RECEIVED
Jan 18 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No. 2019-CP-46-00051

Appellate Case No. 2023-001103

Daniel P. Cedrone and Poly-Tech Industrial, Inc., ... Respondents,

v.

Composite Resources, Inc., ... Appellant.

FINAL BRIEF OF RESPONDENTS

RIMÔN P.C.
Keith D. Munson
S.C. Bar No. 13400
Rimôn Law
220 North Main Street, Suite 500
Greenville, SC 29601
Tel: (864) 420-3426
Fax: (864) 249-7111
keith.munson@rimonlaw.com

WOMBLE BOND DICKINSON
Michael Montecalvo
Womble Bond Dickinson (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
Tel: (336) 721-3770
michael.montecalvo@wbd-us.com

Admitted Pro Hac Vice

Attorneys for Respondents Daniel P. Cedrone and Poly-Tech Industrial, Inc. [1]

[1] Order granting Mr. Montecalvo's pro hac admission by the Business Court is included in the Record. [R. p. 18].

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 2

I. Business Court Judge Hayes correctly determined that the operable provisions of the long-standing 2005 Sales Representative Agreement at issue are unambiguous. 2

II. Business Court Judge Hayes correctly interpreted the unambiguous operable provisions of the long-standing 2005 Sales Representative Agreement, which requires commissions and vendor related payments be made on the sale of any and all Combat Tourniquets, as, in fact, requiring commissions and vendor related payments on Appellant's sales of Combat Tourniquets during and after the sales representative relationship. 2

III. Appellant's attempt to argue its damages case within the confines of this restricted interlocutory appeal of a legally based grant of partial summary judgment should be rejected. 2

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 7

STATEMENT OF FACTS 11

ARGUMENT 19

I. Business Court Judge Hayes correctly determined that the operable provisions of the long-standing 2005 Sales Representative Agreement at issue are unambiguous. 20

II. Business Court Judge Hayes correctly interpreted the unambiguous operable provisions of the long-standing 2005 Sales Representative Agreement, which requires commissions and vendor related payments be made on the sale of any and all Combat Tourniquets, as, in fact, requiring commissions and vendor related payments be paid by Appellant on its sales of Combat Tourniquets during and after the sales representative relationship. 27

III. Appellant's attempt to argue its damages case within the confines of this restricted interlocutory appeal of a legally based grant of partial summary judgment should be rejected. 29

A. Post-contract project evolution extrinsic evidence is irrelevant. 30

B. Parallel *dicta* does not impact the Business Court's four corner's legal determination. 31

C. The Partial Summary Judgment Order did not, *de facto*, strike affirmative defense or counterclaims. 31

D. The 2005 Agreement is not indefinite. 34

CONCLUSION..38

TABLE OF AUTHORITIES

Page(s)

Cases

A+JG Holdings LLC v. Dunn,
392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011),
aff'd, 410 S.C. 346, 764 S.E.2d 912 (2014) 7

Bank of New York v. Sumter Cnty.,
387 S.C. 147, 691 S.E.2d 473 (2010) 38

Baughman v. Am. Tel. & Tel. Co.,
306 S.C. 101, 410 S.E.2d 537 (1991) 7

Bruce v. Blalock,
241 S.C. 155, 127 S.E.2d 439 (1962) 10

In re Bus. Ct. Pilot Program,
410 S.C. 6, 763 S.E.2d 351 (2014) 9

Butler v. Travelers Home & Marine Ins. Co.,
433 S.C. 360, 858 S.E.2d 407 (2021) 27

Cmty. Servs. Assocs., Inc. v. Wall,
421 S.C. 575, 808 S.E.2d 831 (Ct. App. 2017).....28

Connelly v. Main St. Am. Grp.,
439 S.C. 81, 886 S.E.2d 196 (2023) 25, 26

Eagle Container Co., LLC v. Cnty. of Newberry,
379 S.C. 564, 666 S.E.2d 892 (2008) 8

Fay v. Total Quality Logistics, LLC,
419 S.C. 622, 799 S.E.2d 318 (Ct. App. 2017).....6

First-Citizens Bank & Tr. Co. v. Conway Nat. Bank,
282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984).....11

Fraternal Ord. of Police, Lodge No. 69 v. City of Fairmont,
196 W. Va. 97, 468 S.E.2d 712 (1996).....24, 25

George v. Fabri,
345 S.C. 440, 548 S.E.2d 868 (2001) 7

Goldstein v. Am. Steel Span, Inc.,
181 N.C. App. 534, 640 S.E.2d 740 (2007).....3

Green v. Biddle,
21 U.S. 1, 5 L. Ed. 547 (1823).....11

Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.,
401 S.C. 395, 736 S.E.2d 863 (Ct. App. 2012).....28

Hawkins v. Greenwood Dev. Corp.,
328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997).....4, 7

Hays v. Adair,
267 S.C. 291, 227 S.E.2d 665 (1976) 10

Lamoureux v. MPSC, Inc.,
849 F.3d 737 (8th Cir. 2017) 36, 37

Madvig v. Gaither,
461 F. Supp. 2d 398 (W.D.N.C. 2006) 8

McCord v. Laurens Cnty. Health Care Sys.,
429 S.C. 286, 838 S.E.2d 220 (Ct. App. 2020).....9

McGill v. Moore,
381 S.C. 179, 672 S.E.2d 571 (2009) 25

Mendez v. Republic Bank,
725 F.3d 651 (7th Cir. 2013) 8

Milliken & Co. v. Morin,
399 S.C. 23, 731 S.E.2d 288 (2012) 28

Mishoe v. Gen. Motors Acceptance Corp.,
234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958) 11

Monster Daddy, LLC v. Monster Cable Prod., Inc.,
483 F. App'x 831 (4th Cir. 2012).....33, 34

Moss v. Porter Bros.,
292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987).....33

Muller Enterprises, Inc. v. Gerber,
178 Neb. 463, 133 N.W.2d 913 (1965).....36

Olson v. Fac. House of Carolina, Inc.,
354 S.C. 161, 167-68, 580 S.E.2d 440, 443-44 (2003).....7, 38

Pumphrey v. Pelton,
250 Md. 662, 245 A.2d 301 (1968) 36

Reyes v. Metromedia Software, Inc.,
840 F. Supp. 2d 752 (S.D.N.Y. 2012).....26, 27, 28

Rodarte v. Univ. of S.C.,
419 S.C. 592, 799 S.E.2d 912 (2017) 5, 8, 9, 10

Russell v. Wachovia Bank, N.A.,
353 S.C. 208, 578 S.E.2d 329 (2003) 7

S.C. Dep't of Nat. Res. v. Town of McClellanville,
345 S.C. 617, 550 S.E.2d 299 (2001) 4, 7, 27

Schiavo ex rel. Schindler v. Schiavo,
404 F.3d 1270 (11th Cir. 2005) 25

Schulmeyer v. State Farm Fire & Cas. Co.,
353 S.C. 491, 579 S.E.2d 132 (2003) 10, 25

Southern Recycling, LLC v. Gibbs Int'l, Inc.,
No. 7:13-CV-3125-BHH, 2016 WL 1258402 (D.S.C. Mar. 31, 2016) 28, 32

Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC,
938 F.3d 113 (4th Cir. 2019) 18

Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co.,
No. 3:17-CV-01781-JFA, 2020 WL 13065453 (D.S.C. June 15, 2020) 35

Travelers Indem. Co. v. Bailey,
557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009).....19

Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.,
386 F.3d 581 (4th Cir. 2004) 33

Warner v. Weader,
280 S.C. 81, 311 S.E.2d 78 (1983) 9

Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.,
178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) 36, 37, 38

World-Wide Rts. Ltd. P'ship v. Combe Inc.,
955 F.2d 242 (4th Cir. 1992) 4

Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc.,
80 Cal. App. 4th 1, 94 Cal. Rptr. 2d 829 (2000).....36

Statutes

S.C. Code Ann. § 2-13-175 23

S.C. Code Ann. § 39-65-10 4

Rules

Rule 56(c), SCRCP 7

Rule 56(f), SCRCP 16

Other Authorities

11 Williston on Contracts § 33:1 (4th ed.) 5

Restatement (Second) of Contracts § 202 cmt. d (1981) 24, 25

Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina 76 (2d ed. 2002) 5

USPTO Office Combat Application Tourniquet Trademark index 21, 23

STATEMENT OF ISSUES ON APPEAL

I. Business Court Judge Hayes correctly determined that the operable provisions of the long-standing 2005 Sales Representative Agreement at issue are unambiguous.

II. Business Court Judge Hayes correctly interpreted the unambiguous operable provisions of the long-standing 2005 Sales Representative Agreement, which requires commissions and vendor related payments be made on the sale of any and all Combat Tourniquets, as, in fact, requiring commissions and vendor related payments on Appellant's sales of Combat Tourniquets during and after the sales representative relationship.

III. Appellant's attempt to argue its damages case within the confines of this restricted interlocutory appeal of a legally based grant of partial summary judgment should be rejected.

STATEMENT OF THE CASE

This appeal arises out of the South Carolina Business Court.[2]

Respondent Dan Cedrone brought Appellant the manufacturing project opportunity of a lifetime. This project opportunity was to be the manufacturer for the United States military's new standard battlefield tourniquet, known as the Combat Application Tourniquet, and trademarked as the C-A-T Tourniquet. (herein after "**Combat Tourniquet**" or **"C-A-T Tourniquet"**) In June 2005, the parties formalized the project opportunity in a restated sales representative agreement, with the special provisions related to the Combat Tourniquet project in Annex C, Section C (page 11 of 11 [R. p. 74]) of the 2005 Sales Representative Agreement ("**2005 Agreement**") [R. pp. 63-74, Complaint ("Compl."), Exhibit A]. In exchange for the opportunity to manufacture and sell the Combat Tourniquets, Appellant Composite Resources, Inc. ("**Composite Resources**") agreed to purchase raw materials from Respondent Poly-Tech Industrial, Inc. ("**Poly-Tech**") and pay a fixed commission (essentially a royalty) on the sale of each Combat Tourniquet. After more than 13 years, Appellant terminated the general sales representative relationship under the 2005 Agreement and stopped making the raw material and commission payments under special provisions of Annex C, Section C, despite increasing the number of tourniquets sold to the US military under the manufacturing project.

Respondents filed this action on January 7, 2019 to recover past and future sales commissions and raw material vendor profits due from Appellant relating to the sale of Combat Tourniquets. (R. pp. 63-74, Compl., *passim*.) Respondents' Complaint asserts claims for breach of contract, breach of contract accompanied by a fraudulent act, failure to pay compensation

[2] Business court opinions are persuasive, not binding, authority, but 'we are mindful that the Business Court exists solely to hear complex business cases, and as such are respectful of its opinions." *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536 n.2, 640 S.E.2d 740, 742 n.2 (2007).

under S.C. Code Ann. § 39-65-10, unjust enrichment, and conversion. (R. pp. 51-59, *Id*. ¶¶ 30-62.) The Complaint additionally seeks an accounting (R. p. 59, *Id.* ¶¶ 63-66) and declaratory judgment. (R. pp. 60-61, *Id*. at ¶ 74.)

On November 16, 2021, the Appellant submitted a proposed Consent Scheduling Order, which was entered on November 17, 2021. [R. pp.14-17, Consent Sched. Or.]. In that Consent Scheduling Order, the parties expressly provided in Paragraph 4 [R. p. 15]:

> **Contract Ambiguity Motion**: Generally, under South Carolina law, "A court should first consider 'whether, as a matter of law, the contract is ambiguous or unambiguous on its face.'" *World-Wide Rts. Ltd. P'ship v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1992). Any party may move the court at any time for any order construing the ambiguity/non-ambiguity of the Contract by identifying terms and phrases in the Contract that should be considered ambiguous or unambiguous by the Court as a matter of law by way of a motion of partial summary judgment as to contract interpretation.

Both sides availed themselves of this opportunity. On March 18, 2022, Respondents filed their Motion for Partial Summary Judgment as to Unambiguous Material Terms ("Plts. PSJ Mot.").

Business Court Judge, J. Mark Hayes, II ("Business Court Judge Hayes") performed his preliminary mandatory duty to objectively analyze the four corners of the contract. After which he determined the relevant provisions of the long-standing 2005 Agreement were unambiguous. Accordingly, Business Judge Hayes then granted partial summary judgment construing the unambiguous relevant provisions as a matter of law pursuant to the Business Court's duty in any contract interpretation case. ("Bus. Ct. PSJ Or.")[3]

When confronted with the routine purely legal task of unambiguous contract interpretation, the appellate record should essentially be limited to the contract and the orders

[3] "It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) and "[t]he construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

below.[4] Despite this, Appellant floods the record on appeal with thousands of parol/extrinsic pages in an attempt to inject a hint of ambiguity from far outside the four corners and well beyond the execution date of the long-standing 2005 Agreement.[5] This is inappropriate where the appeal relates to the narrow question of whether the four corners of the contract are unambiguous. Apparently, Appellant believes if it can induce Respondents into a competition to muster parol evidence in support of differing subjective current factual interpretations of the contract, then this Court might forget that the issue before it is the narrow question of unambiguousness of the long-standing 2005 Agreement as a matter of law. That Respondents do not rise to the bait on Appellant's attempt to "change the subject" should not be interpreted as an inability to counter-flood the record with an equal amount of irrelevant parol evidence confirming the unambiguous terms of the contract. See e.g., R. pp. 933, 943-53, Plaintiffs' Response in Opposition to Defendant's Supplement to Motion to Reconsider, Clarify, Alter, or Amend Order Granting Plaintiffs' Motion for Partial Summary Judgment, pp. 1, 11-21. Rather it is an effort to keep this appeal focused on the issue on appeal – that the agreement is unambiguous, with regard to the issues in dispute.

---

[4] See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina 76 (2d ed. 2002) ("[a] party must not include any matter in the record on appeal which is not relevant to the appeal."). A cursory review of Appellant's designations show that Appellant has overloaded the record with an irrelevant and distracting data dump in contravention of the goal of the SCACR to eliminate irrelevant matter from the record on appeal. *Id.* at 140 ("[a] primary purpose of SCACR and its procedures for the preparation of briefs and the compiling of the record is to eliminate irrelevant material.… [t]his process should result in smaller records, containing only relevant matters.").

[5] *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (allowing consideration of parol evidence "would be tantamount to permitting a party to convert an unambiguous contract into an ambiguous one based on little more than 'the subjective, after-the-fact meaning one party assigns to it.'"). "The [parol evidence] rule is founded on experience and public policy, created by necessity, and designed to give certainty to a transaction that has been reduced to writing by protecting the parties against the doubtful veracity and uncertain memory of interested witnesses." 11 Williston on Contracts § 33:1 (4th ed.) (Internal citations omitted).

This case has had a tortured procedural history. The Complaint was filed on January 7, 2019. [R. pp. 44-74, Compl.]. On February 7, 2019, Appellant noticed its first removal of this case to the United States District Court for the District of South Carolina. [R. p. 513, 2019 Not. to St. Ct. of Removal]. On February 13, 2019, District Judge Mary Geiger Lewis granted Appellee's Motion to Remand to State Court. [R. p. 3, Remand transfer filed in Bus. Ct. on February 13, 2019]. Two years later, on January 29, 2021, Appellant noticed its second removal of this case to the United States District Court for the of South Carolina. [R. p. 514, 2021 Not. to St. Ct. of Removal]. On September 22, 2021, District Judge Mary Geiger Lewis again remanded this case to state court. [R. pp. 4-13, Second Remand Or.]. In her 2021 remand order, Judge Geiger noted that Appellant's first failed removal attempt was on the basis of diversity jurisdiction, and its second failed removal attempt was on the basis of federal question jurisdiction. [R. pp. 4-5, Second Remand Or. 1-2]. Judge Geiger characterized Appellant's first removal on diversity jurisdiction as "lack[ing] an objectively reasonable basis for seeking removal." [R. p. 11, Second Remand Or. 8]. Judge Geiger characterized the second removal as "improper", though stopping short of concluding that it lacked any objective basis. *Id.*

The September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment and/or the Order denying reconsideration (collectively the "**Order**" or "**Bus. Ct. PSJ Or.**") was not unexpected. In fact, it was called for by the parties in the Consent Scheduling Order, *supra*. Respondents' Motion for Partial Summary Judgment as to Unambiguous Material Terms resulted in the grant of partial summary judgment that is before the court in this appeal. This process also resulted in denying Appellant's requests for summary relief in its favor. To the extent Appellant rehashes its own summary judgment requests in its appellate brief, such references should be ignored as improper. *See e.g. Fay v. Total Quality Logistics, LLC*, 419 S.C.

622, 634, 799 S.E.2d 318, 325 (Ct. App. 2017) ("[t]he denial of summary judgment is not appealable even when accompanied by a proper appeal of the grant of summary judgment on a separate issue"); *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011), *aff'd,* 410 S.C. 346, 764 S.E.2d 912 (2014) ("[b]ecause the circuit court *denied* summary judgment, we are prohibited from reviewing that ruling pursuant to *Olson v. Fac. House of Carolina, Inc.*, 354 S.C. 161, 167–68, 580 S.E.2d 440, 443–44 (2003).").

STANDARD OF REVIEW

"[A]n appellate court reviews the granting of summary judgment under the same standard applied by the trial court." *George v. Fabri*, 345 S.C. 440, 451, 548 S.E.2d 868, 873 n.5 (2001). Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted if "… the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114–15, 410 S.E.2d 537, 545 (1991). "When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt ….'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003).

Here, partial summary judgment was granted as to the unambiguous nature and application of plain and clear long-standing contract provisions. That the at-issue provisions of a contract are unambiguous is determined as a matter of law. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). Similarly, "[t]he construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). In such cases, the standard of review is adjusted to de novo review. "Because this case requires us to answer a question of law[,] … we apply a different standard of review than in the typical fact-based

challenge to summary judgment. … [W]e review this issue de novo." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 600–01, 799 S.E.2d 912, 916 (2017) (emphasis added) (reviewing the enforcement of an unambiguous contract under "the general rule that written contracts must be respected, and effect must be given to their plain terms, prevails" and reversing the court of appeals in order to reinstate summary judgment). See also, *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 567–68, 666 S.E.2d 892, 894 (2008) (noting that "[b]ecause we are called upon to construe the meaning of an unambiguous ordinance, our review does not track the fact-based summary judgment review path."). Appellant erroneously relies on the inapplicable "fact-based summary judgment review path."[6]

De novo review does not require this court to disregard the opinion of the Business Court. As articulated by the Seventh Circuit Court of Appeals with regard to district court opinions:

> Being persuaded by the magistrate judge's reasoning, even after reviewing the case independently, is perfectly consistent with *de novo* review. To illustrate the point, the federal courts of appeals conduct *de novo* review of a wide range of district court decisions. The fact that we read a district court's reasoning before making a decision is not thought to undermine the *de novo* character of that review.

Mendez v. Republic Bank, 725 F.3d 651, 661 (7th Cir. 2013). In this vein, the opinions of the Business Court in North Carolina have been recognized in reported federal opinions. See, e.g., *Madvig v. Gaither*, 461 F. Supp. 2d 398, 404 (W.D.N.C. 2006) ("[t]he court also notes that this

[6] Using the wrong standard allows Appellant to regurgitate irrelevant information, which it does for almost 10 pages in discussing what it calls "counter evidence" and "extrinsic evidence" allegedly supporting "genuine issues of material fact precluding summary judgment." [App. Br. 25-34]. This court should not allow Appellant's statement of the wrong legal standard to distract it away from the task at hand – the *de novo* acknowledgment, as a matter of law, of the unambiguous operative provisions of the long-standing 2005 Agreement.

court finds the opinions of the Business Court to be particularly persuasive on issues concerning North Carolina business laws and practices.").[7]

In conducting the required de novo review, the legal standard is that which applies to the initial legal questions in any contract interpretation case. The South Carolina Supreme Court has long held that in a contract dispute the court must "first look to its language" and, "[w]here a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983) (holding that a real estate agent and agency were entitled to their commission under the unambiguous provisions of an agreement); *see also McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) (holding that unambiguous language "determines the contract's force and effect," and finding appellant's ambiguity argument "a bridge to far", in affirming summary judgment on the unambiguous language); *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917 (2017) (reversing the court of appeals and reinstating summary judgment) ("[w]here an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties *as found within the agreement*.") (emphasis in the original) (internal quotations omitted).

The applicable legal rules for determining the nature and application of the unambiguous operative provisions of the long-standing 2005 Agreement include:

[7] In expanding the South Carolina Business Court, statewide in 2014, Chief Justice Jean H. Toal's order found that the Business Court program has "successfully created an option to litigate complex business, corporate and commercial matters in circuit court." *In re Bus. Ct. Pilot Program*, 410 S.C. 6, 763 S.E.2d 351 (2014).

- "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

- "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning." *Id.*[8]

- "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id*.

- "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Id.*

- "[O]ne may not, by pointing out a single sentence or clause, create an ambiguity." *Id*.

- "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the [contract] as a whole and considering the context and subject matter." *Id.*[9]

- "A proper construction seeks to harmonize the various provisions and a construction which gives meaning to all should be preferred." *Hays v. Adair*, 267 S.C. 291, 296, 227 S.E.2d 665, 667–68 (1976).

- "Interpretation of a contract is governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it." *Rodarte,* 419 S.C. at 603, 799 S.E.2d at 917–18 (emphasis in original) (internal quotations omitted).

It is worth noting that in its own motion for summary judgment, Appellant states that "Contracts should be liberally construed so as to give them effect and carry out the intention of

---

[8] See also, *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 442 (1962) (affirming unambiguous contract nature and application by trial court) ("The parties have the right to make their own contracts, and when such contracts are capable of clear interpretation, the Court's province is confined to the enforcement thereof.").

[9] See also, *Bruce*, 241 S.C. at 160, 127 S.E.2d at 442 ("It is axiomatic that the intent and purport of a written contract or agreement has to be gathered from the contents of the entire agreement and not from any particular clause or provision thereof.").

the parties," quoting *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958). [R. p. 653, Def. Mot. and Memo. for Contract Constr. at 1]. Then in this appeal, Appellant ties itself into a knot trying to parse single words and phrases.

To summarize, partial summary judgment is proper when the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself. *First-Citizens Bank & Tr. Co. v. Conway Nat. Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984). The appropriateness of summarily enforcing unambiguous contract provisions goes back to at least 1823 in the United States. *See Green v. Biddle*, 21 U.S. 1, 89–90, 5 L. Ed. 547 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements") (emphasis added).

STATEMENT OF FACTS

Respondent Daniel P. Cedrone was instrumental in developing the manufacturing and marketing plan for the one-handed Combat Tourniquet that is standard issue for the United States Armed Forces, other military around the world, police, firefighters, emergency medical technicians and others. R. p. 45, Compl. ¶ 1; Response in Opposition to Defendant's Supplement to Motion to Reconsider, Exhibit A, pp. 3-4. According to Appellant, the Combat Tourniquet has decreased the mortality rate due to extreme exsanguination by 85%. [See R. p. 75, Am. Answer ¶ 2].

Poly-Tech is a plastic and metal fabrication manufacturer that also offers engineering services and technical design advice to help inventors design, manufacture and improve their products. R. pp. 46 & 76, Compl. ¶ 4; Am. Answer ¶ 5. In June 2005, Respondent Dan Cedrone,

as president of Poly-Tech executed the 2005 Agreement with Appellant Composite Resources, Inc. establishing, in relevant part, a commission structure for Combat Tourniquets; and a vendor relationship with the respect to certain raw materials. [R. p. 75, Am. Answer ¶ 3, admitting to the 2005 Agreement; see also R. pp. 74 & 540, 2005 Agreement, Compl. Ex. A. p. 11, which is attached to Plts. PSJ Mot. as Ex. A]. Poly-Tech's effort was responsible for over $500,000,000 in sales by Composite Resources throughout the relationship (from 2005 to August 31, 2018). [R. p. 517, MPSJ, March 18, 2022, p.3, Compl., ¶ 2]. Poly-Tech's effort continues to result in millions of dollars in Combat Tourniquet sales by Appellant. [R. p. 77, Am. Answer ¶ 25 (admitting that "Composite is preparing for a substantial increase in its sales of Combat Tourniquets."]

Respondent Dan Cedrone had a pre-existing business relationship with Appellant Composite Resources and introduced Composite Resources to the Combat Tourniquet intellectual property owner, Mark Esposito, and his company Phil Durango L.L.C. [See R. p. 76, Am. Answer ¶¶ 11-12]. Respondents convinced Mark Esposito to use Composite Resources to assemble and mass-produce the Combat Tourniquet. Recognizing the tremendous long-term potential of the tourniquet project, the parties agreed to a special compensation program, and memorialized their intention through a special provision in Annex C of the restated sales representative agreement (2005 Agreement). Therein, Composite Resources agreed to a special compensation program to compensate Respondents for all sales of the Combat Tourniquet by Composite Resources and to compensate Respondents for sourcing raw materials for use in the Combat Tourniquet, and that this compensation would continue even after the termination of Poly-Tech as a sales representative. These changes were included in a new contract, the 2005

Agreement. [See R. pp. 44-74, Compl. Ex. A p. 11 [R. p. 74]; see also R. p. 48, Compl. ¶ 15 and R. pp. 75-76, Am. Answer ¶¶ 3, 13 & 15].

The Combat Tourniquets were subject to "special" provisions found in Annex C, Section C of the Contract, page 11 of 11 ("special commission provisions"), including, *inter alia*, that Respondents are to receive a commission of $1.75 per Combat Tourniquet sold by Composite Resources, irrespective of whether Poly-Tech serves as the Sales Representative or not, with said commissions "to continue [even] if for any reason the regular contract is discontinued." [See R. p. 74, 2005 Agreement, page 11]. The operative provisions relevant to this appeal are set forth on the following page.

[SPACE INTENTIONALLY LEFT BLANK]

COMPOSITERESOURCES

C. The following special accounts are exceptions to the above stated commission rate and are paid individually as described below.

1. GraviGate Products

17% on All GraviGate, GraviBar & Gravi-T Products sold.

Commission for this product is to continue at 10% if for any reason the regular contract is discontinued and paid to the estate of Daniel P. Cedrone for as long as the product line continues.

2. Phil Durango L.L.C.

A Commission rate of $1.75 per tourniquet sold.

All Pre-sewn "bases" purchased from Poly-Tech @ $1.75 ea.

Raw materials to be purchased from Poly-tech:
Aplix 500 @ cost + $1.12 per yard
Aplix Hook 800 1" PSA @ cost + $0.51 per yard
Aplix Loop 800 1" No PSA @ cost + $0.163 per yard

The Company may at any time elect to manufacture in house procured services from Poly-Tech. The Company may elect at any time to procure products from vendors other than Poly-Tech. If the Company chooses to do so with any products or services currently rendered by or purchased from Poly-Tech Industrial, the commission rate or profit margin on remaining items will be adjusted so that overall profits will be maintained.

Commission for this account is to continue if for any reason the regular contract is discontinued and paid to the estate of Daniel P. Cedrone for as long as project continues.

Within the special commission provision for the Combat Tourniquet, Respondent Dan Cedrone is identified by name with intended third-party beneficiary rights and remunerations. Specifically, the tourniquet special account provisions provide, in relevant part, that:

> a. That Poly-Tech is to receive a commission of $1.75 per Combat Tourniquet sold by Composite Resources, irrespective of whether Poly-Tech serves as the Sales Representative or not; and
>
> b. A guarantee that if Composite Resources obtains services or products from other vendors, the commission rate and profit margin on remaining items will be adjusted so that Poly-Tech receives the same "overall profits" as if it provided all the services and products related to the Combat Tourniquets.[10]

Id.

These special account remunerations, durable commissions, and vendor profit guarantees were "to continue [even] if for any reason the regular contract is discontinued." In addition, after the death of Respondent Dan Cedrone, the special account remunerations, durable commissions, and profit guarantees are to be paid to his estate for as long as Composite Resources continues to be involved in the manufacturing and sale of Combat Tourniquets.

Effective beginning in March 2017, Composite Resources unilaterally, and over the objections of Respondents, reduced the commission rate paid to Poly-Tech on sales to North American Rescue ("**NAR**"), one of the major purchasers of Combat Tourniquets, by $0.625/tourniquet. On June 26, 2018, Composite Resources notified Poly-Tech of its intent to terminate pursuant to Section IX of the regular provisions, which allowed for termination of the continuing sales representative relationship (but not the post-termination Combat Tourniquet commissions), without cause upon sixty (60) days written notice. [See R. p. 77, Amended Answer ¶ 23 (admitting allegation of Compl. ¶ 27 [R. p. 51), and R. p. 541, copy of the

[10] Specifically, "$1.12 per yard" of "Aplix 500" material, "$0.51 per yard" of 1 inch wide "Aplix Hook 800" and "$0.163 per yard" of 1 inch wide "Aplix Loop 800" purchased by Composite Resources.

Termination Letter, Plts. PSJ Mot. Ex. B]. In terminating the regular sales representative relationship, Composite Resources' president, Jonathan Bennett, acknowledged the parties' co-partnership over decades by leveraging synergies and complementary capabilities that inured to their "mutual prosperity." Mr. Bennett then noted he was forcing a "sunset" of this mutual prosperity, at Composite Resources' convenience because Composite Resources "has created internal marketing and sales departments" and no longer has a need for Poly-Tech's services.

Appellant inappropriately used the termination of the sales relationship to repudiate Appeallant's obligation to pay commission/profit payments for ongoing Combat Tourniquet sales ("if for any reason the regular contract is discontinued." R. p. 74, Compl. Ex. A, p. 11.) Notably, the Termination Letter does not state that Poly-Tech stopped earning the commissions in 2014. To the contrary, Appellant, in the Termination Letter promised to pay commissions and vendor payments through August 2018. Despite increasing sales, Appellant stopped making Combat Tourniquet commission and vendor payments to Poly-Tech as of August 31, 2018. [R. p. 77, Am. Answer ¶ 24].

Appellant's flooding of the record with irrelevant factual information in this purely legal appeal includes filing improper factual information gathered after the summary judgment hearing and after filing the motion for reconsideration. The Motion for Reconsideration was filed on October 10, 2022. On November 15, 2022, Appellant filed a "supplement" (i.e., second and untimely motion for reconsideration) including after the fact deposition testimony from November 2, 2022. [See Appellant's Designation of Matters ¶ 11.][11] Appellant never filed a motion under Rule 56(f), SCRCP to be allowed to take any deposition before partial summary

[11] Respondents filed an opposition memorandum to the Appellant's November 15 filing on November 22, 2022, R. pp. 933-974 (Plaintiffs' Response in Opposition to Defendant's Supplement to Motion to Reconsider and Exhibit A).

judgment was rendered. In light of the extent of the record created by Appellant, it seems appropriate to include the following brief parallel *dicta* in Respondents' statement of facts. The testimony of the Operations Director, who was Composite Resources' representative in drafting the 2005 Agreement, testified:

> Q. Did you consider it a forever thing?
> A. I considered it to be as long as the tourniquets were in production.
> Q. Okay. As long as Composite Resources is making tourniquets Poly-Tech would get the commission?
> A. Yes.
> Q. And negotiating and finalizing the 2005 agreement was that your intent?
> A. Yes.
> Q. And was that Composite's intent?
> A. I believe it was Composite's intent.
> Q. Okay. And you were the operation director at the time?
> A. Yes.
> Q. And you had -- did you have authority on behalf of Composite to negotiate that agreement?
> A. Yes.
> Q. And under this agreement there is no way for Composite to sell Poly-Tech's products and not pay Poly-Tech the commission, right?
> A. Correct.

See R. pp. 542-545, deposition excerpt of Lisa Bennett, Plts. PSJ Mot. Ex. C. Although Jonathan Bennett signed the Contract in this case, Lisa Bennett's authority to negotiate and enter into contracts on behalf of Composite Resources is conceded by Appellant. For example, in a formal corporate act, Jonathan Bennett, as Composite Resources sole director, "ratifies, approves and adopts said actions and agreements taken and executed on behalf of the Corporation by its Officers," expressly including Lisa Bennett.[12] Thus, even if Appellant Composite Resources can articulate a hypothetical ambiguity, summary judgment would still have been appropriate because there still would be no material fact in dispute and Plaintiffs' would be entitled to this

[12] See, R. p. 546, Plts. PSJ Mot., Ex. D (Composite Resources, Inc. Written Consent to Informal Action of the Sole Director).

partial summary judgment as a matter of law. *see, e.g., Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113 (4th Cir. 2019). In *Sprint Nextel*, the Fourth Circuit held that summary judgment is appropriate where an alleged ambiguity can be resolved by extrinsic evidence, stating, "[e]ven where a court ... determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis" 938 F.3d at 131 (emphasis added).

Finally, Composite Resources continued, and continues, to sell/distribute Combat Tourniquets after the termination of the sales representation portions of the Contract and substantially increased its sales of Combat Tourniquets since it stopped paying Respondents their commissions. [See R. p. 77, Am. Answer ¶ 25, admitting allegations of Compl., ¶ 29 (R. p. 51)].

Composite Resources admitted the following facts relevant to this Appeal:

a. ***Exhibit A, is a genuine copy of the June 1, 2005 Sales Representative Agreement.*** (R. p. 547, Plts. PSJ Mot., Ex. E (RTAs-Genuineness No. 1).

Composite Resources also provided the following interrogatory answer:

> **INTERROGATORY NO. 10:** Identify and describe the nature and operational terms of any agreements or modifications between Composite and Poly-Tech and/or Cedrone from 2000 forward in time, including the Agreement, dated June 1, 2005, at issue in this case, and state who negotiated and drafted those agreements and state how and why each such term of any such agreement impacts, if at all, the obligations and benefits of the Agreement in this case.
>
> **ANSWER**: CRI objects to this interrogatory on the basis that it seeks information that is not relevant to the issues in this dispute. **The June 1, 2005 agreement sets forth "the nature and operational terms" between the parties.** …. (R. p. 565, Plts. PSJ Mot., Ex. G).

ARGUMENT

Nothing in the Business Court's September 29, 2022 Order Granting Plaintiffs' Motion for Partial Summary Judgment or the Order denying reconsideration (collectively the "**Order**" or "**Bus. Ct. PSJ Or.**") is controversial. That a contract must first be interpreted as a matter of law by the trial court is a fundamental staple of American commercial jurisprudence, as sound as the rule of law itself (which uses a similar standard in the interpretation of statutes). For example, the United States Supreme Court observed in *Travelers Indem. Co. v. Bailey*:

> If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, see 11 R. Lord, Williston on Contracts § 30:4 (4th ed.1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms. This is all the Bankruptcy Court did.

557 U.S. 137, 150–51, 129 S. Ct. 2195, 2204, 174 L. Ed. 2d 99 (2009). The Order is also not unexpected. On November 16, 2021, Appellant submitted a proposed Consent Scheduling Order, which expressly provided "…under South Carolina law, [a] court should first consider whether, as a matter of law, the contract is ambiguous or unambiguous on its face. Any party may move the court at any time for any order construing the ambiguity/non-ambiguity of the Contract … as a matter of law by way of a motion of partial summary judgment as to contract interpretation." (internal citation omitted). [R. p. 15, Consent Sched. Or. ¶ 4].

The Order under appeal focused on two tasks required as a matter of law: (1) determination that the long-standing 2005 Agreement is unambiguous regarding the operative provision at issue in the litigation; and (2) application of those unambiguous terms of the agreement. Sections I and II of the argument below will address the issues properly before the court under this appeal. Section III will address the inappropriate red-herrings interjected by

Appellant, such as the mounds of extrinsic information regarding another product that did not even exist until more than a decade after the execution of the 2005 Agreement.

I. Business Court Judge Hayes correctly determined that the operable provisions of the long-standing 2005 Sales Representative Agreement at issue are unambiguous.

To establish a breach of contract, a plaintiff need only establish the existence of a contract, a breach of the duty imposed upon defendant under the contract, and resulting damages. Appellant has admitted the 2005 Agreement was executed and "speaks for itself." [R. p. 75, Am. Answer ¶ 3]. The provision that was breached simply provides for a "[c]ommission rate of $1.75 per tourniquet sold" and raw material sourcing payment, with the payments to continue "for as long as the project continues" even if the contract terminated or if Dan Cedrone were to pass away before the project ended. See R. p. 74, 2005 Agreement, p. 11. Specifically, the tourniquet special provisions provide for:

- Poly-Tech to receive a commission of $1.75 per Combat Tourniquet sold by Composite Resources, irrespective of whether Poly-Tech serves as the Sales Representative or not; and

- Poly-Tech to receive cost plus profit margin payments for sourcing certain raw materials, with a guarantee that if Composite Resources obtains services or products from other vendors, the commission rate or profit margin on remaining items will be adjusted so that Poly-Tech receives the same "overall profits" as if it provided all the services and products related to the Combat Tourniquets.

Id. These special remunerations, continuing commissions, and profit guarantees were "to continue [even] if for any reason the regular contract is discontinued."

As a matter of law, partial summary judgment should be affirmed. On June 28, 2019, Appellant responded to Requests for Admission and admitted the following facts, to which it is conclusively bound:

- ***Exhibit A, is a genuine copy of the June 1, 2005 Sales Representative Agreement.***

- ***The June 1, 2005 Sales Representative Agreement attached to the Complaint is the most recent written agreement executed between Poly-Tech Industrial and Composite Resources, Inc. which governs or governed the rights and obligations of Poly-Tech with regard to Combat Application Tourniquets under the special account identified with Phil Durango, LLC***.;

[R. pp. 547 & 551, Plts. PSJ Mot., Ex. E (Composite's Answers to Poly-Tech's First Set of Requests Admit].

On July 28, 2019, Composite Resources answered Poly-Tech's First Set of Interrogatories [See R. pp. 564-568, Plts. PSJ Mot. Ex., G]. When asked to "[i]dentify and describe the nature and operational terms of any agreements or modifications between Composite Resources and Poly-Tech and/or Cedrone from 2000 forward in time, including the Agreement, dated June 1, 2005, at issue in this case", Composite Resources answered that the 2005 Agreement "sets forth 'the nature and operational terms.'" [See R. p. 565, Plts. Mot. PSJ, Ex. G, Interrogatory Answer #10 at 4]. Therefore, Composite Resources should be barred from attempting to state other facts to try and create a false factual issue to vacate partial summary judgment.

Appellant hinges its entire appeal on the happenstance of the caption "Phil Durango, L.L.C." as the heading on Page 11 of the 2005 Agreement under which the continuing tourniquet product commissions, and profit obligations are set forth. Phil Durango, LLC was merely the initial name for the product rights holder for the Combat Tourniquet. [R. pp. 674, 678-680, May 18, 2002 Suppl Memo, 5-7, citing USPTO Office Combat Application Tourniquet Trademark index: (https://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:xua51x.5.2)].

Under the rules for contract construction, a court interprets terms as of the time of the contract and against the background of the entire agreement and its general purpose. In looking at the broader contract, subsequent maneuvers such as buying the intellectual property from Phil

Durango, LLC and moving the project under a different stand-alone subsidiary, does not change the fact that the Combat Tourniquet production "project continues." (which is the general purpose of this subsection of the long-standing 2005 Agreement). The appropriateness of construing the words "Phil Durango, LLC" as the Product rights holder for Combat Tourniquets is validated by the absurdity Composite Resources' position. Under Composite Resources' rationale, it can shirk the obligations it accepted in order to become involved in the project by becoming more deeply involved in the project. Moreover, in determining the intent of the parties here from reviewing the whole agreement, Annex B's express focus on "***all*** the Products the Company [Composite Resources] handles" is insightful. [R. p. 72, 2005 Agreement, Annex B, Products, p. 9]. It is undisputed that the Combat Tourniquets are still among the products "handled" by Appellant, and that the production/sale of Combat Tourniquets has continued unabated.[13] This does not change the general purpose of these provisions of the 2005 Agreement -- as set forth in the commission formula for GraviGate products, and in the commission formula for the Combat Tourniquet products – that payments continue even after the sales relationship is discontinued pursuant to the express special exception on Page 11. This is strongly and expressly punctuated by the fact that the 2005 Agreement literally calls for payments to continue after the death of Poly-Tech's principal, Dan Cedrone, if the project of selling Combat Tourniquets is ongoing. ("… and paid to the estate of Daniel P. Cedrone for as long as the project continues."). [R. p. 74, 2005 Agreement, p. 11].

Another applicable rule of contract construction is that the same provision should be applied consistently across the same subject matter. Composite Resources' failure to be

[13] Accepting Appellant's argument would be equivalent to cancelling all the season ticket holder's rights because the Washington D.C. Football Team changed its name to the Washington Commanders and is now under new ownership.

consistent is another reason to discard its attempts to generate material ambiguity. For example, after the name Phil Durango was no longer associated with the project, Composite Resources argues that there were no more compensable sales (despite its ever-increasing Combat Tourniquet sales rate). However, this Phil Durango LLC/Combat Tourniquet special subsection, (2005 Agreement, page 11) also covers the manufacturing (not just sales) of the Combat Tourniquets. Specifically, Poly-Tech is the raw materials supplier for the manufacturing of all the Combat Tourniquets regardless of how they are ultimately sold. ("Raw materials to be purchased from Polytech: …") *Id.* at 11. Internal consistency for this subsection of the 2005 Agreement does not support Appellant's suggested interpretation. This self-contradiction is further revealed by reviewing the Combat Tourniquet subsection in conjunction with the other special subsection in Section C of Annex C, related to "GraviGate Products". Under this subsection, the heading refers to "GraviGate Products", but the body of this subsection includes, in addition, GraviBar and Gravi-T Products. This subsection also provides for the commission payments to continue "if for any reason the regular contract is discontinued and paid to the estate of Daniel P Cedrone for as long as the product line continues." To accept Appellant's position would necessarily mean that if the GraviGate Products (mentioned in the subsection heading) were discontinued, then Composite Resources could continue manufacturing and selling the GraviBar and Gravi-T Products without paying Poly-Tech its commissions. Such an interpretation should be rejected as a matter of law. Finally, Appellant's self-serving fixation with the subsection caption is inconsistent with the common neutralization of captions and headings in contracts and statutes generally. See, e.g., S.C. Code Ann. § 2-13-175 (a "caption which immediately follows the section number of any section of the Code of Laws … must not be used to construe the section more broadly or narrowly than the text of the section would indicate.").

Similarly, the use of the word "account" in the 2005 Agreement also does not drive the analysis to the conclusion Appellant seeks. This is especially true in light of the surrounding context expressly requiring "Commission for this product is to continue … as long as the product line continues" and "Commission for this account is to continue … as long as the project continues." [R. p. 74, 2005 Agreement Annex C, Section C, p. 11]. For example, the use of the word "this" in conjunction with account ("this account… is to continue… for as long as the project continues") also requires the consideration of the surrounding language.[14] In construing these provisions in light of the whole contract and its discernable purpose, payments are unambiguously tied to the continuation of the product line and the continuation of the project. The owner of product-rights and the manufacturing/sale of products are necessarily interconnected. So, whether the product is known by reference to the owner, or the owner is known by reference to the product is legally irrelevant. If the owner of the intellectual property that controls the continuation of the project evolves, a different name may be associated with the product, but if sales of the products continue (whether GraviGate or tourniquets), then payments are to continue according to the plain language of the long-standing 2005 Agreement as a whole and according to the general purpose apparent therein.

Appellant's approach of finely parsing single words or phrases was poignantly rejected with reference to the Restatement (Second) of Contracts, by the West Virginia Supreme Court in the case of *Fraternal Ord. of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712 (1996) (concerning the interpretation of wage and benefit agreement). There the court held:

[14] Virtually every motion filed in any litigation follows the title with "hereinafter this motion" (emphasis added). Subsequent references to "this motion" are not references simply to the title, but are references to the substance of the entire motion.

> The defendants contended … that the concluding language "effective the first day of the fiscal year beginning immediately after execution of this agreement" is sufficient to limit the pay increase to one year because it speaks only to one year and not "years." This argument has the shrill ring of desperation. The defendants' mental gymnastics are indeed nimble, but an accepted canon of construction forbids the balkanization of contracts for interpretive purposes. *See Restatement (Second) of Contracts* § 202 cmt. d at 88 (1981) (explaining that "[w]here the whole can be read to give significance to each part, that reading is preferred"). Here, when the phrase "effective the first day of the fiscal year beginning immediately after execution of this agreement" is read in the full context of the sentence, the language is not ambiguous at all. …
>
> The defendants have presented us with an artful reading of the agreement, but that reading belies the plain meaning of the contract as a whole. The agreement is clear, and lengthy judicial proceedings do not make it any clearer.

Id. at 103, S.E.2d at 718. This is in accord with South Carolina law. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (affirming denial of specific performance) ("[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("one may not, by pointing out a single sentence or clause, create an ambiguity").

An axiom in the study of law is that "hard facts make bad law." *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271 (11th Cir. 2005). Although this Business Court case does not present the kind of "hard facts" that legal limitations in a personal injury case might, this court should resist being swept away by the injection of unrelated points by Appellant in the analysis of the unambiguous contractual obligations. Earlier this year, the South Carolina Supreme Court reiterated this caveat with regard to unambiguous interpretation of the State uninsured motorist statute in *Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 886 S.E.2d 196 (2023) (reversing the Court of Appeals and finding language unambiguous), where it stated:

> We decline the invitation to rewrite the statute or construe it in a manner manifestly at odds with its plain meaning. … For the courts to set about to

> [change the requirements of the UM statute themselves] would inevitably lead to the establishment of a mischievous precedent, and to great uncertainty and confusion in the determination of future cases of a similar nature. It is needless to describe the effects of such a condition of things in order to appreciate the necessity of avoiding it. (internal citation and quotation marks omitted)).
>
> This case presents a straightforward question of the correct interpretation of the UM statute … . our holding today arguably does not comport with equity and one's sense of fairness. We state the obvious: we are a court, not a legislative body. We are thus constrained by our judicial role to interpret the law as written and not to create exceptions to plainly-worded statutes. That is the province of the legislature alone, and a boundary we do not cross, even in sympathetic situations such as this.

439 S.C. at 96-97, 886 S.E.2d at 204 (2023).

Cases from outside of South Carolina are not binding on this court, but they may be persuasive. Often the more they are on all fours with the case at hand, the more insightful. Under that measure, the case of *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752 (S.D.N.Y. 2012) is very instructive in that it addresses essentially identical issues. In *Reyes*, the federal court had before it a contract that required the payment of commissions for an additional seven years after the termination of the sales representative agreement. Plaintiff moved for partial summary judgment seeking declaration of entitlement to post-termination commission payments under terms of contract and that employer breached those terms. 840 F. Supp. 2d at 753-54. In *Reyes*, a "separate section" of the agreement "provided that if the contract were 'terminated for any reason whatsoever … commissions will be paid to [Reyes] pursuant to Section 2(a)(i) above for a period of seven (7) years from the date of such termination." *Id*.

The Court noted in its decision that:

> The Employment Agreement's provisions regarding the payment of commissions are clear and unambiguous. [One paragraph] governs the payment of commissions while Reyes is employed by [defendant]. *See* Employment Agreement [ ]. Paragraph 4(c) of the Employment Agreement governs the payment of commissions in the event Reyes's employment were to terminate, and provides

> that [defendant] must pay him the same commissions … for seven years from the termination date, unless it terminates him for certain wrongdoing.

Reyes, 840 F. Supp. 2d at 755. The federal court rejected defendant's argument that termination ended the obligation, noting that:

> Paragraph ¶ 4(c), by contrast, serves a different purpose to set forth the compensation Reyes was entitled to receive in the event the employment relationship terminated. The fact that these commissions were to be paid post-termination, however, is not inconsistent with [defendant]'s obligation to pay Reyes certain defined salary and commissions "only" while Reyes was employed. Indeed, the independent purpose and function of ¶ 4(c) are rendered all the more obvious because … ¶ 4(c) ties the amount of the post-termination commissions to the very amounts that would have been due to Reyes [ ] had he remained an employee.

Reyes, 840 F. Supp. 2d at 756. Adding that, "[a]ccepting [defendant]'s interpretation, however, requires a strained—indeed, almost nonsensical—reading of the contract and violates the cardinal rule that a contract should not be read to render any provision superfluous." *Id*.

II. Business Court Judge Hayes correctly interpreted the unambiguous operable provisions of the long-standing 2005 Sales Representative Agreement, which requires commissions and vendor related payments be made on the sale of any and all Combat Tourniquets, as, in fact, requiring commissions and vendor related payments be paid by Appellant on its sales of Combat Tourniquets during and after the sales representative relationship.

Having laid out the first mandate before the Business Court, i.e., the "question of law for the court [as to] whether the language of a contract is ambiguous,"[15] this court must consider the second mandate, i.e., Business Judge Hayes's construction and application of the unambiguous terms of the 2005 Agreement. *Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366–677, 858 S.E.2d 407, 410 (2021) (answering certified question from USCD-SC) (noting "[w]here [a] contract's language is clear and unambiguous, the language alone determines the contract's

[15] *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001).

force and effect." (emphasis added); *Milliken & Co. v. Morin*, 399 S.C. 23, 36, 731 S.E.2d 288, 295 (2012) (stating that when a contract is unambiguous, the appellate *court must apply* the contract's plain language) (emphasis added); *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C. 575, 582, 808 S.E.2d 831, 835 (Ct. App. 2017) ("[w]hen the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's *force and effect*") (emphasis added) (internal citation omitted); *Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co.*, 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (affirming summary judgment) ("[t]he construction *and enforcement* of an unambiguous contract is a question of law *for the court*, and thus can be properly disposed of at summary judgment.") (emphasis added).

This is not a particularly difficult analysis when, as here, the contact is straightforward, and the Business Court's construction follows the straightforward language verbatim. Again, the federal district court opinion in *Reyes* is instructive here. After finding the sales representative employment agreement plainly required the continued payment of commissions after termination, the federal court noted that the defendant did not dispute that it failed to pay Reyes for the amounts owing and entered "partial summary judgment on the issue of [defendant's] breach." *Reyes*, 840 F. Supp. 2d at 758. Although the fact of post-termination non-payment is undisputed in the instant case, it technically is a "fact" outside the four corners of the contract, and Business Judge Hayes did not go as far as the federal court in *Reyes* in entering summary judgment as to breach. Instead, Judge Hayes limited his partial summary judgment to construing and determining the unambiguous obligation, which, if unfulfilled without legal excuse, may ultimately result in a breach/damages determination at a later proceeding or at trial. In *Southern Recycling, LLC v. Gibbs Int'l, Inc.,* No. 7:13-CV-3125-BHH, 2016 WL 1258402 (D.S.C. Mar. 31, 2016), District Judge Hendricks, entered a summary judgment order on similar terms.

Specifically, concluding, "[t]hus, the Court finds, as a matter of law, that pursuant to the terms of the purchase contract, [Defendant] was obligated to deliver the copper wire in containers to the Port of Manila, Philippines and, if [Defendant] failed to satisfy this obligation, [Defendant] bore the risk of loss."

In this case and for the purposes of the Motion for Partial Summary Judgment, the relevant Contract provision simply provides for "A Commission rate of $1.75 per tourniquet sold" and express raw material vendor payments to continue "for as long as the project continues" even if Dan Cedrone passes away before Composite Resources ends the project. Business Judge Hayes's partial summary judgment order concludes by simply confirming that this plain language from the contract between the parties creates obligations as unambiguously stated in the long-standing 2005 Agreement. This was done in faithful fulfillment of the mandatory requirement to construe the nature and application of an unambiguous contract as a matter of law.

III. Appellant's attempt to argue its damages case within the confines of this restricted interlocutory appeal of a legally based grant of partial summary judgment should be rejected.

Appellant lays out its Statement of Issues along four lines. In none of the stated issues does Appellant directly counter the Business Court's partial summary judgment conclusion that, within the confines of the four corners of the long-standing 2005 Agreement, the operative terms are unambiguous, and call for Appellant to pay commissions and vendor payments for the Combat Tourniquets manufactured and sold by Appellant. In each statement, Appellant has to interject extrinsic, parol and/or post contracting considerations. Appellant pivots away from the long-standing 2005 Agreement because it has already conceded that the 2005 Agreement, itself, "sets forth the 'nature and operational terms' between the parties" and that the 2005 Agreement "sets forth Polytech's rights and obligations." [See Statement of Facts, *supra*, p. 20]. Appellant

also pivots away from the Order by falsely reading into the Order unexpressed mandates (e.g., that the Order strikes Appellants counterclaims) in order to attack these "strawmen."

A. Post-contract project evolution extrinsic evidence is irrelevant.

Appellant first reaches beyond the contact to claim that some after-the-fact extrinsic customer development overrides the uncontested unambiguous language within the four corners of the 2005 Agreement. (Statement of issues Number 1). Not even Appellant itself believes this. If the obligation to pay commissions evaporated in 2014 when Appellant increased its control over the project from exclusive licensee to formal owner of the intellectual property (i.e., became more deeply involved in the project), then why did Appellant continue to pay commissions throughout the termination notice period through August 2018? [App. Br. 3 (Statement of the Case)] That is, if in June 2018 when Appellant sent the termination letter it believed all payments since 2014 were unnecessary, then why did appellant find it necessary to make the payments for months after sending the termination letter in June 2018? It was because Composite Resources knew it had a current obligation to pay the commissions and vendor payments, which it acknowledged by the act of continuing to pay them during the 2018 notice period. Now, faced with the obvious reality that Annex C, Page 11, of the 2005 Agreement expressly supplanted the general termination provision, Appellant argues to this court that it does not matter because Appellant did not even have to make the notice period payments. But it does matter. It shows that when "living the agreement", as opposed to "litigating the agreement", Appellant acknowledged the continuing duty to pay commissions and vendor payments on each Combat Tourniquet sold, regardless of the technicality of whether Appellant had the exclusive license or title to the intellectual property. By way of analogy, although when the leaseholder buys the leased property the leasehold merges into the ownership title, the leaseholder's pre-existing landscaping contract

with Acme Co. does not evaporate just because the leaseholder elevated its status in the property from lessee to owner.

B. Parallel *dicta* does not impact the Business Court's four corner's legal determination.

Next, Appellant complains about extrinsic evidence that parallels, in *dicta*, the Business Court's four corners determination. That the Appellant's former officer, who negotiated the 2005 Agreement testified consistent with the clear, plain and legally unambiguous provisions does not make the 2005 Agreement any less unambiguous. In addition, that another route, applicable at another time leads to the same destination does not impact the fact that this route, appropriate (in fact, mandated) at this time leads to the destination set forth in the partial summary judgment. Appellant's argument here may be sincere, but it fails to address the issue on appeal and should be disregarded.

C. The Partial Summary Judgment Order did not, *de facto*, strike affirmative defense or counterclaims.

In its third Issue/Argument, Appellant argues that if fact intensive affirmative defenses exist, a court may not interpret the nature of an unambiguous agreement. That is completely unfounded. The Business Court entered "partial" summary judgment as the meaning the long-standing 2005 Agreement. Defenses or counterclaims related to the meaning of the 2005 Agreement were squarely addressed in that they cannot invade the four corners of an unambiguous agreement. Any other affirmative defenses or counterclaims were not determined and have nothing to do with the partial summary judgment being appealed. For example, if the Respondents committed a material prior breach of the 2005 Agreement such that Appellant's should be relieved of its obligations under the contract, that is in no way affected by this partial summary judgment ruling defining that unambiguous obligation. Appellant makes this an issue for the improper purpose of taking the court on a tour of cherry-picked factual discovery in hopes

of leading the court away from the requirement to conduct a simple de novo review of Business Judge Hayes's unambiguous determinations as a matter of law.

For example, whether ultimately the dollar amount of a final judgment on damages for past and future commissions is a mathematical calculation based on $1.75/tourniquet (per contract obligation) or $1.42/tourniquet is irrelevant here. The Order merely confirms that the plain and unambiguous language of the long-standing 2005 Agreement is that Appellant obligated itself in 2005 by entering into the 2005 Agreement to pay $1.75/tourniquet up to today and into the future. That there might be some extra-contractual reasons that the ultimate liability/damages/judgment is mathematically different is not a basis to challenge this Order. The non-precedential case of *Southern Recycling, LLC v. Gibbs Int'l, Inc.*, No. 7:13-CV-3125-BHH, 2016 WL 1258402 (D.S.C. Mar. 31, 2016) is instructive on the issue of the clear distinction between a contract obligation and ultimate damage liability. In *Southern Recycling,* the court granted partial summary judgment after determining that the defendant was "obligated" under the unambiguous terms of contract to deliver the goods to the port. *Id*. at *2. Subsequently, defendant filed a motion for reconsideration (and to amend defenses) arguing that the terms of the contract should be defined by subsequent action (different delivery process) as opposed to the express wording used in the written document. *Id*. In denying the motion, the district court noted that "[w]hile these points may support Defendant's argument that Plaintiffs failed in their duty to mitigate damages, that is not before the Court at this time." *Id.* That is, it is not relevant to the unambiguous meaning of the contract terms. In the same way, Appellant misconstrues "obligation" under the 2005 Agreement as affecting damage liability or striking of counterclaims in the lawsuit. Appellant does this for the purpose of arguing that the Order goes too far, but, in fact, this ploy falls short of justifying reversing the Business Court Judge's well-reasoned Order.

In the factually similar case of *Moss v. Porter Bros.*, 292 S.C. 444, 357 S.E.2d 25 (Ct. App. 1987) (affirming partial summary judgment as to contractual liability for commissions in a sales agreement), a salesman brought an action against his former employer for breach of a sales commission agreement. The court granted the salesman summary judgment on issue of liability based on the unambiguous language of the contract. On appeal, the Court of Appeals held that, the salesman's unambiguous rights under the contract were not affected by the later course of conduct between the parties regarding the practice of paying commissions. *Id*. at 447. ("[t]he trial court expressly rejected the notion that anything in the affidavits submitted by Porter Brothers 'can be used to change the clear terms of the [employment] contract.'"). The Court of Appeals agreed with this conclusion "because [the terms] are unambiguous and thus cannot be varied or explained by evidence of custom or usage." *Id*. at 448; s*ee also Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 598 (4th Cir. 2004) (in applying South Carolina law, the Fourth Circuit refused to "look to the course of dealing between the parties" in "defining the parties' obligations under the [ ] Agreement.").

Nevertheless, Appellant twice cites *Monster Daddy, LLC v. Monster Cable Prod., Inc.*, 483 F. App'x 831, 835 (4th Cir. 2012) [App. Br. 27 & 36] to suggest that its alleged affirmative defense of material prior breach precludes partial summary judgment as the unambiguous legal meaning of the long-standing 2005 Agreement. The use of the *Monster Daddy* opinion for this purpose is very misleading. The present appeal deals with the existence of the obligation, not the extent of damages associated with that obligation. On this point, i.e., the point of this appeal, the Fourth Circuit is in complete accord with Business Judge Hayes, and stated as much up front in the *Monster Daddy* opinion reference by the Appellant. Specifically, the Fourth Circuit stated:

> We begin by addressing [appellant]'s primary argument, that the district court was precluded from enforcing the forum selection clause of the settlement agreement,

> given the unresolved dispute regarding whether Monster Daddy committed a prior material breach of the agreement. In effect, [appellant] argues that so long as there remains an unresolved allegation that one party committed a prior material breach of a settlement agreement, the other provisions of that settlement agreement are unenforceable. We disagree with this argument.

Id. at 835 (emphasis added). Based on Appellants own legal citations, the Business Court's grant of partial summary judgment as the unambiguous meaning and effect of the operative provisions of the 2005 Agreement should be affirmed.

D. The 2005 Agreement is not indefinite.

Finally, Appellant suggests in Statement of Issue No. 4 that the 2005 Agreement is indefinite for want of a triggering event. This is at best disingenuous in light of Appellant's *express* recitation of *the* triggering event only eight lines earlier in Statement of Issue No. 1 – "for so long as CRI makes and sells the product." In the Order the Business Court Judge Hayes very clearly stated: "[e]ven though the term "perpetual" has been used to describe this provision of the Contract, the provision is not perpetual because it terminates once the product stops being produced and sold." R. pp. 37-38, Bus. Ct. PSJ Or. 17-18. At this point Appellant turns from subverting the 2005 Agreement to subverting Business Judge Hayes's Order by suggesting this language means "if CRI stopped making and selling [Combat] Tourniquets for a month - or even a year - the provision would be "*terminated*." App. Br. 39. This is nonsense. It is quite possible that if the Israeli-Gaza War and Ukraine War ended, the U.S. Military and its allies would have such a stockpile of battlefield Combat Tourniquets that they could go "for a month – or even a year" without purchasing Combat Tourniquets; but how Appellant could read Business Judge Hayes's Order as suggesting that if the current wars ended the 2005 Agreement would terminate is beyond comprehension. When a book sells out before the publisher republishes it, the author does not lose his royalty rights under the new publication just because the publisher stopped

selling the book "for a month - or even a year." This year, the Beatles release a song that John Lennon wrote and began recording in the 1970s. That recording of the song stopped for 50 years does not impact the right to receive royalties because of the gap in time. The mere suggestion that Composite Resources could use Business Judge Hayes's Order to justify a temporary artificial hiatus in selling Combat Tourniquets, "for a month – even a year" as a way to outsmart the unambiguous language of the long-standing 2005 Agreement shows how watertight the 2005 Agreement is.

In his Order, Business Judge Hayes also stated:

> "the Contract's terms set forth in the four corners of the Contract support entry of partial summary judgment establishing that the Contract obligates Defendant to pay Plaintiff's the Tourniquet Commissions and Raw Material Profit payments at the rate set forth on page 11 of the Contract during the term of the Contract, beginning in June 2005, extending beyond the termination of the sales representative relationship on August 31, 2018, and lasting for so long as the Combat Tourniquets are produced and sold."

R. p. 33, Bus. Ct. PSJ Or. at 13 (emphasis added).

Appellant cites to the unreported non-precedential case of *Tower St. Cap. Mgmt. Inc. v. KnightBrook Ins. Co.*, No. 3:17-CV-01781-JFA, 2020 WL 13065453 (D.S.C. June 15, 2020) to identify a general disfavor of perpetual contracts. In that case, District Court Judge Joseph Anderson expressly noted that his decision turns on the agreement not having a "life of the program" term, which the "parties specifically deleted" in drafting the contract. *Id.* at *7. This stands in stark contrast to the present case where the 2005 Agreement expressly states, "for as long as the project continues," and shows that Judge Anderson's thinking on this subject is the exact same as the Business Court's findings in the Order at hand. Another issue in the *Tower St. Cap. Mgmt*. case, was the lack of a "mechanism by which [defendant]'s payments to [plaintiff]

ever end." That is not in issue in the present litigation as the mechanism to stop paying a commission on the sale of goods is self-evident – stop selling the related goods.

District Judge Anderson and Business Court Judge Hayes are also in line with federal circuit courts of appeals that have addressed this issue. In *Lamoureux v. MPSC, Inc.*, 849 F.3d 737 (8th Cir. 2017) (affirming summary judgment) defendant was contractually obligated to pay fees "as long as" it processed meat. In finding the contract not indefinite, the Eighth Circuit noted that "[t]he choice to process meat, which triggers the contractual obligation to pay, rests entirely at [defendant]'s discretion."). *Id*. at 742. The Eighth Circuit further noted that:

> Here, we see an alternative investment agreement where the start-up retains all of its equity but instead offers a stream of royalty payments based on the product's use. If [plaintiff] had taken an equity stake in the company, [defendant] surely could not come back some 25 years later, after it had achieved great success, and erase [plaintiff]'s equity stake. Likewise, we see no reason to presume that a stream of royalty payments, paid out as part of an investment agreement, can be terminated except under the terms of that agreement.

Id. at 741.[16]

The Second Circuit Court of Appeals addressed this issue in affirming summary judgment in a case involving continuing payments related to the mouthwash product Listerine in *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) ("*Listerine*") (wherein the district court found the continuing

[16] *Accord Muller Enterprises, Inc. v. Gerber*, 178 Neb. 463, 133 N.W.2d 913, 919 (1965) ("[h]is only obligation is to pay Muller 10 percent for as long as he himself performs the contract. If it becomes unprofitable or onerous, all he has to do is quit. … [t]o hold otherwise would be to permit the receipt of continuous benefits under a contract without payment of the corresponding obligation."); *Pumphrey v. Pelton*, 250 Md. 662, 665, 245 A.2d 301, 303 (1968) ("[t]he fact that Clause 19 provides that it terminates upon the expiration of the patents and copyrights saves it from the rule that a contract may not exist in perpetuity"); *Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc.*, 80 Cal. App. 4th 1, 7, 94 Cal. Rptr. 2d 829, 833 (2000) (noting that California has long recognized that a contract may avoid indefinites when "tied not to the calendar but to the conduct of the contracting parties.").

payment contract to be plain, unambiguous and not indefinite, and continuing payments required). In *Listerine*, the manufacturer was obligated to pay its product specification source and his heirs six dollars on each gross of Listerine manufactured or sold. *Id.* at 659. After approximately seventy-five years of making payments, the manufacturer wanted out of its payment obligation and brought a declaratory judgment action to have the agreement declared indefinite. *Id.* at 655. In rejecting the manufacture's attempt to avoid its obligations, the *Listerine* court noted that the general disfavor for "perpetual" contracts did not apply because from the face of the agreement it was plainly not perpetual or indefinite in as much as the manufacturer could always "terminate its obligation to pay whenever in good faith it desires to cease the manufacture or sale of Listerine." *Id.* at 662–63. On this issue, the court cautioned that:

> [t]he word 'perpetuity' is often applied very loosely to contractual obligations. Indiscriminate application of the term serves only to confuse. The mere fact that an obligation under a contract may continue for a very long time is no reason in itself for declaring the contract to exist in perpetuity or for giving it a construction which would do violence to the expressed intent of the parties.

Id., at 661. The *Listerine* court echoed the Eighth Circuit's observation in *Lamoureux* that unexpected financial success is no excuse for terminating the agreement by noting that "[b]ecause the business has prospered far beyond anticipations affords no basis for changing the terms of the contract the parties agreed upon when the volume was small." *Listerine*, 178 F. Supp. at 666. The *Listerine* court also disregarded the manufacture's after-the-fact effort to redefine the termination event to the disclosure of the Listerine formula, especially in light of the fact that the manufacture continued to make the payments for years after this event. *Id.* at 667 ("[t]he courts will follow the interpretation placed upon the contract by the parties themselves as shown by their acts and conduct."]. Similarly, here, Appellant has tried to invent an after-the-fact termination event in 2014, but continued to make the required payments through the end of

the notice of termination period in August 2018. This court should follow the *Listerine* court in giving no credence to the manufacturer's litigation position that it did not, itself, ever follow during the parties' relationship.

A more fundamental obstacle to Appellant's argument here is that it was the basis of its own motion for summary judgment, which was denied. In its May 13, 2022 Motion and Memorandum for Contract Construction, Appellant argued for adoption of a construction of the 2005 Agreement as unenforceable based on indefiniteness of the term. R. p. 661, Def. Mot. and Memo. for Contract Constr. at 9] ("… indefinite and must be deemed unenforceable"). In the Order at issue in this appeal, Business Court Judge Hayes ruled that "the relief sought in [Appellant's] Motion and Memorandum for Contract Construction filed on May 13, 2022 is hereby DENIED."[R. p. 39, Bus. Ct. PSJ Or. 19]. In raising it here, Appellant is attempting to obtain appellate review of a non-reviewable denial of summary judgment. *Bank of New York v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) (noting it is well-settled that an order denying summary judgment is never reviewable on appeal) (*citing Olson v. Fac. House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). This is emblematic of Appellant's entire approach to this appeal to make it about anything other than a four corners review of Business Court Judge Hayes's straightforward Order interpreting the nature and application of the unambiguous operative provisions of the long-standing 2005 Agreement.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the Business Court's entry of Partial Summary Judgment and such other and further relief as this Court deems just and proper.

Respectfully submitted,

RIMÔN P.C.

/s/ Keith D. Munson
Keith D. Munson
S.C. Bar No. 13400
Rimôn Law
220 North Main Street, Suite 500
Greenville, SC 29601
Tel: (864) 420-3426
Fax: (864) 249-7111
keith.munson@rimonlaw.com

WOMBLE BOND DICKINSON
Michael Montecalvo
Womble Bond Dickinson (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
Tel: (336) 721-3770
michael.montecalvo@wbd-us.com

Admitted Pro Hac Vice

Attorneys for Respondents Daniel P. Cedrone and Poly-Tech Industrial, Inc.

January 18, 2024

RECEIVED
Jan 18 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No. 2019-CP-46-00051

Appellate Case No. 2023-001103

Daniel P. Cedrone and Poly-Tech Industrial, Inc.,……Respondents,

v.

Composite Resources, Inc.,……Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s/ Keith D. Munson

Keith D. Munson (S.C. Bar No. 13400)
RIMÔN P.C.
220 North Main Street, Suite 500
Greenville, SC 29601
(864) 249-7111
keith.munson@rimonlaw.com

WOMBLE BOND DICKINSON
Michael Montecalvo
Womble Bond Dickinson (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
(336) 721-3770
michael.montecalvo@wbd-us.com
Admitted Pro Hac Vice

Attorneys for Respondents
Daniel P. Cedrone and
Poly-Tech Industrial, Inc.

January 18, 2024