Agreement fully comport with the public policy of South Carolina. South Carolina generally requires the enforcement of contracts entered into freely, including covenants not to compete. Oxman, 241 S.C. 28, 126 S.E.2d 852. Moreover, the prohibitions included in the Agreement reasonably protect TQL’s legitimate interest in protecting its business contacts and trade secrets, an interest shared by all businesses. See Wolf v. Colonial Life and Accident Ins. Co., 309 S.C. 100, 108, 420 S.E.2d 217, 221 (Ct. App. 1992).

However, the Court of Appeals did not even base its decision on the language of this valid non-compete provision. Rather, the provision upon which the Court of Appeals invalidated the Agreement at issue is actually a confidentiality provision, which is not required to have a temporal or geographic limitation under Ohio law (or, for that matter, South Carolina law). The Court of Appeals erroneously conflated the standard of review for a non-compete provision and a confidentiality provision in its failure to apply Ohio law.

During the course of his employment with TQL, Fay learned both confidential and non-confidential information regarding the transportation industry. Fay is free to use his learned knowledge based on any non-confidential information to work in a field of his choice. However, it is not unreasonable for TQL to continue to protect its trade secrets following Fay's employment with TQL. This neither imposes a hardship on Fay nor is it injurious to the public. Additionally, Fay has not been unduly harmed or burdened by the requirements of the confidentiality provision. During the course of his employment with TQL, Fay learned a variety of general transportation concepts and may continue to work in this field without violating the Agreement. (App. at 201-02). The Agreement, which should be considered under the law of Ohio, only prohibits unfair competition and the use of TQL's confidential and trade secret information.

Before Fay was hired, he did not have access to any of the non-public information about TQL's customers or TQL's proprietary business methods. In fact, Fay had not even worked in the transportation or logistics industry prior to his employment with TQL. (App. at 191). Nothing in the Agreement, particularly the provisions related to confidentiality, stifle Fay's skill and experience or restrict his ability to use any general knowledge gained during his employment.

The Court of Appeals erred when it failed to apply Ohio law to the terms of the Agreement, and the Agreement is enforceable under Ohio law. By not examining the Agreement first under Ohio law, the Court of Appeals failed to consider the explicit, and enforceable, choice of law provision contained in the Agreement. Ohio courts do not construe specific confidentiality provisions as non-competes, and Ohio courts have upheld confidentiality provisions that lack a specific geographic or temporal limitation. See, e.g., Marlite, Inc. v. America Canas, 453 Fed. Appx. 938 (N.D. Ohio. July 22, 2009); Jeffrey A. Dangelo v. Total Quality Logistics, Case No.

1:09cv512, 2009 WL 10679469 (S.D. Ohio Aug. 24, 2009); Total Quality Logistics, LLC v. Michael Siano, Case No. 2010-CV-2731, 2010 WL 5583333 (Court of Common Pleas, Clermont County, Ohio Jan. 4, 2011); Total Quality Logistics, LLC v. Ryan Burke, et al., Case No. 2017-CVH-00881 (Court of Common Pleas, Clermont County, Ohio July 24, 2017); see also Total Quality Logistics, LLC v. Justin Moritz, et al., Case No. 2017-CVH-00261 (Court of Common Pleas, Clermont County, Ohio, May 15, 2017). Further, neither the language of the non-competition provision nor the confidentiality provisions violate the public policy of South Carolina. The Court of Appeals was required to examine this Agreement under the law of Ohio, and Ohio would enforce both the non-compete and confidentiality provisions. Thus, the Court of Appeals erred, and its decision should be reversed.

2. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE STANDARDS BY WHICH TO JUDGE THE ENFORCEABILITY OF A NON-COMPETE PROVISION TO A CONFIDENTIALITY PROVISION.

The Court of Appeals erred in holding that the confidentiality provision at issue in the Agreement was so broad as to render it a non-compete clause.

The South Carolina Trade Secrets Act defines a “trade secret” as follows:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although

individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code Ann. § 39-8-20(5).

Additionally, this Act does not require a confidentiality provision to include a temporal or geographic limitation. It states as follows:

A contractual duty not to disclose or divulge a trade secret, to maintain the secrecy of a trade secret, or to limit the use of a trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographic limitation.

S.C. Code Ann. § 39-8-30(D).

The South Carolina General Assembly adopted this language in 1997 in response to the decision of the Court of Appeals in Carolina Chem. Equip. Co. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), a case on which the Court of Appeals and Fay mistakenly rely. The amended statutory language, which makes clear that neither a temporal nor a geographic limit is required for a confidentiality provision to be enforceable, controls the consideration of the terms of the Agreement, not the decision in Muckenfuss.

“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) (quoting GTI Corp. v. Calhoon, 309 F. Supp. 762, 768 (S.D. Ohio 1969)). In Morin, this Court held that an employer can have legitimate business interests it has the right to protect through the use of a confidentiality agreement, and that a confidentiality agreement is not required to be limited by

time or geography. Id. at 38, 731 S.E.2d at 296. Further, if a terminated employee is able to use general skills and knowledge in a new line of employment, the confidentiality provision should not be considered to be harsh or oppressive. Id.

The Court of Appeals decision in this matter is in direct contradiction to the language of Section 39-8-30 and this Court's prior rulings. Section 39-8-30 explicitly states that confidentiality provisions are not required to have either a geographic or temporal limitation. The decision of the Court of Appeals to construe a confidentiality provision as a non-compete rests entirely on dicta found in a footnote. Morin, 399 S.C. at 33 n.4, 731 S.E.2d at 293 n.4. The legislative intent of the amendments to the South Carolina Trade Secrets Act was to permit confidentiality provisions, such as the ones in the Agreement signed by Fay, to be enforced rather than construed in an impermissibly broad manner. See S.C. Code Ann. § 39-8-30(D). The plain language of the confidentiality provision applies only to information which would be considered confidential and protected under South Carolina law. See S.C. Code Ann. § 39-8-20(5) (discussing the definition of a trade secret). The Court of Appeals' decision focuses on the confidentiality provision's lack of any geographic or temporal limitations in its decision that the Agreement is unenforceable—this is simply in conflict with the language of the statute.

Following the amendment to S.C. Code Ann. Section 39-8-30, numerous businesses and employers updated their confidentiality provisions under the belief that these agreements would be enforceable in South Carolina without a time or geographic limit. Should the Court of Appeals' and Respondent's interpretation prevail, nearly all confidentiality and non-disclosure agreements would become subject to the same requirements as non-compete provisions regardless of the intention of the parties or the nature of the information. For example, the confidentiality of trade secret information, such as product receipts, proprietary methods of

conducting business, or customer data, would be incapable of protection in perpetuity, which is not the intent of the statute passed by the South Carolina General Assembly. If the Court of Appeals' erroneous interpretation is permitted to stand, all of these confidentiality provisions will be required to be rewritten or will be challenged by disgruntled employees who desire to work for competitors or harm the business of a former employer. For example, an individual would be able to accept employment with a particular employer knowing he would be able to learn confidential information, then turn around and become a direct competitor with no penalty. This was clearly not the intent of the General Assembly. In fact, the General Assembly moved quickly in response to the decision in Muckenfuss. This Court denied the petition for certiorari in Muckenfuss on January 23, 1997. On January 31, 1997, a mere eight days later, a bill was introduced to amend the South Carolina Trade Secrets Act. South Carolina Senate Journal, 1997 Reg. Sess. 1/30/1997. The General Assembly moved quickly after this proposal, specifically "codif[ying] the common law distinction between a trade secret agreement and a covenant not to compete." South Carolina Legislative Update, 1997 Reg. Sess. 4/29/1997. The addition of subsection (D) to S.C. Code Ann. Section 39-8-30 became effective on May 21, 1997, approximately one year after the Court of Appeals' decision in Muckenfuss and less than six months after its initial introduction, an unequivocal statement by the General Assembly of its desire to allow for the continuous protection of confidential information without restriction as to a time period or geographic scope.

Further, the definition of confidential information provided in the Agreement is limited to that which encompasses genuinely proprietary information and concepts. (App. at 49-50). While the definition is a robust expression of the information subject to protection, a close reading

shows that the Agreement genuinely includes only secret and/or proprietary information concerning TQL and/or its customers. (App. at 97-98).

General concepts are not incorporated into the definition of confidential information in the Agreement. As conceded by Fay, Kotlarz described a comprehensive list of general transportation concepts, methods, and information Fay learned from TQL which Fay is permitted to use in the transportation industry. (App. at 201-03). Fay learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry and still be in compliance with the Agreement: how to price loads for customers and to motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when the carrier is hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the product is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload at each; how to talk to a carrier about sealing the doors to their trailers; how to handle mechanical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-deck; how to calculate how long it should take for a carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its refrigeration unit during transit; how to locate flag cars and permits for a motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain products during certain periods of the year (for example, produce, landscaping, building materials); where products originate (i.e., produce out of Laredo, TX in March, etc.) and where they are headed, which will help

brokers understand when truck costs and availability will “tighten up” because of increased demand; and how to obtain backhauls for motor carrier and how to price them. (App. at 202-03).

The definition of confidential information focuses on TQL’s proprietary concepts and methods to which Fay was exposed. As part of his training and employment, Fay had access to TQL’s proprietary software system, which contained much of the information designed to be protected by the confidentiality provision, as well as marketing and business strategies for TQL’s employees. (App. at 191). Prior to his employment with TQL, Fay had no knowledge of and did not understand TQL’s proprietary methods to develop leads or how to “build” loads, nor did he know TQL’s pricing, profitability, and margin information. (App. at 191). This is the type of information considered to be confidential under the Agreement.

The Court of Appeals erred in interpreting the Agreement’s confidentiality and nondisclosure provision to be overbroad such that it was required to satisfy the standard used to enforce a non-compete provision. Under South Carolina law, such a confidentiality provision must not “purport to preclude an employee from finding gainful employment in his chosen field.” Vessel Medical, Inc. v. Elliott, No. 6:15-cv-00330-MGL, 2015 WL 5437173, at *4 (D.S.C. Sept. 15, 2015). At no point do these paragraphs contain restrictions so onerous that Fay could not find any employment in the logistics and transportation field. The confidentiality provision of the Agreement is merely a reasonable restraint on Fay to prevent him from “disclosing and using confidential information which was developed as a result of [TQL’s] initiative and investment.” Morin, 399 S.C. at 37, 731 S.E.2d at 295 (quoting GTI Corp., 309 F. Supp. at 768)).

Further, the confidentiality provision is not so broad that Fay could not work in any capacity in the transportation industry. For example, Fay could work in any of the following

capacities: dispatcher for a trucking company, driver for a trucking company, carrier compliance coordinator, safety compliance officer with a motor carrier, carrier coordinator with a motor carrier, logistics planner for any company other than a freight broker, freight broker for an ocean or air freight company, freight broker for a non-vessel operating common carrier, barge or intermodal freight company, customs broker or international freight broker, produce broker, lumber broker, and an alloy broker. (App. at 201-02). The confidentiality provision simply requires Fay refrain from disclosing TQL's trade secret and proprietary information.

By broadly construing the confidentiality provision and narrowly construing the statute, the Court of Appeals mistakenly concluded that the confidentiality provision of the Agreement was so expansive that it qualified as a covenant not to compete. By explicitly including the statement that a contractual duty not to disclose a trade secret is not "void or unenforceable or against public policy for lack of a durational or geographical limitation", S.C. Code Ann. § 38-8-30, the General Assembly has made clear its intent for the proprietary information of a business to be able to remain confidential following termination of employment. By reading the statute in such a limited manner, the Court of Appeals ignores the clear legislative intent and this Court's decision in Morin. See 399 S.C. 23, 731 S.E.2d 288.

This Court's ruling in Morin makes clear that confidentiality provisions are not required to have a temporal or geographic limit. The provision at issue is not so broad to preclude all forms of employment in the transportation and logistics industries, but rather merely the use of the confidential and proprietary information of TQL. The Court of Appeals erroneously construed the confidentiality provision of the Agreement by considering its enforceability based on the standards applied to a non-compete provision, a clear contradiction of the statutory law and this Court's prior decisions. Therefore, the Court of Appeals' decision should be reversed.

CONCLUSION

For the reasons stated, Petitioner requests this Court reverse the decision of the Court of Appeals and affirm the decision of the Circuit Court.

Respectfully Submitted,

Emily I. Bridges

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

Attorneys for Petitioner Total Quality Logistics, LLC

March 1, 2018

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 02 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2017-001391

JOSHUA FAY.....Respondent,

vs.

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

PROOF OF SERVICE

The undersigned of the law offices of Smith Moore Leatherwood LLP, attorneys for Petitioner, does hereby certify that service of the Brief of Petitioner was made on counsel for Respondent, specified below, by sending a copy via US Postal Service, Priority Mail Express, on **March 1, 2018**, to the following address:

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

Date: March 1, 2018

Emily I. Bridges

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

Emily I. Bridges (SC ID: 102199)

SMITH MOORE LEATHERWOOD LLP

2 West Washington Street, Suite 1100 (29601)

P.O. Box 87

Greenville, South Carolina 29602

Telephone: (864) 751-7600

Facsimile: (864) 751-7800

rob.moseley@smithmoorelaw.com

emily.bridges@smithmoorelaw.com

Counsel for Petitioner Total Quality Logistics, LLC