THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2017-001391
Opinion No. 5471

RECEIVED
JUN 05 2018
S.C. SUPREME COURT

JOSHUA FAY, ...Respondent,

vs.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in determining that South Carolina's public policy exception to noncompete agreements applied even though the agreement provided that it was governed by the law of Ohio?

2. Did the Court of Appeals err in determining that the confidentiality provisions of the agreement at issue were actually noncompete agreements?

COUNTER-STATEMENT OF CASE

TQL's appeal seeks to undermine the time-honored rules of South Carolina law regarding noncompete agreements, asking this Court to overrule its precedent that: (1) noncompete agreements, even those that are to be construed according to the law of other states, are not valid if they are contrary to South Carolina's public policy; and (2) nondisclosure provisions that have the effect of a covenant not to compete must be subjected to the same scrutiny as a covenant not to compete. The Court of Appeals correctly held that the confidentially provisions at issue in this case amount to covenants not to compete and, because they are not reasonably limited in scope, they violate the public policy of South Carolina.

Respondent Fay began working for Petitioner Total Quality Logistics, LLC ("TQL") in December of 2012 as an assistant to a freight broker. He signed an Employee Non-Compete, Confidentiality and Non-Solicitation Agreement ("Agreement"). On June 17, 2013, TQL terminated Fay. The Brandt Companies ("Brandt"), a customer and not a competitor of TQL, hired Plaintiff, through his solely owned business, JF Progressions, LLC, to work as Brandt's exclusive shipping agent. On or about August 27, 2013, TQL notified Fay that it intended to pursue legal action against him for violating the Agreement if he did not immediately cease working as a freight broker. ROA, pp. 181-184.

The Agreement defined "Confidential Information" in two places, in a "Whereas" clause and in Section 4. The first definition in the Whereas clause set forth in specific detail what TQL considered to be confidential. However, in addition to those matters specified earlier in the Agreement, Section 4 stated that "all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information..." ROA, p. 25.

Similar to Paragraph 4, Paragraph 6 provided that "Employee's 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 ... using TQL's Confidential Information to unfairly compete with TQL." ROA, p. 25.

Paragraph 11 provides that the Agreement shall be interpreted and enforced under the laws of the State of Ohio. ROA, p. 28.

Fay initiated this action asking that the Court declare the Agreement purporting to prohibit him from ever working in the motor carrier industry again to be invalid and unenforceable. TQL then brought an action in Ohio against the Brandt Companies, which ceased doing business with Fay. Fay then amended his Complaint to seek damages from TQL for intentional interference with his contractual relationship with Brandt. Both parties moved for summary judgment as to the validity and enforceability of the Agreement, and TQL also moved for summary judgment that Fay had breached the Agreement. Judge Roger Young found that Ohio law applied and that the Agreement was valid and enforceable under Ohio law but did not find that Fay had breached the Agreement.

On appeal, the Court of Appeals held that the Agreement was not valid or enforceable, because the confidentiality and nondisclosure provisions of the Agreement "operated as noncompete provisions and did not contain a reasonable time restriction, which violated the public policy of South Carolina." The Court relied on South Carolina precedent in making its decision and further determined that, under this precedent, it did not have to look to Ohio law when the agreement violated the public policy of South Carolina. However, Judge Geathers issued a

concurring opinion, in which he looked to the law of Ohio and determined that, even under that law, the Agreement was not valid or enforceable.

TQL asked the Court of Appeals to reconsider, and the Court denied that request. TQL petitioned this Court for certiorari, and such request was granted.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED SOUTH CAROLINA LAW; HOWEVER, EVEN IF IT SHOULD HAVE APPLIED OHIO LAW, THAT WAS HARMLESS ERROR AS OHIO LAW WOULD ALSO HAVE INVALIDATED THE AGREEMENT.

Covenants not to compete are generally disapproved of and are strictly construed in favor of the employee. Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995); Milliken & Co. v. Morin, 399 S.C. 23, 31, 731 S.E.2d 288, 292 (2012). Although the South Carolina Courts have recognized "the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living. Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013).

A covenant not to compete will be valid ***only*** if it is: (1) necessary for the protection of the employer's legitimate interests; (2) reasonably limited as to time and place; (3) "not unduly harsh or oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;" (4) reasonable when considering public policy; and (5) entails valuable consideration. Faces Boutique, Ltd., 318 S.C. at 42, 455 S.E.2d at 708; see also Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (listing the five required factors). A non-compete agreement must meet all of the above criteria or it will be declared unenforceable as a "restraint upon trade which is against public policy." Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533, 542 (1961).

TQL hired Fay in South Carolina to work at TQL's office in South Carolina. The only nexus to Ohio is that TQL's home office is there. The Agreement provides that it "is made and entered into in the State of Ohio," which was not true as Fay executed the agreement in South Carolina, and that "[t]he Agreement shall be interpreted and enforced under the laws of the State

of Ohio, without regard to its conflict of law principles." On the bottom left hand corner of every page of the agreement are the initials "SC." ROA, pp. 23-29.

In Standard Register, supra, the employer, Standard Register, sought to enforce a non-compete against a former employee, Kerrigan. The agreement in question provided that it was to be "construed according to the laws of Ohio," just as does the agreement at issue before this Court. In that case, the South Carolina Supreme Court held: "The contract with which we are here concerned provides that it shall be construed according to the law of the State of Ohio, but ***if it is invalid under the law of the State where it is to be performed*** [1] ***and contrary to our public policy, we will not enforce it.***" 238 S.C. at 70; 119 S.E.2d at 541-42 (emphasis added). That Court, citing South Carolina precedent, further stated: "We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void." 238 S.C. at 70, 119 S.E.2d at 542.

In a more recent case, Stonhard v. Carolina Flooring Specialists, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005), the United States District Court had certified certain questions to be answered by the State Supreme Court: "***The first question is whether a non-compete agreement which does not contain a geographical limitation may be reformed or 'blue penciled' according to New Jersey law and then enforced in South Carolina. The answer to this question is no.***" (emphasis added). The Stonhard Court did not reverse its holding in Standard Register but, instead, quoted it with approval: "[t]erms in a non-compete agreement may be construed according to the law of another state.... ***But if the resulting agreement is invalid as a matter of law or contrary***

[1] The Agreement at issue here was at all times performed in the State of South Carolina. ROA, pp. 181-184.

to public policy in South Carolina, our courts will not enforce the agreement." Id. (emphasis added). The Stonhard Court looked to New Jersey law, which allows a court to "modify or 'blue pencil' a non-compete agreement so as to make its terms reasonable." Id. The Court stated that "the non-compete agreement does not contain a geographical limitation, and we have been unable to find a single case from New Jersey in which a court has added a geographical term when one was previously omitted" and then held "that the contract may not be reformed or blue-penciled so as to add an entirely new term to which neither of the parties agreed." Id. 366 S.C. at 160, 621 S.E. 2d at 354. The Court finally determined that "[b]ecause we find no term that may suffice as a substitute for a geographical restriction so as to render the covenant reasonable, we hold that the covenant is unenforceable as against public policy." Id. The Stonhard Court cited Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207 (2001) for its holding "that a covenant not to compete is enforceable if it is not detrimental to the public interest, is reasonably limited as to time and territory, and is supported by valuable consideration." Id. Because the agreement in question failed to limit the covenant to a reasonable geographical area, the Court held that "[t]o add and enforce such a term requires this Court to bind these parties to a term that does not reflect the parties' original intention" and "the covenant, despite any reformation, is void and unenforceable as a matter of public policy." Id.

The Stonhard Court concluded:

> We hold that the non-compete agreement may not be reformed in accordance with New Jersey law and then enforced in South Carolina. The absence of a geographical limitation makes the agreement void as a matter of law. New Jersey's "blue penciling" law, though appearing to provide a court with the discretion to rewrite unreasonable provisions, does not allow a provision to be written into a covenant when such a provision never previously existed. ***Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy***.

366 S.C. at 161, 621 S.E.2d at 354 (emphasis added). Thus, the Court held that South Carolina law applied when determining whether a non-compete agreement violated public policy.

In TQL's brief, TQL makes an argument that it had not previously made and did not address in its Petition for Writ of Certiorari. In its Petition, TQL argued that the confidentiality provision was not so broad as to render it a noncompete clause as determined by the Court of Appeals. It never argued that the Court of Appeals wrongly based its decision on the "confidentiality provision" rather than the "separate and distinct" noncompete provision, so it did not preserve this argument. Rule 242(d)(2), SCACR; McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995) (issue not raised in petition for a writ of certiorari but presented in brief is not preserved for appeal).

TQL appears to concede, on page 11 of its brief, that, if the confidentiality provision actually is a noncompete provision as found by the Court of Appeals, it does not meet the public policy requirements of South Carolina, because there are no time or geographic limitations, and, therefore, is invalid.

As the Court of Appeals correctly determined, South Carolina case law does not allow an agreement to be rewritten by adding a term to which the parties neither negotiated nor agreed. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). "Terms in a noncompete agreement may be construed according to the law of another state. But if the resulting agreement is invalid as a matter of law or contrary to public policy in South Carolina, our courts will not enforce the agreement." Stonhard, 366 S.C. at 159, 621 S.E.2d at 354.

Contrary to TQL's arguments, if TQL had brought this action in Ohio, the Ohio courts would have determined the validity of the Agreement in accordance with the law of South

Carolina. In Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co., 453 N.E.2d 683, 684 (1983), the Ohio Supreme Court stated that it would enforce the parties' choice of law unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." The Schulke analysis is applied even when the parties have set forth a choice of law and indicated that it applied "without regard to principles of conflicts of law." Greif Packaging, LLC v. Ryder Integrated Logistics, Inc., 2010 WL 3610588 (2010); Tyler v. Sento Corp., 2008 WL 4999985 (2008); see also Century Business Services, Inc. v. Barton, 967 N.E.2d 782 (2011).

In an unpublished case out of the United States District Court, Southern District of Ohio, dated October 7, 2013, the Court was asked to interpret a non-competition agreement, which stated that Ohio law applied to any dispute concerning it. Lifestyle Improvement Centers, LLC, v. East Bay Health, LLC, 2013 WL 5564144 (S.D. Ohio 2013). Similar to the facts in the present case, that matter concerned a contract entered into and performed in the State of California, but included a choice of law provision that Ohio law would apply. California has, by statute, prohibited non-competition agreements, so the choice of law decision governed the entire case. Based on the ruling in Schulke, the Ohio Court found that California law would apply and that the non-competition agreement was not valid.

Therefore, because even the Ohio Court would apply the law of South Carolina, there is no question but that South Carolina law governs this dispute which arose solely in South Carolina.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE

CONFIDENTIALITY PROVISIONS OF THE AGREEMENT AMOUNT TO A NONCOMPETE THAT HAS NO TIME OR GEOGRAPHICAL RESTRICTIONS, AND IS, THEREFORE, INVALID.

TQL's argument that, following the enactment of S.C. Code Ann. § 39-8-30 in 1997, confidentiality agreements are not required to be limited by time or geography ignores the finding of the Court of Appeals that, not only did the Agreement at issue prohibit the use of confidential information by Fay, it prohibited him from ever being employed in the freight brokerage business in the future. It further ignores the fact that the confidentiality provisions at issue here encompass far beyond that which could be properly considered "trade secrets" subject to S.C. Code Ann. § 39-8-30.

TQL's entire argument is based on a self-serving affidavit from a TQL employee that there were certain jobs in the freight brokerage business that Fay could perform. However, the Agreement controls, and the Agreement, in Paragraph 4, clearly states that "all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information." ROA, p. 25. In addition, Paragraph 6 provides that "Employee's 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 ... using TQL's Confidential Information to unfairly compete with TQL." ROA, p. 25.

Because the definition of Confidential Information in the Agreement includes everything that Fay learned or could have learned about the motor carrier industry and Paragraph 4 prohibits Fay from ever using this "Confidential Information," the Agreement effectively barred Fay from ever doing work in the motor carrier industry. The Court of Appeals correctly determined that the

confidentiality provisions "were so broad they effectively became a non-compete provision and required a reasonable time restriction" and "paragraphs 4 and 6 conspired to restrict Fay's employment activities after leaving TQL, rather than merely prohibiting Fay from revealing TQL's trade secrets or Confidential Information." See Milliken, 399 S.C. 23, 33 n.4, 731 S.E.2d 288, 293 n.4 (2012) (if a confidentiality provision is so broad as to effectively become a non-compete agreement, then it is subject to the same judicial scrutiny as a non-compete agreement).

The Court of Appeals acknowledged that there was a separate noncompete provision with a time limitation, but it determined that the one year restriction could not be inferred into paragraphs 4 and 6, "because paragraph 4 expressly contains a time limit of 'at all times.'" In addition, the Court found that it would violate public policy if it rewrote the Agreement to insert a reasonable time restriction for those paragraphs.

As the Court of Appeals found, if the confidentiality provisions related only to protecting confidential information, there would be no requirement for a time restriction, but, because they restricted Fay's right to future employment in the motor carrier industry, they effectively became a noncompete provision requiring a reasonable time restriction. Contrary to TQL's argument, the confidentiality provisions do not merely restrain Fay from disclosing and using confidential information which was developed as a result of TQL's initiative. Instead, they prohibit him from ever working in the motor carrier industry. If TQL had limited the confidentiality provisions to restricting the disclosure of "trade secrets" as opposed to prohibiting him from using any information that he obtained while working for TQL and stating that, if he ever took a similar job, he would be considered to have violated the agreement, then § 38-8-30 would control. Because TQL did not limit Paragraphs 4 and 6 to the protection of reasonable confidential information, those paragraphs became noncompete provisions, and the Court of Appeals correctly determined

information, those paragraphs became noncompete provisions, and the Court of Appeals correctly determined that they violated public policy and were invalid.

CONCLUSION

The Court of Appeals correctly determined that the Agreement is invalid and unenforceable. This Court should affirm the Court of Appeals.

Respectfully submitted,
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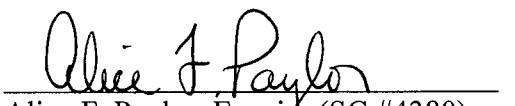

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