SUPREME COURT OF MISSISSIPPI

CASE # 2007-TS-01554

HERRING GAS COMPANY, INC. — APPELLANT

VS.

PINE BELT GAS, INC., LLOYD BROOM, JASON STRINGER, STEVEN STRINGER AND JIMMY RUTLAND — APPELLEES

On Appeal from
The Chancery Court of Marion County
Cause No. 2006-0336-G-W

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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VS.

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APPELLEES' CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellees certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Plaintiff/Appellant - Herring Gas Company, Inc.

2. Defendants/Appellees - Pine Belt Gas, Inc., Lloyd Stringer, Jason Stringer, Steven Stringer, and Jimmy Rutland

3. Attorneys for Appellant - John L. Maxey II, Esq.; Paul H. Kimble, Esq.

4. Attorneys for Appellees - David M. Ott, Esq.; Kris A. Powell, Esq.

5. Honorable Johnny L. Williams, Marion County Chancery Court

CERTIFIED, this the 9th day of June, 2008.

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees believe oral argument is not necessary to resolve the issue before this Court. This Court has previously held that a covenant not to compete executed between a seller and a purchaser of a business is assignable by the purchaser to a party to whom it subsequently sells the business. However, this Court distinguished that situation from this case of attempted assignment of a mere employee's non-compete clearly indicating the result would be different. Further, it is unnecessary for this Court to reach the issue of whether a mere employer's non-compete is assignable in this case because the purported assignment of Mr. Rutland's covenant not to compete was fatally flawed. Only if the Court reaches the issue of first impression is oral argument warranted.

STATEMENT OF THE ISSUES

This suit seeks enforcement of a disfavored limitation on trade and of an employee to choose his employer. The Appellant, Herring Gas, wants to significantly expand the reach of non-compete agreements so they can indiscriminately survive an employer's sale to a competing business. The issues before this Court in this case are:

1. Whether Rutland's covenants not to compete terminate upon Broome's failing to continue in the gas distribution business and its sale of certain assets to Herring;
2. Whether Broome's purported assignment of Rutland's Non-Compete Agreement to Herring was effective such assignment occurring a full twenty-four (24) days after the execution of the asset purchase agreement; and
3. Whether a covenant not to compete which is entered into between an employer and a mere employee and is silent as to assignability may be unilaterally assigned to a purchaser of some assets of the employer.

Herring Gas seeks to enforce a flawed assignment of a covenant not to compete[1] against an employee of a competitor from which it purchased some assets. The attempted assignment of the non-compete did not occur for almost a month after the sale of assets and while the non-compete itself is silent as to assignability. It is an affront to civilized jurisprudence to allow a non-compete agreement binding an employee to be freely assigned to not only a stranger to the original agreement, but a despised competitor from whom the employee would never have accepted employment. A covenant not to compete executed between an employer and an employee, which is silent as to its assignability, may not be assigned unilaterally by the employer to a stranger who happens to purchase some of the employer's assets.

The standard of review of the Chancellor's decision is that of manifest error for factual finding and denovo on issues of law since the ruling of the Chancellor was made after all parties presented all evidence they desired. This is not an appeal from a Summary Judgment as Herring Gas suggests.

The Court need not reach the issue of whether the assignment of a mere employee's non-compete is enforceable, because the purported assignment of Mr. Rutland's covenant not to compete by Broome Gas to Herring Gas was not valid. Even if valid, its enforcement is unconscionable. Rutland's employer, Broome Gas, is no longer in the propane business in the Purvis, Mississippi area. Jimmy Rutland did not breach any agreement with his employer, Broome Gas, by going to work for Pine Belt Gas and refusing to work for Herring Gas. Broome Gas no longer has any interest in enforcing a non-compete and would not be allowed to do so because it has no legitimate interest

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[1] Throughout this brief, restrictive contracts limiting competitive activities are referenced to as a "non-compete" or a "covenant not to compete". This is meant to include any restrictive contracts preventing competition including non-solicitation agreements.

to protect.

The vast majority of states refuse to allow assignment of a mere employee's non-compete or carefully circumscribe the cases where enforcement by an assignor of such a personal contract is allowed. This Court in *Cooper v. Gidden*, 515 So.2d 900 (Miss. 1993) recognized the distinction between a non-compete involving restriction of a seller of the business that generally is well paid for the rights surrendered and that of a "mere . . . servant" clearly indicating an attempt to assign a servant's contract would not be honored. *Id. at 905.*

STATEMENT OF THE CASE

A. Proceedings Below

On November 3, 2006, Plaintiff Herring Gas Company, Inc. ("Herring Gas") filed suit against Jimmy L. Rutland, Pine Belt Gas, and its principals seeking preliminary and permanent injunctions restraining Jimmy L. Rutland ("Rutland") from calling on or soliciting Herring Gas customers, as well as compensatory damages. Herring Gas alleged that Rutland was in breach of a covenant not to compete he entered into as part of his employment contract with Broome LP Gas, Inc. ("Broome Gas"), and that by virtue of Herring Gas's purchase of some of Broome Gas's assets, the covenant had been assigned to Herring Gas. Herring Gas also alleged that by virtue of its employment of Rutland, Pine Belt Gas and its principals had tortiously interfered with Herring Gas's contracts with its customers, for which it sought damages. Herring Gas filed a motion for preliminary injunction, and the Defendants filed a Motion to Dismiss or for Summary Judgment on December 1, 2006. The Chancellor held a hearing and considered all of the evidence presented, and on December 4, 2006, the request for injunctive relief was denied. The court below entered an Order finding in favor of Defendants on all claims on August 23, 2007 upon certification by Herring Gas that it had no further evidence to present to the Court in support of its claims. The Court found there was not a valid assignment, the non-compete agreement had terminated, and that Mississippi law would not permit an employer/employee non-compete agreement to be unilaterally assigned by an employer in a partial asset purchase agreement. Herring Gas appealed.

B. Statement of the Facts

Jimmy L. Rutland is a hard-working, 65-year-old man who has been employed in the propane business for fourteen (14) years, driving a gas truck and delivering propane to his customers. For twelve of those years prior to the institution of this suit, Mr. Rutland worked for Broome Gas. (R.

at 145). Before that, he worked at a co-op in Columbia for twenty (20) years, driving a spreader truck and hauling feed out to chicken houses and dairy farms. (R. at 143-44). Mr. Rutland has no other marketable skills and has stated that if he was not allowed to deliver propane for a living, he would not be able to find other work or pay his bills; he would have to go on welfare and get food stamps. (R. at 144).

Incident to his employment with Broome Gas, Mr. Rutland signed an employment contract that was executed "by and between Broome LP Gas, LLC . . . and Jimmy L. Rutland . . ." (R. at 14). This agreement provided that Jimmy Rutland would not go to work for a competitor of Broome Gas in the Purvis area or call on Broome Gas customers if Jimmy's employment with Broome Gas ended. (R. at 14-5). Nowhere in the employment contract does it mention that the contract or the covenant not to compete would be assignable to the successors or assigns of Broome Gas.

During his tenure with Broome Gas, Mr. Rutland had occasion to meet some of the employees and truck drivers for Herring Gas, a competing business located near Broome Gas's offices. During that time, Mr. Rutland formed some strong opinions about the way Herring Gas did business. He believed they were not a good company to work for because he had heard that many of their drivers were fired in the Spring months when "sales dropped." Mr. Rutland also believed that Herring Gas was "having to buy out [other gas] companies, because their business leaves them." He believed a lot of customers "won't do business with them" because of the "treatment they get." Mr. Rutland said he "wouldn't work for them for any amount of money." (R. at 146).

On or about April 10, 2006, Mr. Rutland had a conversation with a Herring Gas representative. Mr. Rutland was told that Herring Gas was purchasing one of Broome Gas's propane trucks. They looked at the truck and discussed how many miles Mr. Rutland had put on it, and the Herring Gas representative was shocked to learn Mr. Rutland's age and the amount of hours he

worked for Broome Gas. They did not discuss any impending sale of Broome Gas assets to Herring Gas or whether Mr. Rutland would work for Herring Gas after the sale. (R. at 106). Herring Gas did not offer Rutland a job. One morning about a week later, Mr. Rutland arrived at work only to learn that Broome Gas was "selling out" to Herring Gas. (R. at 146-47).

The Asset Purchase Agreement executed between Broome Gas and Herring Gas on April 19, 2006, states that it "does not convey . . . any assets . . . *not specifically set forth in the Agreement.*" (R. at 25) (emphasis added). It lists the "Assets Being Purchased" as: "Accounts receivable, inventories, bulk plants, tanks, rolling stock, propane service, equipment, tools, supplies repair parts, propane parts, appliance inventory held for resale, propane inventory, customer lists and files, route books, office equipment, telephone systems, customer leases and other leasehold interest, real estate with improvements and all fixtures thereto, poultry farmer contracts, and covenant not to compete." (R. at 26). The only covenant not to compete that Herring Gas paid $100,000.00, to buy was executed between Herring Gas and the owners of Broome Gas to prevent the Broome Gas owners from opening a competing business after the sale. (R. at 28, 33-34). The Asset Purchase Agreement did not include any of the non-compete agreements Broome Gas had with its employees. The Asset Purchase Agreement specifically excludes any "limited liability company interest or ownership of the company." (R. at 28). All in all, Herring Gas paid over $1.3 million for these assets, including $100,000.00 for the former owners' covenant not to compete. (R. at 28, 29, 33).

Nowhere in the Asset Purchase Agreement does it include any contracts between Broome Gas and its employees that include covenants not to compete. In fact, the Asset Purchase Agreement gives Herring Gas the unilateral right to terminate Broome Gas employees after the sale, stating that the agreement "does not create any contract of employment or expectation of continued employment by entering into this Asset Purchase Agreement. [Herring Gas] reserves the complete right to make

employment decisions after the closing of this sale with regard to all employees of [Broome Gas]." (R. at 32).

The Asset Purchase Agreement does recognize that "[Broome Gas] agree[s] that their current employees provide [Herring Gas] incentive to close this purchase and [Broome Gas] agree[s] that the employment status of current employees of [Broome Gas]'s current employees will not be changed without prior approval of [Herring Gas]." (R. at 31). The same Herring Gas representative who spoke to Mr. Rutland about his truck said that "the truck salesman is one of [their] key persons in the company because [the customers] trust him." (R. at 101). However, no one even discussed the buyout with Mr. Rutland, asked him if he would agree to work for Herring Gas, or offered him continued employment with Herring Gas until after the closing of the sale. (R. at 106, 147).

In the days immediately before Herring's purchase of Broome, Mr. Rutland took a number of orders from his customers who required gas, so Mr. Rutland continued to deliver propane for about four days after the sale because he wanted to "meet [his] obligations" and "keep [his] promises to his customers." (R. at 149). Thereafter, Mr. Rutland resigned from his position and went to work for Pine Belt Gas. (R. at 98). Jimmy Rutland never signed an agreement with Herring Gas. For about a month, Herring Gas representatives continued trying to convince Mr. Rutland to work for the company. (R. at 147). When he refused, they reversed course and sued him. *Id.* Twenty-four (24) days *after* the execution of the Asset Purchase Agreement, Broome Gas executed a purported assignment to Herring GAs of Mr. Rutland's employment contract with Broome Gas, including his covenant not to compete. (R. at 17). On November 3, 2006, Herring Gas filed this suit against Mr. Rutland, Pine Belt Gas, and its principals, based on that purported assignment, alleging breach of Mr. Rutland's covenant not to compete and tortious interference with Herring Gas's customer contracts. (R. at 3).

SUMMARY OF THE ARGUMENT

Covenants not to compete are not favored by the law. Mississippi has long recognized the potential oppression by an employer trying to unfairly enforce a non-compete and required a careful balancing of interests. Furthermore, public policy concerns reject restricting a person from earning his livelihood. This Court has long recognized that the precise facts and circumstances of each case govern the enforceability of a non-compete agreement. The Chancellor has already scrutinized the facts and circumstances of this case and determined that the non-compete agreement at issue is unenforceable against Jimmy Rutland.

This Court should defer to the judgment of the Chancellor, who found that "[t]he attempted assignment by Broome twenty-four (24) days after the closing [of the Asset Purchase Agreement] fails to Breathe [sic] life into the dead contract." (R. 162). Herring Gas obviously recognized the importance of protecting itself from competition, but it failed in the purchase of Broome's assets to provide for the assignment of employees' covenants, nor did it specifically purchase them. After the sale, Broome Gas had no further interest in enforcing Mr. Rutland's non-compete and Mr. Rutland was no longer prevented from taking employment with a competitor. Therefore, Broome could not validly assign the non-compete covenant to Herring Gas, much less nearly a month later. To allow the unrestricted assignment of an employee's agreement not to compete to a total stranger or even a competitor is more reminiscent of concepts of involuntary servitude and monopolistic practices than the modern ideals of fair competition and individual freedom from tyranny. There is no legitimate business interest in protecting Herring Gas from competition by Jimmy Rutland. Herring Gas paid nothing for the right to enforce the agreement, had no agreement at all with Jimmy Rutland, and did nothing to secure the services of Jimmy Rutland except to threaten, intimidate and ultimately sue him.

This case involves a very specific set of circumstances, and this court must distinguish this case from other cases involving covenants not to compete. There are basically two types of covenants not to compete; those between a seller and purchaser of a business and those between an employee and his employer. Employee/employer covenants not to compete are personal to the parties and they amount to personal services contracts. Therefore, they are not assignable. If this Court holds that covenants not to compete executed between an employee and his employer are not personal to the parties and therefore assignable to a subsequent purchaser, it should at the very least restrict that rule and require the assignability to be addressed in the employment contract. That at least would theoretically put the employee on notice that the limitation agreed upon could survive and even be extended to another employer.

Herring Gas argues that the case law in Mississippi as well in other jurisdictions supports its argument that a covenant not to compete can be enforced by a subsequent purchaser. However, the cases Herring Gas cites in support of this proposition are almost all distinguishable from the present case. Some of them involve seller/purchaser non-compete agreements, and the rest do not involve a sale of business assets and subsequent assignment. This case involves an employee/employer covenant not to compete and an assignment made as an afterthought to the transaction.

This Court does not have to decide the enforceability or assignability of non-compete agreements generally, nor is it required to determine specifically whether employee/employer covenants not to compete are assignable. All this Court must decide is whether the *post hoc* assignment of Mr. Rutland's non-compete agreement was valid. This Court should defer to the Chancellor, who had an opportunity to consider all the evidence including the credibility and demeanor of the witnesses, and held that it was not a valid assignment.

In the alternative, if the Court reaches the question of whether employee/employer covenants not to compete are assignable, this Court should phrase the question as whether a covenant not to compete in the context of an employment contract can be unilaterally assigned by the employer to its successor when both the employment contract and the asset purchase agreement are silent on the subject. Human dignity, fairness, reason and the law compel rejection of such cavalier treatment of a faithful servant and draconian consequences for those who accept limitations on future competitive activities in exchange for present employment.

ARGUMENT

I. Standard of Review

This court should apply a limited standard of review on this appeal from the Chancery Court and not interfere with the Chancellor's findings. *Tucker v. Prisock*, 791 So. 2d 190, 193 (Miss. 2001). The appropriate standard of review for this case is whether the Chancellor's opinion was manifestly wrong or not supported by substantial credible evidence or whether the Chancellor applied an erroneous legal standard. *Bayview Land, Ltd. v. State ex rel. Clark*, 950 So. 2d 966, 971-972 (Miss. 2006) ("When we are called upon to review a Chancellor's opinion after a plenary trial on the merits of a case, our standard of review is well established. This Court will not reverse the Chancellor's findings of fact unless they are manifestly wrong, not supported by substantial credible evidence, or an erroneous legal standard was applied.") (citing *Vaughn v. Vaughn*, 798 So. 2d 431, 433 (Miss. 2001); *Tucker*, 791 So. 2d at 193. Defendants/Appellees acknowledge that the Chancellor's application and interpretation of the law is subject to a de novo standard. *Tucker*, 791 So. 2d at 193.

Herring Gas asserts that a de novo standard of review is appropriate for all issues, and requests the application of the heightened standard under Rule 56(c) of the Mississippi Rules of Civil

Procedure. Defendants dispute this request for heightened standard, as the trial court's Order clearly provides that the court convened a hearing on the merits, heard testimony from several individuals, accepted all available evidence, and the parties indicated no further evidence or testimony was necessary before a ruling on the merits. (R. at 155). The Court's Memorandum Opinion and Order Dismissing all Claims clearly indicates that the Order is a final adjudication and not an Order merely on Defendants Motion for Summary Judgment:

> This matter is now before this court for a final disposition, both Herring Gas and the Defendants having certified to this Court that neither party seeks to produce any further evidence in order for this Court to make a final ruling.
> ...
> Since resolution of this case on the merits is available because all parties have submitted all evidence, the Court will instead of ruling on the pending Motions, simply render its final decision on the merits of the case.

(R. at 155).

Thus, the Chancellor's ruling in this case was a final ruling following a plenary trial. Furthermore, based upon the representation to the court by Herring Gas that it had no further evidence to submit, the Court rendered its final decision on the merits of the Case. The heightened standard of review under M.R.C.P. 56(c) is not appropriate. Accordingly, this Court should defer to the factual findings of the Chancellor.

II. Mississippi Law – Non-Compete Agreements are Inherently Disfavored under Mississippi Common Law and Should be Strictly Construed

Covenants not to compete are not favored by the law, and require the person seeking to enforce such a covenant to bear the burden of proving their reasonableness. *See, Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982). The law in Mississippi has long recognized that potential oppression by an employer is of great concern and requires a balancing of interests.

Donahoe v. Tatum, 134 So. 2d 442, 445 (Miss. 1961) ("This requires [the Court] to recognize that there is such a thing as unfair competition by...unreasonable oppression by an employer."). The Mississippi Supreme Court decades ago confirmed that covenants not to compete will be "cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld....Being a contract in restraint of trade, it is presumptively void." *Thames*, 420 So. 2d at 1043 (citing *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685 (Ohio 1952)). Additionally, the Mississippi Supreme Court has recognized and affirmed the significant procedural hurdles an employer must leap and clear:

> In this type of case, heavy procedural burdens impede the plaintiff employer. Because the restraint sought to be imposed is one which restricts the exercise of a gainful occupation, it is a restraint in trade . . . . The employer shoulders the burden of proving the restraint reasonable and the contract valid . . . . Even where the restraint is partial, the rule is not that it is good, but that it may be good . . . . The fact that an employer has a written agreement that the employee will not, on leaving his employment, compete with his employer, that the employee breaks that agreement, that the employee quits his employer, that the employee starts working for a rival, and that the rival thereby becomes a more efficient competitor,-all this, without more, does not automatically entitle the employer to an injunction . . . .

Thames, 420 So.2d at 1043.

The precise facts and circumstances of each case govern the enforceability of a non-compete agreement. *Id.* ("The circumstances of each case will be carefully scrutinized to determine whether it falls within or without the boundary of enforceability."). The Chancellor has already scrutinized the facts and circumstances of this case and determined that the non-compete agreement is unenforceable. The determination of the relevant facts and circumstances of this case by the Chancellor, and the finding that the non-compete at issue here is not enforceable, should not be disturbed.

III. This Covenant Not to Compete is Not Enforceable Because it was Not Properly Assigned

The first and most important question this Court must determine is whether the purported assignment of Mr. Rutland's non-compete agreement by Broome to Herring Gas, executed as an afterthought a full twenty-four (24) days after the closing of the Asset Purchase Agreement, is valid. Answering this question in the same manner as the Chancellor would forestall this Court's responsibility to answer the remaining question of first impression. Hypothetically, a case may arise in the future in which a company sells its assets and specifically assigns its employment contracts, including non-compete contracts with its employees, to the buyer. That hypothetical case would be a much better vehicle for this Court to answer the question of whether and when and employee's non-compete agreement can be assigned as to whether employee/employer covenants not to compete are assignable to subsequent purchasers. But this is not such a case. This Court should avoid answering the hypothetical question.

The purported assignment in this case is not valid. This Court should defer to the judgment of the Chancellor, who had the opportunity to consider all the evidence and who found that "[t]he attempted assignment by Broome twenty-four (24) days after the closing [and eighteen (18) days after Mr. Rutland resigned] fails to Breathe life into the dead contract." (R. 162). There are several reasons that Herring Gas should not be allowed to rely on this afterthought assignment.

First, if the truck salesmen were so important to the operation of its business, Herring Gas should have included their employment contracts in the Asset Purchase Agreement. Even though the Herring Gas representative that spoke to Mr. Rutland before the sale stated that "the truck salesman is one of [their] key persons in the company because [the customers] trust him," (R. at 101), Herring Gas made no express purchase of their contracts in the Asset Purchase Agreement.

In fact, the Asset Purchase Agreement specifically writes out the employment contracts from the purchase. It gives Herring Gas the unilateral right to terminate Broome Gas employees after the sale, stating that the agreement:

> "does not create any contract of employment or expectation of continued employment by entering into this Asset Purchase Agreement. [Herring Gas] reserves the complete right to make employment decisions after the closing of this sale with regard to all employees of [Broome Gas]." (R. at 32).

This is very odd, since the Asset Purchase Agreement itself recognizes the importance of these employees to the continued success of the business. It states that "[Broome Gas] agree[s] that their current employees provide [Herring Gas] incentive to close this purchase and [Broome Gas] agree[s] that the employment status of current employees of [Broome Gas]'s current employees will not be changed without prior approval of [Herring Gas]." (R. at 31).

Next, Herring Gas obviously recognized the importance of protecting itself from competition, since it executed a covenant not to compete with Broome Gas. It paid handsomely for it, too, purchasing the sellers' non-compete agreement for $100,000. If Herring Gas wanted to protect itself from similar competition on the part of Broome Gas's employees, it should have expressly provided for the assignment of their employment contracts in the Asset Purchase Agreement and assured itself that the employees would agree to work for Herring Gas. Herring Gas could have also included their employment contracts as assets it was purchasing from Broome Gas. At a very minimum, Herring Gas should have consulted the truck salesmen about the purchase and negotiated new covenants not to compete, paying them something for the extension of their agreement with Broome. Herring Gas did none of this. Instead, Herring Gas wanted to have its cake and eat it too. It proceeded with a limited asset purchase while retaining the right to unilaterally terminate employees after the sale. Therefore, Herring Gas sought to gain the value of these employees' continued services at no cost

while wielding the power to restrain the employees from earning a living after the sale. Herring Gas' position is fundamentally unfair, and offensive to the interests of the public of the State of Mississippi.

Finally, Mr. Rutland's non-compete agreement became null and void as of the date of the closing of the Asset Purchase Agreement. Mr. Rutland entered into a covenant not to compete with Broome Gas, not Herring Gas. Broome ceased business in the Purvis market after April 19, 2006. Herring Gas was a stranger to the original employment contract. Recently, in *Cain v. Cain*, 967 So. 2d 654 (Miss. App. 2007), the Mississippi Court of Appeals ran down the issues which Mississippi courts must consider when determining the enforceability of employee/employer covenants not to compete. The court stated:

> The employer bears the burden to prove that the restriction is reasonable in light of the economic interest sought to be protected. *Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982). Non-competition agreements are valid only "within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent." *Id.* (quoting *Wilson v. Gamble,* 180 Miss. 499, 510-11, 177 So. 363, 365 (1937)). To determine the validity of a covenant in restraint of trade, we look to the respective rights of the employer, the employee, and the public. *Empiregas, Inc. of Kosciusko v. Bain,* 599 So. 2d 971, 975 (Miss. 1992).

Cain, 967 So. 2d at 661. Because Broome Gas entered into a covenant not to compete with Herring Gas, it could no longer engage in the business of selling propane. Therefore, Broome Gas had no further economic interest in enforcing Mr. Rutland's non-compete clause; in essence, there was no entity, as of the day of the closing, against which Mr. Rutland was prohibited from competing. Since Broome Gas no longer had any "economic interest" to be protected, it could not seek enforcement of the covenant not to compete because it would not have been "reasonably necessary" to protect anything. Thus, Mr. Rutland's covenant not to compete died upon the Broome closing with Herring, and nothing remained to assign.

Mr. Rutland was working for Pine Belt Gas when Herring Gas attempted its *post hoc* assignment of his non-compete agreement. Rutland's non-compete was dead. The purported assignment, twenty-four (24) days after the sale and eighteen (18) days after Mr. Rutland began working for Pine Belt Gas does not raise the non-compete contract from the dead. Additionally, when balancing "the rights of the employee, the employer, and the public," this Court should consider the "undue hardship on the employee," Mr. Rutland, who will be prevented from earning his livelihood if he is prevented from working. This Court should also consider the "rights of the public," i.e. the gas customers who prefer Mr. Rutland's services, no matter who employs him.

IV. This Court Should Hold Employee/Employer Covenants not to Compete Unassignable

If this Court determines that Herring Gas's assignment after-the-fact is viable, it must then reach the question of whether employee/employer covenants not to compete are assignable in this circumstance. Herring Gas would have this Court lay down a blanket rule that covenants not to compete are assignable, period. That is bad law and worse public policy. In this case, Mr. Rutland entered into a covenant not to compete with his employer, Broome Gas, only to have Broome Gas sell certain described assets of the company to Herring Gas, a competitor. The precise question before this Court is whether a covenant not to compete, included in an employment contract executed between an employee and his employer, can be unilaterally assigned to a subsequent purchaser of some assets of the employer company, when the employment contract and the sale agreement are silent as to its assignability. This is a very nuanced question that requires consideration of the specific facts.

A. There are Two Basic Types of Covenants Not to Compete

There are basically two types of covenants not to compete; those between a seller and

purchaser of a business and those between an employee and his employer. However, there are more situations in which a suit to enforce these covenants might arise. *See infra*, section V.

First, and most frequently there is the *seller/purchaser* covenant not to compete. It is executed between a seller of a business and the purchaser, where the seller agrees, as part of the sale of the business, not to compete with the buyer for a certain period of time after the sale. Almost always, these types of covenants involve equally sophisticated parties to the contract who occupy equivalent bargaining positions. These covenants are important to protect the interests of the purchaser, and usually are bought from the seller for a significant amount of money.[2] The other possible contract not to compete is between an employee and his employer restricting the employee's competitive activities after termination of his employment.

1. Between Seller and Purchaser

A *seller/purchaser* non-compete clause is often included in the sale of a business as a separate item purchased. It may be part of a wholesale purchase of all assets including the right to operate under the name of the original company or a more limited purchase as occurred in this case with the Herring/Broome agreement. Litigation involving these occurs when the seller breaches the covenant or when the purchaser resells the company to a third party, who then seeks to enforce the covenant against the *original* seller. These non-compete covenants are enforceable by the purchaser or the third-party buyer against the seller as long as it is reasonable in duration and area. *See infra*,

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2 There is such a covenant in the instant case, executed between Broome Gas, the seller, and Herring Gas, the purchaser. Broome Gas is prohibited from competing with Herring Gas for a period of five years from the date of the Asset Purchase Agreement. Herring Gas paid Broome Gas $100,000.00 for this restrictive covenant. (R. at 33). The Appellee Mr. Rutland does not dispute that these types of covenants not to compete may be valid and assignable to third-party buyers, but this is not the issue before the Court in this case.

section V.

2. Between Employer and Employee

The second type of covenant not to compete is the *employee/employer* type. These covenants are executed between an employer company and its employee, and they generally restrict the employee from competing with the employer company in a certain area for a period of time after the termination of the employment. Mississippi has long recognized the need to carefully restrict the scope of such agreements.

A number of situations cause litigation in the context of employer/employee non-competes, including a change in the business entity, restructuring of it, or an asset purchase.

No Change in Entity - Not the Case Here

The typical context for judicial intervention is where the employee quits his job or is fired, and he subsequently begins working for a business that competes with his former employer. Perhaps he even starts up his own competing business. Employers who have not changed ownership or altered their structure are generally allowed to enforce these disfavored non-competes as long as they are reasonable in scope and time. *See infra*, section V.

Restructuring - Not the Case Here

There are also *employee/employer* non-compete covenants enforced after the employer company has restructured. When the employer company shifts from a partnership to a limited liability corporation, or when its stock is purchased by another entity, or when its parent company buys it out, the employer company may seek to enforce the covenant against the employee. These restrictive covenants are usually enforceable by the restructured company against the employee because the company's identity has not really changed. *See Infra*, section V.

These employee/employer covenants not to compete are often enforced by the courts and

assignments upheld due to the lack of any real substantive change in the persons involved in the employment relationship. Some courts allow them to be assigned to subsequent purchasers if their assignability is expressed in the employment contract or the purchase agreement or as long as there is no language in either making them unassignable. *See infra*, section V.

Asset Purchase - This Case

The covenant not to compete at issue in this case is different from the situations identified above. It does not involve a seller/purchaser covenant or an employer company simply restructuring, or even a merger. It is a pure employee/employer covenant not to compete executed between Broome Gas and Mr. Rutland. Herring Gas, not a party to the covenant, is seeking to enforce it against Mr. Rutland. It purchased *some* Broome Gas's assets. Mr. Rutland's employment contract is silent as to its assignability, and the Asset Purchase Agreement not only fails to assign the employment contracts to Herring Gas, but specifically excludes such employment contract.

If the delayed assignment is deemed enforceable then this Court must determine whether covenants not to compete executed between Broome and Rutland can be enforced by Herring Gas. The approach to this issue employed by the Chancellor below in this case is the best rule.

B. Employee/Employer Covenants Not to Compete Should be regarded as Personal to the Parties and Not Assignable.

The court below rejected Herring Gas's argument that employee/employer covenants not to compete are freely assignable. The Chancery Court recognized many of the differences between the present case and the cases relied upon by Herring Gas and similarly distinguished them all. The Chancellor chose a better rule, one employed by the Supreme Courts of Alabama and Pennsylvania, both courts having decided this question in their states.

The Supreme Court of Pennsylvania addressed the issue of whether or not a covenant not to

compete entered into between an employee and an employer is assignable. In *Hess v. Gebhard & Co., Inc.*, 808 A.2d 912, 918 (Pa. 2002), the Pennsylvania Supreme Court was faced with a case of first impression and was forced to examine other jurisdictions' laws as to the assignability of a non-compete agreement between an employee and an employer. The Court stated:

> More than a dozen states have rendered decisions on whether employment contracts containing covenants not to compete are assignable to the new owner in the event of the sale of the business. **The majority of these states have concluded that the restrictive covenants are not assignable.** Some of these jurisdictions have based their decisions on a finding that the employment contracts, and therefore the covenants, are personal to the parties and may not be assigned. Others have concluded that employment contracts involve personal services and are not assignable.

Hess, 808 A.2d at 918-919 (emphasis added).

Pennsylvania's Supreme Court further reasoned that employer/employee covenants not to compete were not enforceable.

> Strong [public] policy considerations underlie the conclusion that restrictive covenants are not assignable. **Given that restrictive covenants have been held to impose a restraint on an employee's right to earn a livelihood, they should be construed narrowly; and, absent an explicit assignability provision, courts should be hesitant to read one into the contract.** Moreover, the employer, as drafter of the employment contract, is already in the best position to include an assignment clause within the terms of the employment contract. **Similarly, a successor employer is free to negotiate new employment contracts with the employees . . . or secure the employee's consent to have the prior employment contract remain in effect.**

808 A.2d 912, 921 (emphasis added)(citing *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 351 (Pa. Super. 1997)).

Further, the Pennsylvania Supreme Court stated:

> We also find . . . that covenants should be construed narrowly and that courts should hesitate to "read [an assignability provision] into

> the contract." **Moreover, we are persuaded that the better rule in deciding whether restrictive covenants are assignable is that the employment contract, of which the covenant is a part, is personal to the performance of both the employer and the employee, the touchstone of which is the trust that each has in the other. The fact that an individual may have confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking**. . . . In reaching this conclusion, we find that personal characteristics of the employment contract permeate t he entire transaction. Like the contract for hire, upon which the covenant was given, the employee's restrictive covenant is confined to the employer with whom the agreement was made, absent specific provisions for assignability.

Hess, 808 A.2d at 922 (emphasis added).

The Supreme Court of Alabama decided a strikingly similar case to the instant proceeding before this Court. In *Sisco v. Empiregas, Inc.*, the plaintiff sought an injunction to enforce a non-compete agreement by an alleged assignee of the contract. 237 So. 2d 463 (Ala. 1970). The plaintiff in that case purchased the assets of the defendant's previous employer. *Id.* at 464. The defendant employee was a route salesman with whom customers established contact with the gas company. The issue before the Court was whether the contract containing the non-competition provision sought to be enforced against the defendant was personal to the defendant's previous employer and therefore, incapable of effective assignment. *Id.* The Supreme Court of Alabama held that the duties under the contract were for personal performance and therefore, were not delegable. *Id.* Thus, the plaintiff had no right to performance from the defendant employee since such performance was conditioned on personal performance by the employee's previous employer, and such performance by the previous employer was no longer possible due to the sale of the business. *Id.* The Court reasoned that the non-competition agreement involved a personal relationship between the parties and therefore was not capable of assignment, conforming with the general proposition that personal

service contracts are not assignable. *Id.* at 466. The Court stated:

> **We think this [Complaint] shows on its face that the contract here at issue involved a relationship of personal confidence between the parties.** No other conclusion seems logical where the contract by its language permits the employer to discharge the employee on thirty days notice and then to prevent him for five years from pursuing his livelihood over an area we judicially know to encompass some 7,850 square miles and to include [multiple cities in Alabama] and a considerable portion of middle Tennessee. **Surely, one would not be presumed to have intended to commit himself into the hands of a stranger so empowered and the [Complaint] shows on its face that [the previous employer] was no stranger to [the defendant employee]**, having been his employer for some two years and eight months prior to his execution of the contract at issue. The circumstances, we feel, demonstrate that [the defendant employee] relied upon the uniqueness of his corporate employer and their relationship of mutual confidence when he entered into this contract.

Empiregas, 237 So.2d 463 at 466-467 (emphasis added).

The Alabama Supreme Court recognized that there is considerable authority throughout various jurisdictions that such a non-compete agreement between an employer and employee is a personal contract. Thus, the Alabama Supreme Court held in the context of this remarkably similar case to the instant proceeding, that the non-compete agreement was not enforceable by a successor owner of a company with which an employee had entered into a covenant not to compete. *Id.*

As recognized by the Pennsylvania Supreme Court and the Alabama Supreme Court, there is significant authority from jurisdictions throughout the Untied States preventing non-compete agreements from being assigned in employer/employee relationships.[3] For example, in *Smith, Bell*

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[3] See also, *Mid-West Presort Mailing Serv., Inc. v Clark*, 1988 WL 17825 (Ohio Ct. App. 1988)(refusing to allow purchaser of a corporation in bankruptcy proceeding to enforce non-compete agreements executed between employees and the bankrupt corporation; *Sun Group Enterprises, Inc. v DeWitte*, 890 So.2d 410 (Fla. Ct. App. 2004)(refusing to permit assignment of an employee's "personal service contract" in the form of a non-compete agreement unless the

& Hauck, Inc. v. Cullins, 183 A.2d 528 (Vt. 1962), the Supreme Court of Vermont faced an enforcement action related to an employee's covenant not to compete in the insurance business. The Court was required to determine whether or not the covenant not to compete was assignable to a successor entity. The Vermont Supreme Court held that:

> We conclude the personal characteristics of the employment contract permeate the entire transaction. Like the contract for hiring, upon which it was given, the employee's restrictive covenant is confined to the employer with whom the undertaking was made. Since the beneficial interest in [the employee's] agreement not to engage in the insurance business was personal to [the previous employer], it was incapable of effective assignment without the employee's consent or ratification.

Id. at 532.

In support of its decision, the Vermont Supreme Court reasoned:

> **From its inception, the relationship between [the employer] and its employee . . . was one of mutual confidence. The employer confided to the servant important customer relationships and business confidences. The employee entrusted to his employer the important privilege of discharging him at will and without cause. This eventuality would at once invoke the severe detriment of foreclosing him from employment elsewhere in that community in his chosen occupation. The restriction, in its own terms, was designed to protect a fiduciary relationship which emanated solely from the master and servant relationship. Knowing the character and personality of his master, the employee might be ready and willing to safeguard the trust which his employer had reposed in him by granting a restrictive covenant against leaving that employment. His confidence in his employer might be such that he could scarcely anticipate any rupture between them. As to that particular employer, if a break did occur, he might be willing to pledge that his fidelity would continue after the employment had ended, even at the cost of forsaking the vocation for which he was best suited. This does not mean that he was willing to suffer this restraint for the benefit of a stranger to the original undertaking.**

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employee consents to the assignment.

Id. at 532 (emphasis added).

These statements, as well as those by the Supreme Courts of Alabama and Pennsylvania, are especially poignant in regard to the instant proceedings. Mr. Rutland was willing to be restrained by Broome Gas, for the price of $500.00, but that does not mean he was willing to do the same with regard to Herring Gas. Mr. Rutland knew how Herring Gas ran its business, and he didn't like it. He stated that he would not work for them for any amount of money. So to allow Herring Gas to restrict Mr. Rutland's only means of supporting himself would be unconscionable. Conversely, if one were to accept Herring Gas's theory, Herring Gas could have terminated Mr. Rutland's employment, though it was a stranger to his employment contract, and restricted him from earning a living. Such an unfair restraint would offend the rights of Mr. Rutland as the employee and the public's right to fair competition. If this was the rule in this state, it would essentially create a subservient class of employees who would be prevented from their livelihoods by unscrupulous, "Johnny-come-lately" employers, without notice or negotiation.

Similarly, courts in other jurisdictions have held that employee/employer covenants not to compete are "personal services contracts" and are therefore unassignable. In *Trinity Transp., Inc. v. Ryan*, 1986 WL 11111 (Del. Ch. Ct.1986), the Chancery Court of Kent County, Delaware, was faced with the plaintiff's petition for a temporary restraining order to enjoin the defendant from breaching a non-compete agreement. The Court noted that the corporation with which the employee defendant originally entered into the non-compete agreement, had been sold to a successor corporation, and the corporate offices of the employer were relocated following such purchase. The Court noted that an agreement for personal services is not assignable and that it was undisputed that the plaintiff had been sold to another corporation and its office moved to the office location of the acquiring corporation. *Id.* at ¶ V. The Court held, "[T]hat plaintiff had not sustained its heavy

burden of showing a reasonable probability of success on the merits as to the issue of whether plaintiff is the same entity as existed when the agreements were entered into. . . ." *Id.* at ¶ VI.

The Court of Appeals of Indiana has faced the precise issue before this Court in the instant case. In *SDL Enterprises, Inc. v. Dereamer,* 683 N.E.2d 1347 (Ind. Ct. App. 1997), a successor employer brought an action seeking to enforce a covenant not to compete based upon the contract entered into with the predecessor employer. The Indiana Court of Appeals held that the covenant not to compete executed by the employees were personal service contracts which were not assignable, and therefore, the assignee employer had no right to enforce the covenants. *Id.* at 1350.

In the instant case, the Chancellor weighed the unique facts and circumstances at issue in this case and determined that Herring Gas was not entitled to the benefit of enforcing a non-compete agreement from Mr. Rutland in light of the relevant authorities in Mississippi and other persuasive jurisdictions. The Chancellor found enforcement of the non-compete in this case was not reasonable given the facts of the instant case. The findings of the Chancellor should not be disturbed.

C. An Employee/Employer Covenant Not to Compete Silent as to Assignability is Unenforceable by an Assignee

A covenant not to compete that is assigned should only be enforceable if the agreement provides that it is assignable. This is the rule adopted by the Chancery Court and employed statutorily in Florida and through common law in Pennsylvania. *See,* Fla. Stat. Ann § 542.335 (West 2002); *see also, Hess v. Gebhard & Co., Inc.*, 808 A.2d 912 (Pa. 2002).

In *Hess*, the Pennsylvania Supreme Court found that employee/employer covenants not to compete are personal to the parties entering the contract. Considering this, the court held that "a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant

is included in a sale of assets." *Hess*, 808 A.2d at 922.

Similarly, the Florida legislature passed a statute in 1996 that includes almost the same requirements. It reads:

> (f)The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:
>
> 1.In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.
>
> *2.In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.*

Fla. Stat. Ann. § 542.335(f) (emphasis added).

Under this rule the restrictive covenant in this case does not pass muster even if the assignment is found to be valid. Nowhere in the covenant not to compete contained in Mr. Rutland's employment contract does it say that it could be assigned by Broome to someone else. This Court should affirm the opinion of the Chancellor that the lack of any provision in the covenant not to compete allowing an assignment renders the restrictive contract unassignable.

V. The Assignability of Employee/Employer Covenants Not to Compete by Jurisdiction

Herring Gas argues that the case law in Mississippi as well in other jurisdictions supports its argument that a covenant not to compete may be enforced by a subsequent purchaser. However, the cases Herring Gas cites in support of this proposition are almost all distinguishable on their facts from the present case because they involve one of the different situations, explained above, in which covenants not to compete can arise. *See supra*, section IV-A. Following is a case-by-case, jurisdiction-by-jurisdiction explication of every authority cited by Herring Gas as evidence of its contention and an explanation of how each is distinguishable from the instant case. *See* Brief of

Appellant, section IV, at 10-35.[4]

A. Mississippi Law – Existing Mississippi Law Supports the Non-assignability of Covenants Not to Compete in the Context of Employer/Employee Relationships

First, Herring Gas cites Mississippi cases to argue that covenants not to compete are assignable in this state. Herring Gas has misapplied *Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151(Miss. 1963), because its facts are very different from those in the instant case. *Frierson* involved a covenant not to compete between the owner of a building supply company and its manager, whom the owner had hired. When the owner fired the manager, the manager started his own building supply company to compete against his former employer, in violation of the covenant not to compete. There was no sale or purchase of the business or any assignment of contractual rights to another entity. The same can be said for *Redd Pest Control Co., Inc. v. Foster*, 761 So. 2d 967 (Miss. 2000). These cases do not involve the sale of the business to another entity who then tries to enforce the non-compete clause against an employee, so they have little application here.

Next, Herring Gas utilizes *Cooper v. Gidden*, 515 So. 2d 900 (Miss. 1993) for the proposition that "[a] covenant not to compete will be given general application unless, by its own terms, it specifically expresses an intent that it be a personal covenant flowing only to the original obligee." *Id.* at 904. This statement of the rule seems to be dispositive when taken out of context, but *Cooper* did not involve an employee/employer covenant not to compete. *Cooper* involved a covenant between the seller and purchaser of the company. Later the purchaser resold the business to a new

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[4] This Brief should be close to an end except that Herring Gas has string cited cases in order to give the appearance of having persuasive authority on its side. Cases in these jurisdictions do not provide the support Herring Gas seeks. However, detailed examination of the cases is required to expose the empty nature of the argument made by Herring Gas. Almost every case cited is distinguishable from the facts and circumstances at issue in the instant case.

buyer, purportedly assigning the covenant to it. The new buyer then sought to enforce the covenant against the original seller. There were no employees whose covenants were assigned to any purchaser by the seller, thus, the assignment of employer/employee covenants were not at issue in the case.[5] The same is true for *Herring Gas v. Whiddon*, 616 So. 2d 892 (Miss. 1993)(enforcement of contract by purchaser against seller where purchaser re-sold the business held enforceable). In the instant case, Mr. Rutland did not enter into a covenant not to compete with Herring Gas, but with Broome Gas. Now, Herring Gas, a stranger to Mr. Rutland's employment contract, seeks to enforce that covenant against Rutland through a faulty assignment. Rutland received nothing out of the sale by Broome to Herring Gas.

Herring Gas then proposes a so-called "general rule" that rights under a contract may be assigned. However, the case in which Herring Gas finds this rule does not involve covenants not to compete at all, much less those entered into by an employee whose employer sells the assets of the company to a third party. *See, S. Miss. Planning and Dev. Dist. v. Alfa Gen. Ins. Corp.*, 790 So. 2d 818 (Miss. 2001). That case involved two banks assigning priority liens to an insurance company to enforce against a defaulted property owner. Therefore, it has little application to the instant case, as covenants not to compete are given much greater scrutiny due to their disfavored nature as a restraint of trade.

Herring's suit against Rultand is not about the assignability of contracts generally, this case

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A significant underpinning of the Court's reasoning in *Cooper* was the contractual sale of the business's "goodwill". Interestingly, goodwill was not listed as one of the specific assets being transferred from Broome to Herring in this case pursuant to the asset purchase agreement. (R. 44-47). It is no secret that Herring Gas's motivation for only purchasing specific assets was to avoid any successor liability for the obligations of Broome. This makes Herring's *post hoc* attempt to alter the asset purchase agreement to the detriment of the rights of Mr. Rutland all the more unfair.

is about the assignment of a non-compete agreement in a very precise and peculiar circumstance. The facts of this case involve a non-compete agreement of a mere employee, rather than the owner/seller of a business. Further, the non-compete contains no assignability provision. Additionally, Herring Gas purchased from Broome only those particularly described assets pursuant to a detailed asset purchase agreement, a purchase agreement which Herring Gas admits failed to transfer any right, title or interest in the non-compete agreement of Mr. Rutland. Following the termination of Broome's operation as a gas company and employer for Mr. Rutland, Broome purportedly assigned the non-compete agreement to Herring, a full twenty-four (24) days after Broome stopped operating as a gas company. Also an important distinction, Herring Gas did not "merge" with Broome, or "buy the Company" of Broome, but rather purchased only specifically defined assets.

However, *Cooper* and *Whiddon* are not useless for this Court's consideration in this case; Rutland submits to this Court that Mississippi cases, including *Cooper* and *Whiddon*, are instructive on the precise issue in this present controversy. This Court noted in *Cooper* that, "[w]e recognize that there is a valid and accepted distinction between covenants not to compete in an employer-employee setting, and those dealing with the sale of a business, as in the present case." *Cooper*, 515 So. 2d at 905 (citing 246 ALR 2nd, 144-147 (1956)). The Court pointed out that the essential line of distinction between the two situations is that:

> [T]he purchaser is entitled to protect himself against competition on the part of the vendor, while the employer is not entitled to protection against mere competition on the part of a servant. In addition thereto, a restrictive covenant ancillary to a contract of employment is likely to affect the employee's means of procuring a livelihood for himself and his family to a greater degree than that of a seller who usually receives ample consideration for the sale of the goodwill of his business.

Cooper, 515 So.2d at 905.

The reasoning of the *Cooper* court that a covenant not to compete is distinguishable in the employee/employer relationship from the seller/purchaser relationship was reaffirmed in *Whiddon.* In that case, this Court briefly discussed covenants not to compete in the context of employment contracts between employer and employee and their assignability to purchasers of the employers' assets. The Court reaffirmed its discussion in *Cooper*, and stated:

> [C]ovenants not to compete are restraints on trade and not favored by the law. . . . While this rule has received general acceptance by the courts, a distinction remains between covenants not to compete in an employer/employee setting and those involved in the sale of a business.

Whiddon, 616 So. 2d at 897.

In *Whiddon*, the Court was faced with a non-compete agreement that was executed between sellers of a business and the new owners of that business. The question before this Court in the instant proceeding is clearly not whether a covenant not to compete executed between the seller of the business and its new owner is enforceable by a subsequent third-party buyer. Rather, the question is whether or not an employer can unilaterally assign an employee's covenant not to compete to a purchaser of its business, or as in the instant case, a purchaser of only certain business assets. This is a very precise question, one which this Court has not yet directly answered.

Herring Gas has appealed to a wide variety of decisions from other jurisdictions in its failed attempt to bolster its position that such non-compete provisions are assignable. The cases cited by Herring Gas are factually distinguishable from the instant case, and are therefore of little value to this Court in determining the instant proceeding. Nevertheless, it requires a detailed examination instead of the cursory glance provided by Herring Gas.

B. Other Jurisdictions

Herring Gas looks outside Mississippi to find support for its contention that courts frequently allow employee/employer covenants not to compete to be assigned to a subsequent purchaser. Unfortunately for Herring Gas, these cases suffer from some of the same ailments as the Mississippi cases.

1. Sixth Circuit

First, Herring Gas looks to the Sixth Circuit, citing *Managed Health Care Assoc., Inc. v. Kethan*, 209 F.3d 923 (6th Cir. 2000) (applying Kentucky law). The employment contract in *Kethan* was silent as to assignability but, the employer/seller of the business expressly assigned all the employment contracts to the buyer in the contract for sale. *Id.* at 926. This is a very different circumstance than in the present case, where no such assignment of contract rights was made, at least not until after Rutland refused to work for Herring Gas and accepted employment with a competing business.

2. North Carolina

Next, Herring Gas looks to North Carolina, citing *Reynolds and Reynolds Co. v. Tart*, 955 F. Supp. 547 (W.D.N.C. 1997). In *Reynolds*, however, the employer sold its assets to Reynolds and Reynolds Co. and expressly assigned the employment contracts of the two employees who Reynolds would later sue to enforce the covenant not to compete. In the present case, Rutland's employment contract was not specifically assigned to Herring Gas until weeks after the purchase and after Rutland refused employment with Herring Gas. The court in Reynolds also said that such covenants were assignable assets that could be transferred to the purchaser who bought all the assets and goodwill of the company. In the instant case, Herring Gas did not buy all the assets of Broome Gas, but only specifically delineated ones. In fact, in the asset purchase agreement, Herring Gas

specifically excludes from assets purchased all "assets or liabilities of the company not otherwise listed in [the] Asset Purchase Agreement." (R. at 28).

3. Maine

Similarly, the case from Maine which Herring Gas cites is distinguishable. In *Katahdin Insurance Group v. Elwell*, 2001 WL 1736572 (Me. Super. 2001), Elwell entered into a covenant not to compete with her employer insurance agency, which was sold to Katahdin. In the contract for sale, specific assets were named, including the rights and obligations under Elwell's employment contract. Further, Elwell acted in a tortious manner by stealing customer lists while she was still employed by Katahdin. In the instant case, no contract rights or obligations were assigned to Herring Gas until after Rutland resigned, and there is no evidence that Rutland acted tortuously stealing any business information from Herring Gas while continuing his employment.

4. Minnesota

The case which Herring Gas cites out of Minnesota is also distinguishable. In *Saliterman v. Finney, Dr. L.M.*, 361 N.W.2d 175 (Minn. App. 1985), Dr. Finney, a dentist, entered into an independent contractor employment agreement with a dentistry company, which later sold the company to Saliterman. The independent contractor agreement specifically stated that the rights and obligations were assignable to the successors of the parties. However, in the present case, neither the employment contract nor the contract for the sale of Broome Gas provided for assignment of the employment contract rights to a purchaser. Broome Gas and Herring attempted to specifically assign the rights and obligations under Rutland's employment contract only after Rutland had resigned.

Herring Gas also argues, based on *Peterson v. Johnson Nut Co.*, 283 N.W. 561 (Minn. 1939), that "[a] valid covenant not to compete may be assigned unless by its peculiar nature it cannot be." *Id.* at 569. A more circular statement we have never heard. Herring Gas is correct that there is no

language in the agreement at issue in the instant case which states that it cannot be assigned. The truer statement is that there is no language in Rutland's covenant not to compete that says *it can* be assigned. Further, in *Johnson Nut*, the covenant not to compete was entered into by two joint owners of the original company; it did not involve an employee's covenant not to compete contained in an employment contract at all.

5. Connecticut

Next, Herring Gas moves to Connecticut, citing *Torrington Creamery v. Davenport*, 12 A.2d 780 (Conn. 1940), and *Magner Int'l Corp. v. Brett*, 960 So. 2d 841 (Fla. App. 4 Dist. 2007) (using choice of law rules to apply Connecticut law). These cases both hold that Connecticut law regards covenants not to compete as assignable assets when the purchaser buys the "entire company," including all assets and goodwill. However, that is not what happened in the present case. Herring Gas purchased only specifically defined assets from Broome Gas in its "asset purchase agreement." Perhaps sensing that something was amiss, they attempted twenty-four (24) days after the fact to assign Rutland's employment contract to Herring Gas.

6. Tennessee

Next, Herring Gas cites a case from a bankruptcy court, *In re VisionAmerica, Inc.*, 2001 WL 1097741 (Bkrtcy. W.D. Tenn. 2001). In *Vision America*, two doctors entered into covenants not to compete with their employer, VisionAmerica, Inc. VisionAmerica went bankrupt and applied to the court to allow bankruptcy proceedings by which VisionAmerica could assume all the executory contracts it had with its employees so that they could be assigned to the purchaser, Eye Health Partners, Inc. ("EHP"). Therefore, the impetus for *VisionAmerica* to reach the court was the debtor seeking to assume and assign the contracts, and specifically the covenants not to compete, to the purchaser. Because the bankruptcy court held that the Sixth Circuit generally allows assignment of

covenants not to compete, citing *Kethan*, 209 F.3d 923 (6th Cir. 2000) (holding covenants not to compete are assignable absent language in the contract prohibiting assignment), it held that assumption was proper and that the contracts could be assigned to EHP. However, there is no bankruptcy in the instant case, so Broome Gas was never required to assume the contract with Rutland. Moreover, its purported assignment of Mr. Rutland's employment contract occurred after the sale of assets, not before, as in *VisionAmerica.*

7. Colorado

The cases Herring Gas cites from Colorado suffer from similar problems. In *National Propane Corp. v. Miller*, 18 P.3d 782 (Colo. App. 2000), the entire propane company employing the defendant was sold, and the defendant's employment contract expressly provided for assignment of the rights and obligations of both sides to successor companies. *Flower Haven, Inc. v. Palmer*, 502 P.2d 424 (Colo. App. 1972), involved a covenant not to compete between a seller and a purchaser, not between a seller and its former employee. Finally, in *Miller v. Kendall*, 541 P.2d 126 (Colo. App. 1975), an accordion instructor's employer was sold, but the instructor entered into a new employment contract, including a covenant not to compete, with the purchaser. That employment contract expressly provided that it applied to all the instructor's students, including the ones he had taught under his old contract with his former employer. There is no express assignment of rights or obligations in the instant case, nor is there any mention of assignability in Mr. Rutland's employment contract. Only after Rutland resigned and the employment contract terminated did Herring Gas revisit the issue and attempt to get Broome Gas to expressly assign it such rights.

8. Kentucky

Next, out of Kentucky, Herring Gas cites *Gardner Denver Drum, LLC v. Goodier*, 2006 WL 1005161 (W.D.Ky. 2006). However, in that case the business was not sold, but its parent company

was acquired by the plaintiff company. *Id.* at 1. Therefore, the identities of the parties to the covenant had not changed, so the covenant was being enforced by the original company that entered into the contract, not a stranger to the contract, as Herring Gas is in the instant case.

9. Michigan

Herring Gas next cites *Virchow Krause & Co. v. Schmidt*, 2006 WL 1751835 (Mich. App. 2006). Herring Gas is incorrect about the purchase contract not assigning rights. In *Virchow*, the employee signed a non-compete agreement with her employer, Nemes. Two months after the employee resigned, Nemes entered into a Contribution and Partner Admission Agreement (CPAA) with Virchow. The CPAA required Nemes to distribute its assets amongst it shareholders, who would then be required to contribute them to Virchow. The CPAA also provided that Nemes itself would contribute to Virchow "other intangible assets including client information and rights under employment relationships with Nemes' employees." *Id.* at 1. In the instant case, however, no such express delegation of rights was made, either in the employment contract or in the asset purchase agreement.

10. Florida

Next, Plaintiff cites cases out of Florida. However, three of the four cases to which Herring Gas appeals from Florida occurred prior to 1996, when Florida dealt with the assignability of covenants not to compete statutorily. *See* Fla. Stat. Ann. § 542.335 (West 2002). The Florida rule disallows assignment without getting express permission to do so.[6] See *Marx v. Clear Channel*

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(f)The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1.In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant

Broad., Inc., 887 So. 2d 405 (Fla. Dist. Ct. App. 2004) (noting that "non-competition agreements can be enforced by assignees, but only if the agreement expressly so provides."). Therefore, since 1996, Florida allows for assignment only when "expressly authorized." The other Florida case to which Herring Gas looks, *Allegiance Healthcare Corp. v. Coleman*, 232 F. Supp. 2d 1329 (S.D. Fla. 2002), does not involve a change in the employer company's identity; it involves a mere stock purchase.

11. Tenth Circuit

Herring Gas next moves back into federal court, citing *Equifax Services, Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990). This case falls on the same sword as *Allegiance Healthcare* above, in that it involves a stock purchase and a subsequent merger. There was no similar transition of stock or merger in the instant case.

12. Missouri

The first case Herring Gas cites from Missouri does not involve a covenant not to compete by an employee but by a seller of a business. In *Schucks Twenty-Five, Inc. v. Bettendorf*, 595 S.W.2d 279 (Mo. App. 1979), the seller of a grocery store agreed not to compete with the purchaser, who then resold the store to a third party. The third party sought to enforce the non-compete clause against the original seller. Since all three parties were on equal footing regarding the sale of the business, the court held that the covenant was assignable. *Id.* at 282. Thus, the case is distinguishable from the instant proceedings involving employer and employee. Next, Herring Gas looks to *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311 (Mo. App. E.D. 1986). However,

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was intended for the benefit of such person.

2.In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor. Fla. Stat. Ann. § 542.335 (West 2002).

in that case the employer, a wholly owned subsidiary, did not sell the business but simply merged into its parent company. The employee had already been working for the parent company. In the instant case, however, Mr. Rutland entered into a covenant not to compete with Broome Gas, which was not a subsidiary of Herring Gas. Further, there was no merger in the instant case but a mere partial asset purchase. Mr. Rutland has no contractual obligations to Herring Gas.

13. Iowa

Herring Gas would also have this Court look to Iowa for guidance, but its reliance on these cases is similarly misplaced. In *Sickles v. Lauman*, 169 N.W. 670 (Iowa 1918), the covenant not to compete was executed between a seller and a purchaser; no employees were involved. Then the purchaser resold the business to a third party who enforced the covenant against the original seller. Just like in *Schucks Twenty-Five* above, all parties had equal bargaining power and were equally sophisticated. However, in the instant case the transaction between Broome Gas and Herring Gas should have no bearing on Mr. Rutland's employment contract since Herring Gas was not a party to that agreement. Iowa did enforce a non-compete covenant against an employee in *Orkin Exterminating Co., Inc. v. Burnett*, 146 N.W.2d 320 (Iowa 1966), however, as Herring Gas admits, the employment contract in that case expressly mentions rights of "successors and assigns." *Id.* at 327. However, in the present case, there is no such mention of the rights of "successors and assigns" in Rutland's employment contract.

14. New York

Next, Herring Gas travels to New York. It cites many New York cases holding that covenants not to compete entered into by employees are assets of the employer which are assignable, perhaps without the employee's permission. *See, Eisner Computer Solutions, LLC v. Gluckstern*, 293 A.D.2d 289 (N.Y. 202); *Norman Ellis Corp. v. Lippus*, 176 N.Y.S.2d 5 (N.Y. 1955); *Premier*

Laundry v. Klein, 73 N.Y.S.2d 60 (N.Y. 1947). It is apparent from these New York authorities that covenants not to compete in employment contracts are assignable to purchasers of the company . . . in New York. However, it is fair to say that perhaps the state of New York has a stronger policy concern in protecting businesses' and corporations' interests in their assets and operations rather than protecting workers' interests in earning a livelihood. This Court should reject the invitation to fllow New York law which would ignore the rights of individual employees.

Herring Gas equates these New York holdings to the holding of the Mississippi Supreme Court in *Cooper v. Gidden*, 515 So. 2d 900 (Miss. 1987). However, as mentioned above, the covenant at issue in *Cooper* was between a seller and a purchaser of a business, who sold the business to a third party; it did not involve employees. An employee's covenant not to compete was enforced in *Special Products Mfg., Inc. v. Douglass*, 159 A.D.2d 847 (N.Y. 1990). However, in that case, the purchasing company bought all assets and contract rights from the seller. *Id.* at 847. In the present case, Herring Gas and Broome Gas' asset purchase agreement only included certain specific assets; employee contract rights and obligations of Broome's employees, like Mr. Rutland, were excluded. (R. at 32).

15. New Jersey

Herring Gas looks next to New Jersey to bolster its position. First, Herring Gas relies on *J.H. Renarde, Inc. v. Sims*, 711 A.2d 410 (N.J. 1998), for the proposition that covenants not to compete are freely assignable. The court in *Renarde* relied on an earlier New Jersey case, *A. Fink & Sons v. Goldberg*, 139 A. 408 (N.J. 1927), to decide that covenants not to compete are assignable. These cases also seem powerful when taken out of context. However, in *Fink*, the successor company was "a New Jersey corporation of the same name and composed of practically the same stockholders and officers." *Id.* at 409. Therefore, the covenant not to compete was, for all intents and purposes,

enforced by the same entity who had signed it. There is no such relationship in the present case. Further, in *Renarde*, the court stated that "it is preferable to assume that when a business is sold, the purchaser and the employee expect, without new negotiations between them, that the purchaser will honor the employment contract and that the employees, who choose to remain, will honor the promises made to the former employer." *Renarde*, 711 A.2d at 414. In the instant case, however, the asset purchase agreement between Broome Gas and Herring Gas expressly disallows any such assumptions, stating that the agreement "does not create any contract of employment or expectation of continued employment . . . with regard to all employees of [Broome Gas]." (R. at 32).

16. Texas

Herring Gas cites *Thames v. Rotary Eng'g Co.*, 315 S.W.2d 589 (Tex. Civ. App. 1958), but in that case, the employer partnership did not sell but dissolved and reformed as a corporation. The employee who signed the covenant not to compete worked for the company before and after the incorporation of the partnership, which for all practical purposes was the same entity. The covenant not to compete in *Wells v. Powers*, 354 S.W.2d 651 (Tex. Civ. App. 1962) was executed between a seller and a purchaser; no employees were involved. Further, in *Williams v. Powell Elec. Mfg. Co., Inc.*, 508 S.W.2d 665 (Tex. Civ. App. 1974), the owner of the employer subsidiary sold out to its parent company, making the employer company a wholly-owned subsidiary. Then the original owner started a new competing business. The covenant not to compete was between the original owner/seller and the parent company. There is no similar restructuring or "wholly-owned subsidiary" in the present proceeding. Herring Gas was at all times a stranger to Mr. Rutland's employment contract.

17. Kansas

The covenant not to compete at issue in *Safelite Glass Corp. v. Fuller*, 807 P.2d 677 (Kan.

App. 1991), was executed between the seller and the purchaser of a business. Once again no employees were involved. The specific situation in the instant case differs from that situation, in that Rutland was an employee of the seller, Broome Gas, with whom he entered into the covenant; he had no contractual relationship with Herring Gas, the purchaser.

18. Georgia

In *Nat'l Linen Service Corp. v. Clower*, 175 S.E. 460 (Ga. 1934), the employment contract at issue, which included a covenant not to compete, expressly provided that "[t]he provisions of this contract shall extend to the successors and assigns of the [employer]." *Id.* at 462. In the instant case, no such provision was included in Rutland's employment contract. Further, in *Gill v. Poe & Brown of Georgia, Inc.*, 524 S.E.2d 328 (Ga. App. 1999), "all non-solicitation agreements and covenants not to compete signed by employees were assigned to [the purchaser]." *Id.* at 330. In the instant case before this Court, no such assignment was included in the asset purchase agreement between Broome Gas and Herring Gas.

19. Maryland

Herring Gas's authorities out of Maryland are similarly misplaced. There was no sale of the employer business in *Nat'l Instrument, LLC v. Brathwaite*, 2006 WL 2405831 (Md. Cir. Ct. 2006). The employer company simply transitioned from an incorporated "Company, Inc." into a limited liability corporation, or "LLC." It had the same owners, CEOs, and employees, so the covenant was enforceable because the company was essentially the same entity. Thus, the court in *Brathwaite* held the assignment was valid. This is a very different situation from the instant case, where no such transition occurred. Further, the court in *Brathwaite*, perhaps sensing the delicate situation involved in restricting a person's ability to earn a livelihood, qualified its rule. It held that if the employee's duties and obligations changed materially by the company's transition, the covenant not to compete

would have been unenforceable despite the mere restructuring. *Id.* at 4.

20. Miscellaneous Jurisdictions

Herring Gas next suggests that many other jurisdictions permit the assignment of restrictive covenants, but these cases suffer from many of the same infirmities as those above. *See e.g.*, *Mail-Well Envelope Co. v. C.P. Saley*, 497 P.2d 364 (Or. 1972) (involving no sale of the business or assets; employee simply quits and subsequently competes while the covenant was expressly assignable); *compare Pino v. Spanish Broad. Sys. of Fla., Inc.*, 564 So. 2d 186 (Fla. 1990) (holding, before Florida dealt with restrictive covenants statutorily, covenant enforceable since purchase agreement expressly assigns it), and *Nenow v. L.C. Cassiday & Son of Florida, Inc.*,141 So. 2d 636 (Fla. 1962) (same). *See also, La. Office Systems, Inc. v. Boudreaux*, 298 So. 2d 341 (La. 1974) (holding covenants enforceable where employer sold "all assets" to buyer who paid additional consideration to enforce employees' covenants); *Bradford & Carson v. Montgomery Furniture Co.*, 92 S.W. 1104 (Tenn. 1906) (holding covenant included in sale of company enforceable, but involving no employees' covenants); *Seligman & Latz of Pittsburg v. Vernillo*,114 A.2d 672 (Pa. 1955) (involving transition of employer company from partnership to corporation with no change in corporate identity); *Hexacomb Corp. v. GTW Enterprises, Inc.*, 875 F. Supp. 457 (N.D. Ill. 1993) (involving misappropriation of trade secrets); and *Abalene Pest Control Serv., Inc. v. Hall*, 220 A.2d 717 (Vt. 1966) (holding valid assignment where the employment contract expressly so provided, and the purchase agreement purported to transfer all assets in the company, expressly including contracts entered into by the seller containing covenants).

Mr. Rutland entered into a covenant not to compete with Broome Gas that was silent as to its assignability, Broome Gas sold certain specific assets of the company to a competitor, Herring Gas. The asset purchase agreement was also silent as to the assignment of any employees' restrictive

covenants, and it specifically excluded any employment obligations or agreements from the assets purchased by Herring. Herring Gas wants to enforce the original covenant against Mr. Rutland using an assignment that occurred almost a month after Broome Gas ended its gas business in Purvis.

Almost all of the cases relied on by Herring Gas have different facts. Some involve non-compete covenants between sellers and purchasers of a business, between employers and employees that were parties to the original agreement, or cases where the employer has made some corporate or business change that really made no difference as far as the employee that was restricted. The cases that come close to what Herring Gas urges are out of the New York courts. The overwhelming weight of authority is against the position of Herring Gas.

VI. Mr. Rutland's Standing

Herring Gas asserts that Mr. Rutland lacks standing to contest the validity of the consideration related to the purported assignment of the non-compete covenant at issue herein. Appellant's Brief at 8. It is nonsensical, that after Herring Gas has filed suit against Mr. Rutland alleging breach of the agreement, that Herring Gas would submit to this court that Mr. Rutland lacks standing to contest the validity and enforceability of the very contract upon which Herring Gas brings its action. The elements of a breach of contract are: (1) the existence of a valid and binding contract; (2) that the defendant has broken, or breached it; and (3) that the plaintiff has been thereby damaged monetarily. *Favre Property Management, LLC v. Cinque Bambini*, 863 So. 2d 1037, 1044 (Miss.App.,2004) (citing *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss.1992)). Mr. Rutland has every right to attack the validity and enforceability of the alleged contract being charged against him, including the defenses of contractual prerequisites and other contractual formalities such as consideration. Whether his contract with Broome was validly assigned goes to the heart of the issue of whether it is capable of being enforced against him. Further, Mr. Rutland has the right to dispute

the elements of Herring Gas's breach of contract claim. To deprive Mr. Rutland of such rights would violate Rultand's due process rights. Other Court's have clearly held when an employment contract is asserted against an individual, the individual has standing to challenge the validity of the contracts. For instance, the Alabama Supreme Court has said:

> When a party to a contract that restrains employment is sued on that contract, the party sued has standing to challenge the validity of the contract...thereby asserting a violation of Alabama public policy in a setting in which it has a specific and peculiar stake in the validity of the contract.

Ex parte Howell Eng'g and Surveying, Inc., No. 1050579, 2006 WL 3692536 (Ala. 2006).

It is clear that Mr. Rutland has standing to challenge the validity of the *post hoc* assignment of his covenant not to compete to Herring Gas, including the lack of consideration for the purported assignment.

CONCLUSION

This Court and our state value the dignity of the hard working individuals like Jimmy Rutland who work long hours and are loyal employees, dedicated to their jobs. Herring Gas wants to buy and sell these individuals like any other commodity. Herring Gas in this case just assumed that Broome's drivers would want to work for them after they bought Broome's tanks, trucks and customer lists. But Herring Gas never asked Jimmy Rutland if he would come to work for them, until he walked off the job and quit.

Jimmy Ruthland was willing to agree to the non-compete restriction with Broome because there was trust that it would not be abused. With Herring Gas, Jimmy Rutland knew he would have only been employed long enough for Herring Gas to use him to get all of the customers and then when spring arrived and the gas sales fell off, he would be fired. Jimmy Rutland does not trust Herring Gas because of the way he has seen them treat their customers and their drivers, because of

their lack of respect. Mississippi does not need to join New York in devaluing human dignity and the importance of individual freedom by binding Jimmy Rutland to a contract that keeps him from earning a living. He did not agree to any transfer of the rights he gives to Broome to anyone else and this Court should refuse to enforce it against him.

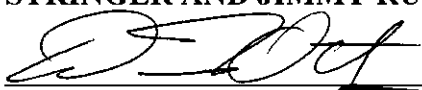
It is requested that this Court hold that Rutland's non-compete agreement died upon Broome ceasing to do business, and the attempted assignment of the Rutland/Broome non-compete contract was ineffective to raise it from the dead and give Herring Gas any rights. Alternatively, the Court is asked to refuse to allow assignment of the non-compete agreement especially where there is no notice to the employee that a stranger might wind up holding the trigger which such a powerful contract gives an employer, as the high courts of Pennsylvania, Alabama, and Vermont have so articulately reasoned.

It is respectfully requested that the decision of the Chancellor below be affirmed.

This the 9th day of June, 2008.

Respectfully Submitted,

PINE BELT GAS, INC., LLOYD BROOM, JASON STRINGER, STEVEN STRINGER AND JIMMY RUTLAND



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CERTIFICATE OF SERVICE

I, David M. Ott, hereby certify that I have mailed by U.S. First Class Mail, postage prepaid, a true and correct copy of the foregoing **Brief of Appellees** to the following:

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