IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-CA-00750

GREGORY S. DALTON, Individually and d/b/a LOUISVILLE ELECTRONICS — **APPELLANT**

v.

CELLULAR SOUTH, INC. — **APPELLEE**

SUPPLEMENTAL BRIEF OF APPELLEE

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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.

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6. P. Nelson Smith, Jr., Esq., Hicks & Smith, P.O. Box 1111, Columbus, MS 39703, Attorney for the Appellant, Gregory S. Dalton;

7. Gregory S. Dalton, Appellant;

8. Cellular South, Inc., Appellee;

9. Honorable Joseph H. Loper, Jr., Circuit Court Judge, P.O. Box 616 Ackerman, MS 39735.

Dated, this the 15th day of June, 2009.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES:

CELLULAR SOUTH, INC.'S SUPPLEMENTAL BRIEF

Appellee Cellular South, Inc. ("Cellular South") submits this Supplemental Brief in accordance with Mississippi Rule of Appellate Procedure 17(h).

I. INTRODUCTION AND BACKGROUND

Dalton was an independent contractor who served as a Cellular South agent pursuant to an agency agreement dated March 1, 1993 (R.E. 1 at 10, R.E. 6). During his agency, Dalton procured customers for Cellular South, and Cellular South paid him commissions as required under the agency 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, respectively. (R.E. 8).

In late 2003, 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 performs 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 30 days' written notice of its election of terminate the agency agreement by letter dated December 19, 2003. (R.E. 6). Termination of the agency agreement with Dalton, pursuant to the termination notice, was effective on February 6, 2004. (R.E. 6).

When Dalton claimed that Cellular South did not act within its rights in terminating the agency agreement, Cellular South commenced the trial court action seeking a declaratory judgment that it acted within its contractual rights. Both parties filed cross-motions for summary judgment on the issue of whether Cellular South acted within the terms of the agency agreement.

Both the trial court and the Court of Appeals found that Cellular South properly terminated the agency agreement pursuant to its terms.

Throughout the appellate process, Dalton has taken varying positions in alleging the trial court and Court of Appeals erred in finding that Cellular South acted within its contractual rights in terminating his agency. Cellular South has previously responded to these positions. In his Petition for Writ of Certiorari, Dalton has discarded many of these arguments and chosen to rely upon on his position that the Court of Appeals erred by allegedly relying on the affidavit of Hu Meena to determine that the agency agreement is unambiguous.

As demonstrated more fully below, the court did not rely on the affidavit of Hu Meena to determine the agency agreement was unambiguous. Rather, it determined the agency agreement unambiguously provided that Cellular South could terminate Dalton's agency upon 30 days' notice, if Cellular South determined that the continuation of the agency relationship would be detrimental to its overall well-being, reputation and goodwill. The court then found that there was no genuine issue of material fact as to whether Cellular South made such a finding. Thus, by the very definition of parol evidence under Mississippi law, the affidavit of Hu Meena is not parol evidence. The affidavit did not seek to change or contradict the terms of the agency agreement. Rather, the affidavit merely allowed the trial court and Court of Appeals to confirm that Cellular South made a decision in accordance with its obligations under the Agreement, precluding any issue of material fact for summary judgment.

The trial court and Court of Appeals properly applied the canons of construction in construing the agency agreement, and then properly found that Cellular South acted in accordance with the agency agreement in terminating Dalton's agency. Accordingly, this Court must affirm the Court of Appeals' decision.

II. ARGUMENT

A. The Trial Court and Court of Appeals Properly Applied the Canons of Contract Construction in Determining the Agency Agreement Is Unambiguous.

It is undisputed by both parties that Sections 3.1[1], 3.4[2] and 3.5[3] are the provisions of the agency agreement that are relevant to the Court's analysis of whether Cellular South acted within its rights in terminating Dalton's agency. The trial court and Court of Appeals examined the contract and interpreted the various ways in which the agency agreement could be terminated by both Dalton and Cellular South under its terms. The court found that pursuant to Section 3.5 of the agreement, Cellular South may terminate the agreement upon thirty (30) days' notice, but its reasons for termination are limited by the second sentence in Section 3.1—that is, if it determined that a continuation of the agency relationship would be detrimental to the overall well being, reputation and goodwill of Cellular South. Cellular South could also terminate pursuant to the terms of Section 3.4 in the event Dalton defaulted under the agreement. Dalton could, of course, terminate for any reason or no reason at all pursuant to terms of Section 3.5.

By reading the agency agreement as a whole, the Court further determined that Cellular South "made itself the sole arbiter of what would be detrimental to its overall well-being, reputation and goodwill" because "[n]o provision in the agreement requires that Cellular South announce or discuss its reasoning for finding it detrimental to continue an agency relationship....[or] that requires an agent to agree with Cellular South's reasoning or find it

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[1] 3.1 Term: The term of the Agreement shall be one year, commencing on the date specified in Exhibit D of this Agreement, 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.

[2] 3.4 Default: 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 said thirty-day period.

[3] 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....

satisfactory...[or that] require that a detached third party agree with Cellular South's determination of detriment...[t]he agreement *only* requires that *Cellular South* determine that a continued agency relationship would be to its detriment." Court of Appeals' Opinion at ¶¶ 9-11 (emphasis in original).

The court did not look at any other evidence, including the affidavit of Hu Meena, to reach this interpretation of the agreement. Thus, in arriving at this interpretation of the agency agreement, the trial court and Court of Appeals clearly examined only the four corners of the agreement. *See McKee v. McKee*, 568 So. 2d 262, 266 (Miss. 1990). Indeed, the court gave effect to all of the provisions of the agency agreement in order to reach this interpretation, as one or more of Sections 3.1, 3.4 or 3.5 would have been rendered meaningless under any other interpretation. *See Brown v. Hartford Ins. Co.*, 606 So. 2d 122, 126 (Miss. 1992).

B. The Trial Court and Court of Appeals Did Not Rely on the Affidavit of Hu Meena to Interpret the Agency Agreement Between the Parties.

Because the court determined in its interpretation of the agency agreement that the agreement required *only* that *Cellular South* determine that a continued agency agreement would be to its detriment, the Court then turned to the question of whether there existed an issue of material fact as to whether or not Cellular South made such a determination. The affidavit of Hu Meena submitted by Cellular South stated that Cellular South found that a continued agency would be to its detriment for several reasons. Cellular South's specific reasons, however, are immaterial to the analysis—the only real question was whether Cellular South made the determination. *See* Court of Appeals' Opinion at ¶ 11 ("It is essential to note what is *not* in the agreement. No provision in the agreement requires that Cellular South announce or discuss its reasoning for finding it detrimental to continue an agency relationship. There is no provision that requires an agent to agree with Cellular South's reasoning or find it satisfactory. Additionally, the agreement does not require that a detached third party agree with Cellular

South's determination of detriment"). Although Dalton can feasibly dispute the reasons why Cellular South determined that continuation of the agency would be to its detriment, Dalton did not seriously dispute or offer any evidence to rebut the fact that Cellular South made the determination that the continuation of his agency would be detrimental to the overall well being, reputation and goodwill of Cellular South before terminating the agreement. Moreover, the trial court and Court of Appeals found that the agency agreement unambiguously provides that the determination of whether the continuation of the agency would be detrimental is not a fact-finder's to make—it is only Cellular South's. By finding that Cellular South made the determination that the agency was to its detriment, the Court properly found no genuine issue of material fact to be resolved by the fact-finder.

C. The Affidavit of Hu Meena Does Not Vary or Contradict the Terms of The Agency Agreement and Thus Is Not Parol Evidence.

Furthermore, Dalton's contention that the trial court and Court of Appeals arrived at its determination by parol evidence contained in the affidavit of Hu Meena misconstrues the definition of parol evidence under Mississippi law. The affidavit simply is not parol evidence.

The parol evidence rule under Mississippi law is explained as follows:

> It is a general rule that parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property, or are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake. This rule, which is known as the parol evidence rule, is one of substantive law and not merely one of evidence; and it obtains in equity as well as at law.

Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 725 (Miss. 1985) (citing *Fuqua v. Mills*, 73 So. 2d 113, 118-119 (Miss. 1954)). The Supreme Court has mandated that "[t]he parol evidence rule has no application where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement. *Keppner*, 462 So. 2d at 725 (citing *Byrd v. Rees*, 171 So. 2d 864 (1965); 3 CORBIN ON CONTRACTS § 579 (1960)) (emphasis added).

A close examination of authorities from this Court in which a determination must be made as to whether certain evidence is parol evidence reveals that one of the parties to a contract is inevitably attempting to prove that the parties actually agreed to something different than or in addition to what the words to the contract said. *See, e.g., Houser v. Brent Towing Co.*, 610 So. 2d 363, 364 (Miss. 1992) (plaintiff attempted to show by letters and affidavit that despite the fact that he signed release from future claims or expenses, the defendant had actually agreed to pay all expenses incurred prior to payment of settlement in addition to the amount contained in the release).

On the other hand, the Court has routinely recognized that it is entitled to consider evidence that does not attempt to change the contract between the parties. In *Clow Corp. v. J.D. Mullican, Inc.*, 356 So. 2d 579, 583 (Miss. 1978), the Court determined it could consider testimony regarding the initial negotiations of the parties to the contract because the "evidence did not tend to vary or contradict the written instruments." Further, in *Swinny v. Cities Service Oil Co.*, 197 So. 2d 795, 797-798 (Miss. 1967), the retail distributor contract at issue provided that the amount of commissions to be paid to the distributor "shall be agreed upon." Thus, the Court found that evidence regarding the parties' oral agreement as to the amount of commissions was not "an effort to change the contract or amend it." *Swinny*, 197 So. 2d at 798.

Like the evidence offered in the above authorities, the affidavit of Hu Meena merely showed that Cellular South made a decision in accordance with its obligations under the Agreement. The terms of the agency agreement provided that Cellular South could not terminate the agency relationship unless Cellular South made the determination that the agency was detrimental to its overall well-being, reputation and goodwill. The affidavit of Hu Meena did not seek to change those terms. Nor was the affidavit necessary to help the court discern the intent of the agency agreement with regard to termination. The affidavit merely demonstrated that

Cellular South took an action that was consistent with the terms of the agency agreement and precluded any issue of material fact to the contrary. The affidavit thus does not meet the definition of parol evidence, and the court's consideration of it was not impermissible.

Finally, Hu Meena's affidavit meets the requirements of Mississippi Rule of Civil Procedure 56(e) and is not conclusory. The affidavit plainly states the facts underlying Cellular South's determination that continuation of the agency relationship would be detrimental to its overall well being, reputation and goodwill. Thus, the affidavit properly shows that Cellular South made the prerequisite determination as it was required to do under the agency agreement.

III. CONCLUSION

The trial court and Court of Appeals properly found the agency agreement to be unambiguous and interpreted it by referring only to the four corners of the document. The agreement plainly gives Cellular South the right to terminate the agency, if it determines that continuation of the agency would be detrimental to its overall well being, reputation and goodwill. Having interpreted the agreement, the courts below considered the affidavit of Hu Meena only for purposes of finding the absence of an issue of material fact as to whether Cellular South had made the prerequisite determination. Thus, this Court should affirm the decision of the Court of Appeals.

Dated, this the 15th day of June, 2009.

Respectfully submitted,

CELLULAR SOUTH, INC.

By: 

Charles L. McBride, Jr., One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Charles L. McBride, Jr., do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of Supplemental Brief of Appellee to:

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