THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2018-001885

Glenn P. Howell........................................................................ Appellant,

v.

Covalent Chemical, LLC and Matthew W. Rowe.......................................... Respondents.

# INITIAL BRIEF OF RESPONDENTS

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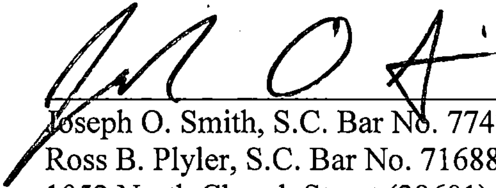

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March 27, 2019

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## I. Statement of the Issues on Appeal

1. Did the circuit court err in enforcing an unambiguous contractual forum selection provision in Howell's Employment Agreement to grant Respondents' Motion to Dismiss?
2. Did the enactment of S.C. Code Ann. § 15-7-120(A) in 1990 abolish the enforceability of forum selection clauses in South Carolina and prohibit the Circuit Court's enforcement of the forum selection provision in Howell's Employment Agreement?
3. Did the Circuit Court's recognition of the validity and potential enforcement of the contractually agreed upon choice of law provision in the Employment Agreement violate established South Carolina public policy?
4. Was the Circuit Court required to perform an additional forum non conveniens analysis in ruling upon Respondents' Motion to Dismiss when dismissal was sought solely upon contractual grounds?

## II. Statement of the Case

Appellant, Glen Howell ("Appellant" or "Howell") worked for Respondent, Covalent Chemical, LLC, whose principal is now Respondent, Matt Rowe (collectively "Respondents") as a sales representative/account manager from on or about October 15, 2015 until April 2018. As part of his employment, Howell negotiated and signed an Employment Agreement (the "Agreement") with Covalent with a paragraph entitled "Governing Law" that contained a forum selection provision calling for adjudication of actions to occur in Harris County, Texas and a choice of law clause designating Texas law. (Agr. ¶ 8(J)). The Agreement states it is between Howell as the Employee, and Covalent Chemical, LLC, "a Texas limited liability company." (Agr. p. 1). Covalent now is headquartered out of Raleigh, NC where Rowe lives. The Company maintains multiple warehouses in Texas and Rowe routinely travels to the State for business.

Following his separation from the company in April 2018, Howell claimed that Covalent failed to pay him certain wages and commissions he alleges were then, and now remain due. Ultimately, on May 9, 2018 he filed a complaint in the South Carolina Court of Common Pleas captioned *Glenn P. Howell v. Covalent Chemical, LLC, and Matthew W. Rowe* C.A. No. 2018-CP-23-02759 (the "State Action"), claiming that Respondents violated the South Carolina Payment of Wages Act, breached the Employment Agreement, and requesting an equitable accounting. (State Compl.). He filed an Amended Complaint on June 8, 2018. (Amend. State Compl.). Respondents filed a Motion to Dismiss the State Action based upon the Employment Agreement's forum selection clause on July 16, 2018. (Def. Mot. Dismiss). An Amended Motion to dismiss was filed on September 24, 2018, requesting compel arbitration if the matter was not dismissed pursuant to the forum selection provision. (Amend. Mot. Dismiss).

The Circuit Court heard Respondents' Motion to Dismiss on October 4, 2018. The Honorable Letitia H. Verdin, Thirteenth Circuit Court Judge, granted Defendants' Motion, and dismissed the State Action pursuant to an Amended Form 4 Order entered October 16, 2018 (the "Order") "due to South Carolina being the improper venue." (Order).[1] Howell filed a Motion to Reconsider on October 17, 2018 which was denied the following day. (Mot. Recon.; Order Denying Mot. Reconsider 10.18.19).

[1] The Circuit Court issued a series of Form 4 Orders in this matter. The first was issued on October 5, 2018 and found that "the proper forum for the action is Texas and interpretation of the terms and provisions of the contract should be governed by the laws of Texas" yet mistakenly stated the Motion to Dismiss was "denied." (Order 10.5.18). Respondents wrote the Circuit Court requesting clarification which led to the entry of an October 9, 2018 Order that granted the Motion, recited the same grounds as noted in the previous Order, but checked the box indicating the ruling did not end the case. (Order 10.9.18; *See also* Email(s) to Cir. Court re 10.5.18 Order). Finally, the final Amended Form 4 Order was entered on October 16, 2018 granting the Motion to Dismiss as noted above and fixing the administrative errors in the previous Orders. (Order 10.16.18). The Circuit Court then issued an Order on October 19, 2018 withdrawing the October 5th and 9th Orders. (Order 10.19.18).

On October 18, 2018 Howell filed a Notice of Appeal of the Order. That same day he also filed a complaint in the South Carolina District Court that was identical to the State Action in every way, save for a few variations in the jurisdictional pleadings. (Fed. Compl.). The Federal Action is styled *Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe*, C.A. No. 6:18-cv-02824-BHH and is currently pending in the Greenville Division. Respondents filed a Motion to Dismiss the Federal Action on the same grounds as set forth in the State Case along with some additional legal basis that were unique to the situation and federal venue. Howell opposed that Motion upon the same grounds he challenged the Motion to Dismiss in the State Action. As of this date, the dispositive motion remains pending before the District Court.

## III. Legal Argument and Authorities

### A. The Circuit Court Properly Ruled that South Carolina Was the Improper Venue Pursuant to the Employment Agreement's Unambiguous Forum Selection Clause

The contractual provision at the center of this appeal is a short, simple, and unambiguous paragraph in the Employment Agreement labeled "Governing Law" which states:

> THE INTERPRETATION OF THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LOCAL, INTERNAL LAWS OF THE STATE OF TEXAS, UNITED STATES OF AMERICA. THE PARTIES AGREE TO THE JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN HARRIS COUNTY, TEXAS, AND WAIVE ANY RIGHT AVAILABLE TO A TRIAL BY JURY.

(Agr. ¶ 8(J)). This paragraph contains three parts: (1) a choice of law provision designating Texas law as the governing law; (2) a forum selection provision pursuant to which Howell and Covalent agreed to Harris County, Texas as the adjudicative forum; and (3) a waiver of the right to a jury trial. Howell wishes to avoid application of the forum provision and tries to impute err to the Circuit Court's dismissal of his claims pursuant to it by manufacturing false ambiguity, stating the provision says something it does not, and claiming he was entitled to a deferential interpretation.

(Ap. In. Br. at 6-8). His arguments fail on each account, and the Circuit Court rightfully enforced the unambiguous forum selection clause to dismiss Howell's claims.

### 1. Unambiguous Language in the Employment Agreement Requires Enforcement

First, the language of the forum selection provision is clear and simple, stating that "[t]he Parties agree to the jurisdiction of the State and Federal Courts ***located in*** Harris County, Texas…." (Agr.¶ 8(J))(***emphasis added***). That unambiguous language, considered as a whole, requires enforcement rather than interpretation as Appellant contends. "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *Lee v. University of South Carolina*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014) *quoting S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). Howell petitions the Court to alter the clear language of this provision so he can avoid enforcement. South Carolina law requires he live with the clear terms he contractually agreed upon rather than allowing *al a carte* enforcement of select provisions he wishes to remain in effect.

#### *a. The forum selection provision is unambiguous*

Howell agreed "to the jurisdiction of the State and Federal courts ***located in*** Harris County, Texas" and "waived any right available to a trial by jury." (Agr. ¶ 8(J)). That language is clear and unambiguous, and as such, it alone determines it force and effect. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)("If the contract language is clear and unambiguous, the language alone determines the contract's force and effect.").

Appellant attempts to create ambiguity by violating a basic tenant of contract construction

that requires consideration of the entire contract provision at issue and its meaning within the context of the agreement as a whole. *Id.* His argument for ambiguity relies upon partial consideration of select portions of the contract provisions at issue to portray them as ambiguous. Such a practice, however, may not establish contractual ambiguity. "A contract must be read as a whole document such that litigants may not create ambiguity by pointing to a single sentence or clause." *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016)(internal citation omitted). Howell attempts to do just that, and his piecemeal consideration of a few words within the forum selection provision cannot support Appellant's arguments that the clause itself is ambiguous.

Howell attempts to portray the forum selection statement as ambiguous by summarily claiming that the phrase "'agree to the jurisdiction'...is inherently ambiguous because it is capable of being construed in multiple ways." (Ap. In. Br. at 7). That's true only if the rest of the sentence is ignored which ties this phrase to "the state and federal courts ***located in*** Harris County, Texas." Consideration of these ten additional words renders the ambiguous unambiguous. Howell's argument that an isolated portion of a provision may be interpreted in a variety of ways is irrelevant. Ambiguity may not be established through partial consideration of contract language. *See Maybank*, 416 S.C. at 576. Howell's attempt to establish false ambiguity through this prohibited tactic reveals the frailty of his position. In isolation the four-word phrase "agree to the jurisdiction" within the forum selection provision may be susceptible to varying interpretations, however, review and consideration of the entire clause (in this case a single sentence) reveals but one clear and reasonable meaning.

Appellant also emphasizes the "agrees to jurisdiction" portion of the forum provision, without regard to the remainder of that statement, and attempts to intertwine it with the waiver of

the right to a jury trial language in order to claim the entire forum selection provision is ambiguous. (Ap. In. Br. at 7-8). This approach again fails to abide by the established rules of contract construction because it requires ignoring the contract language as a whole. The entire first sentence reads "THE PARTIES AGREE TO THE JURISDICTION OF THE STATE AND FEDERAL COURTS ***LOCATED IN*** HARRIS COUNTY, TEXAS, AND WAIVE ANY RIGHT AVAILABLE TO A TRIAL BY JURY." To claim the underlined language in Howell's brief ("AGREE TO THE JURISDICTION") and a second separate declarative clause waiving rights to a jury trial indicates the provision as a whole is "merely a waiver of personal jurisdiction" ignores the clear and complete language of the provision. (Ap. In. Br. at 7). Appellant does not stop there, however, and goes a step further by then declaring that the provision actually "states that the parties waive personal jurisdiction for the courts in Texas to hear such a case." *Id.* It does not.[2] Reading the provision in its entirety, and heeding the function and meaning of basic punctuation – a comma separating two declarative clauses –shows the inaccuracy of Appellant's statement and baselessness of his arguments claiming ambiguity premised upon them.

A simple reading of this short provision shows it does not waive personal jurisdiction but instead the right to a jury trial and the jurisdiction language emphasized by the Appellant is related to the remainder of the sentence in which it appears. Namely the mention of jurisdiction is related and tied to the words directly after it "of the state and federal courts located in Harris County,

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[2] Assuming *arguendo* that the forum language is a waiver of personal jurisdiction as Howell claims; that would support Respondents' position. The purpose of waiving personal jurisdiction is to facilitate and allow adjudication of claims in that specified forum. There is no other reason for parties agreeing to waive personal jurisdiction. Therefore, Howell's contention that the forum provision is a waiver of personal jurisdiction clause, while misguided, is a tacit recognition and concession that the Parties to the Employment Agreement contemplated litigating claims in Harris County, Texas and agreed to subject themselves to the personal jurisdiction of the state and federal courts in that County. *Schulemyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)(The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.).

Texas." There is no statement concerning waiver of personal jurisdiction; only the right to a jury trial. (Agr. ¶ 8(J)). Howell's attempt to confuse and conflate these two simple parts of the forum selection clause to make statements disproven by reading the provision neither establishes they are ambiguous nor that it is something other than a forum selection provision containing a waiver of a right to a jury.

Ambiguity cannot be manufactured through tortured argument based upon piecemeal consideration of the contract provision at issue. *See Maybank*, 416 S.C. at 576("A contract must be read as whole document such that litigants may not create ambiguity by pointing to a single sentence or clause."). Howell starts his argument on this issue with the declaration that "words matter." (*See* Ap. In. Br. at 6). Respondents share that sentiment and recognize that ascertaining the meaning of a contract provision requires consideration of the entire clause and contract in which it appears. The omission or inclusion of one or two key words or phrases within a contract provision can determine its meaning and clarity. Howell wants to make declarations and espouse "cardinal rules" but live by neither. Just as he wishes the Court to allow him to shun his contractual obligations, he hopes that his own nonadherence to the authoritative missives that preface his argument go unnoticed. The short, clear, and simple contract provision however makes successfully employing such tactics to portray the clause as something it is not – ambiguous and a personal jurisdiction waiver – an impossible task.

Words do matter, and Howell must live with those words he agreed to abide by when he signed the Agreement. The contract provision is clear and unambiguous. Howell and Covalent agreed to Harris County, Texas as the adjudicative forum and Appellant's attempts to portray the provision as ambiguous or a mere waiver of personal jurisdiction fail and cannot justify reversal of the Circuit Court's Order.

### b. *Neither party was entitled to deferential interpretation of unambiguous contract provisions*

Howell caps this argument by imputing err to the Circuit Court because it did not construe the forum provision in his favor and instead, he claims, gave deferential interpretation to the Respondents. (Ap. In. Br. at 8). Tellingly, no argument or citation to any supporting record or law accompanies this statement, which is disbanded by the applicable law and facts. First, neither party to a contract is entitled to a deferential interpretation of an unambiguous provision. Second, even if the provision were ambiguous, Howell negotiated his Employment Agreement with Covalent, and therefore as a participant in its drafting, was not entitled to any favorable interpretations of the forum provision. *Maersk Line, Ltd. v. United States*, 513 F.3d 418, 423 (4th Cir. 2008)(Basic contract law principle *contra proferentem* counsels court construe any ambiguities in a contract against the draftsman. When the parties are both draftsman no deferential construction can be had.).

This Court and the State's Supreme Court have both made it clear that the only thing a South Carolina judge may do when faced with an unambiguous contract or contractual provision is enforce it. "A court ***must*** enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Lee v. University of South Carolina*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014)(***emphasis added***). Enforcement is not an option but instead a mandate under the controlling jurisprudence. In this case, Judge Verdin carried out that mandate and enforced an unambiguous forum selection clause. Howell now takes issue with that provision following his departure from Covalent and instigation of the underlying state suit. Regardless of the "wisdom or folly" or claimed "unreasonableness" of enforcing that provision, the lower court took the only action it could, and in fact was required to take. Howell's attempt to have the judiciary allow him to not

abide by select terms of the Agreement he does not like or claims endanger, hinder, or deprive him of legal rights, is a request that the Court shun its mandate to enforce unambiguous contract provisions and allow an alternation and rewriting of the Agreement. Both violate the law of South Carolina requiring enforcement of unambiguous contracts and prohibiting courts from rewriting agreements. *See Poynter Investments, Inc., v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)(internal citations omitted)(Held that "blue-penciling" of a non-compete to lessen the geographic restriction was impermissible because it "would essentially rewrite the parties' contract, a service the courts of South Carolina do not perform.").[3]

**B. ENACTMENT OF S.C. CODE ANN. § 15-7-120(A) DID NOT ABOLISH THE ENFORCEABILITY OF FORUM SELECTION CLAUSES IN SOUTH CAROLINA**

Howell claims that the Circuit Court erred in enforcing the forum selection clause because S.C. Code § 15-7-120(A) reflects South Carolina's "strong public policy disfavoring forum selection clauses" and "overrides" enforcement of them. (Ap. In. Br. at 8). Appellant is not the first to make this argument that, if true, would mean no forum selection clauses could have been legally enforced in South Carolina since enactment of Section 15-7-120(A) in 1990. The undeniable fact that South Carolina courts have enforced forum selection provisions after enactment of Section 15-7-120(A) singularly and definitively upends Howell's argument and establishes enforcement of these clauses does not offend South Carolina public policy.

In reality, South Carolina courts have recognized the validity of forum selection clauses in a variety of contexts. *See e.g., St. John's Episcopal Mission Ctr. v. S.C. Dept. of Soc. Servs.*, 276 S.C. 507, 280 S.E.2d 207 (1981)(pre-dating statute, but holding parties bound to terms of forum selection clause where agreement was "not contrary to public policy"); *Minorplanet Systems USA*

[3] Notably, the *Poytner* Court supported its holding with *Stonard, Inc. v Carolina Flooring Spec., Inc.* 366 S.C. 156, 621 S.E.2d 352 (2005) in which the Supreme Court held that it would violate public policy to allow a court to insert a geographical limitation into a non-compete where none existed. *Poynter*, 387 S.C. at 587-88.

*Ltd. v. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43 (2006)(post-dating statute and upholding enforcement of forum selection clause calling for adjudication of claims to occur in Texas and for agreement to be governed by Texas law); *Sec. Credit Leasing Inv. v. Armaly*, 339 S.C. 533, 529 S.E.2d 283, 290 (Ct. App. 2000)(post-dating statute and holding default judgment obtained in Florida against South Carolina resident was valid and enforceable despite the fact that jurisdiction in Florida was based on existence of forum selection clause in parties' contract); *Firestone Fin. Corp. v. Owens*, 309 S.C. 73, 419 S.E.2d 830 (Ct. App. 1992)(post-dating statute and upholding forum selection clause in lease that required claim to be brought in Massachusetts).

Furthermore, S.C. Code Ann. § 15-7-120(A) is inapplicable to the forum selection clause at issue because it designates a locale outside of South Carolina, making it an inter-state rather than intra-state forum provision. As the District Court explained when faced with this very issue:

> In fact, the referenced statute appears to apply to intra-state forum selection clauses. This referenced statute is the last section of the South Carolina Code chapter dealing with proper venue of actions brought in South Carolina State Courts. *See* S.C. Code Ann. § 15-7-10 to -120 ("Chapter 7"). This chapter deals exclusively with proper venue among the various counties in South Carolina, not whether venue would be proper in one state over another.

*Atl. Floor Servs., Inc. v. Wal-Mart Stores, Inc.*, 334 F. Supp. 2d 875, 879 (D.S.C. 2004).

Furthermore, Section 15-7-120(A) must reflect the strong public policy of South Carolina disfavoring enforcement of forum selection clauses in order for the Circuit Court's alleged failure to consider that code section in reaching its ruling to have been in err. However, when presented with this issue, the District Court recognized that the decisions of the State's appellate courts since enactment of Section 15-7-120(A) did not support that conclusion:

> Thus, despite numerous opportunities, South Carolina's appellate courts have not suggested, much less declared, that forum selection clauses violate the public policy of the State. In fact, the courts have affirmed and recognized that these clauses are valid and enforceable. There is certainly evidence that forum selection clauses are not repugnant to South Carolina policy. Thus, a finding that such clauses violate

> the "strong public policy" of South Carolina is not supported by decisions of its State Courts.

*Atl. Floor Servs., Inc. v. Wal-Mart Stores, Inc.*, 334 F. Supp. 2d 875, 879-80 (D.S.C. 2004).

Section 15-7-120(A) is not a prohibition on the enforcement of forum selection clauses in South Carolina as Appellant's argument claims and the existence of this code section cannot excuse him from abiding by the terms of his Employment Agreement. Simply put, Howell's argument is that forum selection provisions cannot be enforced in South Carolina due to the existence of S.C. Code Ann. § 15-7-120(A) because doing so would offend the public policy embodied in that statute. (Ap. In. Br. at 8-9). That is not the case. South Carolina courts have continued to enforce forum selection provisions since enactment of Section 15-7-120(A) in 1990, definitively establishing that requiring parties to abide by these contractual obligations is not an affront to public policy of the State.

Section 15-7-120(A) therefore did not prohibit the Circuit Court from enforcing the inter-state forum selection provision at issue, and its doing was not in err.

### C. THE CIRCUIT COURT'S RECOGNITION OF THE VALIDITY AND POTENTIAL ENFORCEMENT OF THE CONTRACTUALLY AGREED UPON CHOICE OF LAW PROVISION DESIGNATING TEXAS LAW DID NOT VIOLATE ESTABLISHED SOUTH CAROLINA PUBLIC POLICY

The Agreement's "Governing Law" Paragraph states that "THE INTERPRETATION OF THE AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LOCAL, INTERNAL LAWS OF THE STATE OF TEXAS." (Agr. ¶ 8(J)). The Circuit Court held in earlier Orders that the interpretation of the terms and provisions of the contract were governed by the laws of Texas. (Orders 10.5.18 & 10.9.18).[4] This was the only reasonable conclusion one could reach in light of the choice of law provision's unambiguous language.

[4] As noted above these earlier Orders were rescinded by the Circuit Court. Appellants contend, and argue in more detail below, that the Circuit Court's Final Order which is on appeal did not reflect the lower court's adoption, enforcement, or reliance upon the choice of law provision and application of Texas law.

Notably, that finding was not one that South Carolina law did not apply to the determination of whether the forum selection provision was enforceable.

Regardless, Howell claims the Circuit Court erred by applying the Texas choice of law provision because, he contends, doing so "would squarely contradict the public policy embodied in two provisions of the South Carolina Code of Laws: S.C. Code Ann. § 15-7-120(A)…and S.C. Code Ann. § 41-10-100, of the South Carolina Payment of Wages Act." (Ap. In. Br. at 9). He is mistaken on both accounts.

**1. The Circuit Court's Final Order Did Not Enforce the Choice of Law Provision or Rely Upon Application of Texas Law**

As an initial matter, the final Order entered by the Circuit Court granted the Motion to Dismiss "due to South Carolina being the improper venue" without mention of the applicability of Texas law. (Order 10.16.18). The earlier Orders entered on October 5th and 9th, 2018 addressed applicability of Texas law by finding that "interpretation of the terms and provisions of the contract should be governed by the laws of Texas." (Orders 10.5.18 & 10.9.18). These earlier Orders were rescinded on October 19, 2018. (Order 10.19.18). Therefore, the final and actual holding and Order of the Circuit Court presently on appeal contains no mention of the applicability of Texas law, rendering Howell's argument concerning it moot. Even if the Circuit Court's final ruling was premised or otherwise reliant upon application of Texas law, Howell's arguments imputing err by claiming doing so violated the public policy of South Carolina still fail.

**2. Application of Texas Law Does Not Offend the Public Policy of South Carolina**

***a. Consideration of S.C. Code Ann. § 15-7-120(A) was unnecessary and inconsequential***

Howell takes issue with the Circuit Court's ruling by assuming it applied Texas law in evaluating enforceability of the forum selection provision, and consequently did not consider S.C.

Code Ann. § 15-7-120(A) in reaching its holding. (Ap. In. Br. at 9-11). This presumed failure, Appellant contends was in err and warrants reversal because the statute prohibits enforcement of the forum selection provision. In reality, consideration of this code section was unnecessary and inconsequential because it has no bearing on the enforceability of the forum clause.

Howell's position that applying Texas law runs afoul of South Carolina public policy relies upon the same faulty premise advanced in his earlier arguments; that S.C. Code Ann. § 15-7-120(A) reflects South Carolina's public policy against enforcement of forum selection provisions, applies to the forum clause at issue, and prohibits its enforcement. (*See supra.* p. 9-11). As discussed above, S.C. Code Ann. § 15-7-120(A) is neither applicable to the inter-state forum selection provision at issue nor does it prevent enforcement of it. (*See supra.* p. 9-11). Therefore, whether the Circuit Court applied Texas law, and ignored this code section, or applied South Carolina law and considered it, in determining the enforceability of the forum selection clause is inconsequential. Consideration of a statute having no bearing on the determination of the legal issue at hand is a useless exercise and cannot call into question the Circuit Court's holding. Thus, even if the Circuit Court's application of Texas law was in err, it was harmless because application of South Carolina law would lead to the same result and accordingly cannot warrant reversal.

Therefore, the Circuit Court's evaluation and enforcement of the forum provision under Texas law did not offend any strong public policy of South Carolina and was not in err.

***b. The Circuit Court's ruling on Texas law did not allow circumvention of the South Carolina Payment of Wages Act***

Howell next claims that "by ruling that Texas law applies in this case, the Circuit Court would, in effect, be allowing Respondents to contravene the stringent requirements of the South Carolina Payment of Wages Act…." (Ap. In. Br. at 10-11).[5] Namely, Appellant claims that the

[5] Howell's argument is really one claiming that adjudicating his case in Texas under its laws robs him of the ability to

Circuit Court's application of Texas law violates Section 41-10-100 of the Act which states that "[n]o provision of this Chapter may be contravened or set aside by a private agreement." S.C. Code Ann. § 41-10-100. Neither the choice of law provision nor the Circuit Court's recognition that the Employment Agreement is governed by and construed under the laws of Texas circumvents the Act. The choice of law provision merely states that Texas law governs the interpretation of the Employment Agreement. (Agr. ¶ 8(J)). The Circuit Court's earlier Orders simply recognized this clause and held that "interpretation of the terms and provisions of the contract should be governed by the laws of Texas." (Orders 10.5.18 & 10.9.18). The plain terms of the choice of law provision and the Circuit Court's recognition of their function do not run afoul of Section 41-10-100. Therefore, the Circuit Court's enforcement of or reliance upon the choice of law provision to reach its holding was not in err.

***c. The Court's Decision Stonard Inc. v. Carolina Flooring***

Howell cites the South Carolina Supreme Court's decision in *Stonard, Inc. v. Carolina Flooring Specialist, Inc.*, 336 S.C. 156, 621 S.E.2d 352 (2005) to support his argument that enforcement of the choice of law provision offended public policy; noting the case's general holding that contractual choice of law provisions will not be enforced where they are "invalid as a matter of law or contrary to public policy in South Carolina." (App. In. Br. p. 9). The *Stonard* case is distinguishable from the present matter and therefore does not support Appellant's argument on this issue.

In *Stonard*, the Court refused to enforce the choice of law provision calling for application

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seek the redress provided under the South Carolina Payment of Wages Act. First, the Act does not state that South Carolina is the exclusive forum for adjudicating alleged violations. Therefore, contracting to resolve disputes in another venue cannot be an attempt to circumvent the statute as Plaintiff argues. This position also ignores the existence of the Texas Payday Act which provides statutory remedies similar or identical to those afforded under the South Carolina Act. *See* Tex. LAB Code Ann. § 61.0001 *et seq.*

of New Jersey law because doing so would inevitably result in the violation of South Carolina public policy. Specifically, the Court in *Stonard* was faced with an employment agreement containing a non-compete without any territorial restriction. Application of New Jersey law would have allowed the Court to rewrite the agreement to make it enforceable by inserting a territorial restriction; a practice that is a far cry from South Carolina's narrow blue penciling rule that limits the courts to merely striking through invalid provisions. *See Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 17-18 (2010)(Held circuit judge erred in rewriting territorial restriction in noncompete. In discussing line of South Carolina cases noted that they stood "for the proposition that, in South Carolina, the restrictions in a non-compete cannot be rewritten by a court…"). Thus, in *Stonard*, enforcement of the choice of law provision and resulting application of New Jersey law would have run afoul of a clear and established public policy of South Carolina.

Unlike in *Stonard*, Howell has not established how the Circuit Court's recognition of the choice of law provision, and presumed application of Texas law, offends the public policy of South Carolina. That high bar – establishing enforcement results in violation of public policy – must remain a stringent and difficult showing in order to maintain the fundamental tenants of contract law and the purpose of entering written agreements. Those entering written contracts must do so with the knowledge and assurance that each party will abide by the agreed upon terms, face consequences for not doing so, and only have the ability to shun their obligations under extraordinary circumstances. As detailed above, Howell has failed in his efforts to show how enforcement of the choice of law provision offends South Carolina public policy and he therefore cannot avoid adherence to that part of his Employment Agreement.

Furthermore, South Carolina's public policy is to enforce unambiguous contract provisions

unless doing so results in a violation of that policy. (*See supra.* p. 4). Howell's arguments do not address, much less rectify, the fact that adoption of his position on this issue requires violation of South Carolina's public policy of enforcing unambiguous contract terms.

Avoiding one's contractual obligations must be reserved for situations in which it is necessary in order to not run afoul of South Carolina public policy. Appellant has not shown that nonenforcement of the choice of law provision is required to avoid such an outcome. Nor has he established how disregarding the unambiguous choice of law provision as he urges would not offend the State's public policy. He need show both in order to succeed on his argument that Texas law should not apply in this case and the Circuit Court erred in doing so.

In short, Howell is asking the Court to violate South Carolina's public policy of enforcing unambiguous contract provisions so he can avoid abiding by his contractual obligations. Howell's desire to litigate his claims under this State's laws and in its courts cannot excuse his adherence to the Agreement's choice of law provision absent a showing it is necessary to avoid running afoul of this South Carolina public policy. That showing has not been made, and the Circuit Court's recognition and assumed application of the choice of law provision in the Employment Agreement was therefore not in err.

### D. The Circuit Court Was Not Required to Undertake a Forum Non Conveniens Analysis to Decide Respondent's Motion to Dismiss that Sought Dismissal Solely Upon Contractual Grounds

#### 1. Standard of Review

"The decision to invoke the doctrine [of forum non conveniens] is one that lies within the discretion of the trial court: 'Forum non conveniens is the discretionary precept which allows a court with proper jurisdiction to dismiss an action, when such would further the ends of justice and promote the convenience of the parties.'" *Braten Apparel Corp. v. Bankers Tr. Co.*, 273 S.C. 663,

667, 259 S.E.2d 110, 112 (1979)(internal citations omitted). Therefore, the lower court's decision to invoke the doctrine in order to dismiss an action will be upheld absent "a clear showing of abuse of discretion amounting to a manifest error of law." *Cavalier v. Corley*, 247 S.C. 509, 511 (1966).

**2. The Circuit Court Did Not Abuse its Discretion by Granting the Motion to Dismiss Upon the Contractual Grounds Dismissal Was Sought**

Respondents moved to dismiss Howell's Complaint pursuant to the Employment Agreement's forum selection clause. (Amend. Mot. Dis.). The Circuit Court granted the Motion upon those contractual grounds. (Order). Appellant, however, claims the Circuit Court erred by failing to invoke the common law doctrine of forum non conveniens to evaluate and deny Respondents' Motion to Dismiss even though it was made purely upon contractual grounds. (Ap. In. Br. at 11). Nothing is offered to support this position, yet Appellant seeks reversal of the lower court's decision because it did not undertake this additional analysis. The absence of an unnecessary legal analysis in the challenged Order does not warrant reversal. This is especially true given the applicable standard of review that requires a clear showing of abuse of discretion amounting to manifest error of law for the Appellate Court to reverse a lower court's decision to invoke, or in this instance not invoke, forum non conveniens in ruling on a motion to dismiss. Such a showing has not been made, and the Circuit Court's choice to forego inclusion of a forum non conveniens analysis in the Order was an appropriate exercise of its discretion.

Appellant cites to the South Carolina Supreme Court's decision in *Braten Apparel Corp. v. Bankers Tr. Co.*, 273 S.C. 663, 259 S.E.2d 110 (1979) in support of his argument that the Circuit Court abused its discretion by not invoking the doctrine of forum non conveniens. (Ap. In. Br. at 11). He notes the general holding of *Braten*, wherein the Court reversed a circuit judge for failing to apply the doctrine in considering defendant's motion to dismiss, but notably never claims the case stands for the proposition its inclusion on brief seeks to imply – that courts are *required* to

undertake a forum non conveniens analysis when evaluating motions to dismiss regardless of the basis advanced in support. No such mandate exists, and the circumstances of *Braten* reveal its inapplicability to this case.

In *Braten*, the Defendant, Bankers, made two motions to dismiss, neither of which relied upon a forum selection provision. Bankers first moved to dismiss under the South Carolina Door Closing statute. *Id.* at 666. The circuit judge denied that motion, prompting Bankers to file an answer and second motion to dismiss the Complaint under the forum non conveniens doctrine. *Id.* The circuit judge refused to dismiss the action pursuant to the forum non conveniens doctrine advanced as the basis for Banker's second motion to dismiss. *Id.* Thus, the issue before the South Carolina Supreme Court in *Braten* was whether the circuit judge abused his discretion in failing to invoke forum non conveniens when dismissal was expressly sought pursuant to the doctrine. *Id.* at 667("The question here...is whether there was error in the trial judge's refusal to dismiss the action on the ground of Forum [*sic*] non conveniens."). The Court held that the circuit court abused its discretion in failing to dismiss the Complaint under the doctrine of forum non conveniens and reversed its ruling. *Id.*

Here, Respondents' Motion to Dismiss was made pursuant to the Employment Agreement's forum selection clause alone. (Amend. Mot. Dis.). Appellant invoked the forum non conveniens doctrine to oppose that Motion and argue analysis under it warranted denial. (Memo Opp. Mot. Dis. at 5-6). Therefore, the Circuit Court did not err in taking up and resolving the Motion to Dismiss solely on the grounds advanced in support of it.

Deciding to enforce an unambiguous forum clause agreed to by the Parties did not require the Circuit Court undertake a separate forum non conveniens analysis. That common law analysis had no bearing on the legal issue presented by Respondents' Motion – the enforceability of the

forum selection provision requiring adjudication in Texas. Here, the Circuit Court resolved the contractual issue before it and needed not undertake additional common law evaluations.

Howell seeks to impute reversable err to the Circuit Court's finding because it did not consider the forum non conveniens doctrine he contends warranted denial of Respondents' Motion. The fact is Respondents did not rely upon forum non conveniens in seeking dismissal and the doctrine had no bearing on the resolution of the contractual issue before the Circuit Court. Therefore, the Circuit Court's decision to refrain from invoking the doctrine was not an abuse of discretion warranting reversal.

**3. Howell Assumes the Circuit Court Did Not Consider His Forum Non Conveniens Argument in Granting Defendants' Motion to Dismiss**

Howell's argument on this issue rests upon an assumption that the Circuit Court did not consider forum non conveniens factors in reaching its holding. He does not indicate the basis for that assumption, which presumably is based upon the absence of any discussion of the doctrine in the Order. Howell did however put the issue before the Circuit Court when he expressly raised the forum non conveniens argument in his Memorandum in Opposition to Respondents' Motion to Dismiss. (Memo Opp. Mot. Dis. at 5-6). Therefore, the issue was before the Circuit Court and Howell cannot say with any certainty it was not considered in reaching the ruling. The absence of a substantive forum non conveniens treatment in the Order does not mean the Circuit Court failed to consider the factors of that analysis, and certainly provides an inadequate basis for establishing an abuse of discretion as needed to reverse on these grounds.

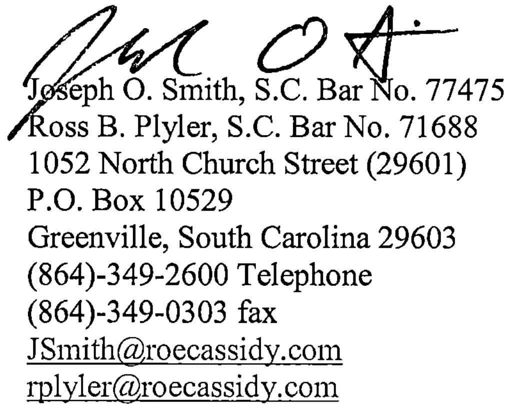
## IV. CONCLUSION

For the reasons set forth above, Respondents respectfully request the Circuit Court's Order be affirmed.

(signature page to follow)

Respectfully submitted,

**ROE CASSIDY COATES & PRICE, P.A.**



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March 27, 2019
Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM GREENVILLE COUNTY**
**Court of Common Pleas**

**The Honorable Letitia H. Verdin, Circuit Court Judge**

**Appellate Case No. 2018-001885**

Glenn P. Howell................................................................................. Appellant,

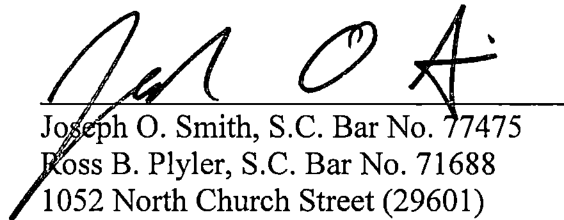
v.

Covalent Chemical, LLC and Matthew W. Rowe......................................... Respondents.

## CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule 211(b), SCACR.

**ROE CASSIDY COATES & PRICE, P.A.**



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## PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Matter on the Appellant Glenn P. Howell, by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2019, addressed to counsel of record as follows.

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(signature page to follow)

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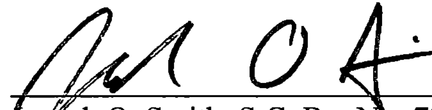

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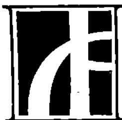

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**Re:** ***Glenn P. Howell v. Covalent Chemical, LLC, et al.***
**Appellate Case No. 2018-001885**
**RCCP No. 3060.0001A**

Dear Madam Clerk:

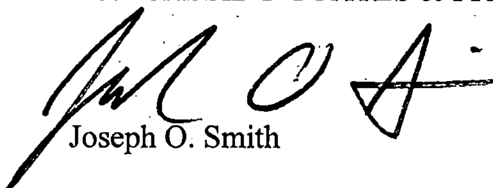
Enclosed please find the original and one copy of Respondents' Initial Brief, Respondents' Designation of Matter to be Included in Record on Appeal, and Proof of Service in the above-referenced appeal.

Please file both in your office and return the filed copy to me in the envelope provided herein. By copy of this letter, we are serving counsel for Appellants with a copy of same.

With highest regards, I am

Sincerely,

ROE CASSIDY COATES & PRICE PA



Joseph O. Smith

JOS/ads

cc: David E. Rothstein, Esq.

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