IN THE SUPREME COURT OF MISSISSIPPI

GREGORY S. DALTON — APPELLANT

VERSUS — CAUSE NO. 2007-CA-00750

CELLULAR SOUTH, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF WINSTON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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CELLULAR SOUTH, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

Name	Connection and Interest
Gregory S. Dalton	Appellant/Defendant and Counter-Plaintiff
William H. Liston	Attorney for Appellant/Defendant and Counter-Plaintiff
John M. Montgomery	Attorney for Appellant/Defendant and Counter-Plaintiff
Dewitt T. Hicks	Attorney for Appellant/Defendant and Counter-Plaintiff
Cellular South, Inc., (formerly Cellular Holding, Inc.)	Appellee/Plaintiff and Counter-Defendant
Hu Meena	President of Cellular South, Inc.
Wade H. Creekmore, Jr.	Vice-President and Director of Cellular South, Inc.
James H. Creekmore, Sr.	Vice-President, Treasurer, Secretary and Director of Cellular South, Inc.
Paul D. Perry	Incorporator of Cellular South, Inc.
James A. Torrey, Jr.	Registered agent for service of process of Cellular South, Inc.

Name	Connection and Interest
Terrell Knight	Director of Sales for Cellular South, Inc.
Unknown persons/ corporations	Stockholders of Cellular South, Inc.
Charles L. McBride, Jr. Brunini, Grantham, Grower & Hewes, PLLC	Attorney for Appellee/Plaintiff and Counter-Defendant
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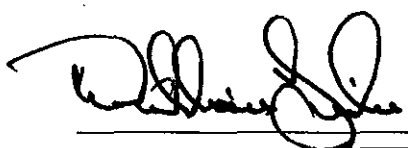
Unknown partners/share-holders of Brunini, Grantham, Grower & Hughes, PLLC, and Gore, Kilpatrick, Purdie & Metz, PLLC	Attorneys for Appellee/Plaintiff and Counter-Defendant

DATED: September 20, 2007.



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STATEMENT OF THE CASE

A. Nature of the Case:

This case presents with a dispute over the interpretation of a contract governing the agency relationship between Gregory S. Dalton ("Dalton") and Cellular South, Inc. ("Cellular South"). In particular, the specific facts which give rise to this dispute is Cellular South's termination of Dalton under the Authorized Agency Agreement ("Agreement") entered into between the parties and centers on the core issue of whether or not Cellular South's termination violated the termination provisions of the Agreement.

B. Course of the Proceedings:

Cellular South filed suit in the Circuit Court of Winston County, Mississippi, on January 24, 2006, against Dalton seeking a declaratory judgment that it had not violated the Agency Agreement it entered into with Dalton by terminating Dalton's agency relationship with Cellular South. (R.E., Vol. 1, pp. 3-38). On March 10, 2006 (before Dalton's time to respond to the Complaint had elapsed), Cellular South filed a Motion for Summary Judgment (R.E., Vol. 1, pp. 46-81) and served the trial judge and counsel opposite a Memorandum in Support of the Motion for Summary Judgment. It argued that either party had the right and freedom to choose when to end the contractual relationship by simply giving thirty (30) days written notice under § 3.5 of the Agreement. It further asserted that it complied with the 30-day written notice by serving Dalton with the termination notice and that was all it had to do under the terms of the Agreement to terminate Dalton. *Id.*

In its accompanying Motion for Summary Judgment, Cellular South, as it did in its Complaint, alleged that it provided telecommunications services by both company-owned retail

outlets as well as by third-party Agency Agreements with independent contractors but that in late 2003, it elected to terminate its use of the Agency Agreements with independent contractors who performed such retail functions and to rely instead on its company-owned retail outlets. The only supporting evidence presented in support of its Motion was the Agreement between it and Dalton, d/b/a Louisville Electronics entered into on March 1, 1993, and amendments to the Agreement dated October 10, 2002. Cellular South asserted that the agreement between the parties was unambiguous on its face and presented no genuine issue of material fact insofar as its right to terminate Dalton at will on thirty (30) days notice was concerned (R.E., Vol. 1, pp. 46-81) and it was, therefore, entitled to judgment as a matter of law on all of its claims.

On March 1, 2006, Dalton timely filed his response to the Complaint and to Cellular South's Motion for Summary Judgment. (R.E., Vol. 1, pp. 83-101) Included in this pleading was Dalton's Counter-Motion for Partial Summary Judgment, wherein he denied that the Agreement authorized Cellular South the right and freedom to chose when to end its contractual relationship by giving thirty (30) days written notice under § 3.5 of the Agreement and further maintained that, under § 3.1 of the Agreement, Cellular South could "**terminate a successful agency only if Cellular Holding determines that the continuation of the agency relationship would be detrimental to the overall well being, reputation and good will of Cellular Holding.**" (Emphasis ours) Dalton's position was, and is, that the terms of § 3 of the Agreement were not ambiguous in that clearly the second sentence of ¶ 3.1 modified ¶ 3.5 language which provided that either party could terminate the Agreement by giving the other party written notice of its desire to terminate it at least thirty (30) days prior to the intended date of termination. Alternatively, Dalton alleged that, if the Court determined that the terms set forth in ¶¶ 3.1 and 3.5 concerning termination rights were ambiguous, then and in

that event the ambiguous terms, as a matter of law, should be determined in his favor. Dalton, in accordance with Rule 4.03(2), Unif. Cir. & Cty Court Rules, filed his Statement of Uncontested Material Facts in Support of his Motion for Partial Summary Judgment. (R.E., Vol. 2, pp. 436-440) Dalton also filed his Affidavit in Support of the Motion. (R.E., Vol. 2, pp. 365-435).

On May 2, 2006, Cellular South filed its Answer and Defenses to Dalton's Counterclaim (R.E., Vol. 2, pp. 450-460), along with its Response to Dalton's Statement of Uncontested Facts (R.E., Vol. 2, pp. 461-465)[1]

During discovery, Dalton propounded Rule 33, *M.R.C.P.*, Interrogatories to Cellular South, who responded to the Interrogatories on May 2, 2006. (R.E., Vol. 2, pp. 516-528). Dalton propounded Rule 36, *M.R.C.P.*, Requests for Admissions which was responded to on May 2, 2006, by Cellular South. (R.E., Vol. 2, pp. 534-546). On July 11,2006, Dalton answered Cellular South's First Set of Interrogatories and responded to Requests for Production of Documents. (R.E., Vol. 2, pp. 559-614).

On May 2, 2006, Cellular South filed a response to Dalton's Motion for Partial Summary Judgment wherein it completely abandoned the argument set forth in its Motion for Summary Judgment that either party had the unfettered right and freedom to chose when to end the contractual relationship by simply giving thirty (30) days written notice under ¶ 3.5 to the claim that the second sentence of ¶ 3.1 modified Cellular South's right of termination by requiring a determination that continuation of the agency relationship would be detrimental to its overall well being, reputation and good will. (Court's Opinion, p. 5; R.E., Vol. 2, p.675). It included with this filing the Affidavit of

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[1]Cellular South did not file the Itemization of Material Facts in support of its Motion for Summary Judgment until May 2, 2006 (R.E., pp. 473-478). Dalton's Response to Cellular South's Itemization of Material Facts was filed on July 13, 2006 (R.E., pp. 503-508).

Hu Meena, President of Cellular South (R.E., Vol. 2, pp. 470-472). Meena opined in his Affidavit that the decision to terminate Dalton's Agreement was based on the claim that **all** agencies were detrimental to the overall well-being, reputation and good will of Cellular South.

On July 13, 2006, Dalton filed his Reply to Cellular South's Response to his Motion for Partial Summary Judgment. (R.E., Vol. 2,pp. 511-515).

The Circuit Court of Winston County, Mississippi, on April 5, 2007, ruled on Cellular South's Motion for full Summary Judgment and Dalton's Motion for Partial Summary Judgment wherein it held that the terms of the Agency Agreement entered into by the parties were not ambiguous, which finding was based on the Court's consideration of extrinsic evidence in the form of the Affidavit of Hu Meena, wherein he stated that Cellular South decided that a continuation of the Agency Agreement with Dalton would be detrimental to the overall well being, reputation and good will of the company. In its ruling, the Circuit Court adopted Cellular South's reasoning and interpretation of the contract, basing its interpretation of the Agreement on the Affidavit of Hu Meena, to determine that there were no material issues of fact present and granted summary judgment in favor of Cellular South and denied Dalton's Motion for Partial Summary Judgment. (R.E., Vol. 2, pp. 671-682). Contemporaneously, the Trial Court entered its Final Order granting full summary judgment to Cellular South and denying Dalton's Motion for Partial Summary Judgment (R.E., Vol. 2, pp. 671-681).

Dalton has now perfected and filed his appeal to address the errors of the Circuit Court. (R.E., Vol. 2, pp. 686-687).

C. Statement of Relevant Facts:

Pursuant to *M.R.A.P.*, 28(a)(4), Dalton sets forth the following relevant facts:

1. On April 21, 1992, Dalton entered into an agency relationship with Cellular South in which Dalton would procure customers for Cellular South and receive compensation in the form of commissions. (Answer to Interrogatory 8; R.E., Vol.2, pp. 564-569). The original contract between the parties was replaced in whole on March 1, 1993, with a new Authorized Agent Agreement, this document is the subject of this dispute. (R.E., Vol. 1, pp. 140-170).

2. The March 1, 1993 Agreement (as did the April 21, 1992 Agreement) contained the following language in § 3 under the heading "Contract Period":

> 3.1 Term: The term of the agreement shall be one year, commencing on the date specified in Exhibit B of this Agreement, **unless otherwise terminated or renewed pursuant to the provisions hereinafter provided. Cellular Holding is cognizant of the increase in 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] (Emphasis ours)
>
> 3.3 Renewal: This agreement shall be automatically renewed for one year terms unless terminated as herein provided.
>
> 3.4 Default: In the event agent fails to perform any of its obligations under this agreement and such failure continues unremediated for a period of thirty 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.
>
> 3.5 Termination: Either party may terminate this agreement by giving the other party written notice of its desire to termination at least thirty days prior to the intended date of termination.
>
> Further, Cellular Holding shall have the right to terminate this agreement effective upon written notice if:

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[2]Cellular South, Inc., the plaintiff herein, is the successor corporation of Cellular Holding which resulted from a name change.

A) Agent makes an assignment for the benefit of creditors;

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 agent's assets is appointed by any court;

or

D) Agent (1) has made any material misrepresentation or admission in its application to establish any agency relationship with Cellular Holding or agent in, or any principal thereof, is convicted of or pleads no contest to a felony or other crime of 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 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 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., Vol. 1, pp. 140-170).

3. Dalton performed his duties as an agent of Cellular South with the utmost diligence and worked hard to establish Cellular South's presence in the seven counties he covered. Prior to April 21, 1992, Dalton operated a profitable Radio Shack business in Louisville, Mississippi. Upon the commencement of his Agency Agreements with Cellular South, Dalton located the Cellular South store in the same building as his Radio Shack business. (R.E., Vol. 2, pp. 365-435).

4. Over the course of Dalton's thirteen years as an agent of Cellular South, he procured over 6,000 customers for Cellular South in his assigned area. His agency relationship with Cellular

South met with financial successes as shown by the increasing commissions paid Dalton under the Agreement, namely, $81,970.30 for the year 1999; $127,740.00 for the year 2000; $172,095.00 for the year 2001; $183,380.00 for the year 2002; and $197,160.00 for the year 2003. (R.E., Vol. 2, p. 672). The commission earnings paid to Dalton represent only a small portion of the proceeds gained by Cellular South as a result of the sale of Cellular South services by Dalton.

5. Dalton's dedication and aggressive marketing for Cellular South resulted in a downturn in his income from the operation of his Radio Shack.

6. Discovery propounded to Cellular South reflected that, after 1993, the verbiage of ¶ 3.1 of the Agreement provided that Cellular South would terminate a successful agency relationship **only** if Cellular Holding determined that the continuation of the agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular Holding. (R.E., Vol. 2, p. 523). Further responses by Cellular South to discovery revealed that only nine (9) agents of Cellular South were parties to Agreements which contained the second sentence of paragraph 3.1 when Cellular South decided to terminate all of its agents. (R.E., Vol. 2, p. 524).

7. Notwithstanding Dalton's dedication to and good work for Cellular South from 1992 to December, 2003, Terrell Knight, director of sales for Cellular South, sent a letter to Dalton advising him that as of February 6, 2004, his agency relationship with Cellular South would be terminated. The only reason for Dalton's termination set forth in Knight's letter was that Cellular South had reorganized its retail distribution plan. (R.E., Vol. 1, pp. 171-172).

8. Dalton, believing his agency relationship was terminated in violation of the provisions of § 3 of the Agreement, made demands to Cellular South for redress, but such demands were to no avail.

9. Hu Meena, President of Cellular South at the time of Dalton's termination, admitted in an Affidavit filed by him in this case that Dalton's agency relationship was a "successful" one, but, nevertheless, Cellular South had the right to terminate Dalton's agency relationship with thirty days written notice for any reason without cause. (R.E., Vol. 2, p.472).

10. In essence, Cellular South maintains that, under the terms of the Agreement, it had the right and freedom to terminate Dalton's agency at will, provided it gave him thirty days prior notice of the termination. Dalton, on the other hand, alleges that such interpretation of the terms of the contract effectively eliminates the second sentence of ¶ 3.1 of the Agreement having the effect of completely abrogating Cellular South's binding promise not to terminate a successful agency relationship unless it determined that the continuation of Dalton's agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular Holding. On the other hand, Cellular South - while at the same time admitting that Dalton's agency relationship was successful - claims that the terms of § 3 are not ambiguous and that termination can be accomplished by it by simply giving Dalton written notice of its desire to terminate at least thirty days prior to the intended date of termination. Conversely, Dalton maintains, in his Counter-Motion for Summary Judgment, that the terms of § 3 of the Agreement were not ambiguous and that the second sentence of ¶ 3.1 required that his agency relationship be detrimental to the overall well-being, reputation and goodwill of Cellular Holding before he could be summarily terminated. Alternatively, Dalton maintains that, if an ambiguity exists between ¶ 3.1 and ¶ 3.5, the ambiguity should have been submitted to the jury for determination.

SUMMARY OF THE ARGUMENT

In this contract interpretation lawsuit, the longstanding and venerable "Rules of Contract Interpretation" govern the construction of the terms of the contract entered into between Dalton and Cellular South.[3] These rules encompass the oft-referred to "three-tiered" approach to the construction of a contract. The first step is to determine whether or not the instrument is ambiguous, using the "four-corners" test. If the contract is not ambiguous, it is enforced as written and the inquiry ends. However, if the contract is found to be ambiguous, the trial court may proceed to the other tiers, which are (2) the implementation of applicable Canons of construction and lastly, (3) the consideration of extrinsic or parole evidence. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 751 (Miss. 2003); *Pursue Energy Corp. v. Perkins,* 558 So.2d 349 (Miss. 1990).

If, after working its way through the three tiers, the Court determines that the instrument is ambiguous, the subsequent interpretation of the agreement is a question of fact for the jury. *Royer Holmes of Miss., Inc.*, 857 So.2d at 752. Here, the trial court erred in its negotiation of the three-tiered approach by determining that the Agreement was unambiguous based on matters outside the four corners of the instrument, namely, the self-serving Affidavit of Hu Meena, (R.E., Vol. 2, pp. 470-472), wherein Meena swore that Dalton was one of approximately ninety (90) agency relationships terminated by Cellular South at his direction in late-2003 and early-2004.[4] (R.E., Vol.

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[3]Overlooked by the trial court is the fact that the Agreement between Dalton and Cellular South was just that, between Dalton and Cellular South and no other parties, including other independent contract agents of Cellular South. This point is pivotal in the determination and construction of the subject Agreement.

[4]This statement is, at the best, misleading in that Cellular South only had approximately nine such agency relationships under contracts containing the second sentence of ¶ 3.1. In 1993, Cellular South initiated a re-worked agency agreement which **did not** contain the second sentence of ¶ 3.1. The agency agreements of the remaining 81 of its discharged agents, therefore, did not have the protection of ¶ 3.1's second sentence and could be terminated at the will of Cellular South.

2, pp. 671-681). By utilizing extrinsic evidence in the first step of contract construction, the trial court violated the "four-corners" rule by (1) utilizing extrinsic evidence and by failing to read the contract (a) objectively, (b) as a whole, and (c) giving effect to all of its clauses and provisions. *Royer Homes of Miss.*, 857 So.2d at 752-3. The court violated the rule that, "[T]he reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue." *Cooper v. Crebb*, 587 So.2d 236, 239, 241 (Miss. 1991). Further, the trial court was obligated to construe the Agreement in a manner which "makes sense to an intelligent layman familiar only with the basics of English language" and is reasonable and fair. *Id.*; *Frazier v. Northeast Miss. Shopping Cntr., Inc.*, 458 So.2d 1051, 1054 (Miss. 1984).

Only if a contract is found to be ambiguous can the trial court go beyond the text of the document and consider extrinsic or parole evidence to determine the intent of the parties. *Benchmark Healthcare Center, Inc. v. Cain,* 912 So.2d 175, 182 (Miss. 2005) (holding that parole evidence of the intention of the contracting parties may be admitted only when the terms of the agreed upon contract are ambiguous). Further, the interpretation of an ambiguous contract that is subject to more than one reasonable interpretation is a matter for the jury. *Royer Homes of Miss., Inc.*, 857 So.2d at 752.

Since the trial court did not correctly apply the rule of contract interpretation in concluding that § 3 of the Agreement was unambiguous and because it considered extrinsic evidence in reaching this decision, there was no basis for the court's finding. Therefore, the interpretation of § 3 of the Agreement was a question of fact for the jury. (Court's Opinion, p. 7 (R.E., Vol. 2, p. 677).

In summary, Dalton submits that the trial court committed prejudicial error of law in the granting of Cellular South's Motion for Summary Judgment by (a) failing to follow and apply the

longstanding rules of contract construction; and/or (b) finding that § 3 of the Authorized Agent Agreement between Cellular South and Dalton was unambiguous; and/or (c) basing its finding that the language of § 3 of the Agreement was not ambiguous on extrinsic evidence.

Further, the trial court erred in denying Dalton's Motion for Partial Summary Judgment for the reason that material issues of fact were present for jury consideration on the issue of the determination of the contract terms. The Agreement is not unambiguous on its face as to Cellular South's right to terminate Dalton without cause. The termination terms of the Agreement set forth in § 3 are clear and unambiguous as to the provisions governing Cellular South's right to terminate and its limited grounds for termination. The provisions of ¶¶ 3.1, 3.4, and 3.5 set forth clearly and unambiguously the circumstances that must exist before Cellular South can terminate its independent contract agents. The language of these paragraphs provides that Cellular South agreed that it would **terminate a successful agency only if it determined that the continuation of the agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular South.** Paragraph 3.4 provides for termination in the event **Dalton** "fails to perform any of the obligations under the Agreement and such failure continues unremediated for a period of thirty days after written notice is given Dalton by Cellular South." The second unnumbered paragraph of ¶ 3.5(A) - (D) sets forth specific events justifying termination. Cellular South did not invoke any of these bases for termination of Dalton. Consequently, the termination of Dalton was a nullity and the court erred in failing to interpret § 3 of the Agreement to provide that Cellular South could only terminate **Dalton** by determining that **Dalton's** agency was detrimental to the overall well-being, reputation and goodwill of Cellular South.

The cause for termination language of ¶ 3.1 cannot be disregarded in the interpretation of § 3 of the Agreement. Cellular South drafted the Agreement of March 1, 1993. Dalton had no part in or any input in the drafting of this Agreement. Exercising the power of authorship, Cellular South limited its rights to terminate **Dalton's** agency when it chose to burden itself with the "for cause" termination only language of ¶ 3.1. There is nothing unclear or ambiguous about the language of paragraph 3.1 in that regard. Simply understood, ¶ 3.1 unambiguously negates Cellular South's right to terminate the Agreement without cause upon thirty days written notice.

Had the trial court initiated inquiry as to the first tier of contract construction, by examination of the "four-corners" of the Agreement only, without the burden of Meena's self-serving declaration), there would have been no need to proceed with the other two tiers in concluding that § 3 was not ambiguous insofar as prohibiting Cellular South from terminating the contract without cause.

Alternatively, if this Court finds that the provisions for termination are ambiguous, then and in that event, this Court should remand this case back to the trial court for jury trial.

ARGUMENT AND AUTHORITIES

I.

STANDARDS OF REVIEW

A. Issue of Contract Construction:

The first issue on appeal involves the construction of the March 1, 1993, Authorized Agency Agreement entered into between Cellular South and Dalton, specifically as to the interpretation of Section 3 of the Agreement. Issues of contract construction are issues of law and are reviewed by

this Court *de novo*. *Mickalowski v. American Flooring, Inc.*, 2007 WL 1532564, *11 (Miss. App. Ct., 2007) (holding that interpretation of the terms of a contract is an issue of law subject to *de novo* review by this Court, citing *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So.2d 96, 108 (Miss., 1998)).

The second issue involves the existence of an issue of material fact that should have prevented the lower court from granting summary judgment to Cellular South. *Lancaster v. Stevens*, 2007 WL 2034699, *2 (Miss. App. Ct., 2007) (holding that "[T]his Court applies a *de novo* standard of review to the grant or denial of summary judgment.") (citing *Leffler v. Sharp*, 891 So.2d 152, 156 (Miss., 2004)).

B. Summary Judgment Standard:

Summary judgment is a combined issue of law and fact. The standard of review for summary judgment under Mississippi law is well established. Summary judgment should only be granted:

> If the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Miss.R.Civ.P. 56. A fact is material if it "tends to resolve any of the issues, properly raised by the parties. *Webb v. Jackson*, 583 So.2d 946, 949 (Miss. 1991) citing *Meek v. Andrew Jackson Cas. Ins. Co.*, 537 So.2d 431, 433 (Miss. 1988) (quoting *Miss. Road Supply v. Zurich-American Ins. Co.*, 501 So.2d 412, 414 (Miss. 1987). The evidence must be viewed in the light most favorable to the non-moving party. If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in his favor. *Brown v. Credit Cntr., Inc.*, 444 So.2d 358, 362 (Miss. 1983).
>
> *See also, Prescott v. Leaf River Forest Products, Inc.*, 740 So.2d 301, 308-9 (Miss. 1999) (quoting *Morgan v. City of Ruleville*, 627 So.2d 275, 277 (Miss. 1993) and *Ellis v. Powe*, 645 So.2d 947, 951 (Miss. 1994).

II.

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR OF LAW IN GRANTING CELLULAR SOUTH'S RULE 56(b),*M.R.C.P.*, MOTION FOR SUMMARY JUDGMENT?

A. Contract Provisions and Interpretations

Mississippi law holds that the construction of contract language is a question of law committed to the court. *Royer Homes of Miss., Inc.,* 857 So.2d at 751. In construing a written contract, the trial court's job is to give effect to the intent of the parties. *Simmons v. Bank of Miss.,* 593 So.2d 40, 42 (Miss. 1992). This Court has created a three-tier process for the determination of the intent of the parties. *Royer Homes of Miss.*, 857 So.2d at 751. This approach is: (1) The first step in contract construction is to determine whether or not the instrument under examination is ambiguous, using the "four-corners" test. If the contract is not ambiguous, it is enforced as written and the inquiry ends. If the contract is found to be ambiguous, the court may proceed to the other tiers, namely, (2) the implementation of applicable Canons of construction, and (3) the consideration of extrinsic or parole evidence. *Id.*; *Pursue Energy Corp. v. Perkins,* 558 So.2d 349 (Miss., 1990). If, however, after completion of the three tiers the instrument is ambiguous, the subsequent interpretation of the instrument is a question of fact for the jury. *Royer Homes of Miss.,* 857 So.2d at 752.

In the first step, the Court must look to the language contained within the "four-corners" of the document to determine the intent of the contracting parties. *Id.*; *See also, Pursue Energy Corp.*, 558 So.2d at 352. In implementing the "four-corners" test, the Court must read the contract: (a) objectively; (b) as a whole; and (c) give effect to all of its clauses and provisions. *Royer Homes of*

Miss., 857 So.2d at 752-3, holding that "[E]ach word and clause should be reconciled and given meaning if that can be reasonably done." "[A] court must be concerned with what the parties said and not some secret thought of one which was not communicated to the other." "[T]he reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue." *Cooper v. Crebb*, 587 So.2d at 239-241. A contract should be construed in a manner which "makes sense to an intelligent layman familiar only with the basics of English language" and is reasonable and fair. *Id.* (Internal citations omitted); *see also, Frazier v. Northeast Miss. Shopping Center, Inc.*, 458 So.2d at 1054.

If, after employing the "four-corners" test the court determines the contract is clear and unambiguous, the parties' intent must be effectuated as stated and the court's inquiry ends. *Pursue Energy Corp.*, 558 So.2d at 352. A contract is ambiguous if it is subject to more than one reasonable interpretation. *Id.* However, the mere fact that the parties to a contract disagree as to the correct interpretation of the contract does not make the instrument ambiguous as a matter of law. *Simmons,* 593 So.2d at 43. If the provisions of a contract, when read as a whole, contradict one another, the court can attempt to "harmonize" the contradictory provisions based on the intent of the parties **as emanating from the text of the document**. *Id.*; *see also, Pursue Energy Corp.*, 558 So.2d at 353. In attempting to harmonize contradictory provisions in a contract, **the court cannot go outside the text of the contract to infer the intent of the parties.** If the language of the document is unambiguous as written, or as harmonized using only the intent emanating from the words in the document, the contract must be enforced as written and harmonized.

Only if a contract is found to be ambiguous can the court go beyond the text of the document. Then and only then, the court may employ the use of Canons of Construction, including

consideration of extrinsic evidence to determine the intent of the parties. *Royer Homes of Miss., Inc.*, 857 So.2d at 752-3; *Benchmark Healthcare Center, Inc.*, 912 So.2d at 182 ("Parole evidence of the intention of the contracting parties may be admitted only when the terms of the agreed upon contract are ambiguous.").

Finally, the interpretation of an ambiguous contract that is subject to more than one reasonable interpretation is a matter for the jury. *Royer Homes of Miss., Inc.*, 857 So.2d at 752.

B. The Trial Court Failed to Follow and Apply the Rules of Contract Construction; Erred in Finding that § 3 of the Authorized Agent Agreement was Unambiguous; and Based its Summary Adjudication that § 3 of the Agreement was Not Ambiguous on Extrinsic Evidence and is, therefore, in Error.

1. Failure to Apply Rules of Contract Construction:

The contract in dispute in this matter is the Authorized Agency Agreement establishing the agency relationship between Cellular South and Dalton. The sole dispute between the parties involves the provisions contained in § 3 of the Agreement entitled "Contract Period." Specifically, the issue is what limits the language in ¶ 3.1 places upon Cellular South's right to terminate its agency relationship with Dalton as proscribed in ¶¶ 3.4, "Default," and 3.5, "Termination."[5]

Cellular South interprets the provisions of § 3 to mean that: (1) under the first paragraph of ¶ 3.5, Cellular South had the unfettered right to terminate Dalton's agency relationship with thirty days written notice for any reason without cause; (2) under the second paragraph of ¶ 3.5, Cellular South has the right to termination Dalton's agency relationship effective immediately upon written notice, for any of the causes listed in this sub-section; (3) under ¶ 3.4, Cellular South had the right to terminate Dalton's agency relationship for his failure to remedy any default of his obligation for

[5]The full text of § 3 is set forth at pages 6 - 7 of this Brief.

thirty days after written notice; and (4) the second sentence of ¶ 3.1 does not limit Cellular South's ability to terminate Dalton under ¶ 3.5 at all or ¶ 3.1 limits Cellular South's ability to terminate Dalton under ¶ 3.5 only to the extent that Cellular South is required to determine that agency relationships, **generally,** are "detrimental to Cellular South's overall well-being, reputation and goodwill."[6]

Dalton's interpretation differs from Cellular South's only in the effect the second sentence of ¶ 3.1 has on Cellular South's ability to terminate **his** agency relationship under the first paragraph of ¶ 3.5. Dalton contends that the second sentence of ¶ 3.1 limits Cellular South's ability to terminate him under ¶ 3.5 by requiring Cellular South to determine that **his** agency, in particular, is detrimental to Cellular South, if his agency is a successful one.[7] Dalton interprets these provisions to mean that: (1) under the first paragraph of ¶ 3.5, Cellular South may terminate Dalton's agency relationship with thirty days written notice if it determines that Dalton's agency, in particular, is detrimental to Cellular South's overall well-being, reputation and goodwill; (2) under the second paragraph of ¶ 3.5, Cellular South may terminate Dalton's agency relationship, effective immediately upon written notice for any of the listed causes in ¶ 3.5; and (3) under ¶ 3.4, Cellular South may terminate Dalton's agency relationship for his failure to remedy any default of his obligations for thirty days after written notice.

The trial court adopted Cellular South's reasoning and interpretation of the Agreement finding that ¶ 3.1 limited Cellular South's ability to terminate Dalton under the first paragraph of ¶

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[6]It is important to understand that the Agreement does not establish a standard for determination of Cellular South's overall "well-being," "reputation" and "goodwill."

[7]Cellular South admitted that Dalton's agency was successful (See H. Meena Affidavit; R.E., Vol. 2, p. 472), and the Court found as a matter of fact that the agency was successful. (Court's Opinion of April 5, 2007, p. 2; R.E., Vol. 2, p. 672).

3.5 by requiring Cellular South to make a determination that agency relationships, **generally,** are detrimental to the overall well-being, reputation and goodwill of Cellular South, observing that "there is nothing in the second sentence of ¶ 3.1 that limits Cellular South's right to terminate the Agreement only in the event that **Dalton** does something that is detrimental to the overall well-being, reputation and goodwill of the Company." (Court's Opinion, p. 9, R.E., Vol. 2, p. 679). The trial court then held, based on the statements made in the Affidavit of Hu Meena, that Cellular South had determined that the continuation of Dalton's agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular South **because Cellular South believed that continuing agency relationships generally was detrimental to Cellular South's overall well-being, reputation and goodwill."** (Emphasis ours) (Court's Opinion, p. 9, R.E., Vol. 2, p. 679).

2. The Trial Court's Ruling is Contrary to the Plain Meaning of the Agreement Language:

First and foremost, the trial court's interpretation is not consistent with the plain meaning of the language in the Agreement. To interpret the meaning of ¶¶ 3.1 and 3.5, § 3 must be examined as a whole. *Pursue Energy Corp.*, 558 So.2d at 352. ("Particular words should not control, rather, the entire instrument should be examined"). Paragraph 3.1 specifically reads, "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.**" (Emphasis ours). This language establishes that ¶ 3.1 focuses on Dalton, not other, or all, Cellular South agents.

Paragraph 3.5 states that either party may terminate the agency relationship upon thirty days written notice to the other party; then lists specific causes for which Cellular South could terminate Dalton immediately upon written notice. Clearly, as the trial court correctly held, ¶ 3.1 does place a limitation on Cellular South's ability to terminate Dalton's agency relationship under ¶ 3.5. With regards to ¶ 3.1, attention should be paid to the plain meaning of the language. Paragraph 3.1 clearly and unambiguously states that, if Dalton's agency is successful, Cellular South must determine before it terminates Dalton that "**the agency relationship**" is detrimental to the overall well-being, reputation, and goodwill of Cellular South. The authored Agreement by Cellular South does not provide that Cellular South can terminate a successful agency relationship if it determines that,"agency relationships" or "any agency relationship" are detrimental to the overall well-being, reputation and goodwill of Cellular South. In determining that the clause in ¶ 3.1, "the agency" means "agencies" or "all agencies," the trial court has erroneously given meaning to the words in the Agreement that are contrary to the meaning emanating from the text of the contract.

The language of ¶ 3.1 necessitates a reading that it was intended to be specific to the performance of each agency relationship with Cellular South - in this case Dalton. First, the limitation on termination only applies to a successful agency. It applies to Dalton only if his agency is a successful one. It makes no logical sense that the language used in the Agreement that "Cellular Holding . . . will terminate **a successful agency relationship** only if Cellular Holding determines that the continuation of **the agency relationship** would be detrimental. . ." applies to agencies, generally. A finding that this language was intended to mean all independent contractor agents of Cellular South instead of Dalton's agency, specifically, is completely contrary to the language

utilized in the intent of the parties, as written. In finding otherwise, the trial court committed reversible error.

Further, the trial court's interpretation makes the limiting language in ¶ 3.1 utterly meaningless and of no effect. The clear intent of the parties emanating from the words of the contract is that, if Dalton maintains a successful agency relationship - which he did, he will be provided some protection from arbitrary termination by requiring Cellular South to make a determination that the continuation of **his agency relationship**, in particular, was detrimental to the overall well-being, reputation, and goodwill of Cellular South. The trial court's interpretation only requires Cellular South to determine that **agency relationships**, in general, are detrimental to Cellular South. This interpretation effectively removes the performance-based protection from the contract and erases the second sentence of ¶ 3.1.

3. The trial court erred in relying on Hu Meena's Affidavit to interpret the contract.

The trial court erred in its interpretation of the Agreement because it impermissibly used the Affidavit of Hu Meena to interpret the contract, yet found the contract to be unambiguous.

The trial court, in its opinion, relied heavily on, and cited several times to, the May 12, 2006 Affidavit of Hugh Meena. (Court's Opinion, pp. 2, 3; R.E. Vol. 2, pp. 672-673). Further, the trial court relied on and adopted arguments of Cellular South that were supported solely by Hu Meena's Affidavit. (Court's Opinion, pp. 5, 9-10; R.E., Vol. 2, pp. 675, 679, 680). The trial court correctly determined that Cellular South's right to terminate Dalton's agency relationship under ¶ 3.5 was limited by the second sentence of ¶ 3.1 and held that Cellular South could only terminate Dalton if it determined that the continuation of the agency relationship between it and Dalton would be detrimental to Cellular South's overall well-being, reputation, and goodwill. (Court's Opinion, p.

9; R.E., Vol. 2, p. 679). However, the court then held that "there is nothing in the second sentence of 3.1 that limits Cellular South's right to terminate the agreement only in the event that **Dalton** does something that is detrimental to the overall well-being, reputation, and goodwill of the company." *Id.* (Emphasis added).

This statement is clearly contrary to the plain meaning of the language of ¶ 3.1, as discussed previously in this Brief. To come to the conclusion that Cellular South could terminate Dalton if it determined that continuing to have **agency relationships**, in general with no specific findings as to Dalton's agency are detrimental, the trial court had to have looked to extrinsic evidence and assertions of Cellular South.

The trial court apparently relied on Cellular South's assertions, specifically those made in the Affidavit of Hu Meena, that Cellular South was entitled to terminate Dalton upon the determination by it that **all agencies** are detrimental to the well-being of Cellular South. Nothing in the Agreement or any other piece of evidence produced by either party, other than Hu Meena's Affidavit, even suggested that "the agency relationship" means "agency relationships" or "all of Cellular South's agency relationships". Therefore, unless the trial court misinterpreted the four-corners of the Agreement, it must have relied on Hu Meena's Affidavit to come to this conclusion.

Relying on the Affidavit of Hugh Meena constituted reversible error on the part of the trial court for the reason that the trial courts can only use extrinsic evidence to interpret a contract if the contract is ambiguous.

In *Benchmark Healthcare Center, Inc.*, 912 So.2d at 182, the Court stated that, "One of the fundamental principles of contract law is that parole evidence will not be received to vary or alter the terms of the written agreement as intended to express the entire agreement of the parties on the

subject matter at hand." The *Benchmark* Court clearly held that extrinsic or parole evidence regarding the intention of the parties can only be used when the court finds that the terms of the contract are ambiguous. *Id.*

Here, the trial court held that the Agreement **was not ambiguous**. (Court's Opinion, p. 8; R.E., Vol. 2, p. 678). Because the trial court resorted to extrinsic evidence and the assertions of Cellular South to interpret the Agreement, the Agreement must have been ambiguous as a matter of law. *Id.* In *Pursue Energy Corp.*, 558 So.2d at 534, the Court held that disposition at the summary judgment level is not appropriate in cases in which a contract is deemed to be ambiguous within its four corners, because the ultimate disposition, the construction of the contract, generally involves triable issues of fact.

The trial court's reliance on extrinsic evidence to conclude that ¶¶ 3.1 and 3.5 were not ambiguous was improper and, therefore, as a matter of law, summary judgment was not appropriate.

Even if the trial court would have attempted to resolve the ambiguity by harmonizing the provisions of the Agreement, it could only do so by looking solely to the intent of the parties as shown in the four corners of the contract and give meaning and effect to all of these provisions first. *Royer Homes of Miss.*, 857 So.2d at 752; *Pursue Energy Corp.*, 558 So.2d at 352. The trial court's failure to attempt to harmonize the provisions and then base its conclusion on the Meena Affidavit constitutes reversible error.

C. Alternatively, Material Facts Existed on the Issue of Whether Cellular South had Grounds Under ¶ 3.1 of the Agreement to Terminate Dalton.

The trial court found that Cellular South could not terminate Dalton's agency relationship under the contract unless it made a determination that the agency relationship was detrimental to

Cellular South's overall well-being, reputation and goodwill. The court found that Cellular South had made a sufficient determination that Dalton's agency relationship was detrimental to the overall well-being, reputation and goodwill - a fact based determination. The court's conclusion was based solely on the Affidavit of Hu Meena. Cellular South did not present any evidence to support the self-serving and illogical statements made by Meena in his Affidavit. On the other hand, Dalton presented evidence consisting of Answers to Interrogatories and supporting Affidavits that Cellular South's determination to terminate his agency relationship was based on the reorganization of Cellular South and not on a finding of detriment.[8]

Regardless of the trial court's interpretation of the contract, material issues of fact existed, and the court, therefore, erred in granting summary judgment to Cellular South because an issue of fact remained 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.

Cellular South admitted that Dalton's agency was a successful agency and did not contend that it terminated his agency based on a determination that his specific agency relationship was detrimental to the overall well-being, reputation and goodwill of Cellular South. Therefore, these issues were not in dispute at the trial level. The sole proof put on by Cellular South that its decision to terminate the agency relationship was based on its determination that agency relationship in general were detrimental to Cellular South was Meena's Affidavit. In finding that Cellular South did make a reasonable determination of the existence of this key factor, the court relied on the Meena

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[8]See Cellular South's December 19, 2003, termination letter to Dalton. (R.E., Vol. 1, pp. 171-172).

Affidavit, despite the fact that the assertions in the Affidavit were mere self-serving statements that were not supported by any other evidence, did not make logical sense, and were the product of an afterthought defense.

III.

THE TRIAL COURT ERRED IN DENYING DALTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Each of the parties sought summary adjudication in their favor based upon their claims that the terms of the Agreement relative to the provisions for termination of the Agreement were unambiguous. They differ sharply, however, on the interpretation of the "unambiguous" provisions, as set forth in this discussion. Cellular South maintains that, under its interpretation of the "unambiguous" terms of the Agreement, it had the right to terminate Dalton's Agency Agreement without cause. Dalton claims that the termination provisions of the Agreement impose upon Cellular South the duty (1) to determine cause for the termination as set forth in the Agreement and **then** (2) give Dalton in writing a thirty-day notice of termination. Dalton's interpretation of § 3 of the Agreement is arrived at by (1) an objective reading of the words used in the contract to the exclusion of parole evidence, (2) application of the "four-corners" rule, (3) reading the contract as a whole so as to give effect to all of its clauses, and (4) refraining from inferring the intent of the parties but rather relying on what they said in the contract. The methodology employed by Dalton is the correct approach, long sanctioned by the law of Mississippi.

Based on this law, Dalton filed his Counter-Motion for Partial Summary Judgment asserting that he was entitled to summary adjudication and that § 3 of the contract was unambiguous as to Cellular South's ability to terminate the Agreement without cause, wherein he asserted that the

provisions of ¶¶ 3.1, 3.4, and 3.5 set forth clearly and unambiguously the circumstances that must exist before Cellular South could terminate his agency. The language of these paragraphs clearly provides that Cellular South agreed that it would terminate its successful agency only if it determined that the continuation of the agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular South (¶ 3.1). Paragraph 3.4 provides for termination in the event Dalton failed to perform any of his obligations under the Agreement and such failure continued unremediated for a period of thirty days after written notice was given Dalton by Cellular South. The second unnumbered paragraph of ¶ 3.5(A) - (D) sets forth specific events justifying termination. The record establishes that Cellular South did not invoke any of these basis for termination of Dalton.

Dalton supported his Counter-Motion for Partial Summary Judgment with (1) his Response to Cellular South's Motion for Summary Judgment, (2) his Counter-Motion for Summary Judgment, (3) countervailing evidence set forth in his Response to Cellular South's Motion consisting of a) Cellular South Complaint, b) Answer of Dalton to Complaint, c) March 1, 1993 Agreement between Cellular South and Dalton, d) Cellular South's termination letter; e) Counter-Plaintiff's Rule 36, *M.R.C.P.*, Requests for Admissions propounded to Cellular South, f) Counter-Plaintiff's Rule 33, *M.R.C.P.*, Interrogatories propounded to Cellular South, g) Counter-Plaintiff's Rule 34, *M.R.C.P.*, Requests for Production of Documents propounded to Cellular South, h) Gregory S. Dalton Affidavit, i) original of Counter-Plaintiff's Statement of Uncontested Material Facts presented in support of Counter-Motion for Summary Judgment.

Dalton respectfully maintains that the trial court committed reversible error in denying his Motion for Partial Summary Judgment adjudicating that the terms of the Agreement clearly provided that Cellular South could only terminate his agency with cause for the reason that ¶¶ 3.1 and 3.5 are

unambiguous. Alternatively, in the event the Court determines that the provisions for termination are ambiguous, then, and in that event, Dalton requests that this Court reverse the trial court's Order denying his Motion for Partial Summary Judgment and remand this case to the Circuit Court of Winston County, Mississippi, for a determination by the jury of the intent of the parties.

IV.

CONCLUSION

The trial court committed reversible error in (1) granting summary judgment to Cellular South and (2) denying Dalton's Motion for Partial Summary Judgment for the reasons set forth in this Brief.

The decisions of the trial court should be reversed and this matter should be remanded to the trial court.

DATED: September 20, 2007.

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CERTIFICATE OF SERVICE

I, William H. Liston, one of the attorneys for Appellant herein, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing instrument unto:

Honorable Joseph H. Loper, Jr., Judge
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