

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Sealevel Systems, Inc.,)
)
)
Plaintiff,)
vs.)
)
CreatiVasc Medical, Inc., Diaxamed, LLC,)
successor in interest to Brookhaven)
Vascular, Inc., successor in interest to)
Brookhaven Merger Corp. successor in)
interest to CreatiVasc Medical, Inc.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO: 2022-CP-23-01310

**ORDER GRANTING DEFENDANTS’
MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT**

RECEIVED

Aug 15 2025

SC Court of Appeals

The above-captioned action came before the Court for trial on February 10, 2025. At the close of the Plaintiff’s case-in-chief, Defendants moved for a directed verdict as to all causes of action alleged in Plaintiff’s Complaint. That motion was granted in part and denied in part, and the Court allowed Plaintiff’s claim for Breach of Contract against Defendants Creativasc Medical, Inc., Brookhaven Vascular, Inc., Brookhaven Merger Corp. and its claim for Intentional Interference with a Contract against Diaxamed, LLC to be submitted to the jury. It held Plaintiff’s promissory estoppel claim in abeyance pending the outcome of the jury’s consideration of the other claims. After the jury returned verdicts for Plaintiff on both causes of action that were submitted to it on February 13, 2025, Defendants timely moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial under the thirteenth juror doctrine, or, in the alternative, for a new trial absolute, or, in the alternative, for a new trial *nisi remittitur*. A hearing on these Motions was held on May 23, 2025. For the reasons that follow, the Court hereby GRANTS Defendants’ motion for judgment notwithstanding the verdict. The Court likewise DISMISSES Plaintiff’s claim for promissory estoppel based upon the rationale set forth at the

conclusion of this Order.

Standard of Review

“[A] motion for JNOV under Rule 50(b), SCRPC is a renewal of a directed verdict motion.”¹ “A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.”²

“In ruling on motions for [JNOV], the Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions”³ However, viewing reasonable inferences in favor of the nonmoving party “does not authorize submission of speculative, theoretical, and hypothetical views to the jury.”⁴ “A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation.”⁵

A. All of the evidence in the record indicates that the agreement between Sealevel Systems, Inc. and CreatiVasc is unenforceable.

The evidence introduced at trial was undisputed that in approximately 2007, Defendant CreatiVasc Medical, Inc. (“CreatiVasc”) acquired the patent for and began developing the Hemoaccess Valve System (the “System”), an implanted medical device designed to address complications associated with hemodialysis. The System was intended to act as an accessory to an FDA-approved arteriovenous graft—a graft that connects an artery to a vein—which is prone

¹ *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006).

² *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

³ *Strange v. S.C. Dep’t of Highways and Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 400 (1994); *see also Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002) (court must determine whether a verdict for the opposing party “would be reasonably possible under the facts”).

⁴ *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) (citing *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997)).

⁵ *Id.*

to clotting. Because clotting often necessitates surgical intervention to remove blood clots, the System was designed to mitigate this issue. It featured two inflatable balloon valves positioned on either side of the graft to monitor and regulate blood flow, with the goal of significantly reducing the need for such surgeries.

Once implanted, the original, or “Gen 1,” version of the System could only be activated by puncturing the skin with a needle and injecting saline into the balloons to inflate them and flush the graft. After creating a working prototype and conducting clinical trials for the Gen 1 System, CreatiVasc spent several years researching ways to improve the design to enable activation without the use of needles. One potential solution was a magnetically activated saline pump capable of inflating the balloons remotely using a hand-held actuator.

By early 2014, as CreatiVasc was developing a remote activation mechanism for incorporation into a “Gen 2” version of the System, it began searching for a manufacturer to help finalize the circuit board and other electronic components necessary for remote activation. In September 2014, Steve Johnson, then CEO of CreatiVasc, was introduced to Thomas O’Hanlan, Plaintiff Sealevel Systems, Inc.’s (“Sealevel”) Engineering and Creative Director. Although the technology had not yet been fully developed, Sealevel committed to producing and manufacturing an external handheld actuator and internal electronics to work in tandem with magnetic sensors inside the System to control the implanted balloon valves. Both companies were eager to explore the potential of a remote actuator and agreed to collaborate on its development and integration.

On October 28, 2014, Sealevel and CreatiVasc entered into a Customer Supply Agreement (“Supply Agreement” or “Agreement”), under which Sealevel agreed to design and manufacture the motor control and valve monitor electronics (the “Product”) for use in CreatiVasc’s System. Section 1 of the Supply Agreement defined the “Scope” as follows:

Sealevel agrees to design, manufacture, sell and deliver to [CreatiVasc] hardware and software (the “Product”) used in the System’s handheld actuator and implanted balloon pressure monitoring devices in accordance with the specifications set forth in Exhibit A, which is attached hereto and incorporated herein by reference (such specifications, the “Specifications”). Sealevel shall be responsible for procuring all materials associated with the manufacture of the Product, as well as assembling and testing the Product.

(Plaintiff’s Exh. 4, § 3). Under the Supply Agreement, CreatiVasc also agreed that Sealevel would be the “exclusive supplier of the Product” to CreatiVasc once the Gen 2 System went to market, and that CreatiVasc would not “directly or indirectly, purchase or order the Product, or any other good substantially similar to the Product, from any person or entity other than Sealevel.”

(Plaintiff’s Exh. 4, § 1).

However, the Supply Agreement failed to establish key material terms, rendering it unenforceable as a matter of law. Specifically, the Supply Agreement lacked defined specifications, omitted essential terms, and left performance obligations undefined.

As of the date the Agreement was executed, the “Specifications” identified as Exhibit A to the Agreement were still in development and did not yet exist. (Sealevel Depo. 36:8-14). In addition to the “Specifications,” the Supply Agreement also incorporated by reference an Exhibit B (“Purchase Order”), Exhibit C (“Invoice”), and Exhibit D (“Quotation”), none of which existed at the time or were included in the Agreement. (Pl.’s Ex. 4). There was also no agreement on the price of the Product or the number of units of the Product that CreatiVasc had to purchase. Instead, the Supply Agreement contemplated that “the dates and quantities of the Product to be delivered and the current price for the Product” would be specified in separate Purchase Orders. As to the price, the Supply Agreement provided that the “price for the Product will be agreed upon in writing by the Parties and may not be changed except as agreed upon in writing by the Parties.” (Pl.’s Ex. 4, § 3).

The elements required to form an enforceable contract are an offer, acceptance, and valuable consideration.⁶ Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish an enforceable contract, the question becomes one of law.⁷

“In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement.”⁸ “Thus, for a contract to be binding, material terms cannot be left for future agreement.”⁹ “In a contract for services[,] two essential terms are the scope of the work to be performed and the amount of compensation.”¹⁰

Here, the Supply Agreement amounted to nothing more than a fluctuating framework in which the parties agreed to proceed in good faith to attempt to design, manufacture, and sell a product that did not yet exist, under terms to be determined in the future. The Agreement lacked essential terms, including a fixed price of the Product, a minimum purchase obligation for CreatiVasc, or concrete delivery deadlines.

Critically, while the Agreement’s core purpose was for Sealevel to “design, manufacture, sell and deliver” a Product for use in the Gen 2 System, it failed to specify how the Product would be designed, manufactured, or sold—or even what, exactly, CreatiVasc would be purchasing

⁶ *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003).

⁷ *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920).

⁸ *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 647 S.E.2d 488, 492 (S.C. Ct. App. 2007) (citing *Player v. Chandler*, 382 S.E.2d 891, 893 (S.C. 1989)); see also *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007).

⁹ *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986)).

¹⁰ *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

beyond generic references to “hardware and software.” Instead, the Supply Agreement deferred these crucial details to a nonexistent set of “Specifications” that were supposed to define the Product’s design and manufacturing requirements. Similarly, a “Warranty” provision was intended to establish the “Sealevel Standards” for manufacturing the Product in compliance with those “Specifications.” (Pl.’s Ex. 4, § 8). However, neither the “Specifications” nor the “Sealevel Standards” were ever agreed upon or incorporated into the Supply Agreement.

Moreover, fundamental commercial terms—including the price, quantities, delivery dates, and payment terms—remained undefined. The Agreement left these issues to be addressed through future “Purchase Orders,” “Invoices,” “Quotations,” and other written agreements that were never drafted, let alone agreed upon. In short, the Supply Agreement failed to establish a binding contractual framework, instead leaving all essential terms open to future negotiation.

The South Carolina Supreme Court’s decision in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014), is instructive. There, the City of Columbia entered into a “Memorandum of Understanding” with various developers to collaborate on the “design, development, construction and delivery of the Hotel in accordance with the terms of the Development Management Agreement to be finalized between the City or [non-profit corporation] and the Developer.”¹¹ When the City later abandoned the project, the developers sued for breach of contract and equitable relief.

On appeal, the Supreme Court reversed the Court of Appeals’ holding that a genuine issue of material fact existed as to whether the Memorandum of Understanding (“MOU”) constituted a valid and enforceable contract. The Supreme Court held the MOU was too indefinite to be enforceable, noting it failed to specify key terms such as price, the actual design process, and the

¹¹ *Id.* at 581, 762 S.E.2d at 702.

scope of duties, and that it merely contemplated future agreements.¹² The Supreme Court emphasized: “We cannot see how merely stating a forthcoming document will dictate the terms of the ‘design, development, construction and delivery’ does not plainly leave material terms undecided. The whole project *is* the design, development, construction, and delivery of the hotel.”¹³

Similarly, the Supply Agreement in this case purports to “represent the entire agreement between the Parties with respect to the purchase and sale of the Product.” (Pl.’s Ex. 4, § 26). Yet, like the MOU in *Stevens*, it lacks a meeting of the minds on multiple material terms yet to be defined and provides no mechanism for determining them with certainty. In sum, the Supply Agreement merely obligated CreatiVasc, at some undefined future date and at an undetermined price, to purchase an unspecified number of components for a device that was yet to be successfully developed or sold. Under these circumstances, no enforceable contract was formed, and Defendants are entitled to judgment notwithstanding the verdict on Sealevel’s claim for breach of contract as a matter of law.

B. Even if the Supply Agreement were enforceable, there is no evidence in the record that it was breached.

The evidence was undisputed that the System has never been fully developed or sold to anyone. The only way CreatiVasc or any of its successors in interest¹⁴ could have breached the Supply Agreement would have been to sell some version of the Product without purchasing the

¹² *Id.* at 580-81, 762 S.E.2d at 702.

¹³ *Id.*

¹⁴ It was undisputed at trial that the Brookhaven entities (Defendants Brookhaven Vascular, Inc. and Brookhaven Merger Corp. (collectively referred to as “Brookhaven”)) are the successors-in-interest to CreatiVasc.

external wand from Sealevel. There is no evidence that such a transaction ever occurred. To the contrary, multiple witnesses confirmed that no such sale has ever taken place.

Under South Carolina law, “[t]he elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach.”¹⁵ A plaintiff bears the burden of proving each of these elements.¹⁶ Here, there is a complete dearth of evidence establishing breach.

Sealevel’s role as an “exclusive supplier” was always contingent on two critical conditions: (1) Sealevel creating a working Product that could be incorporated into the Gen 2 System, and (2) CreatiVasc actually being able to produce, market, and sell a commercially viable Gen 2 System. Furthermore, even if Sealevel had been able to create a Product that worked seamlessly with the Gen 2 System, nothing in the Supply Agreement *required* CreatiVasc to manufacture, market, and sell the System. Sealevel’s own representative, Tom O’Hanlan, acknowledged this reality, testifying that the Supply Agreement imposed no obligation on CreatiVasc to purchase anything.

The record at trial was undisputed that no version of the System has ever been developed, marketed, or sold. There was also no evidence that CreatiVasc or its successors engaged with any company other than Sealevel to develop or purchase a handheld actuator. O’Hanlan conceded on the witness stand that Sealevel has no evidence that the Product has ever been sold to anyone.

Sealevel also asserted that CreatiVasc/Brookhaven breached the Confidentiality provision in the Supply Agreement. However, it introduced no evidence to substantiate this contention. During Sealevel’s case-in-chief, its counsel asked Steve Johnson what happened to his laptop and

¹⁵*Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

¹⁶*Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

other storage media after his departure from Defendant DiaxaMed, LLC (“DiaxaMed”), the company that employed him for 90 days following DiaxaMed’s purchase of CreatiVasc/Brookhaven’s assets. Johnson testified that he was required to turn these items over to DiaxaMed. However, there was no testimony about what those devices contained, nor was there any other testimony or evidence indicating that CreatiVasc/Brookhaven disclosed Sealevel’s confidential information to anyone. The record is, therefore, entirely devoid of evidence in support of Sealevel’s claim.

C. Sealevel has no evidence of damages.

The only evidence Sealevel presented at trial regarding damages was a single invoice for \$321,540.00, purportedly representing engineering services rendered as of June 13, 2017. (Pl.’s Ex. 26). Despite its admission into evidence, Tom O’Hanlan’s undisputed testimony confirmed that the Supply Agreement contained no provision permitting Sealevel to bill CreatiVasc for research and development expenses. The jury’s verdict against CreatiVasc and the Brookhaven entities for breach of contract matched exactly the amount of Sealevel’s invoice, underscoring the absence of any other evidence of damages.

The Supply Agreement does not contain a liquidated damages provision or any clause assigning a specific monetary value to a breach. (Pl.’s Ex. 4). Instead, Sealevel’s sole contractual remedy in the event of a breach by CreatiVasc is that CreatiVasc must “take delivery of and pay the full price for the remainder of open Purchase Orders (if any).” (Pl.’s Ex. 4, § 12(b)). Similarly, if CreatiVasc were to terminate the Agreement for convenience, it would be required to “take delivery of and pay the full price for the remainder of open Purchase Orders (if any).” (Pl.’s Ex. 4, § 12(b)). Given that no such open Purchase Orders exist, Sealevel’s damages under the express terms of the contract amount to zero.

Under South Carolina law, “[t]he general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.”¹⁷ “The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed.”¹⁸ “The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach.”¹⁹

While lost profits may, in some cases, serve as a measure of damages for breach of contract, they must be established with reasonable certainty. Recovery cannot be based on profits which are conjectural or speculative, though proof with mathematical certainty is not required.²⁰ Here, however, Sealevel introduced no evidence of lost profits. In fact, it was impossible to do so—no unit of the Gen 2 System was ever developed for commercial sale, no unit was ever sold, and CreatiVasc/Brookhaven never derived any benefit from Sealevel’s work on the external actuator.²¹ As courts have long recognized, “[i]t is a well settled rule of law that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto.”²²

O’Hanlan himself admitted that Sealevel’s June 13, 2017 invoice was not a genuine

¹⁷ *Maro v. Lewis*, 389 S.C. 216, 223, 697 S.E.2d 684, 688 (Ct. App. 2010) (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

¹⁸ *Id.* (quoting *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct.App.1996).

¹⁹ *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).

²⁰ *Minter v. GOCT, Inc.*, 473 S.E.2d 67 (S.C. App. 1996).

²¹ *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (“Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.”).

²² *United Merchants & Mfrs. v. S.C. Elec. & Gas Co.*, 113 F. Supp. 257, 261 (W.D.S.C.), *aff’d*, 208 F.2d 685 (4th Cir. 1953) (citation omitted) (emphasis added).

demand for payment but rather an attempt to get CreatiVasc/Brookhaven's attention. The invoice—admitted over Defendants' objection—was nothing more than a retrospective tally of engineering and development time that Sealevel devoted to the project. However, it is undisputed that Sealevel would have incurred these same developmental costs regardless of whether the project was successful or not. The evidence was undisputed that *both* Sealevel and CreatiVasc/Brookhaven expended hundreds of hours trying to develop a product that worked. Sealevel focused on the external actuator component and the internal sensors integration, while CreatiVasc/Brookhaven worked on the internal valves, pump, and balloons.

Sealevel has taken the position that its invoice was some evidence of its “consequential” or “incidental” damages, but this is legally incorrect. Section 36-2-715 of the South Carolina code defines “incidental damages” as:

Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Sealevel put no evidence of incidental damages into the record, and there was no charge to the jury regarding such damages.

Similarly, section 36-2-715 defines “consequential damages” as:

- (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- (b) injury to person or property proximately resulting from any breach of warranty.

There is no evidence of injury to person or property in the record before the Court. Subsection (a) of the definition above has been explained by South Carolina courts as follows: “Consequential damages occasioned by the breach of a contract may be recovered where such damages may reasonably be supposed to have been within the contemplation

of the parties at the time the contract was made.”²³ The only consequential damages contemplated by the parties were lost profits, as Tom O’Hanlan candidly admitted:

Q: But you’d agree with me that [Pl.’s Ex. 4] [doesn’t] contain any provisions that require CreatiVasc or any – any entity . . . standing in CreatiVasc’s shoes to pay Sealevel for its engineering time.

A: I would agree with that as stated, but the contract does provide for the exclusive rights to manufacture the product. So that’s how a lot of companies make their money is **you forego the front-end cost in exchange for the manufacturing rights in anticipation that it’s going to be a high volume, a profitable venture.**

(Depo. of Sealevel Systems, Inc., p. 51, ll. 11-23).²⁴

Accordingly, Sealevel’s damages claim under the Supply Agreement fails as a matter of law.

D. Sealevel’s tortious interference with a contract claim against DiaxaMed lacks evidentiary support.

Sealevel’s claim for tortious interference with contract against DiaxaMed fails for multiple reasons, all of which render the claim legally unsustainable. To succeed in a tortious interference claim, a plaintiff must establish: (1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.²⁵ “[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties.”²⁶

In December 2016, Brian McMurray formed DiaxaMed for the purpose of purchasing the

²³ *Hutson v. Continental Assurance Company*, 269 S.C. 322, 332, 237 S.E.2d 375, 380 (1977), *overruled on other grounds*, *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

²⁴ Tom O’Hanlan was impeached on the stand with this testimony.

²⁵ *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (quoting *Camp v. Springs Mort. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)).

²⁶ *Id.* (alteration in original) (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)).

assets and intellectual property of Brookhaven Vascular, Inc. (CreatiVasc’s successor-in-interest). (McMurray Depo. 31:3-13, 32:9-25; Pl.’s Ex. 14). However, DiaxaMed did not take an assignment or otherwise assume Brookhaven Vascular’s responsibilities under the Supply Agreement between CreatiVasc/Brookhaven and Sealevel. The Supply Agreement remained with Brookhaven Vascular, Inc., which acknowledged at trial that the Agreement had never been terminated.

Upon acquiring CreatiVasc’s assets, DiaxaMed immediately shifted its focus to refining the Gen 1 version of the Hemoaccess Valve System—a *design that predated Sealevel’s involvement* and relied on a needle and subcutaneous port to activate the balloon valves rather than a remote actuator. (McMurray Depo. 31:3-13, 34:9-17, 34:23-35:15, 51:1-16).

The evidence at trial was uncontradicted: DiaxaMed is not currently using and has never used or attempted to use any technology developed or designed by Sealevel in any of its work on the Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4). This is because DiaxaMed does not have and has never had any interest in using a magnetic wand or handheld actuator, or any other remote activation device similar to Sealevel’s technology, in its development of the Hemoaccess Valve System. (McMurray Depo. 34:23 – 35:4, 49:5-17, 50:22 – 51:16).

A claim for tortious interference presupposes the existence of a valid, enforceable contract.²⁷ “The elements of a cause of action for tortious interference with a contract are: (1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.”²⁸ Courts have emphasized, “[a]n essential element to the cause of action for tortious interference with

²⁷ *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993)

²⁸ *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery.”²⁹

Here, the Supply Agreement remains intact but unenforceable, has never been breached, and Sealevel has suffered no damages. Absent evidence of the existence of an enforceable contract or its breach, Sealevel’s tortious interference with a contract claim fails as a matter of law. Moreover, as South Carolina courts have recognized, “[t]he nexus between the two causes of action [breach of contract and tortious interference with contract] is the breach of the contract, for . . . breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims.”³⁰ Because no enforceable contract was breached, Sealevel’s tortious interference claim is legally unsustainable, even before analyzing the specific elements of the tort.

However, even if one looks past that fundamental infirmity, Sealevel’s claim still fails due to the absence of any evidence supporting the third and fourth elements: intentional procurement of a breach and lack of justification.

In *Sea Island Food Grp., LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 857 S.E.2d 902, (Ct. App. 2021), the Court of Appeals cited favorably federal authorities examining the third and fourth elements of the tort.³¹ The Fourth Circuit has noted that “[w]hat constitutes improper means [of interference] may be somewhat difficult to distill as a rule of law”³² Importantly, “[i]nterference with a contract is justified when it is motivated by legitimate business purposes.”³³

²⁹ *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007).

³⁰ *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 481 (Ct. App. 1998) (quoting *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982)).

³¹ 433 S.C. 278, 287, 857 S.E.2d 902, 906.

³² *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993).

³³ *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995).

In fact, “there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.”³⁴ Examples of improper methods include slander, sabotage, violence, fraud, and misrepresentation or deceit.³⁵

Here, the only evidence introduced at trial was that DiaxaMed merely purchased certain assets from Brookhaven Vascular after Brookhaven had exhausted its operating capital and that DiaxaMed did not take an assignment of Brookhaven Vascular’s rights under the Supply Agreement. (McMurray Depo. 49:5-17; Pl.’s Ex. 14). Purchasing assets in an arm’s-length transaction is a legitimate business purpose, and this conduct alone cannot sustain a cause of action for tortious interference with a contract. There is absolutely no evidence of improper means, wrongful conduct, or an intent to induce a breach of the Supply Agreement.

Therefore, Sealevel’s claim for tortious interference with a contract fails for multiple independent reasons: (1) the absence of an enforceable contract or any breach; (2) the lack of evidence that DiaxaMed intentionally procured a breach; and (3) the fact that DiaxaMed’s conduct—purchasing assets—is a legitimate business activity that does not constitute wrongful interference.

E. Sealevel’s promissory estoppel claim fails.

Lastly, the Court has determined that Sealevel’s promissory estoppel claim against Defendants should be dismissed.³⁶ The Court held Sealevel’s promissory estoppel claim in abeyance pending the outcome of the claims that were triable by a jury. The parties agree that

³⁴ *Eldeco*, at 482, 642 S.E.2d at 732 (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).

³⁵ *See Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64.

³⁶ Sealevel alleged this cause of action against all Defendants, but it would make no sense for it to apply to DiaxaMed, which admittedly had no interaction with Sealevel whatsoever.

promissory estoppel is an equitable claim, which is decided by the Court rather than the jury.

In South Carolina, a party asserting promissory estoppel must establish the following elements: “(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance.”³⁷ “The doctrine is designed for the rare instance when equity's aid is necessary to prevent the rank injustice that would ensue if a party could avoid being held to a clear promise he made on which the other party foreseeably and reasonably relied to his detriment.”³⁸

“Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations.”³⁹ “To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor.”⁴⁰ “Therefore, the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist.”⁴¹

Sealevel’s promissory estoppel claim fails because the evidence does not satisfy the required elements. First, Sealevel has not identified any specific, definite, and unambiguous promise made by CreatiVasc upon which it allegedly relied. The mere existence of discussions or negotiations does not constitute a legally enforceable promise to support a promissory estoppel

³⁷ *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379–80, 769 S.E.2d 237, 241 (2015) (citation omitted).

³⁸ *Cruz v. City of Columbia*, 443 S.C. 201, 205, 904 S.E.2d 451, 453 (2024)

³⁹ *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013), *abrogated on other grounds by Cruz*, 443 S.C. 201, 904 S.E.2d 451.

⁴⁰ *Id.* at 470, 742 S.E.2d at 11.

⁴¹ *Id.* at 470, 742 S.E.2d at 11-12.

claim.

Second, even assuming Sealevel subjectively relied on any representations by CreatiVasc, such reliance was not reasonable. The parties were engaged in commercial dealings where contractual terms were subject to negotiation, and Sealevel, a sophisticated business entity, had the opportunity to seek contractual protections rather than rely on alleged verbal assurances or undecided terms to be determined later.

Third, there is no evidence that CreatiVasc made any representations with the expectation that Sealevel would act in reliance on them to its detriment. To the extent that Sealevel made business decisions that resulted in financial consequences, such decisions were based on its own business judgment rather than any binding commitment by CreatiVasc.

Lastly, Sealevel has not demonstrated that it suffered a specific injury as a direct result of its reliance on a promise by CreatiVasc. Any losses it claims to have incurred stem from its own independent decisions to assume business risks rather than from an enforceable promise giving rise to promissory estoppel. Because Sealevel has failed to establish the necessary elements of promissory estoppel, this equitable claim should be dismissed. The doctrine cannot be used to circumvent contractual requirements or impose obligations where none exist.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP is hereby GRANTED. Because this ruling disposes of Sealevel's breach of contract and tortious interference with a contract claims outright, Defendants' alternative motions for post-trial relief are rendered moot.

Additionally, for the reasons set forth above, Sealevel's promissory estoppel claim is

hereby DISMISSED.

AND IT IS SO ORDERED.

Electronic Signature of Judge Gravely to follow



Greenville Common Pleas

Case Caption: Sealevel Systems Inc vs. CreatiVasc Medical Inc , defendant, et al

Case Number: 2022CP2301310

Type: Order/JNOV

So Ordered

s/ Honorable Perry H. Gravely, #2755