

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**

SUPPLEMENTAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANT

VERSUS

CAUSE NO. 2007-CA-00750

CELLULAR SOUTH, INC.

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Gregory S. Dalton, Appellant;
2. William H. Liston, Attorney for Appellant;
3. John M. Montgomery, Attorney for Appellant
4. Liston/Lancaster, PLLC, Attorneys for Appellant;
5. Dewitt T. Hicks, Jr., Attorney for Appellant;
6. P. Nelson Smith, Jr., Attorney for Appellant;
7. Hicks & Smith, PLLC, Attorneys for Appellant;
8. Charles L. McBride, Jr., Attorney for Appellee;
9. Anne C. Sanders, Attorney for Appellee;
10. Katie L. Wallace, Attorney for Appellee;
11. Brunini, Grantham, Grower & Hewes, PLLC, Attorneys for Appellee;

12. Jay Gore, III, Attorney for Appellee;
13. Gore, Kilpatrick, Purdie & Metz, PLLC, Attorneys for Appellee.
14. Cellular South, Inc. (formerly Cellular Holding, Inc.) Appellee/Plaintiff and Counter-Defendant
15. Hu Meena, President of Cellular South, Inc.
16. Wade H. Creekmore, Jr., Vice-President and Director of Cellular South, Inc.
17. James H. Creekmore, Sr., Vice-President, Treasurer, Secretary and Director of Cellular South, Inc.
18. Paul D. Perry, Incorporator of Cellular South, Inc.
19. James A. Torrey, Jr., Registered agent for service of process of Cellular South, Inc.
20. Terrell Knight, Director of Sales for Cellular, Inc.
21. Unknown persons/corporations, Stockholders of Cellular South, Inc.
22. Unknown partners/shareholders of Brunini, Grantham, Grower & Hughes, PLLC, and Gore, Kilpatrick, Purdie & Metz, PLLC, Attorneys for Appellee/Plaintiff and Counter-Defendant

This the 11th day of June, 2009.



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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANT

VERSUS

CAUSE NO. 2007-CA-00750

CELLULAR SOUTH, INC.

APPELLEE

**SUPPLEMENTAL BRIEF OF APPELLANTS PURSUANT TO RULE 17 (h) OF
THE MISSISSIPPI RULES OF APPELLANT PROCEDURE¹**

Comes now, Gregory S. Dalton, individually and d/b/a Louisville Electronics, by and through counsel, and files this his Supplemental Brief Pursuant to Rule 17 (h) of the Mississippi Rules of Appellate Procedure in the Supreme Court for the State of Mississippi and respectfully submits unto the Court, the following:

Appellants respectfully acknowledges that the review by this Court on this grant of Certiorari will be conducted on the record and briefs previously filed. This Supplemental Brief will be a concise summary of the critical facts and compelling law.

In December 2003, after approximately thirteen (13) years of dedicated service that resulted in the securing of over 6,000 customers for Cellular South, Inc., "CSI", appellant was notified that his agreement with CSI was being terminated effective February 6, 2004, as a result of "a reorganization of Cellular South's Retail Distribution Plan....". Dalton was presented a Full and Final Release in a letter of December 2003 which he refused to sign. (Court of Appeal Opinion of September 16, 2008, p. 2, ¶¶ 3 and 4.)

¹ Dalton is satisfied that the pleadings and briefs before this Court sufficiently cover the issue. Out of an abundance of caution, not knowing what Appellees may file, his attorneys are filing herewith this Supplemental Brief.

This Court appears poised to correct the Court of Appeals' error in its holding that the subject Contract of Employment between Dalton and CSI was unambiguous and unilaterally subject to termination by CSI. The following two (2) paragraphs of the Contract are irrevocably in conflict in regard to Dalton's contractual term of employment. The Contract provides in pertinent parts as follows:

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 Holding² is cognizant of the increasing value of the Agency Relationship to a successful Agent and therefore will terminate a successful 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)

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.

(See, Court of Appeal Opinion at pp. 3 - 4, ¶ 6).

The provisions of §3.1 of the subject Contract encompass the circumstances under which a successful Agent could be terminated by CSI. In this case, Dalton could only be terminated on the occurrence of each of the three conditions set forth in §3.1 of the Contract: the continuation of the Agency Relationship would be detrimental to (1) the overall well-being, (2) reputation, and (3) good will of CSI.³ The Court of Appeals found that the employment terms were not ambiguous and approved termination by relying on the affidavit of Mr. Hu Meena, the CEO of CSI.

² The Agreement refers to Cellular South as Cellular Holding as a result of a corporate name change.

³ See, Dissent of Irving, J. joined by Lee, P. J., and Chandler, J. observing "it is clear to me that the financial well-being of Cellular South is only one of three criteria that must be met before termination is authorized. The other two are that there be a detriment to the reputation and goodwill of Cellular South." Dissent p. 11, ¶ 21.

The established law is that a conclusory affidavit cannot be accepted as evidence of undisputed facts. In the analogous case of Burton v. Choctaw County, MS 737 So.2d 1 (Miss. 1997), this Court had before it an insurance contract that contained the term “nursing treatment”. The Court in a unanimous opinion reversed and remanded the decision of the lower Court stating “a factual dispute exists which precludes summary judgment in this case. Rochelle Moore made conclusory statements within her affidavit, to the effect that she gave nursing treatment. This statement was self-serving and cannot form the basis of summary judgment evidence... The Trial Court erred in finding it unambiguous, and the question of whether Rochelle Moore’s actions on August 29, 1993 constituted nursing treatment should have been submitted to a jury...”. Id.

In 2007 the Mississippi Supreme Court emphatically set forth its disdain for conclusory affidavits in the case of Hubbard v. Wansley, M.D., 954 So.2d 951 (Miss. 2007). The Court stated “the language of Dr. Stringer’s affidavit is almost wholly conclusory on the issue of causation and gives very little in the way of specific facts and medical analysis to substantiate the claim that Hubbard had a greater than 50% chance of substantial recovery... This Court has shown its disapproval of such affidavits in the past”, citing Walker v. Skiowski, 529 So.2d at 187 (stating that affidavits which are almost wholly conclusory “are less than satisfactory”).

The compelling facts are:

- (1) There is no dispute that the contract was prepared by Cellular South, Inc.
- (2) The contract must then be construed more strongly against the drafter, Cellular South.

Cain v. Cain, 967 So.2d 654 (Ct. App. Miss. 2007); Phillips v. Enterprise Transportation Service Co., 2008 Miss. App. Lexis 459; AmSouth Bank v. Quincy, 963 So.2d 1145 (Miss.2007).

- (3) The vital provision is that the contract can only be terminated on a successful agency “if Cellular Holding determines that the continuation of the agency relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular South.”

(4) The decision by the Court of Appeals and the Trial Court was based not on the four corners of the contract but on a conclusory affidavit of Mr. Hu Meena.

(5) There are no facts, records or evidence of any kind in the record to support that the overall well-being, reputation and goodwill of Cellular South Holding would result in a detriment by the continuation of the agency agreement.

(6) There are three prerequisite conditions which must be established as a detriment in order to terminate the contract, to wit:

- a. well-being;
- b. reputation; and
- c. goodwill, of Cellular South.

The contract provisions state all three must exist to terminate. It is not a detriment to well-being or to reputation or to goodwill but well-being, reputation and goodwill of Cellular South Holding. Two of the three criteria were not even addressed in the Meena affidavit except through a conclusory allegation.

The record is totally void of any facts in support of the ending conclusory statement "for these reasons, I determine that continuation of Cellular South's agency relationships, including Dalton, would be detrimental to the overall well-being, reputation and goodwill of Cellular South." (Hu Meena Affidavit). At the very least there is an issue of material fact as to whether or not Dalton's agency was detrimental to the reputation and goodwill of Cellular South.

Under Mississippi's established "three-tiered" approach to contract interpretation, if the "four-corners" test fails to yield a clear understanding that the contract terms were not ambiguous, then the Court would be obligated to invoke the canons of contract construction and resort to parole evidence if necessary... Pursue Energy Corp v. Perkins, 558 So. 2d 349, 352 (Miss. 1990); Facilities Inc. v. Rogers-Usry Chevrolet, Inc., 908 So. 2d 107, 111 (¶ 7) (Miss. 2005); One South, Inc. v.

Hollowell, 963 So. 2d. 1156, 1162 (¶ 10) (Miss. 2007). If the terms of the contract are unambiguous after examination of the “four-corners” terms of the Contract, then there is no authority under the law for the Court to proceed with the rules of contract construction. McKee v. McKee, 568 So. 2d. 262, 266, (Miss. 1990); Brown v. Hartford, Ins. Co., 606 So. 2d. 122, 126 (Miss. 1992). However, if the contract is still unclear after examination of the “four-corners”, and is thus ambiguous, then, and only then, is the Court authorized to apply parole evidence. One South, Inc., supra, at pp. 1162-63 (¶ 10). It was clearly erroneous to resort to the conclusory affidavit of Hu Meena. If the “four-corners” are applied, CSI’s right to terminate Dalton could only be done if a jury determined that the agency relationship would be detrimental to CSI’s overall well-being, reputation, and goodwill of Cellular South, based upon evidentiary facts established in the record.

CONCLUSION

The Court of Appeals decision is a sharp departure from the established Mississippi law concerning contract interpretation. The decision of the Trial Judge and the Court of Appeals is in clear violation of long standing published Supreme Court opinions.

Appellant respectfully requests that the Court correct this misapplication of contract construction and apply the well established law regarding contract construction.

Further, Appellant respectfully requests that the Court reverse the grant of Summary Judgment and remand this case to the Circuit Court of Winston County, Mississippi, for further proceedings.

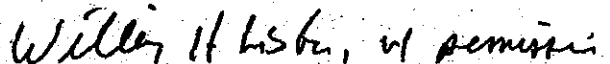
RESPECTFULLY SUBMITTED, this the 11th day of June, 2009.

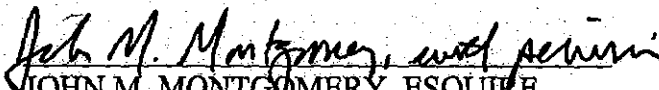
GREGORY S. DALTON, Individually and d/b/a
LOUISVILLE ELECTRONICS, Appellant

By:


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CERTIFICATE OF SERVICE

I, the undersigned attorney, Dewitt T. Hicks, Jr., counsel for the Appellant, do hereby certify that I have filed this *Supplemental Brief of Appellants Pursuant to Rule 17 (h) of the Mississippi Rules of Appellant Procedure* with the Clerk of this Court, and have served a true and correct copy of this *Supplemental Brief of Appellants Pursuant to Rule 17 (h) of the Mississippi Rules of Appellant Procedure* by United States first class mail, postage prepaid, to the following:

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The Honorable Joseph H. Loper, Jr.
CIRCUIT JUDGE, DISTRICT FIVE
Post Office Box 616
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SO CERTIFIED, this the 11th day of June, 2009



DEWITT T. HICKS, JR.

CERTIFICATE OF MAILING

I, the undersigned attorney, Dewitt T. Hicks, Jr., counsel for the Appellant, do hereby certify that I have mailed the original and 10 copies of the *Supplemental Brief of Appellants Pursuant to Rule 17 (h) of the Mississippi Rules of Appellant Procedure* by United States first class mail, postage prepaid, to the following:

Betty W. Sephton, Clerk
Mississippi Court of Appeals
Post Office Box 22847
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And further certifies that a true and correct copy of the *Supplemental Brief of Appellants Pursuant to Rule 17 (h) of the Mississippi Rules of Appellant Procedure* was mailed via United States first class mail, postage prepaid, to the following:

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SO CERTIFIED, this the 11th day of June, 2009.


DEWITT T. HICKS, JR.