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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4857 (S.C. Ct. App. filed July 27, 2011)

Stevens Aviation, Inc.....Petitioner,

v.

DynCorp International LLC ..... Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Plaintiff/Petitioner Stevens Aviation, Inc. ("Stevens") moved for, supported and obtained partial summary judgment that it was the service provider for specific maintenance tasks for certain U.S. Army aircraft under a subcontract to a government prime contract. DynCorp International LLC ("DynCorp") appealed entry of summary judgment in favor of Stevens. The Court of Appeals vacated summary judgment in favor of Stevens ***and*** then *sua sponte* entered summary judgment in favor of DynCorp. As shown in Steven's Brief filed before this Court, the Court of Appeals committed multiple errors resulting in its "granting" summary judgment to DynCorp when no such motion was ever made to the trial court, and the Court of Appeals' summary judgment order was based on grounds never argued nor addressed by either party in the underlying proceeding. Stevens successfully petitioned this Court for a writ of certiorari in order to review the Court of Appeals' decision in Stevens Aviation, Inc. v. DynCorp International LLC, 394 S.C. 300, 715 S.E.2d 655 (Ct.App.2011). This Court should reverse the Court of Appeals' opinion as it conflicts with decisions of this Court as well as the federal law which DynCorp concedes governs this case.

At the outset, Stevens takes the opportunity to address several misleading statements and mischaracterizations in DynCorp's Statement of the Case and Facts, under the notion that "the thirteenth chime of the clock casts doubt on all that came before." In purporting to explain the Teaming Agreement, DynCorp wrongly states that its "sole purpose" was to procure the Prime Contract from the government. (DynCorp Brief, p. 2 (citing Hearing Transcript dated October 21, 2009, p. 8; R. 102; App. p. 102).) However, at this same page in the hearing transcript, Judge McIntosh expressly disagrees with DynCorp's counsel and finds the Teaming Agreement as setting forth "what their rules

and obligations are [under the contract]" and that the Teaming Agreement "shows the parties' intent." (Id.) As set forth in detail in Stevens' Brief, the Teaming Agreement established Stevens as the exclusive party to perform the aviation maintenance services specified therein and in the Subcontract, which expressly incorporated the Teaming Agreement. (Stevens Brief, pp. 3-4.)

Later, when purportedly "summarizing" the motions argued before the trial court in the underlying proceeding, DynCorp claims (without reference to the hearing transcript) that Stevens failed to argue that the Teaming Agreement had been incorporated into the Subcontract. (DynCorp Brief, p. 5.) This is simply incorrect and contradicts multiple instances in the transcript in which incorporation was supported. For example, responding to a question from the court on this precise issue, Stevens' counsel states:

> Well, Your Honor, I believe [the Subcontract] does [identify which parts of the Teaming Agreement are incorporated]. It says to the extent the Teaming Agreement outlines the roles and responsibility of party as prime and subcontractor. . . .
>
> And why do we have that language there? We have that language because we're incorporating into this document the parts of the Teaming Agreement that identified the roles and responsibilities of the party.

(Hearing Transcript dated October 21, 2009, p. 17-18; R. 111-12; App. p. 111-12.) Later, Stevens' counsel again argues that the Teaming Agreement had been incorporated into the Subcontract, stating:

> It is our position that the roles and responsibilities outlined in the Teaming Agreement are part and parcel of the [S]ubcontract agreement at a minimal . . . .

(Id., p. 35; R. 129; App. p. 129.) In fact, the interrelationship between the Teaming Agreement and the Subcontract is evidenced as far back as the Complaint. (*See, e.g.*, Complaint, ¶¶ 6-8; R. 031-32; App. pp. 031-32.)

Finally, DynCorp claims to have argued its current interpretation of the Subcontract – that it is an "invoice-based contract" – before the trial court. (DynCorp Brief, p. 6.) DynCorp references the hearing transcript for this assertion. (Hearing Transcript dated October 21, 2009, p. 47; R. 141; App. p. 141.) However, a review of the reference to the Record reveals an entire page of DynCorp's counsel stammering on in vague terms about the premature stage of the proceeding and his belief that a lot of "material" will be subject to discovery. DynCorp may be correct that it is critical to its position to have made the "invoice-based contract" argument to the trial court, but that fact cannot be created after the fact by a reference to a random page in the Record.

With regard to the substantive portions of DynCorp's Brief, Stevens summarizes its response herein as follows:

- Argument section I explains how the Court of Appeals improperly granted summary judgment to DynCorp, corresponding to section III of DynCorp's Brief.
- Argument section II explains how the Court of Appeals erred in finding that the Subcontract failed as a matter of law to create an exclusive relationship, corresponding to section II of DynCorp's Brief.
- Argument section III explains how the Court of Appeals erred in concluding that the Subcontract did not incorporate the Teaming Agreement, corresponding to section I of DynCorp's Brief.
- Finally, Argument section IV explains how DynCorp's argument that Stevens is barred from arguing that the Subcontract is ambiguous is without merit, corresponding to section IV of DynCorp's Brief.

ARGUMENT

I. The Court Of Appeals Improperly Granted Summary Judgment To DynCorp Because DynCorp Never Moved For Summary Judgment And The Grounds For The Decision Were Never Presented To The Trial Court Or The Court of Appeals.

In its Brief, Stevens argued that the Court of Appeals erred in "granting" summary judgment to DynCorp. In response, DynCorp: (1) contends that ***appellate*** courts have the inherent authority to grant summary judgment to a non-moving party; (2) suggests that it did address the reasoning of the Court of Appeals' decision at the trial court level; and (3) argues that principles of judicial economy can trump the requirements of Rule 56, SCRCP. (DynCorp Brief, pp. 29-36.) DynCorp is legally and factually wrong on each of its contentions.

A. The Court Of Appeals' Granting Of Summary Judgment To A Party That Never Moved For Summary Judgment Was Improper.

DynCorp first argues that it is "irrelevant" that it did not move for summary judgment because an appellate court has authority to grant relief never requested by a party and never presented to or considered by the trial court below.[1] (DynCorp Brief, pp. 30-32.) DynCorp's reference to foreign authorities (id., pp. 30-31) does not trump the law of this state, which holds that appellate courts should not address issues that were not

[1]It is worth noting that the trial court's order denying DynCorp's Motion for Judgment on the Pleadings was not an appealable order. *See* Rose v. Thrash, 291 S.C. 459, 354 S.E.2d 378 (1987). DynCorp does not attempt to reconcile how the Court of Appeals did not have jurisdiction to review the denial of its Motion for Judgment on the Pleadings, but, by ***not*** appealing that order, the Court of Appeals ***did have*** jurisdiction to grant judgment to DynCorp as a matter of law. Under South Carolina jurisprudence, it did not. *See* Fuller v. Blanchard, 358 S.C. 536, 548, 595 S.E.2d 831, 837 (Ct.App.2004) (Kittredge, J., concurring) ("I believe we have neither the authority to reconsider the denial of Appellant's summary judgment motion nor the authority to grant him judgment as a matter of law.").

presented to, and ruled on, by the trial court. *See, e.g.*, Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (appellate courts "do not speak unless spoken to and do not answer questions they are not asked"); Thomasko v. Poole, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2000) ("An appellate court cannot address an issue unless first raised by the appellant and ruled on by the trial judge.").

The facts presented in the South Carolina decisions cited by DynCorp differ starkly from those in the present matter. (DynCorp Brief, pp. 31-32.) In Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 705 S.E.2d 432 (2011), the parties had filed cross motions for summary judgment — not motions to dismiss or for judgment on the pleadings — at the trial court level ***specifically addressing the relevant issues well before they were elevated to the appellate court.*** Thus, the relief granted by the appellate court was specifically requested by a party in the underlying proceeding, such that the opposing party had an opportunity to address the issues involved and put forward evidence in opposition to the same. This is simply not the case here, where DynCorp never requested that the trial court enter summary judgment in its favor on the bases relied upon by the Court of Appeals, and Stevens was never given any notice or the right to respond with evidence, affidavits and arguments, as required by Rule 56, SCRCP.[2]

Moreover, DynCorp concedes that even its broad inherent authority argument applies only "***when the reasoning for the grant of summary judgment has been addressed by the moving party.***" (DynCorp Brief, pp. 30-31 (emphasis added).) But

[2] Each of the other cases cited by DynCorp (DynCorp Brief, p. 32) are similarly factually inapposite, where the parties affirmatively moved for summary judgment and the issues before the appellate court had been fully and properly raised, addressed, briefed and argued in the proceedings below, consistent with Rule 56, SCRCP. In addition, most of these cases are declaratory judgment cases seeking judicial interpretation of statutes.

here, the bases for the Court of Appeals' decision — that a "whereas clause" does not count, and that use of the word "direction" in two sentences of the Subcontract mandated that it was not an "enforceable requirements contract" — were never raised or addressed by any party in either court below. Because DynCorp never suggested that the words "at the direction of" in Section C.1 of the Subcontract were conclusive of, or even affected, the interpretation of the Subcontract, Stevens had no reason or occasion to address it.[3] Thus, the *sua sponte* granting of summary judgment to DynCorp, not requested by DynCorp at the trial court level, was improper and in error.

B. Stevens Never Had An Opportunity To Argue The Issue And Reasoning That Ultimately Formed The Bases Of The Court Of Appeals' Decision.

Next, DynCorp erroneously asserts that Stevens fully argued the issue and reasoning that ultimately formed the basis of the Court of Appeals' grant of partial summary judgment, specifically the issue of exclusivity. (DynCorp Brief, pp. 33-35.) DynCorp is wrong. Stevens never had an opportunity to defend against a motion never made by DynCorp. The law does not require litigants to spar with shadows. Indeed, as already discussed, the lynchpin of the Court of Appeals' decision was the "direction" language in Section C.1, but neither party ever argued in any court that it had any bearing on the exclusivity issue.

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[3]To add insult to injury, the Court of Appeals noted that some of the items of work in Section C.1 did not have the "direction" language, but held that it could "not consider the argument" because Stevens never argued that the items were "divisible." *See* Stevens, 394 S.C. at 311 n.4, 715 S.E.2d at 661 n.4. Stevens, of course, never addressed the issue because DynCorp never contended that Section C.1 had any bearing on whether the Subcontract created an exclusive relationship — or created an "invoice-based contract" as they ***now*** contend.

It is important to note that DynCorp's position on this issue has changed dramatically during the course of this appeal. In its Final Brief before the Court of Appeals, DynCorp repeatedly argued it was premature to grant summary judgment, acknowledging that "much discovery was still needed on this issue of exclusivity under the Subcontract." (DynCorp Ct.App. Final Brief, pp. 10-11.) DynCorp went on to criticize the trial court for granting summary judgment where "the record had not been fully developed on the issue of exclusivity" and where "no discovery had occurred." To do so "failed to afford DynCorp any opportunity to conduct discovery[,] . . . constitut[ing] error." Of course, now that summary judgment has been granted in its favor, DynCorp conveniently adopts the opposite position in this appeal (as to issues that were not only never developed, they were never raised in a summary judgment motion).

C. DynCorp's Argument That Judicial Economy Empowers the Court To Grant Relief Never Requested By A Party, The Reasoning For Which Was Never Addressed In The Underlying Proceeding, Is Without Merit.

Finally, DynCorp argues that principles of judicial economy trump the requirements of Rule 56, SCRCP, and empowered the Court of Appeals to grant summary judgment to DynCorp even though it never moved for such relief. (DynCorp Brief, pp. 35-36.) As an initial matter, none of the cases cited by DynCorp support its position. *See* Hollins v. Richland Sch. Dist., 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993) (in reversing grant of directed verdict and remanding for a new trial, appellate court indicated that because the parties fully briefed the issue it could decide, in first instance, that evidence of record was sufficient to create jury question on issue of exercise of "slight care"); S. Bell Tel & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (***affirming*** judgment, in part, because the constitutional ground was

"fully briefed" and thus "judicial economy" weighed in favor of deciding the issue); City of Aiken v. Cole, 289 S.C. 239, 242, 345 S.E.2d 760, 762 (Ct.App.1986) (***affirming*** judgment under the doctrine that an appellate court can "affirm a judgment on any ground appearing in the record"). Moreover, the basis for the court's decision in each case was fully briefed by the parties, whereas in this case, for example, no party ever contended in any court that the language "at the direction of" in Section C.1 rendered the Subcontract non-exclusive.

When the Court of Appeals granted summary judgment to DynCorp, it ignored the requirements of Rule 56, SCRCP, and "answer[ed] questions [that it was] not asked." Kennedy, 349 S.C. at 533, 564 S.E.2d at 323. This error is both procedural and substantive, and the Court of Appeals' decision should be reversed.

II. The Court Of Appeals Erred In Failing To Consider The Subcontract As A Whole And Its Interpretation Rendered Numerous Provisions Superfluous And Meaningless.

In its Brief, Stevens argued the Court of Appeals erred in finding that the Subcontract failed to create an exclusive relationship as a matter of law and improperly rendered the Subcontract meaningless. In response, DynCorp (1) suggests that the Subcontract could have meaning and enforceability for work actually performed under a purchase order if DynCorp felt inclined to issue a purchase order in its sole and unfettered discretion; and (2) attempts to explain away the numerous grounds supporting exclusivity. (DynCorp Brief, pp. 18-29.) DynCorp fails to present a compelling argument on both fronts.

A. The Interpretation Of The Subcontract By The Court Of Appeals Rendered Numerous Provisions Superfluous And Meaningless, And Failed To Consider The Entirety Of The Subcontract In Interpreting The Same.

DynCorp attempts to breathe life into the various provisions of the Subcontract that are rendered completely meaningless by the Court of Appeals' interpretation by arguing that they have meaning once DynCorp issues a "purchase order." (DynCorp Brief, pp. 19, 20, 24.) That DynCorp admits that it would have to issue "a purchase order" to create any rights or obligation between the parties proves that the Court of Appeals' interpretation rendered the Subcontract a complete nullity. In other words, DynCorp admits that, under the Court of Appeals' interpretation, until and unless it chooses in its sole discretion to issue another contract (a purchase order), the Subcontract entitles Stevens to nothing. As numerous courts have found, this is the quintessential example of an illusory contract, *i.e.*, a contract that bestows no rights on one party and creates no obligations on the other.

As has been repeatedly recognized, federal law (which DynCorp concedes governs the Subcontract) provides for three different types of contracts for supplies and services: those for a definite quantity; those for an indefinite quantity; and those for requirements. Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 515 (1993); Torncello v. United States, 231 Ct. Cl. 20, 28, 681 F.2d 756, 761 (1982); Mason v. United States, 222 Ct. Cl. 436, 444, 615 F.2d 1343, 1347 (1980). There are differences in these three types of contracts:

> With contracts for a definite quantity, the promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that courts require for enforceability. With indefinite quantities contracts, however, the buyer's promise specifically is

> uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term. Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts clearly are enforceable on that basis. The entitlement of the seller to all of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated.

Torncello, 681 F.2d at 761-62 (citations omitted); *see also* A-Transport Northwest Co. v. United States, 27 Fed. Cl. 206, 214 (1993), aff'd, 36 F.3d 1576 (1994) (noting that "it is true" that a contract which does not require "any ascertainable quantity is unenforceable for lack of consideration and mutuality").

In other words, to be an enforceable definite or indefinite quantity contract there must be a numerical quantity term, and to be an enforceable requirements contract the parties agreement on quantity must be "all." But the Subcontract, as interpreted by the Court of Appeals, does not meet the criteria necessary for any of these contracts. As the parties readily acknowledge, there is no numerical "quantity" term in the Subcontract. And, under the Court of Appeals' interpretation, the Subcontract does not provide for "all." Thus, there would be nothing to enforce because such a Subcontract would be illusory and lack consideration. *See* Crown Laundry, 29 Fed. Cl. at 517; Torncello, 681 F.2d at 761-62; Mason, 222 Ct. Cl. at 443 n.5, 615 F.2d at 1346 n.5. Such an interpretation violates the cardinal rules of contract construction that a court: (1) must favor an interpretation that saves the contract instead of voiding it; and (2) should assume the parties intended that a binding contract be formed. *See, e.g.*, Crown Laundry, 29 Fed.

Cl. at 515-17, Torncello, 681 F.2d at 761 (citations omitted); *see also* A-Transport, 27 Fed. Cl. at 214 ("[I]f a contract is susceptible of interpretation as either an indefinite quantities without minimum agreement or as one for requirements, the court should uphold it as of the requirements type.).

DynCorp suggests that the Torncello decision, and those arguments advanced by Stevens in reliance on the same, have "since been rejected" by the court in Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302 (Fed. Cir. 1998). (DynCorp Brief, p. 20-21 n.9.) This, however, is a flawed reading of the decision, which does not support the arguments advanced by DynCorp in its Brief. In Coyle's Pest Control, the contract at issue "called itself an indefinite quantities contract" but "without a minimum quantity clause," and, importantly, the record lacked any evidence to support a finding that the agreement was a requirements contract, entitling the seller to all of the buyer's requirements. Id. at 1305-06. The only evidence put forward by the plaintiff in support of its argument that the agreement was a requirements contract was presented by affidavit attesting to the plaintiff's "understanding" and "belief" at the time of entering into the agreement. Id. at 1306. Having found no evidence in the agreement supporting the sufficient exclusivity necessary for a requirements contract, the court refused to consider the extrinsic evidence and affirmed the lower court's decision.

Here, unlike in Coyle's Pest Control, numerous provisions of the Subcontract support a finding of exclusivity, such as the termination clause, the definitions section and the automatic renewal provisions. (*See* Stevens Brief, pp. 17-18.) The Court of Appeals acknowledged as such in its decision, admitting that the Subcontract includes language that "suggests exclusivity." Stevens, 394 S.C. at 311, 715 S.E.2d at 661.

However, the court put on the "hat" of a fact finder, disregarded these provisions and elected to focus instead on one isolated section of the Subcontract in reaching its decision. In its Brief, DynCorp attempts to defend the court's "thorough review" of the Subcontract — consisting of a sole paragraph, id. — but does not dispute the fact that there is nothing in the opinion which suggests that the Court of Appeals looked at many other provisions which support exclusivity. (DynCorp Brief, p. 21.) The Court of Appeals' failure to consider these provisions as part of the "whole," and over which the parties argued about at length in their briefs, was error.

B. In Attempting To Explain Away The Numerous Provisions Of The Subcontract That Support A Finding Of Exclusivity, DynCorp Misstates Facts And, At Best, Only Makes A Case That The Subcontract Is Ambiguous.

Next, DynCorp attempts to explain away several of the provisions of the Subcontract raised by Stevens in its Brief that support a finding of exclusivity. (Stevens Brief, pp. 17-18; DynCorp Brief, pp. 24-27.) In doing so, however, DynCorp misstates facts and, at best, lends support to Stevens' contention that the parties' alternative interpretations of the same provisions of the Subcontract support a finding of ambiguity, whereby the interpretation of the Subcontract should have properly been reserved for a jury.

As an example of these misrepresentations, DynCorp attempts to create an issue out of the fact that the term "Aircraft" — defined as "***All*** Army RC/C-12 and UC-35 aircraft covered under the Prime Contract" (Subcontract, Exhibit A to Complaint; R. 48; App. p. 48 (emphasis added)) — is contained within the general definitions portion of the Subcontract. (DynCorp Brief, pp. 24-25.) Without identifying a single term or provision that conflicts with the "Aircraft" definition, DynCorp attempts to disregard it based solely

on the rule of contract interpretation that a general term must yield to a more specific, ***conflicting*** term within an agreement. Without a conflict, however, the general term continues to control and be afforded full meaning within the contract. Simply disagreeing with the effect a general term has on the interpretation of a contract (or on a party's case based on that contract) does not constitute a conflict. Thus, DynCorp's reference to this basic rule of contract interpretation is irrelevant and nothing more than a distraction.

Moreover, DynCorp's alternative interpretations of these provisions only serves to support a finding of ambiguity, as advanced by Stevens in its Brief. (Stevens Brief, pp. 17-20.) Thus, even with the Court of Appeals focusing exclusively on Section C.1 in interpreting the Subcontract (as it did), its findings still conflict with this Court's, and federal court's, precedent that when a contract is susceptible of two or more interpretations, it is ambiguous and its interpretation becomes a question of fact for a jury who can consider extrinsic evidence as to the intent of the contracting parties. *See, e.g.,* Miles v. Miles, 393 S.C. 111, 117-18, 711 S.E.2d 880, 883 (2011); *see also* TEG-Paradigm Environmental, Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006).

Accordingly, the Court of Appeals erred in finding that the Subcontract failed to create an exclusive relationship as a matter of law, and this Court should reverse the lower court's opinion.[4]

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[4] DynCorp argues that Stevens failed to seek certiorari regarding the issue of whether it was entitled to work on the UC-35 aircraft, so that this issue is waived and the Court of Appeals' holding is "law of the case." (DynCorp Brief, pp. 28-29.) Contrary to DynCorp's assertions, however, a party is not required to unfold every issue for appellate consideration down to its most minute subparticle using the terminology preferred by the opposing party in order to prevent an issue (in this case ***dicta***) from becoming "law of the

III. The Court Of Appeals Erred In Concluding That The Subcontract Did Not Incorporate the Teaming Agreement.

In its Brief, Stevens argued that the Court of Appeals erred in failing to give any effect to the provision in the Subcontract referencing the Teaming Agreement merely because that provision was contained within a "whereas" clause. In response, DynCorp contends that (1) the terms of the Subcontract preclude a finding of incorporation; and (2) the Court of Appeals gave proper consideration to the "whereas" clause. (DynCorp Brief, pp. 9-18.) DynCorp is legally and factually wrong on each of its contentions.

A. The Express Terms Of The Subcontract Do Not Prohibit A Finding That The Teaming Agreement Was Incorporated Into The Subcontract.

The disputed "whereas" clause at issue reads as follows:

> WHEREAS, ***the parties entered into a Teaming Agreement ("TA") executed on 16, March, 2000, which identifies the roles and responsibilities of the parties as Prime and Subcontractor*** in a cooperative effort to perform the requirements of U.S. Army Contract DAAH23-00-C-0226 [ ];

(Subcontract, Exhibit A to Complaint; R. 45; App. p. 45 (emphasis added).) To discredit this express incorporation, DynCorp oscillates between dismissing "whereas" clauses generally and giving substantive effect to the very next "whereas" clause, arguing that its integration clause precludes the incorporation of the parties' roles as "Prime and Subcontractor":

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case." Moreover, regardless of the breadth with which a party ***seeks*** certiorari review, this Court hears only those issues it selects in its writ granting certiorari. DynCorp never sought to have anything declared the law of the case in its certiorari filings and we believe this Court is well positioned to interpret the scope of its own writ of certiorari. Stevens correctly sought certiorari on the entire Court of Appeals decision, including, specifically, the lower court's holding that the Subcontract did not create an exclusive relationship.

> WHEREAS, this ***Subcontract*** supercedes all prior written or oral agreements between the parties . . .

(Subcontract, Exhibit A to Complaint; R. 45; App. p. 45 (emphasis added).) This argument, however, ignores the fact that the immediate preceding "whereas" clause in ***this Subcontract*** already incorporates the roles and responsibilities of the parties set forth in the Teaming Agreement, or the subsequent clause in this Subcontract that parties "desire to enter into this Subcontract in furtherance of their objectives as stated in the [Teaming Agreement]." (Id.) The Subcontract, by reference, now includes these provisions of the Teaming Agreement.

Dyncorp then attempts to argue that the term "agreement" within the integration clause necessarily refers to the Teaming Agreement, given that it is the only remaining agreement between the parties other than the Proprietary Data Exchange Agreement. (DynCorp Brief, p. 13.) The purpose of an integration clause is to give effect to the parol evidence rule and "prevent either party from relying on statements or representations made during negotiations." Coal Res., Inc. v. Gulf & W. Indus., Inc., 756 F.2d 443, 447 (6th Cir. 1985). First, the clause is not limited to just written agreements, as it specifies its application to both "written or oral agreements between the parties." (Subcontract, Exhibit A to Complaint; R. 45; App. p. 45.) Second, if the position advanced by DynCorp is correct, the parties would have been expected to specify the Teaming Agreement by name, since, according to DynCorp, it was the only remaining prior agreement of the parties to which the clause could apply. Finally, DynCorp's attempt to change "agreement" to "Teaming Agreement" actually violates the integration clause it seeks to enforce. *See* Coal Res., 756 F.2d at 447 (implying terms into an integration clause defeats its purpose).

Lastly, DynCorp attempts to suggest that internal conflicts between the Subcontract and Teaming Agreement in the termination, renewal, dispute resolution and notice terms bar incorporation of the "roles and responsibilities of the parties as Prime and Subcontractor." (DynCorp Brief, pp. 12 n. 4, 14.) However, contracts often have internal consistency (*e.g.,* "Notwithstanding . . . " or an agreement to extend a contract with a termination date). If the parties do not provide for resolving internal conflict, the law has rules of construction, such as recent trumps prior, to resolve any inconsistencies. Here, the parties included their own standard by expressly providing that "***[a]ny ambiguity, discrepancy, inconsistency or conflict . . . be resolved by applying the most reasonable interpretation under the circumstances, giving full consideration to the intentions of the parties at the time of subcontracting***." (Subcontract, Exhibit A to Complaint; R. 56; App. p. 56 (emphasis added).)

B. The Court Of Appeals' Refusal To Find That The Subcontract Incorporated The Teaming Agreement Because That Provision Was In A "Whereas Clause" Conflicts With State And Federal Law.

In its Brief, Stevens showed that the Court of Appeals' refusal to find that the Subcontract incorporated the Teaming Agreement because that provision was contained in a "whereas clause" conflicts with decisions of the Court of Appeals and federal courts. In response, DynCorp argues that a "whereas clause" cannot trump the operative terms of a contract, and that the provision was not sufficiently "explicit or precise" to incorporate the Teaming Agreement. (DynCorp Brief, pp. 14-16.) Both of DynCorp's contentions are incorrect.

First, while DynCorp argues that a "whereas clause" cannot trump the operative terms of a contract, it fails to identify any terms of the Contract that conflict with the provision incorporating the Teaming Agreement. While not clear, DynCorp appears to

suggest that the Teaming Agreement cannot be incorporated because it shows that the parties intended an exclusive relationship while "the express terms of the Subcontract refuted a finding of exclusivity." (Id., p. 15.) This is a circular argument and confuses the issue of incorporation with the issue of exclusivity.

DynCorp is also incorrect in arguing that the incorporation language is not sufficiently "explicit and precise." In support of this argument, DynCorp, like the Court of Appeals, identifies various obligations of the parties ***under the Teaming Agreement*** that supposedly are inconsistent or inapposite to their obligations under the Subcontract. (Id., pp. 15-16.) But that is not what the Subcontract states. Rather that provision provides:

> WHEREAS, ***the parties entered into a Teaming Agreement ("TA") executed on 16, March, 2000, which identifies the roles and responsibilities of the parties as Prime and Subcontractor*** in a cooperative effort to perform the requirements of U.S. Army Contract DAAH23-00-C-0226 [ ];

(Subcontract, Exhibit A to Complaint; R. 45; App. p. 45 (emphasis added).) (And a subsequent provision provides that the parties "enter this Subcontract in furtherance of their objectives as stated in the [Teaming Agreement] . . . ." (Id.)) This provision explicitly identifies "***the roles and responsibilities of the parties as Prime and Subcontractor*** in a cooperative effort to perform the requirements of [the Prime Contract]." (Id.) In turn, the Teaming Agreement sets forth these "roles and responsibilities of the parties" under the Subcontract in "explicit and precise" language. Attachment B of the Teaming Agreement, under the heading "Contract Effort," sets forth with precision the work that Stevens "shall perform" in the "role" as "Subcontractor." (Teaming Agreement, Exhibit B; R. 151; App. p. 151.) There are no other such "roles

and responsibilities" as subcontractor in the Teaming Agreement, so DynCorp's lengthy contentions regarding alleged inconsistencies are, at best, merely academic. For example, there would simply be no need for anyone to "handpick" some responsibilities of Stevens as subcontractor, but not others.

Accordingly, the Court of Appeals erred in failing to give any effect to the provision in the Subcontract expressly referencing the Teaming Agreement.[5]

IV. Stevens Is Not Barred By Judicial Estoppel From Arguing In The Alternative That If The Contract Is Not Unambiguous In Its Favor Then It Is Ambiguous.

In its Brief, Stevens showed that, even if one were to only focus on Section C.1 of the Subcontract (which the Court of Appeals appeared to do), that section would either create a relationship of exclusivity for some of the work, or, alternatively, render the subcontract ambiguous on the issue of exclusivity. DynCorp argues that this Court should ignore Stevens' argument because it "contradicts" its earlier stated position that the Subcontract is not ambiguous (in Stevens' favor). (DynCorp Brief, pp. 36-37). "Whether a contract is clear or ambiguous in a matter of law." Atlantic Mut. Ins. Co. v. Metron Engr. and Constr. Co., 83 F.3d 897, 901 (7th Cir. 1996). Judicial estoppel does

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[5] DynCorp argues that Stevens failed to seek certiorari of the Court of Appeals' finding of no incorporation. It is not required that a party restate, word-for-word the entirety of an adverse ruling of a lower court in order to perfect an appeal of the same. Rather, the Appellate Court Rules require in a Petition "[t]he questions presented for review, expressed in the terms and circumstances of the case ***but without unnecessary detail.***" Rule 242(d)(2), SCACR (emphasis added). "***A question presented will be deemed to include every subsidiary question fairly comprised herein.***" Id. (emphasis added). Thus, Stevens' appeal of the court's failure to give effect to the provision of the Subcontract referencing the Teaming Agreement is sufficient to cover each and every basis for the ruling. (*See, e.g.,* Petition, pp. 17-18 (where Stevens attacked the decision for disregarding the subject clause merely because it was contained within a "whereas" clause), 18-19 (where Stevens specifically argued that the court's decision ignored critical terms set forth in both the Subcontract and Teaming Agreement as a whole).)

not apply to arguing alternative legal theories. Rather, the "purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2003). Moreover, judicial estoppel requires "(1) two inconsistent positions taken by the same party . . . ; (2) the positions must be taken in the same or related proceedings . . . ; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. Id. at 215-16, 592 S.E.2d at 632.

As with most contract claims, the interpretation of the disputed contract term can be (1) unambiguous in favor of party A, (2) ambiguous, or (3) unambiguous in favor of party B. If the Court forecloses the "unambiguous in favor of party A," then party A's next most consistent legal alternative is "ambiguous." Moreover, that party A and party B stake out the "unambiguous" positions, does not foreclose a court from finding the contract "ambiguous." In Fry Communications, Inc. v. United States, 22 Cl. Ct. 497, 501-05 (Cl. Ct. 1991), a dispute arose over whether a "change" charge under a government contract could be charged for both removing information and then adding information, when these two acts were arguably part of the larger single act of replacing the information with new information. Each party staked out the "unambiguous in its favor" position. Even though the parties' positions in Fry Communications appeared to be mutually exclusive, that did ***not*** bind the court to choosing one of the unambiguous positions. Instead the court found the contract to be ambiguous. Certainly in the subsequent proceeding, the parties were not precluded from arguing their most favorable

interpretation of the ambiguous term merely because they had previously taken the position that the term was unambiguous in their favor.[6]

In addition, a significant aspect of Stevens' argument is not that the Subcontract is alternatively ambiguous, but that in overemphasizing one sentence and grafting qualifying words on unqualified phrases to reach the conclusion that the Subcontract is unambiguous in DynCorp's favor was legal error. More precisely, that Section C.1 of the Subcontract, standing alone, cannot be interpreted as negating a relationship of exclusivity. Stevens has been steadfast on this point and completely consistent in all of its arguments. DynCorp's attempt to erect an artificial wall of judicial estoppel to the full analysis of the issues in this appeal should be disregarded.

CONCLUSION

For the reasons set forth above and in its Brief, Stevens respectfully requests that this Court reverse the Court of Appeals' opinion "granting" summary judgment to DynCorp, as set forth in Stevens, 394 S.C. 300, 715 S.E.2d 655.

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[6] DynCorp's desperate argument on this point highlights its concern that if the Subcontract is interpreted as provided in its provisions (applying "the most reasonable interpretation under the circumstances, giving full consideration to the intentions of the parties at the time of subcontracting" (Subcontract, Exhibit A to Complaint; R. 56; App. p. 56)) and within the *res gesta* of the conduct of the parties before the controversy arose (*see* Fry Communications, 22 Cl. Ct. at 503), even a finding that the contract terms are ambiguous might nevertheless lead to summary judgment in favor of Stevens. *See, e.g.,* Boston Five Cents Sav. Bank v. Sec'y of Dept. of Housing and Urban Dev., 768 F.2d 5, 8 (1st Cir. 1985) (in deciding the meaning of an ambiguous term, a court may conclude that the evidence is "so one-sided that no reasonable person could decide the contrary").

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Dated: October 30, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Opinion No. 4857 (S.C. Ct. App. filed July 27, 2011)

Stevens Aviation, Inc.....Petitioner,

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DynCorp International LLC .....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on October 3RD, 2013, a copy of the attached Petitioner's Reply Brief was served on the following parties by placing a copy of the same in the United States mail, postage prepaid and addressed as follows:

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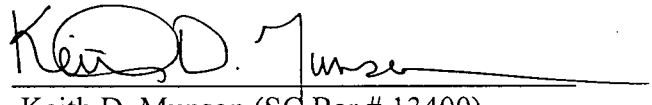
CERTIFICATE OF COUNSEL

The undersigned certifies that this Petitioner's Reply Brief complies with Rule 211(b), SCAR.



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