

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

The Honorable Roger M. Young, Circuit Court Judge

JUN 12 2018

Appellate Case No. 2017-001391
Opinion No. 5471

S.C. SUPREME COURT

Joshua Fay,.....Respondent,

v.

Total Quality Logistics, LLC, Petitioner,

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

Petitioner Total Quality Logistics, LLC (“TQL”) incorporates the Statement of Issues on Appeal, the Statement of the Case, the Facts, and all arguments from its Brief of Petitioner.

In the Brief of Respondent, Respondent Joshua Fay (“Respondent” or “Fay”) makes three assertions that call for reply: (1) Respondent misstates arguments and statements made by Petitioner in its Petition for Certiorari and Brief; (2) that Ohio does not have a substantial relationship to the parties or transaction such that the choice of law clause should not apply; and (3) that the confidentiality provision prohibits Fay from ever working in the motor carrier industry. Neither has merit.

I. Respondent misinterprets and misstates Petitioner’s Petition for Certiorari and Brief.

As a threshold matter, Respondent makes several misstatements in his brief that call for clarification and correction. First, Respondent spends most of his brief proving an undisputed issue: that South Carolina courts will not “blue pencil” an agreement. TQL does not ask this Court to blue pencil the agreement.

Second, Respondent alleges TQL failed to preserve for appeal its argument that the confidentiality provision was not so broad as to render it a non-compete clause, as determined by the Court of Appeals. This is patently incorrect. Petitioner’s second argument in its petition for certiorari states that “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.” (Pet. for Cert., p. 7). This is one of the exact grounds on which TQL based its appeal and this Court granted the petition for certiorari. For Respondent to claim it was not preserved for appeal is simply incorrect.

Finally, Fay claims TQL concedes the confidentiality provision is actually a non-compete and does not meet the public policy requirement. This is a misstatement of TQL's clear position in its brief. TQL states that the separate and distinct non-compete clause in the Agreement comports with South Carolina public policy, therefore this could not and should not be the basis on which the Court of Appeals rests its opinion. TQL specifically states that "...the non-compete provisions of the Agreement fully comport with the public policy of South Carolina." (Br. p. 11). This is clearly not a concession that the confidentiality provision should be viewed as a non-compete, but rather an explanation of the separate and distinct non-compete included in the Agreement.

Thus, Fay has grossly misstated and mischaracterized certain positions in TQL's petition for certiorari and brief which require Petitioner to clarify the record.

II. The State of Ohio Has a Substantial Relationship to the Parties and the Agreement, and its Law Should Apply.

Respondent argues that an Ohio court would not enforce the parties' valid choice of law clause, claiming Ohio does not have a substantial relationship to the parties or Agreement. This is simply incorrect. In fact, in the case cited by Respondent, Schulke Radio Prods., Ltd. v. Midwestern Broadcasting Co., 453 N.E.2d 683 (Ohio 1983), the Court held the choice of law clause was valid and applied the law chosen by the parties to the contract, not the place of performance. Id. at 686. Further, Ohio courts have held that the state of incorporation and where final approval to a contract is given is sufficient to establish a substantial relationship. See Sekeres v. Arbaugh, 508 N.E.2d 941, 942 (Ohio 1987). TQL is incorporated in the state of Ohio, and final approval of employment arrangements are made by TQL in Ohio. Moreover, simply because Fay is a resident of South Carolina does not mean South Carolina had a materially

greater interest in this contract. See id. In actuality, the contract was to be performed not solely in South Carolina, but also in other states across the country. (App. at 26-32).

As explained more fully in the Brief of Petitioner, the courts of Ohio have enforced similar agreements using the law of Ohio. 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). Thus, Ohio has a significant relationship to the parties and this Agreement, and the Court of Appeals erred in its refusal to examine the Agreement under the law of Ohio.

III. Fay Is Permitted to Work in the Motor Carrier Industry Under the Confidentiality Provision.

Fay's assertion that the confidentiality provisions of the Agreement prohibit him from working in the freight brokerage business is inaccurate. Fay appears to claim that the definition of Confidential Information includes every piece of information learned by Fay while employed by TQL, thereby prohibiting him from ever working in the motor carrier industry. This is not the definition of Confidential Information to which the parties agreed. Rather, as TQL has demonstrated, the definition of Confidential Information includes only a list of genuinely proprietary information and concepts.

In support of this assertion, Respondent claims TQL did not properly limit its definition of Confidential Information to trade secrets, therefore it is not afforded the protections of S.C.

Code Ann. § 39-8-30, which states that a confidentiality provision is not required to include a temporal or geographic limitation in order to be enforceable. Under Chapter 39 of the South Carolina Code, “trade secret” is a defined term, and “information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code....” S.C. Code Ann. § 39-8-20(5)(a). This is exactly the type of information incorporated in TQL’s contractual definition of “Confidential Information.” (App. at 23-29).

Moreover, the trade secret provisions in the Agreement are not so broad as to become a non-compete agreement and make it impossible for Fay to work in the motor carrier industry. The confidentiality provision is a reasonable restraint on Fay to prevent him from “disclosing and using confidential information which was developed of [TQL’s] initiative and investment.” Milliken & Co. v. Morin, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (quoting GTI Corp. v. Calhoun, 309 F. Supp. 762, 768 (S.D. Ohio 1969)). Fay and the Court of Appeals rest their position regarding the scope of the confidentiality provision, and its alleged limitations on Fay’s ability to be employed in the motor carrier industry, on one footnote stated in dicta. Morin, 399 S.C. at 33 n.4, 731 S.E.2d at 293 n.4. However, just as in Morin, the confidentiality provisions are valid and would permit Fay work in the motor carrier industry in various capacities so long as he does not disclose TQL’s properly defined trade secret and confidential information. In fact, motor carrier is not even specifically defined as a “Competing Business” in the Agreement. (App. at pp. 23-29).

Finally, Fay claims TQL’s argument related to his ability to work is based solely is based solely on the affidavit provided by Ms. Kotlarz. (App. at 201-03). This is simply untrue and an incorrect reading of TQL’s position. The sworn statement by Ms. Kotlarz gives examples of

general transportation information and types of employment Fay could undertake in the transportation industry in compliance with the terms of the Agreement. This affidavit merely counters Fay's own self-serving and inaccurate claims that the confidentiality provision prevents him from being employed in the transportation industry.

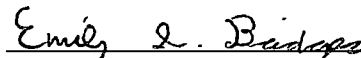
CONCLUSION

As articulated above, Respondent includes in his brief several misstatements regarding Petitioner's position. Second, the Agreement has a close connection to the state of Ohio such that it bears a logical relationship to the parties, and the Court of Appeals erred in failing to respect the parties' choice of law clause applying the law of Ohio. Finally, Fay has the ability to work in various capacities, including in the motor carrier business, under the terms of the Agreement.

TQL is in an extremely competitive environment in which it must protect its interests from the market. In fact, Fay's actions exemplified TQL's very concerns: Fay formed a competing company to provide the exact same services TQL provided to a customer of TQL.

Therefore, for the reasons stated in Petitioner's Brief and in this Reply Brief, TQL respectfully requests this Court reverse the decision of the Court of Appeals and affirm the decision of the Circuit Court.

Respectfully Submitted,



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PROOF OF SERVICE

The undersigned of the law offices of Smith Moore Leatherwood LLP, attorneys for Petitioner, does hereby certify that service of the Reply Brief of Petitioner was made on counsel for Respondent, specified below, by sending a copy via US Postal Service, First Class Mail, on June 11, 2018, to the following address:

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