

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-00750

GREGORY S. DALTON

APPELLANT

v.

CELLULAR SOUTH, INC.

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF WINSTON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Charles L. McBride, Jr., Esq., Anne C. Sanders, Esq., Katie L. Wallace, Esq., Brunini, Grantham, Grower & Hewes, PLLC, P.O. Drawer 119, Jackson, MS 39205, Attorneys for the Appellee, Cellular South, Inc.;
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4. John M. Montgomery, Esq., Liston & Lancaster, PLLC, P.O. Box 891, Starkville, MS 39759, Attorney for the Appellant, Gregory W. Dalton;
5. Dewitt T. Hicks, Esq., Sara Papa, Esq., Hicks & Smith, PLLC, P.O. Box 1111, Columbus, MS 39703, Attorney for the Appellant, Gregory W. Dalton;
6. Gregory S. Dalton, Appellant;
7. Cellular South, Inc., Appellee; and
8. Honorable Joseph H. Loper, Jr., Circuit Court Judge, P.O. Box 616, Ackerman, MS 39735.

Dated, this the 23rd day of October, 2007.

A handwritten signature in cursive script, reading "Charles L. McBride, Jr.", written over a horizontal line.

Charles L. McBride, Jr., Attorney for Appellee,
Cellular South, Inc.

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STATEMENT OF ISSUE

Whether the trial court properly found that Cellular South acted within its contractual rights when it terminated an Agency Agreement with Gregory S. Dalton.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below.

This case is a contractual dispute arising out of the termination by Appellee, Cellular South, Inc. ("Cellular South") of an agency agreement ("Agreement") between it and Appellant, Gregory S. Dalton ("Dalton"). Cellular South filed this action in the Circuit Court of Winston County, seeking a declaratory judgment that it acted within its contractual rights when it terminated the Agreement and that it owed no further contractual duties to Dalton. (R.E. 1). Shortly after initiating this action, Cellular South filed a Motion for Summary Judgment on all counts, and in response, Dalton filed his Countermotion for Partial Summary Judgment. (R.E. 2, 3). The parties' respective motions put the same issues before the Circuit Court as to the interpretation of the Agreement. The Circuit Court granted Summary Judgment for Cellular South and denied Dalton's Countermotion for Partial Summary Judgment, finding that the agency agreement is unambiguous, and that Cellular South properly acted within the terms of the Agreement in its termination of Dalton. (R.E. 8, 9). From the Circuit Court's granting of Summary Judgment in favor of Cellular South and denial of Dalton's Countermotion for Partial Summary Judgment, Dalton has now taken this appeal. (R.E. 10).

B. Statement of Facts.

Cellular South is a provider of wireless telecommunications services throughout its licensed area within the state of Mississippi and elsewhere. (R.E. 6). Cellular South's business includes the procurement and servicing of subscribers to its wireless services and the sale of wireless equipment to its subscribers. (R.E. 6). Cellular South has historically performed these retail functions through both company-owned retail outlets and by entering into agency agreements with independent contractors. (R.E. 6). Where Cellular South used independent contractors as agents, it allowed such contractors to sell its equipment and services on a

commission basis. (R.E. 1 at 24). Cellular South paid a one-time commission to the agent for each new customer signed by the agent. (R.E. 1 at 24).

Dalton was an independent contractor, who served as a Cellular South agent. (R.E. 1 at 10). Cellular South's contractual relationship with Dalton began on April 21, 1992, when Cellular South (then known as Cellular Holding, Inc.) entered into an agency agreement with Dalton. (R.E. 6). This original agency agreement was replaced *in toto* by a new agreement (hereinafter "Agreement") dated March 1, 1993, which was amended several times. (R.E. 6). During his agency, Dalton procured customers for Cellular South, and Cellular South paid him commissions as required under the Agreement. (R.E. 1 at 24). Dalton's commissions were substantial, and in 1999, 2000, 2001, 2002 and 2003, Cellular South paid him \$81,970.30, \$127,740.00, \$172,095.00, \$183,380.00 and \$197,160.00 for such years, respectively. (R.E. 8).

In late 2003, however, Cellular South changed its corporate marketing strategy and decided to terminate its use of independent contractors as agents and instead use only company-owned retail outlets to perform such functions. (R.E. 5). At the time Cellular South made this decision, it had approximately ninety agents, including Dalton. (R.E. 5). Cellular South implemented this change in corporate marketing strategy and gave notice of termination to all of its agents, including Dalton, in late 2003. (R.E. 5). When Cellular South terminated Dalton's agency, it gave Dalton the requisite thirty (30) days' written notice of its election to terminate the Agreement by letter, dated December 19, 2003 (hereinafter, "Termination Notice"). (R.E. 6). Termination of the Agreement with Dalton, pursuant to the Termination Notice, was effective on February 6, 2004. (R.E. 6).

Despite Cellular South's contractual right to terminate the Agreement upon at least thirty days' written notice, Dalton refused to accept the propriety of the termination, claiming that Cellular South was not within its contractual rights to terminate the Agreement. (R.E. 6).

Notwithstanding Dalton's disappointment over termination, however, the Agreement gave Cellular South the right to terminate the relationship as it did and when it did under the following two provisions¹ of the Agreement:

Section 3.1

Term: The term of the Agreement shall be one year, commencing on the date specified in Exhibit D of this Agreement [*date not included on Exhibit D, but Agreement made effective on March 1, 1993*], unless otherwise terminated or renewed pursuant to the provisions hereinafter provided. Cellular Holding is cognizant of the increasing value of the Agency relationship to a successful AGENT and therefore will terminate a successful Agency relationship only if Cellular Holding determines that the continuation of the Agency relationship would be detrimental to the overall well being, reputation and goodwill of Cellular Holding.

Section 3.5

Termination: Either party may terminate this Agreement by giving the other party written notice of its desire to terminate at least thirty (30) days prior to the intended date of termination.....

Further, Cellular Holding shall have the right to terminate this Agreement effective upon written notice if:

- A) AGENT makes an assignment for the benefit [sic] of the creditor;
- B) An order for relief under Title 11 of the United States Code is entered by any United States Court against AGENT;
- C) A trustee or receiver of any substantial part of the AGENT's assets is appointed by any Court; or
- D) AGENT (1) has made any material misrepresentation or omission in its application to establish any agency relationship with Cellular Holding or AGENT (or any principal thereof) is convicted of or pleads no

¹ Section 3.4 of the Agreement also provides grounds for termination upon notice of default and thirty (30) days opportunity to cure. Cellular South did not act under this provision in its termination of Dalton; nevertheless, the text of Section 3.4 is relevant to Cellular South's reading of the Agreement as a whole to reach an interpretation which gives meaning to all of the Agreement's terms. Thus, Section 3.4 provides:

In the event AGENT fails to perform any of its obligations under this Agreement and such failure continues unremedied for a period of thirty (30) days after written notice is given by Cellular Holding to AGENT, then Cellular Holding may thereupon elect to cancel and terminate this Agreement, which termination shall be effective immediately upon the expiration of the thirty-day period.

contest to a felony or other crime or offense that is likely in Cellular Holding's sole opinion to adversely affect the reputation of Cellular Holding or its affiliated companies or the goodwill associated with the Marks; (2) attempts to make an unauthorized assignment of this Agreement; (3) receives a notice of violation of the terms or conditions of any license or permit required by AGENT or its employees in the conduct of AGENT's Cellular Telephone Service business and fails to correct such violation; (4) fails to comply with any provision of this Agreement, or any tariff relating to Cellular Telephone Service and does not correct such failure within thirty (30) days after written notice of such failure to comply is delivered to AGENT; or (5) fails to comply with any material provisions of this Agreement, or any tariff relating to Cellular Telephone Service, whether or not such failures to comply are corrected after notice thereof is delivered to Agent.

(R.E. 1 at 11-13).

Cellular South complied with these terms of the Agreement in terminating Dalton's agency. Section 3.5 states that "either party may terminate this Agreement by giving the other party written notice of its desire to terminate at least thirty (30) days prior to the intended date of termination..." (R.E. 1 at 12-13). Thus, Section 3.5 gives either party the right terminate the Agreement upon thirty days' written notice. The last sentence of Section 3.1, quoted above, states: "Cellular Holding is cognizant of the increasing value of the Agency relationship to a successful AGENT and therefore will terminate a successful Agency relationship only if Cellular Holding determines that the continuation of the Agency relationship would be detrimental to the overall well being, reputation and goodwill of Cellular Holding." (R.E. 1 at 11-12). The effect of the last sentence of Section 3.1 is to temper Cellular South's right to terminate the Agreement upon 30 days' notice as provided in Section 3.5, by requiring that Cellular South must determine that continuation of the agency relationship would be detrimental to its overall well being, reputation and goodwill before terminating the Agreement under Section 3.5. Reading these two provisions together, Cellular South has the right to terminate the Agreement due to a change in its corporate marketing strategy or any other condition causing the Agreement to be detrimental to its overall well being, reputation and goodwill.

Cellular South changed its corporate marketing strategy and concluded for this reason that continuation of its agency relationships, including Dalton's, would be detrimental to its overall well being, reputation and goodwill. (R.E. 5). Cellular South duly complied with Section 3.5 of the Agreement with Dalton by giving the Termination Notice at least thirty days in advance of the effective date of the termination. (R.E. 6). Nevertheless, Dalton refused to accept that Cellular South had the right to terminate the Agreement, arguing that Cellular South could only do so if he did something to cause the agency relationship to be detrimental to the overall well being, reputation and goodwill of Cellular South. (R.E. 6). Dalton made continual demands to Cellular South for redress, including threatening litigation under the Agreement, thereby causing Cellular South to initiate its action seeking declaratory judgment that it was within its contractual rights when it terminated the Agreement. (R.E. 6).

SUMMARY OF THE ARGUMENT

When read together, the first sentence of Section 3.5 and the last sentence of Section 3.1 of the Agreement give Cellular South the right to terminate Dalton's agency due to a change in its corporate marketing strategy or other condition causing the Agreement to be detrimental to its overall well being, reputation and goodwill. Cellular South maintains, and the Circuit Court found, that Section 3.5 gives Cellular South the right to terminate the Agreement upon thirty days' notice. (R.E. 8). Section 3.1 tempers this right by requiring Cellular South to determine that continuation of the agency relationship would be detrimental to its overall well being, reputation and goodwill before terminating the Agreement pursuant to Section 3.5. (R.E. 8). To the contrary, Dalton argues that the first sentence of Section 3.5, when read together with Section 3.1 requires that Dalton himself do something that is detrimental to Cellular South's overall well being, reputation and goodwill. (Appellant's Brief at 18). In fact, Dalton attempts to add words to the last sentence of Section 3.1, arguing that it requires Cellular South to make a determination

that the continuation of “his agency, in particular,” was detrimental to the overall well being, reputation and goodwill of Cellular South. *Id.* [Emphasis added].

The Circuit Court found that the Agreement is clear and unambiguous as a matter of law. (R.E. 8). The Circuit Court further read of all the termination provisions of the Agreement together to reach a reasonable result that gives meaning to all of the terms. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003). Applying these provisions, Sections 3.1, 3.4 and 3.5, the Circuit Court held that the agency relationship need not be detrimental to Cellular South for reasons specific to Dalton, or in other words, due to some act or failure to act by Dalton. (R.E. 8). The Circuit Court also held that the Agreement makes Cellular South the “sole arbiter” of what is detrimental to its overall well being, reputation and goodwill. (R.E. 8). Thus the Circuit Court properly looked no further than the four corners of the Agreement and was able to interpret the Agreement in a manner which is consistent with the unambiguous language of the Agreement and which gives effect to all of the Agreement’s terms regarding termination. *See Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1992) (a contract should be interpreted in a manner which makes sense of all the contract’s provisions); *Nicholas Acoustics and Specialty Co. v. H & M Const. Co.*, 695 F.2d 839, 843 (5th Cir. 1983) (“[c]ontracts should be construed so as to avoid unfair or unreasonable results”).

To the contrary, Dalton’s interpretation causes the termination provisions of the Agreement--Sections 3.1, 3.4 and 3.5--all to have effectively the same result: Cellular South can only terminate the Agreement if Dalton fails to abide by the Agreement. By taking the position that second sentence of Section 3.1 is nothing more than another provision allowing for termination due to Dalton’s default, Dalton ignores the requirement that the Court give effect to all of the Agreement’s terms in a manner which is fair and reasonable. *RESTATEMENT (SECOND) OF CONTRACTS*, § 203(a) (1981) (“an interpretation which gives reasonable, lawful and effective

meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”); *see also Glantz Contracting Co. v. General Elec. Co.*, 379 So. 2d 912, 917 (Miss. 1980) (“[c]ourts must construe contracts so that they give effect to all provisions and do not produce an unfair and unreasonable result”).

Perhaps most drastically, however, Dalton’s interpretation of the Agreement would allow him to terminate the Agreement with Cellular South, whenever he wanted for whatever reason he wanted, but would bind Cellular South to a contractual relationship with Dalton which it could never choose to end absent cause due to some act by Dalton. The Court should reject this interpretation of the Agreement because it is unreasonable. *See Frazier v. Northeast Mississippi Shopping Center, Inc.*, 458 So. 2d 1051, 1054 (Miss. 1984) (court not bound to adopt construction which is “not compelled by the instrument in which we would have to believe no man in his right mind would have agreed to”). The trial court correctly found that “just as Dalton has the right to terminate the Agreement for the reason of his choosing, Cellular South pursuant to section 3.1 has made itself the sole arbiter of what would be detrimental to its overall well being, reputation and goodwill.” (R.E. 8).

In order for Dalton’s interpretation of Section 3.1 to make sense, he must insert the words “his” and “in particular” and ignore the word “overall.” Clearly, Dalton cannot add words to reach his interpretation of the sentence. *See Royer Homes*, 857 So. 2d at 752 (court must first apply language used within the four corners of the document in seeking to interpret agreement); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990) (same); *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975) (same). Dalton also cannot ignore that the definition of the term “overall” means “as a whole: GENERALLY.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 840 (9th ed. 1983). For this reason, the Circuit Court appropriately held that “‘Overall’ means company wide, not just the seven counties where Dalton was serving as agent.”

(R.E. 8). Dalton simply cannot reconcile his interpretation of Section 3.1 without adding words and ignoring the word “overall” contained in the provision.

Finally, the Circuit Court appropriately found that the Agreement is unambiguous as a matter of law, and did not consider extrinsic evidence to interpret the Agreement, including the Affidavit of Hu Meena. In fact, the Circuit Court distinctly held that Cellular South had the right under the Agreement to determine whether Dalton’s agency was detrimental to its overall well being, reputation and goodwill. (R.E. 8). Cellular South submitted the affidavit of Hu Meena in response to Dalton’s countermotion only to demonstrate that that no issues of fact existed concerning its determination that continuation of agency relationships would be detrimental to its overall well being, reputation and goodwill. (R.E. 4). Dalton never seriously disputed this fact, nor did he present sworn evidence to the contrary. (R.E. 7). Therefore, no factual dispute exists between the parties concerning Cellular South’s determination determined that continuation of agency relationships would be detrimental to the overall well being, reputation and goodwill of the company. *See Allen v. Choice Hotels International*, 942 So. 2d 817, 825 (Ct. App. Miss. 2006) (no issue of material fact existed due to non-moving party’s failure to offer affidavit or other sworn testimony to dispute moving party’s testimony).

ARGUMENT

I. STANDARD OF REVIEW.

The Court applies a *de novo* standard of review when reviewing the trial court’s grant of a motion for summary judgment. *Holman v. Howard Wilson Chrysler Jeep*, 2005-CT-01154-SCT (Sep. 27, 2007); *Moss v. Batesville Casket Co., Inc.*, 935 So. 2d 393, 398 (Miss. 2006).

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of material fact and he is entitled to judgment as a matter of law. MISS. R. CIV. P. 56(c). The nonmovant is then required to set forth significant, probative evidence and specific

facts showing that a genuine dispute exists. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). Indeed, to defeat a motion for summary judgment, the plaintiff must offer “significant probative evidence” from which a reasonable jury could find in his favor on every essential element of his claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). “Neither conclusory allegations nor unsubstantiated assertions will satisfy the non-movant’s burden.” *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). Summary judgment is required if the non-movant fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof at trial. *Celotex*, 477 U.S. at 322-323.

II. CELLULAR SOUTH ACTED WITHIN ITS CONTRACTUAL RIGHTS WHEN IT TERMINATED AN AGENCY AGREEMENT WITH GREGORY S. DALTON.

A. The Circuit Court Properly Applied the Rules of Contract Construction by Reading the Termination Provisions of the Agreement Together as a Whole in a Manner Which Gives Effect to All of Their Terms and is Fair and Reasonable.

The Circuit Court properly found that read together, the first sentence of Section 3.5 and the last sentence of Section 3.1 of the Agreement provide Cellular South the right to terminate the Agreement upon thirty days’ notice to Dalton, if Cellular South determines that continuation of the agency relationship would be detrimental to its overall well being, reputation and goodwill. (R.E. 8). In applying these provisions, the Circuit Court further held that the agency relationship need not be detrimental to Cellular South for reasons specific to Dalton, or in other words, due to some act or failure to act by Dalton. (R.E. 8). The Circuit Court also held that the Agreement makes Cellular South the “sole arbiter” of what is detrimental to its overall well being, reputation and goodwill. (R.E. 8).

Dalton, on the other hand, argues that the first sentence of Section 3.5, when read together with Section 3.1, requires that Dalton himself do something which is detrimental to

Cellular South's overall well being, reputation and goodwill. (Appellant's Brief at 18). Indeed, Dalton goes so far as to add words to the last sentence of Section 3.1, stating that it requires Cellular South to make a determination that the continuation of "his agency, in particular," was detrimental to the overall well being, reputation and goodwill of Cellular South. *Id.* [Emphasis added]. Of course, the last sentence of Section 3.1 does not contain the underlined words "his" and "in particular"; however, Dalton's addition of such words demonstrates the need for extra words to reach Dalton's interpretation of the Agreement.

Even though the last sentence of Section 3.1 lacks the words necessary to support Dalton's interpretation of the provision, the Circuit Court nevertheless properly analyzed Dalton's claim as to the meaning of the two sentences by reading all of the termination provisions of the Agreement together. These provisions consist of the following:

Section 3.1

Term: The term of the Agreement shall be one year, commencing on the date specified in Exhibit D of this Agreement [*date not included on Exhibit D, but Agreement made effective on March 1, 1993*], unless otherwise terminated or renewed pursuant to the provisions hereinafter provided. Cellular Holding is cognizant of the increasing value of the Agency relationship to a successful AGENT and therefore will terminate a successful Agency relationship only if Cellular Holding determines that the continuation of the Agency relationship would be detrimental to the overall well being, reputation and goodwill of Cellular Holding.

Section 3.4

In the event AGENT fails to perform any of its obligations under this Agreement and such failure continues unremedied for a period of thirty (30) days after written notice is given by Cellular Holding to AGENT, then Cellular Holding may thereupon elect to cancel and terminate this Agreement, which termination shall be effective immediately upon the expiration of the thirty-day period.

Section 3.5

Termination: Either party may terminate this Agreement by giving the other party written notice of its desire to terminate at least thirty (30) days prior to the intended date of termination....

Further, Cellular Holding shall have the right to terminate this Agreement effective upon written notice if:

- A) AGENT makes an assignment for the benefit [sic] of the creditor;
- B) An order for relief under Title 11 of the United States Code is entered by any United States Court against AGENT;
- C) A trustee or receiver of any substantial part of the AGENT's assets is appointed by any Court; or
- D) AGENT (1) has made any material misrepresentation or omission in its application to establish any agency relationship with Cellular Holding or AGENT (or any principal thereof) is convicted of or pleads no contest to a felony or other crime or offense that is likely in Cellular Holding's sole opinion to adversely affect the reputation of Cellular holding or its affiliated companies or the goodwill associated with the Marks; (2) attempts to make an unauthorized assignment of this Agreement; (3) receives a notice of violation of the terms or conditions of any license or permit required by AGENT or its employees in the conduct of AGENT's Cellular Telephone Service business and fails to correct such violation; (4) fails to comply with any provision of this Agreement, or any tariff relating to Cellular Telephone Service and does not correct such failure within thirty (30) days after written notice of such failure to comply is delivered to AGENT; or (5) fails to comply with any material provisions of this Agreement, or any tariff relating to Cellular Telephone Service, whether or not such failures to comply are corrected after notice thereof is delivered to Agent.

(R.E. 1 at 11-13).

Reading these three provisions together, the Court identified four termination scenarios, as follows:

- 1) Pursuant to Section 3.5, Dalton "may terminate the Agreement for any reason as long as he gives thirty (30) days written notice of his intent to terminate." (R.E. 8).
- 2) "Cellular South may terminate the Agreement by giving thirty (30) days written notice pursuant to the first sentence in section 3.5, but its reasons for termination are limited by the second sentence in 3.1. It may terminate the Agreement only if it determines that a continuation of the agency relationship will be detrimental to the overall well being, reputation, and goodwill of Cellular South." (R.E. 8).
- 3) "Cellular South may also terminate the contract pursuant to section 3.4 of the Agreement in the event of a default by Dalton. However, it must provide Dalton with written notice of the default and allow him thirty (30) days to cure the default before the contract may be terminated." (R.E. 8).
- 4) "The second sentence in section 3.5 lists reasons why Cellular South may terminate the Agreement without giving thirty (30) days written notice. These reasons

only require written notice and do not specify a length of time to be on notice. This court finds that the reasons for termination enumerated in (A)-(D) of section 3.5 are reasons that Cellular South has predetermined would be so detrimental to the overall well being, reputation and goodwill of Cellular South, as to necessitate immediate termination.” (R.E. 8).

Under the three-tiered approach to the interpretation of contracts employed by the Mississippi Supreme Court, the Court should first look to the four corners of the contract, reading the contract as a whole and giving effect to all of its clauses. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003); *see also Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1992) (contract should be interpreted in a manner which makes sense of all the contract’s provisions); *see also Nicholas Acoustics and Specialty Co. v. H & M Const. Co.*, 695 F.2d 839, 843 (5th Cir. 1983) (“[c]ontracts should be construed so as to avoid unfair or unreasonable results”). If the Court finds the contract is unclear and ambiguous as a matter of law, then the Court should apply the “discretionary” canons of contract construction; for example, construction against the drafting party. *Royer Homes*, 857 So. 2d at 753. Finally, if the Court cannot interpret the contract following application of the first two tiers of the approach, then the Court should resort to parol evidence. *Id.*

After analyzing the above termination provisions of the Agreement, the Circuit Court found the Agreement is clear and unambiguous as a matter of law. (R.E. 8). Thus the Circuit Court did not proceed past the first tier of the analytical approach adopted by the Mississippi Supreme Court, and it properly looked no further than the four corners of the contract. In doing so, the Court interpreted the Agreement in a manner which is consistent with the unambiguous language of the Agreement and which gives effect to all of the Agreement’s terms regarding termination.

Moreover, each of the termination scenarios identified by the Circuit Court is reasonable and different from the others. The first scenario for termination is at Dalton’s instance, which he

may elect to do at any time on thirty days' written notice - for any reason or no reason at all. (R.E. 8). The second, third and fourth scenarios allow termination at Cellular South's instance. (R.E. 8). Focusing upon the second termination scenario, the Circuit Court held that Cellular South has made itself the "sole arbiter" of what is detrimental to its overall well being, reputation and goodwill. (R.E. 8). As pointed out by the Circuit Court, there is nothing in the second sentence of Section 3.1 that limits Cellular South's right to terminate the Agreement only in the event that Dalton individually does something which is detrimental to the overall well being, reputation and goodwill of the company. (R.E. 8). As the Circuit Court further points out, the word "Overall" means company-wide, not just the seven counties where Dalton was serving as agent. (R.E. 8).

Under the third scenario, Section 3.4 provides for termination by Cellular South in the event Dalton fails to perform its obligations under the Agreement and neglects to cure such failure within thirty days. (R.E. 8). Finally, under the fourth scenario, subparts (A)-(D) of Section 3.5 quoted above list events that give Cellular South the right to terminate the Agreement, effective upon written notice without a thirty day cure period. (R.E. 8). The Circuit Court found that the reasons enumerated in (A)-(D) of Section 3.5 are reasons that Cellular South has predetermined would be so detrimental to its overall well being, reputation and goodwill as to necessitate immediate termination. (R.E. 8). Thus Sections 3.4 and 3.5 (A)-(D) address termination by Cellular South due to default by Dalton.

The Circuit Court's interpretation of the termination provisions gives effect to all of the Agreement's termination provisions with reasonable results. *See Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1992) ("when construing a contract, we read the contract as a whole, so as to give effect to all of its clauses"); *see also Nicholas Acoustics and Specialty Co. v. H & M Const. Co.*, 695 F.2d 839, 843 (5th Cir. 1983) ("[c]ontracts should be construed so as to avoid

unfair or unreasonable results”). The Circuit Court thus properly applied the rules of contract construction by reading the termination provisions of the Agreement together as a whole and in a manner which gives effect to all of their terms. By doing so, the Circuit Court properly found in its second termination scenario that the last sentence of Section 3.1 and the first sentence of Section 3.5, when read together, allow termination by Cellular South due to a change in corporate marketing strategy or some other condition, and do not require some act on the part of Dalton individually to the detriment of Cellular South’s overall well being, reputation and goodwill. (R.E. 8).

B. Dalton’s Interpretation of Section 3.1 of the Agreement Fails to Give Effect to All of the Agreement’s Termination Terms and Interprets the Agreement in an Unreasonable Manner.

By insisting that the last sentence of Section 3.1 and the first sentence of Section 3.5, when read together, limit the right of Cellular South to terminate only due to some act on the part of Dalton individually, Dalton eliminates the second termination scenario identified by the Circuit Court. Dalton’s interpretation thus would cause Sections 3.1, 3.4 and 3.5 all to have effectively the same result: Cellular South could only terminate the Agreement if Dalton failed to abide by the Agreement. By taking the position the second sentence of Section 3.1 is nothing more than another provision allowing for termination due to Dalton’s default, Dalton ignores the requirement that the Court give effect to all of the Agreement’s terms in a manner which is fair and reasonable. *Royer Homes*, 857 So. 2d at 752; *see also Nicholas Acoustics and Specialty Co. v. H & M Const. Co.*, 695 F.2d 839, 843 (5th Cir. 1983) (“[c]ontracts should be construed so as to avoid unfair or unreasonable results”); *Glantz Contracting Co. v. General Elec. Co.*, 379 So. 2d 912, 917 (Miss. 1980) (“[c]ourts must construe contracts so that they give effect to all provisions and do not produce an unfair and unreasonable result”); RESTATEMENT (SECOND) OF CONTRACTS, § 203(a) (1981) (“an interpretation which gives reasonable, lawful, and effective

meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect”).

More specifically, Section 3.4 provides Cellular South the right to terminate following thirty days’ notice and opportunity to cure in the event Dalton “fails to perform any of its obligations under this Agreement.” (R.E. 8). Indeed, yet another provision of the Agreement forbids Dalton specifically to act in a way that would be detrimental to the overall well being, reputation and goodwill of Cellular South. Section 4.9 mandates the following:

AGENT shall provide prompt, courteous and efficient service to the public, shall be governed in all dealings with members of the public by the highest standards of honesty, integrity and fair dealings, and shall do nothing which would tend to discredit, dishonor, reflect adversely upon or in any manner injure the reputation of Cellular Holding, AGENT or any other AGENT of Cellular Holding. AGENT shall at all times faithfully, honestly and diligently perform its obligations hereunder, and shall continuously exert the best effort to promote and enhance the use of Cellular Holding’s Cellular Telephone Service;

(R.E. 1 at 19).

Accordingly, Cellular South may terminate Dalton for failure to perform his obligations under Section 4.9 and thus for any act by Dalton, individually, which is detrimental to the overall well being, reputation and goodwill of Cellular South. Section 3.4, not Section 3.1, thus gives Cellular South this right to terminate Dalton’s agency for an act by Dalton which is detrimental to its overall well being, reputation and goodwill. Nevertheless, these provisions of the Agreement are again rendered superfluous under Dalton’s reading of the last sentence of Section 3.1 and the first sentence of Section 3.5.

Finally, Dalton’s interpretation of the Agreement would bind Cellular South to a contractual relationship with Dalton which it could never, in its own discretion, choose to end—for business reasons or otherwise. Such a construction is patently unreasonable and illogical. Under the first sentence of Section 3.5 of the Agreement and the first termination scenario identified by the Circuit Court, Dalton can terminate the Agreement upon thirty days’ written

notice, at any time of his choosing for any reason or no reason at all. (R.E. 8). However, if the Court were to accept Dalton's construction of Section 3.1, then Cellular South could never end the relationship absent cause due to some act by Dalton. In addition to the reasons stated above, the Court should reject this interpretation of the Agreement because it is unreasonable. See *Frazier v. Mississippi Shopping Center, Inc.*, 458 So. 2d 1051, 1054 (Miss. 1984) (court not bound to adopt construction which is "not compelled by the instrument in which we would have to believe no man in his right mind would have agreed to"). The Circuit Court correctly observed that "just as Dalton has the right to terminate the Agreement for the reason of his choosing, Cellular South pursuant to section 3.1 has made itself the sole arbiter of what would be detrimental to its overall well being, reputation and goodwill." (R.E. 8). Thus Cellular South has the right to terminate the Agreement due to a change in its corporate marketing strategy or any other condition causing the Agreement to be detrimental to its overall well being, reputation and goodwill.

C. Dalton Must Add Words and Ignore the Word "Overall" to Reach His Interpretation of the Second Sentence of Section 3.1.

As previously noted, Dalton argues in his brief that Section 3.1 requires Cellular South to make a determination that the continuation of "his agency, in particular," was detrimental to the overall well being, reputation and goodwill of Cellular South. (Appellant's Brief at 18) [emphasis added]. Thus, Dalton must insert the words "his" and "in particular" into the sentence where such language does not exist. Obviously Dalton cannot add words to reach his interpretation of the sentence. See *Royer Homes*, 857 So. 2d at 752 (Court must first apply language used within the four corners of the document in seeking to interpret agreement); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990) (same); *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975) (same). The Court must also accept the plain meaning of a contract as the intent of the parties where no ambiguity exists. *Ferrara v. Walters*, 919 So. 2d 876, 882 (Miss.

2005); *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 797 So. 2d 981, 986 (Miss. 2001); *I.P. Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1998); *Phillips Petroleum Co. v. Stack*, 231 So. 2d 475, 482 (Miss. 1969). Moreover, Dalton's addition of words emphasizes the need for the additional words to reach his interpretation of the Agreement.²

Dalton also ignores the word "overall" in the provision, addressing it only tangentially in a footnote to his brief, where he complains that the "Agreement does not establish a standard for determination of Cellular South's overall 'well being,' 'reputation' and 'goodwill.'" (Appellant's Brief at 18, Fn. 6). The Court need look no further than the dictionary to resolve the plain meaning of such language. Webster's Ninth New Collegiate Dictionary defines the term "overall" as meaning, *inter alia*, "as a whole: GENERALLY." [Emphasis in original.] Consistent with this definition, the trial court held that "'Overall' means company wide, not just the seven counties where Dalton was serving as agent." (R.E. 8). Dalton simply cannot reconcile his interpretation of Section 3.1 with the word "overall" contained in the provision.

III. THE CIRCUIT COURT DID NOT RELY UPON THE AFFIDAVIT OF HU MEENA IN INTERPRETING THE AGREEMENT.

Contrary to the arguments of Dalton, the Circuit Court did not look to the affidavit of Hu Meena to assist it in interpreting the Agreement. The Circuit Court clearly stated that the Agreement is unambiguous as a matter of law, and it need not proceed further than the first tier of contract interpretation sanctioned by *Royer Homes*, 857 So. 2d at 752-753. (R.E. 8). The Circuit Court further held that "it is clear from the terms of the Agreement that Cellular South had the right to make that determination ["that the continuation of the Agency Agreement with

² As noted in Section B, *supra*, in order to make sense of his reading of Section 3.1, Dalton must also ignore the fact that specific acts by Dalton would be detrimental to the well being, reputation and goodwill of Cellular South are distinctively contemplated in Section 4.9 and are grounds for termination under Section 3.4 of the Agreement.

Dalton, or with any other agent, would be detrimental to the overall well being, reputation and goodwill of the company.”].” (R.E. 8).

In fact, Cellular South submitted the affidavit of Hu Meena in response to Dalton’s counter-motion only to demonstrate that it did in fact make a determination that the continuation of agency relationships would be detrimental to its overall well being, reputation and goodwill. (R.E. 4, 5). Dalton never seriously challenged or disputed Cellular South’s assertion that continuation of agency relationships as a whole would be detrimental to Cellular South’s overall well being, reputation and goodwill. (R.E. 7). However, Dalton contends that material issues of fact exist “as to whether or not Cellular South actually made its decision to terminate Dalton’s agency because it found that the agency relationship was detrimental to its overall well-being, reputation and goodwill.” (Appellant’s Brief at 24). In response to this assertion by Dalton and in support of its argument that no material issue of fact existed as to this subject, Cellular South submitted the affidavit of Hu Meena, President of Cellular South, who offered his personal knowledge concerning the reasons for Cellular South’s determination that the continuation of agency relationships would be detrimental to its overall well being, reputation and goodwill. Dalton presented no evidence to the contrary. (R.E. 4, 5). Thus, there is no factual issue as to whether Cellular South determined that continuation of its agency relationships, including Dalton’s, would be detrimental to the overall well being, reputation and goodwill of the company. *See Allen v. Choice Hotels International*, 942 So. 2d 817, 825 (Ct. App. Miss. 2006) (finding no issue of material fact existed due to non-moving party’s failure to offer affidavit or other sworn testimony to dispute moving party’s testimony).

CONCLUSION

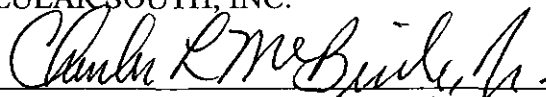
The Circuit Court properly found the first sentence of Section 3.5 and the last sentence of Section 3.1 of the Agreement, when read together, give Cellular South the right to terminate Dalton's agency due to a change in its corporate marketing strategy or other condition causing the Agreement to be detrimental to its overall well being, reputation and goodwill. The Circuit Court reached this determination by examining the four corners of the Agreement, and by reading the applicable provisions of the Agreement together in a manner which makes sense of all of the provisions and is reasonable. Dalton's attempts to reach another interpretation of the Agreement are unreasonable and fail to give effect to all of the Agreement's provisions. Dalton's interpretation also relies on words in the Agreement that simply do not exist. The Circuit Court did not rely upon the affidavit of Hu Meena, which Cellular South submitted in response to Dalton's countermotion, to reach its interpretation of the Agreement. Finally, Dalton has never disputed or offered evidence to rebut Cellular South's determination that continuation of its agency relationships, including Dalton's, would be detrimental to its overall well being, reputation and goodwill. The Court should thus affirm the Circuit Court's grant of summary judgment to Cellular South and denial of partial summary judgment to Dalton.

Dated, this the 23rd day of October, 2007.

Respectfully submitted,

CELLULAR SOUTH, INC.

By: _____


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CERTIFICATE OF SERVICE

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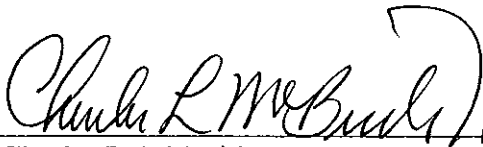
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