

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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Case No. 2011-CP-08-1078

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**RECEIVED**

MAY 30 2012

**SC Court of Appeals**

Blackhawk Logistics, LLC, ..... Respondent

v.

Jerry Ward, ..... Appellant.

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**BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN GRANTING THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENTLY THE PRELIMINARY INJUNCTION WITHOUT REQUIRING A BOND PURSUANT TO RULE 65(c), SCRPC?
- II. DID THE LOWER COURT ERR IN GRANTING THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENTLY THE PRELIMINARY INJUNCTION TO ENFORCE NON-SOLICITATION PROVISIONS OF THE APPELLANT'S CONTRACT WHEN IT FAILED TO CONSIDER ALL OF THE REQUIRED TESTS SET FORTH IN FACES BOUTIQUE, LTD. v. GIBBS, 318 S.C. 39, 455 S.E.2d 707 (Ct.App. 1995) TO DETERMINE THE VALIDITY OF THE PROVISION?
- III. DID THE LOWER COURT ERR IN FINDING THAT RESPONDENT MET ITS BURDEN OF ESTABLISHING THE NECESSARY ELEMENTS FOR THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENT PRELIMINARY INJUNCTION, INCLUDING THROUGH ITS CONSIDERATION OF MATTERS OUTSIDE THE DOCUMENTS PROFFERED AS AFFIDAVITS?

## STATEMENT OF THE CASE

On or about April 6, 2011, Blackhawk Logistics, LLC (hereinafter "Respondent") filed suit and moved for injunctive relief against Jerry Ward (hereinafter "Appellant"), alleging *inter alia* a breach of restrictive covenants set forth in an Employment Agreement entered into by the parties in 2007. (R. pp. 1-93).<sup>1</sup> Despite the failure to provide timely notice or proper service on Respondent, a hearing on Respondent's Motion for a Temporary Restraining Order was held April 14, 2011, with the Honorable Kristi L. Harrington presiding. (R. pp. 100-132). Respondent filed his Memorandum in Opposition on April 14, 2011. (R. pp. 156-172). Upon taking the matter under advisement, Judge Harrington issued an Order Granting Temporary Restraining Order on April 18, 2011. (R. pp. 94-97).<sup>2</sup> Appellant filed his Notice of Appeal with regard to the April 18 Order on or about May 16, 2011.

Thereafter, Judge Harrington held a hearing on Respondent's Motion for Temporary and Permanent Injunction on April 25, 2011. (R. pp. 133-155). Upon taking the matter under advisement, Judge Harrington issued an Order Granting Preliminary Injunction on May 13, 2011. (R. pp. 98-99).<sup>3</sup> Respondent filed his Amended Notice of Appeal on June 16, 2011.

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<sup>1</sup>Respondent also emailed a copy of the Complaint and Motion to Judge Harrington on April 6, 2011, requesting an "emergency" hearing on its Motion. At the time of filing of the Complaint, the attached purported exhibits were not duly notarized.

<sup>2</sup>As argued more fully hereinafter, Appellant asserts that the court below failed to adequately set forth its findings of fact and conclusions of law in violation of Rules 52(a) and 65(d), SCRCP.

<sup>3</sup>The May 13 Order was dated by the Court on April 29, 2011; was entered of record on May 13, 2011; and was received Appellant on May 17, 2011. As set forth more fully in Appellant's arguments, Appellant asserts that the court below failed to adequately set forth its findings of fact and conclusions of law in violation of Rules 52(a) and 65(d), SCRCP.

Subsequent to the interlocutory appeal being brought, Respondent filed his Answer; Appellant filed an Amended Complaint, adding additional parties Respondent alleges to be Appellant's employer; the complained of parties, including Appellant, filed responsive pleadings. Additionally, Respondent has filed a Motion for Permanent Injunction and a Motion to Modify the Preliminary Injunction, which the court below has taken under advisement as to whether it has proper jurisdiction to hear the matter pending this appeal.

### STATEMENT OF FACTS

As this matter is on appeal from an Order Granting Temporary Restraining Order and a subsequently granted Order for Preliminary Injunction, the facts upon which the Court decided the issues are limited. This matter arises from a prior working relationship between Respondent as employer and Appellant as employee. At all times relevant hereto, Respondent has been in the business of third party logistics. (R. p. 106, ll. 12-14). Appellant has been employed in the business of third-party logistics for over thirty years. (R. p. 118, ll. 13-16). Appellant accepted an offer of employment from and a membership stake in Respondent in or around 2005; prior thereto, none of the other members of Respondent had any experience in third party logistics (R. p. 104, ll. 17-20; R. p. 118, ll. 14-16). Effective January 2007, Respondent had Appellant enter into an Employment Agreement, hereinafter referred to as the "Agreement." (R. p. 29 ll. 18-20). The Agreement contained several restrictive covenants, including a covenant not to compete while employed with Respondent and for a period of twenty-four (24) months after the termination of the Agreement, as well as non-solicitation covenants (R. p. 30 at ¶6).

On December 8, 2009, Respondent terminated Appellant from his employment without cause. (R. pp. 94-97; R. p. 138, ll. 6-11; R. p. 151, ll. 11-15; R. p. 152, ll. 3-9; R. pp. 183-184). Appellant thereafter filed for unemployment benefits, contested on the grounds by Respondent that it had fired Appellant for cause and that it had not terminated Appellant until April 2010. (R. pp. 183-184). Appellant prevailed before the South Carolina Department of Employment and Workforce, which determined that he was terminated without cause and was entitled to receive unemployment benefits. (R. pp. 183-184). Upon appeal by Respondent, Appellant again prevailed at hearing of the SCDEW Appeal Tribunal.<sup>4</sup>

Thereafter, Appellant became employed by Pratt (Georgia Box), Inc., a paper and packaging manufacturer. On April 6, 2011, some sixteen months after his termination from Respondent, and several months subsequent to his employment with his new employer, Respondent filed its lawsuit and transmitted to the Honorable Kristi L. Harrington an e-mail request, seeking to schedule an "emergency" temporary restraining order hearing (R. pp. 1-93; R. pp. 166-167).

Respondent transmitted to Appellant's counsel an unsigned courtesy copy, despite the

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<sup>4</sup>Respondent continues to assert that Appellant was terminated for cause, and that Appellant's termination date was in April 2010. Because Respondent neither appealed the findings of the SCDEW Appeal Tribunal nor filed a cross-appeal in the pending matter, Respondent has waived these contentions.

fact that counsel had not yet been retained by Appellant in this matter. No attempt was made by respondent to notify Appellant directly or properly serve him until the evening of April 10, 2011. (R. p. 157). The Complaint provided to Appellant and his counsel did not contain any verification, and the affidavits purportedly supporting the Complaint and Motion were not duly executed by a notary public, making them non-sworn statements and therefore improper support for the injunctive relief sought pursuant to Rule 65, SCRCP.

Despite the procedural deficiencies of the Respondent's pleadings, the court below heard argument as to Respondent's Motion for Temporary Restraining Order on April 14, 2011; upon taking the matter under advisement, the Court issued the Order Granting Temporary Restraining Order on April 18, 2011; subsequently thereto and after an additional hearing on the issues, the court below issued the Order Granting Preliminary Injunction. In response to each of these Orders, Appellant filed a Notice of Appeal.

## ARGUMENTS

### STANDARD OF REVIEW

Actions for injunctive relief are equitable in nature. Granting of injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. City of Columbia v. Pic-A Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000); Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36 (Ct. App. 2005). “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.” Id.; County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). The issue of whether such an agreement is reasonably limited in its operation is a question of law. Stringer v. Herron, 309 S.C. 529, 531-32, 424 S.E.2d 547, 548 (Ct. App. 1992).

### STANDARD TO ISSUE TEMPORARY INJUNCTION

A temporary injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the Plaintiff. Levine v. Spartanburg Regional Services Dist., Inc., 367, S.C. 458, 463, 626 S.E.2d 38, 40 (Ct. App. 2005) (citation omitted). For a temporary injunction to be granted, the Plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

**I. THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENTLY THE PRELIMINARY INJUNCTION WITHOUT REQUIRING A BOND PURSUANT TO RULE 65(c), SCRCF.**

Rule 65(c), SCRCF, provides:

Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court may deem proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Id. At the April 14 hearing, Appellant requested bond in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000.00). (R. p. 130, ll. 7-14). The lower court, upon hearing both parties on the issue of amount of security, stated that "[the Court] will require the security in an amount appropriate, after reading all of the affidavits and the matters involved." (R. p. 131, ll. 16-18). Thereafter, the Court Ordered as follows: "[T]he Court does not find the need that Blackhawk post bond at this time." (R. p. 96).

The issue was brought before the lower court again at the hearing for Respondent's Motion for Temporary and Permanent Injunction. (R. p. 148, ll. 6-20). At said hearing the lower court acknowledged the necessity of a Bond, and specifically asked Respondent's counsel whether "the rule requires[s] that a bond shall be issued". (R. p. 149, ll. 21-22). The court below went on to state "I agreed that there has to be a bond issued that is appropriate under the rule". (R. p. 150, ll. 13-14). Again, however, the Court set the bond at Zero Dollars (\$0.00), a non- amount outside the bounds of its discretion. (R. p. 99).

Rule 65, SCRCF, is clear with regard to the requirement of a bond upon the issuance of a temporary restraining order or temporary injunction. Such requirement is not discretionary, except

under limited circumstances none of which exist here. Likewise, the jurisprudence clearly recognizes the failure to set a bond is an error which must be addressed by the trial court. See AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). Moreover, it is insufficient for the Court to merely set a nominal or arbitrary figure, simply to meet the procedural burdens of Rule 65(c), SCRPC. The Supreme Court has recognized the setting of such a nominal bond as error. "The circuit court's order requiring only a nominal security bond does not satisfy Rule 65(c), SCRPC, because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper." Atwood Agency v. Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007).

The failure of the court below to set a bond upon the issuance of either the restraining order or the temporary injunction is an abuse of said court's discretion and is therefore error. Therefore, this matter must be remanded to the lower court for modification of the Orders and the setting of an appropriate security.

**II. THE LOWER COURT ABUSED ITS DISCRETION BY GRANTING THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENTLY THE PRELIMINARY INJUNCTION TO ENFORCE NON-SOLICITATION PROVISIONS OF THE APPELLANT'S CONTRACT WITHOUT CONSIDERATION OF ALL OF THE REQUIRED TESTS TO DETERMINE THE VALIDITY OF THE PROVISION.**

As a preliminary matter, the lower court has failed to meet the requirements of Rule 52, SCRPC, which provides, in relevant part: "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." Rule 52(a), SCRPC. Findings of fact and conclusions of law must be sufficient "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." In the Matter of the Treatment and Care

Luckabaugh, 351 S.C.122, 132, 568 S.E.2d 338, 343 (2002) (citations omitted). The findings must be sufficient to allow the appellate Court to ensure the law is faithfully executed below. Id. Similarly, Rule 65(d), SCRPC, requires "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...." Id.

In its April 18 Order, the lower court summarily found the Employment Agreement to be valid and enforceable, in part; set forth the prongs of the five-part test to determine the validity of the restrictive covenants; and determined that Respondent has met its burden as to its request for a temporary restraining order. (R. pp. 94-95). The April 18 Order patently fails to set forth the findings of fact sufficient to support the lower Court's conclusions of law, however. The insufficiency of the April 18 Order, on its face, is fatal to its enforcement. Despite Appellant's attempts to clarify the court's rulings at the subsequent preliminary injunction hearing, the May 13 Order merely extends the summary finds of fact and conclusions of law of the April 18 Order. (R. p. 98; R. p. 142, ll. 22-24; R. p. 143, ll. 23-24). Notwithstanding these deficiencies violative of Rules 52(a) and 65(d), SCRPC, the Orders nevertheless do set forth additional grounds upon which the decision of the lower court must be reversed.

It is well settled that non-compete agreements and covenants restricting the business and employment of individuals are disfavored and will be critically examined and construed against the employer attempting to invoke such covenants. See Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Oxman v. Sherman, 239 S.C.

218, 122 S.E.2d 559 (1961); Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41-42, 455 S.E.2d 707, 708 (Ct. App. 1995). For this type of restrictive covenant to be upheld, it must be: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Faces Boutique, Ltd., 318 S.C. at 42, 455 S.E.2d at 708.

While the court below set forth each of these five factors in its April 25 Order, the lower court found only:

Analyzing the Agreement against the five part test used by South Carolina courts to determine the validity of restrictive covenants and non-competition agreements, . . . this Court finds sufficient evidence to conclude that there is:

- a. Protection of a legitimate business interest . . . *and*
- b. Reasonable under public policy . . . *and*
- c. Adequate Consideration . . . .

(R. pp. 94-95 (emphasis in original)). Notwithstanding that the facts are not sufficient to support these three findings, as set forth more fully below, the court's failure to address the other two tests is reversible error and its ordering the injunction relief without findings as to the additional two tests is an abuse of discretion. "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." Faces Boutique, Ltd., 318 S.C. at 42, 455 S.E.2d at 709 (relying on Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972)).

The court below makes no finding as to the geographical limitations of the Agreement,

when in fact this is the first test which must be met. "If . . . the territorial scope of restraint is unreasonable . . . no inquiry need be made as to the presence or absence of other necessary requirements." Stringer v. Herron, 309 S.C. 529, 531-532, 424 S.E.2d 547, 548 (Ct. App. 1992) (citation omitted). Presumably based upon its ruling granting in part and denying in part Respondent's Motion, the court impermissibly attempted to parse out those portions of the Agreement it deemed invalid. The Agreement, however, must be found to be valid or invalid on its face, without modification of specific terms by the court. "[T]he restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 88, 694 S.E.2d 15, 17 (2010).

[T]his Court has held that it would violate public policy to allow a court to insert a geographical limitation where none existed. See Stonhard, Inc. v. Carolina Flooring Spec., Inc., 366 S.C. 156, 621 S.E.2d 352 (2005). Stonhard held that such a reformation would be void, as it would add a term to the contract that the parties neither negotiated nor agreed to. Id. The Court of Appeals has held that it would be impermissible to extend the non-compete period contained in the agreement as a remedy for its breach, since such an extension "would essentially rewrite the parties' contract, a service the courts of South Carolina do not perform." MailSource, LLC, 356 S.C. at 369, 588 S.E.2d at 639 (Ct.App.2003).

Id. at 588. See also Faces Boutique, Ltd., 318 S.C. 39 ("the court noted that at trial the original business had agreed to limit the agreement to its 'spirit' rather than its literal terms, but held that a party could not convert an overbroad clause into an enforceable one by agreeing to an interpretation that artificially limited the actual terms used in the contract.").

Likewise, the court below makes no finding as to whether the Agreement is unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. The Agreement here is similar in wording to that found to be unduly harsh and oppressive in Faces Boutique, Ltd.

The Agreement states, in relevant part:

6. TRADE SECRETS/NON-COMPETITION- The parties hereto acknowledge and agree that the Employer's business is that of providing third party logistics, including warehousing and transportation . . . .Accordingly, during the term of this Agreement and for a period of twenty-four months (24) after the termination hereof for any reason in any county which is home to a sea port or any county directly adjoining a county which is home to a sea port in the States of South Carolina, Georgia, or Virginia:

a. Employee shall not directly or indirectly, individually or as a partner, employee, stockholder, consultant, agent, officer, director, advisor *or in any other capacity*, compete with the Employer in any business engaged in outsourced medical billing or outsourced collections of medical invoices.<sup>5</sup>

(R. p. 30 (emphasis added)). In Faces Boutique, the Court held that "the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Face's Boutique's] legitimate business interests." Id. at 43, 455 S.E.2d at 709. Moreover, this holding survived the employer's express agreement that it would not attempt to enforce the clause in a manner which would exceed the "spirit" of the agreement. Similarly in this case, the Agreement on its face is overly broad in its prohibitions and as such is unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. Appellant's current employer, Pratt (Georgia Box), Inc., is in the business of manufacturing paper and packaging materials.

Because the lower court failed to address two out of the five mandatory tests for determining the validity of the restrictive covenants, the ordering of the temporary restraining order and subsequent preliminary injunction were in error and must be reversed.

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<sup>5</sup>Appellant raised the issue of the direct conflict between the Employer's scope of business and the prohibition regarding medical billing at the April 14 hearing. (R. p. 115, ll. 20-25). The trial court erred in ignoring this clear ambiguity and in failing to construe it against the Respondent-Employer.

**III. THE LOWER COURT ABUSED ITS DISCRETION BY FINDING THAT RESPONDENT MET ITS BURDEN OF ESTABLISHING THE NECESSARY ELEMENTS FOR THE TEMPORARY RESTRAINING ORDER AND SUBSEQUENT PRELIMINARY INJUNCTION, INCLUDING THROUGH ITS CONSIDERATION OF MATTERS OUTSIDE THE PROFFERED AFFIDAVITS.**

Notwithstanding the myriad substantive and procedural errors on the face of the lower court's Orders, the Respondent did not meet its burden of establishing all five of the tests for determination of the validity of the Agreement, nor did it meet its burden of establishing all three of the required elements supporting the granting of injunctive relief.

As discussed more fully above, the court below failed to address two of the five required tests for determination of the validity of the Agreement. Moreover, the court's summary findings as to the remaining three tests are insufficient as a matter of law. See Rule 52(a), SCRPC. With regard to the fifth test, adequacy of consideration, the facts used by the court to support its finding are insufficient as a matter of law. It is undisputed that Appellant's employment with Respondent commenced prior to 2007. (R. p. 3, ¶ 12). While employment and the compensation therefore may be considered consideration in exchange for a non-competition agreement when an employee is first hired, agreements which are entered during the pendency of employment must contain consideration in addition to continued employment. The record before the lower court is silent as to the consideration given to Appellant in exchange for the covenants in the Agreement; the Order states only that "[Appellant] received employment and payment." (R. p. 95, ¶ 2(b)).

In Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207 (2001), the South Carolina Supreme Court distinguished between covenants entered into in exchange for initial employment and those entered into after employment had commenced:

We are persuaded by jurisdictions, such as North Carolina, which find that ordinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, there is no consideration when the contract containing the covenant is exacted after several years employment and the employee's duties and position are left unchanged. Therefore, we adopt the rule that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.

Poole at 382, 548 S.E.2d at 209 (internal citation omitted).

Furthermore, while it is not clear from the Orders, it appears based upon the hearing transcripts that the court below considered improper, unverified documents in its determination. Rule 65(b), SCRCF, provides that "[n]o temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts **shown by affidavit or by a verified complaint** that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." Id. (emphasis added). At the time of the filing of the Complaint, the complaint was not verified, nor were the putative affidavits filed therewith notarized.<sup>6</sup> Additionally, "[n]o temporary restraining order shall be granted to suspend the general and ordinary business of an individual . . . ." Rule 65(e), SCRCF. Prior to the April 14 Hearing, neither Appellant nor Appellant's counsel had received a verified complaint, executed affidavits, or even unredacted versions of certain exhibits to the Complaint.<sup>7</sup> As such, the

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<sup>6</sup>As set forth in Appellant's Memorandum dated April 11, 2011, Respondent filed its Complaint, with no verification or properly executed Affidavits on April 6, 2011. (R. p. 156).

<sup>7</sup>Appellant's counsel received, via electronic mail, a copy of the unredacted employee and vendor list on or about April 12, 2011. (R. p. 146, ll. 20-23).

court's reliance on any facts alleged in Respondent's Complaint or the purported affidavits and exhibits attached thereto, is misplaced. Moreover, certain exhibits to the Complaint, referenced by Respondent's counsel at the hearing on April 14, 2011, were neither verified nor attested to, and were thus outside of the bounds of appropriate evidence to be considered by the court below. (R. p. 108, ll. 18-23; R. p. 109, ll. 20-22; R. p. 110, ll. 11-15; R. p. 111, ll. 9-12; R. p. 112, ll. 14-17; R. p. 112, ll. 22-23, R. p. 118, ll. 7-10). Without reliance on such documents, Respondent cannot meet its burden of proof.

Assuming *arguendo* that Respondent had proffered any reliable evidence to the Court, the Respondent still could not meet its burden of proof as to the elements which must be proven for the issuance of a temporary restraining order and/or preliminary injunction. Respondent cannot show that it was suffering an immediate and irreparable injury. Appellant was terminated from his position with Respondent in December 2009. (R. p.138, ll. 6-11; R. pp.181-182). Sixteen months later, Respondent brought the action. To allow the status quo to run unimpeded for two-thirds of the possible duration of the Agreement runs counter to the definition of "immediate and irreparable."<sup>8</sup> Additionally, Respondent has not and cannot meet its burden of likelihood of success on the merits, as it is clear from the arguments set forth hereinabove that the Agreement is not valid and enforceable. The court below, in contravention of Rule 52(b) and Rule 65(d), SCRPC, failed to provide any factual support for its findings as to the granting of the temporary restraining order and the preliminary injunction. A review of the record makes clear that the evidence proffered by Respondent was simply insufficient to do so.

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<sup>8</sup>The restrictive covenants in the Agreement were to run for a period of two (2) years and an additional two (2) years after termination of the Agreement. Respondents waited sixteen months after termination of Appellant to bring this action.

## CONCLUSION

WHEREFORE, for the reasons stated herein, Appellant Jerry Ward respectfully requests that this Honorable Court reverse the findings of the Court of Appeals as to the Order for Temporary Restraining Order dated April 18, 2011, as well as to the Order Granting Preliminary Injunction, dated May 13, 2011. In the alternative, Appellant requests that this Court remand to the court below with instructions to more fully comply with the requirements of Rules 52(a) and 65(d), SCRCP.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR

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