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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In The Court of Common Pleas,
Thirteenth Judicial Circuit
The Hon. Perry H. Gravely, Circuit Court Judge

Case No. 2018-CP-23-04092 / Case No. 2022-CP-23-01310
Ct. App. Case No. 2025-001630

Sealevel Systems, Inc.Appellant,

v.

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.,.....Respondents.

**APPELLANT’S REPLY TO CREATIVASC MEDICAL, INC., AND
BROOKHAVEN VASCULAR INC., SUCCESSOR IN INTEREST TO BROOKHAVEN
MERGER CORP., SUCCESSOR IN INTEREST TO CREATIVASC MEDICAL, INC.**

FORD WALLACE THOMSON LLC
Ainsley F. Tillman
Robert E. Byrd
715 King Street
Charleston, South Carolina 29403
(843) 277-2011

WESLEY D. FEW LLC
Wesley D. Few
Post Office Box 9398
Greenville, South Carolina 29604
(864) 527-5906

*Attorneys for Appellant
Sealevel Systems, Inc.*

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In its Brief, CreatiVasc/Brookhaven¹ (referred to herein as “CreatiVasc”) mostly makes the same fact-centered claims and arguments as DiaxaMed, and Sealevel incorporates its Reply to DiaxaMed as if fully set forth herein. The purpose of this Reply is to address minor variations in CreatiVasc’s arguments.

REPLY TO CREATIVASC’S STATEMENT OF THE FACTS

DiaxaMed’s Brief devotes itself to its narrative that the Customer Supply Agreement (the “Agreement”) was akin to a joint venture between Sealevel and CreatiVasc, in which they were working together to bring a medical device to market and had agreed (according to DiaxaMed) to share equally in the loss when CreatiVasc (puppeteered by DiaxaMed) decided to shelve the device.

But CreatiVasc’s story is importantly different.

Although CreatiVasc’s rendition of the facts says the relationship was a “collaborative effort,” CreatiVasc nonetheless acknowledges its ownership and control of the “CreatiVasc Hemoaccess Valve System®” (the “System”), and the reality that Sealevel was tasked with supplying a component part—a widget (the Product)—for the System. (CreatiVasc Br. at 3–5). In CreatiVasc’s Brief, it is clear that this was not a joint development or service venture; instead, the “Customer Supply Agreement” was exactly what it was named . . . an agreement by Sealevel to supply a Product that CreatiVasc would buy.

CreatiVasc’s version of the facts invokes the application of the Uniform Commercial Code (the “UCC”), including CreatiVasc’s acknowledgment that the Agreement’s product specifications and price were left for future determination (CreatiVasc describes this as

¹ “DiaxaMed” refers to Defendant Diaxamed, LLC. “Sealevel” refers to Plaintiff/Appellant Sealevel Systems, Inc. “CreatiVasc” refers to Defendant CreatiVasc Medical, Inc. “Brookhaven” refers to Brookhaven Vascular, Inc. and Brookhaven Merger Corp., collectively.

“future collaboration”). (CreatiVasc Br. at 4); *see also, e.g.* S.C. Code § 36-2-106(1) (“Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time.”). Significantly, CreatiVasc’s version of the facts delves at length into the conduct of the parties. (*See, e.g.,* CreatiVasc Br. at 3–7). But CreatiVasc’s rendition shows that Sealevel was performing to make the Product that CreatiVasc admits that it asked for, thereby underscoring that it was for the jury to decide whether the parties’ conduct, coupled with the Agreement, constituted an enforceable contract. *See* S.C. Code § 36-2-204 (“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”); *see also Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 82, 484 S.E.2d 468, 470 (1997).

Playing semantic games (and thus highlighting questions of fact for the jury), CreatiVasc says that it did not actually order the “Product;” instead CreatiVasc claims it requested a quote for (and provided detailed specifications for) six “prototypes.”² (CreatiVasc Br. at 13). But CreatiVasc leaves out of its narrative that it admitted at trial that it ordered either five or six of the Product,³ with specifications.⁴ CreatiVasc also denies (or omits) that the evidence showed that Sealevel did indeed deliver the Product.⁵ And CreatiVasc fails to mention that CreatiVasc, manipulated by DiaxaMed, “ghosted” Sealevel,⁶

² R. _ Pl.’s Trial Ex. 12 and 11 (“Requirement Specifications for HVS Handheld”).

³ R. _ Trial Tr. 317:20-22 (“I recall that we had ordered five of the handhelds . . .”); *see also* Trial Tr. 222:13-15 (Q: “And at one point in 2016, CreatiVasc did order six wands from Sealevel, didn’t it? A: I believe so.”).

⁴ R. _ Pl.’s Trial Ex. 11.

⁵ *See* R. _ Trial Tr. 60:18-19 (“And we did deliver the device. And, in fact, [CreatiVasc] leapt for joy when we delivered the device.”); *see also* Trial Tr. 138:24-25, 139:2-3, 225:18-25, 226:20, 231:21-24.

⁶ R. at _ Trial Tr. 135:19-20.

dodged delivery of any further Product,⁷ refused to agree on a price,⁸ pretended it had no obligation to pay for the Product it had ordered, and insisted it had never even heard of any “purported supply agreement.”⁹ Ultimately, these dubious semantics and material omissions indicate why JNOV was improper; the evidence and inferences to be drawn from it cuts both ways.

CreatiVasc’s “Statement of the Facts” also dwells on CreatiVasc’s funding and financial woes – which of course are not attributable to Sealevel and simply provide context for why CreatiVasc and its successors might want to dodge or disclaim payment to Sealevel. (CreatiVasc Br. at 3, 6). Right after describing how it “was again facing financial depletion,” CreatiVasc acknowledges that DiaxaMed purchased CreatiVasc’s valuable “intellectual property” related to the System but “did not take an assignment of or otherwise assume CreatiVasc’s obligations under the Supply Agreement;” these juxtaposed circumstances infer a scheme to avoid liability. (CreatiVasc Br. at 6). Although CreatiVasc asserts that DiaxaMed “has never used” Sealevel’s confidential technical information, its credibility was a question for the jury. (CreatiVasc Br. at 6). The evidence indicated that (a) DiaxaMed now possesses all information related to the System and could use it, if it so chooses, in the future; and (b) DiaxaMed immediately benefitted from Sealevel’s information by using it to decide which

⁷ R. at _ Trial Tr. 222:18-21 (“We never delivered them, because we did not know where to send them.”); *see also* Trial Tr. 135:7-17 (“[T]hat was when we basically contacted them and said ‘We have a wand that we’d like to deliver to you’ . . . But 2016, basically, we – we didn’t get any answers.”).

⁸ R. at _ Trial Tr. 65:1-4 (“Well, we would’ve been happy to discuss all those things [i.e. price], but our customer went silent on us. And so, we – after delivering the product, we delivered an invoice.”).

⁹ *See, e.g.*, Pl.’s Trial Ex. 21, Correspondence from General Counsel for Brookhaven (which had merged with CreatiVasc and then was purchased by DiaxaMed), stating that **CreatiVasc “does not have a copy of any purported supply agreement** supporting the invoice. If in fact one exists, please send a copy to me.”

version of the System to pursue (which happened to be the version most lucrative to McMurray's company, ATEX).¹⁰

CreatiVasc makes much of the lack of an agreed-upon price for the Product, which only underscores that in the absence of agreement it is for a jury to determine a reasonable price. (CreatiVasc Br. at 17-18); *see also* S.C. Code § 36-2-204 ("the price is a reasonable price at the time for delivery if . . . the price is left to be agreed by the parties and they fail to agree."). CreatiVasc admits that Sealevel worked "for years" to make the Product that CreatiVasc requested in the Supply Agreement, and it admits that Sealevel "poured significant time and money" into creating the Product. (CreatiVasc Br. at 5). And the record indeed reflects the time and money expended by Sealevel. (R. 2, Pl.'s Trial Ex. 26). CreatiVasc's narrative thereby acknowledges that the jury had the tools necessary to evaluate damages for CreatiVasc's breach.

Beyond that, the factual assertions CreatiVasc makes are refutable in the Record and plainly underscore the existing evidence and disputed facts, **which made the claims in this case the very epitome of a jury matter**. For example, CreatiVasc's statement: "the undisputed testimony establishes that Sealevel never . . . built, shipped, or delivered any of the six requested prototypes, and no Purchase Order was ever made" is contrary to the evidence set forth in footnotes 1-7. (CreatiVasc Br. at 5-6).

And CreatiVasc's assertion: "the undisputed trial testimony was that Sealevel never delivered the Product to CreatiVasc," is at odds with testimony by Sealevel saying:

*And we did deliver the device.
And, in fact, [CreatiVasc] leapt for joy when we delivered the device.*

¹⁰ *See Sealevel Reply to DiaxaMed* for a complete discussion of the evidence supporting Sealevel's claim against DiaxaMed and citations to the Record.

(CreatiVasc Br. at 7; *see also* R. __, Trial Trans. 60:18-19).

The existence of conflicting versions of the facts, supported by the evidence, made JNOV improper. This Court should reinstate the jury's verdict.

ARGUMENT IN REPLY

This Reply is meant to be read in conjunction with Sealevel's Reply to DiaxaMed, filed contemporaneously herewith. For the most part, the Respondents CreatiVasc and DiaxaMed make the same arguments – including that (1) there was no enforceable contract, (2) there was no evidence of breach or of damage to Sealevel, and (3) Sealevel's alternative claims for quantum meruit and promissory estoppel fail for lack of evidence. Because the two response briefs have corresponding arguments, Sealevel respectfully asks this Court to consider its Reply to DiaxaMed to be the “lead” reply brief, with this Reply to CreatiVasc to be considered as a short(er) supplement meant to address nuanced arguments by CreatiVasc.

I. It was for the jury to resolve conflicting evidence as to the parties' contract.

The jury awarded damages against CreatiVasc for breach of contract. (R. at __, Verdict). Thus, CreatiVasc's Brief is chiefly concerned with defying contract formation, and it makes substantially the same arguments as DiaxaMed does in Issue I of its Brief. (*See* Diax. Br. at 11-16). Sealevel therefore incorporates its Reply to DiaxaMed, Section I.

A. The UCC was made for this moment.

1. The predominant purpose of the Supply Agreement was sale of the Product.

CreatiVasc first argues that the parties' contract—titled “Supply Agreement” and governing the supply and sale by Sealevel of a widget to CreatiVasc—is not a contract for the sale of goods. (CreatiVasc Br. at 10-15). CreatiVasc is wrong; at a minimum, a jury question existed as to the parties' intent, making JNOV improper. *Kincaid Cotton Co., Inc. v. Kesey Bros.*,

504 F.2d 976 (5th Cir. 1974) (under the UCC, where contract left open price and time of performance, and questions of reasonableness and parties' intent to make a contract exist, "a trial is required.") (emphasis added).

The applicable framework is an inquiry into the predominant purpose intended by the agreement. *Kline Iron & Steel v. Gray Com. Consultants, Inc.*, 715 F. Supp. 135, 139 (D.S.C. 1989) ("In considering whether a hybrid contract is for the sale of goods under the UCC, courts generally employ the 'predominant thrust' or 'predominant factor' test."). Here, the opening preamble of the Agreement announces that its purpose is for CreatiVasc to order and purchase a Product from Sealevel:

Background

A. Customer is engaged in, among other things, providing advanced biomedical technology for addressing the complications associated with hemodialysis. Customer desires to have Sealevel design and manufacture the motor control and valve monitor electronics (both hardware and software) for use in the CreatiVasc Hemoaccess Valve System[®] (the "System").

B. Sealevel desires to design and manufacture certain of the Product, as defined below, and provide to customer, and Customer desires to procure Product from Sealevel.

C. The Parties wish to establish terms and conditions under which the Product will be ordered and purchased by Customer and supplied to Customer by Sealevel.

(R. at __, Pl.'s Trial Ex. 4) (underline added). The "Customer Supply Agreement" had one predominant purpose: for Sealevel to supply a good (i.e., the Product) to its customer, CreatiVasc. The Agreement required Sealevel to create, develop, and then sell to CreatiVasc the Product (a good). (R. at __, Pl.'s Trial Ex. 4 § 1). The Agreement is, notably, not a consulting agreement, nor is it a services agreement. The Agreement is, aptly, a "supply" agreement, under which Sealevel agreed to supply, and CreatiVasc agreed to purchase, a good. This arrangement can only be one for the sale of a good. As a result, the UCC applies. *Plantation Shutter Co., Inc. v. Ezell*, 328 S.C. 475, 478-79, 492 S.E.2d 404, 406 (Ct. App. 1997) ("[if] the contract's predominant factor is the sale of goods with labor incidentally involved,

the UCC applies.”).

As this Court has observed, “In most cases in which the contract calls for a combination of services with the sale of goods, courts have applied the UCC.” *Id.* In *Kline Iron & Steel*, the court looked to the language of the parties’ agreement (to supply a telephone tower) and determined that its primary purpose was the sale of a good, noting: “the terms and language of the proposal show that the alleged agreement is predominantly for the sale of goods. Throughout the proposal, the defendant is referred to as the ‘Buyer,’ a term indicative of a transaction for the sale of goods.” *Id.* at 140. Likewise, in the Agreement here, CreatiVasc is referred to as the “Customer,” and Sealevel is charged with selling to it a “Product,” both of which terms are indicative of a contract for the sale of goods. In fact, the Agreement is clear that the Product *is* a “good,” echoing the UCC:

Customer shall 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.

(R. at __, Pl. Ex. 4 § 1) (emphasis added).¹¹

CreatiVasc focuses on the design aspect of Sealevel’s obligation and insists the focus of the Agreement is a design service. But, even if the Agreement encompasses some level of services, the predominant thrust and ultimate goal of the Agreement is nonetheless for Sealevel to supply the Product (a good) to CreatiVasc. *See id.* Indeed, what CreatiVasc characterizes as “services” – namely design and development work by Sealevel – are all geared toward creation and production of the Product to be sold by Sealevel to CreatiVasc.

The Agreement reflects that the object and ultimate purpose of the designing and

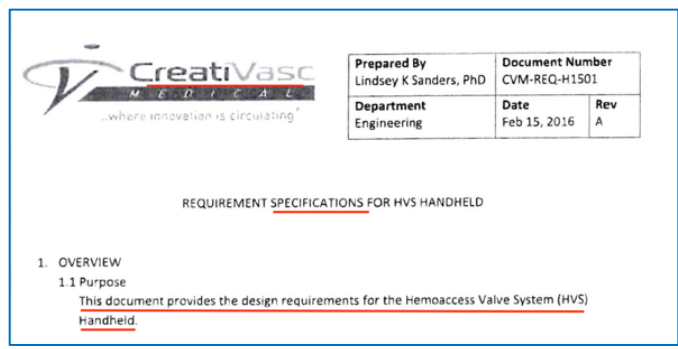
¹¹ *See also* R. at __, Pl.’s Trial Ex. 4 § 10 (“Any **goods** damaged in shipment shall be repaired or replaced under the warranty set forth in Section 8.”) (emphasis added).

manufacturing to be done by Sealevel is the sale of a good to CreatiVasc; it states: “Sealevel agrees to design, manufacture, sell and deliver to Customer . . . the ‘Product’”. (R. at __ Pl. Ex. 4 § 1). In other words, the Agreement necessarily involved some level of engineering, as Sealevel had to analyze how the Product could work with the ultimate System and design it, accordingly, to be sold to CreatiVasc. (See, e.g., R. at __, Trial Trans. 59:3–10, 133:7–25, 135:5–22, 158:15–20). But the design and development contemplated by the Agreement, to the extent they are services, pale in comparison to the actual *purpose* of the Agreement (for Sealevel to provide the Product, a good, to CreatiVasc for its use in its System). No part of the Agreement discusses Sealevel providing consulting or other services to CreatiVasc; regarded as a whole, its language and terms reflect a textbook agreement for the sale of goods under the UCC.

2. CreatiVasc’s insistence that it never provided specifications nor ordered the product is contrary to the Record.

CreatiVasc’s assertions that “there were no Specifications” or purchase orders for the Product are easily refutable. Here is some of the evidence (an excerpt from the first page of a two-page “specifications” sheet) that the jury considered when it discerned whether a contract existed:

As to Specifications:



(R. at __ Pl.’s Trial Ex. 11).

As to Purchase Orders:

Testimony by CreatiVasc's Steve Johnson: "I recall that we had ordered five handhelds for the purpose of testing whether or not they coupled and worked with the implantable device." (R. at __, Trial Trans. 317:20-22; see also Pl.'s Trial Ex. 12; *see also* Trial Trans. 222:13-15 (Q: "And at one point in 2016, CreatiVasc did order six wands from Sealevel, didn't it? A: I believe so.")).

What CreatiVasc seems truly to be arguing is that this evidence is *insufficient* or inadequate to prove that there were specifications or purchase orders. This is not a proper argument on directed verdict or JNOV, and the trial court erred by adopting it. **A jury issue exists where the evidence is conflicting, or when the weight of the evidence is in dispute.** "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272 (2003) (cleaned up). CreatiVasc's arguments about what terms were intended by the parties given the conflicting testimony and evidence—like DiaxaMed's arguments on the same items—do nothing more than throw into stark relief the impropriety of the trial judge's JNOV.

B. Given the evidence, it was for the jury to decide if the Agreement is enforceable.

Beginning on Page 15 of its brief, CreatiVasc argues that the Agreement is unenforceable because it leaves terms open for future determination. DiaxaMed made the same argument, and Sealevel incorporates here Section I(a)(ii) of its Reply to DiaxaMed.

In short, in addition to the UCC's allowance that terms be left open, the law is clear that where the existence of an enforceable contract is disputed, or the evidence conflicts, a

fact question exists that belongs to the jury. *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57, 60-61 (Ct. App. 1984) (reversing directed verdict because “[a]lthough there is evidence in the record to support the conclusion that no enforceable contract exists between the parties, there is also sufficient evidence in the record to support the conclusion that one does exist.”). The evidence in *this* Record defies CreatiVasc’s claims that the parties never agreed on specifications, quantity, delivery, or price. This is particularly true given the course of conduct between the parties, in which the evidence shows each Sealevel and CreatiVasc acted with an intent to be bound. The record includes numerous communications reflecting the terms of their agreement, detailed specifications, an order in writing corroborated by testimony, as well as the making of two amendments to the Agreement. (R. at __, Trial Tr. 98:8-102:11, 120:9-17, 135:7-11, 222:13-15, 317:20-22; Pl.’s Trial Exs. 6, 11, 12, 13). South Carolina law allows parties to evidence an intent to be bound by their conduct. *Benya*, 321 S.E.2d at 60-61; *see also* S.C. Code § 36-2-204 (1) (“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”). Moreover, “[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” S.C. Code § 36-2-204(3). If nothing else, the Agreement is enforceable as to the terms governing Confidential Information, which the parties exchanged and CreatiVasc subsequently sold to DiaxaMed. (R. at __, Pl.’s Trial Ex. 4 § 14; Pl.’s Trial Ex. 14 at Ex. A; Trial Tr. 270:21-271:4, 295:15-19).

Lastly, CreatiVasc’s refrain is that the Agreement was an “agreement to agree,” which sounds superficially catchy but actually *supports* the jury’s conclusion that CreatiVasc was in

breach. Even an agreement to agree contemplates that the parties will one day agree in good faith – not demand performance, cull and sell proprietary information, and then dodge all obligation by pretending that there was never an agreement. The bottom line is that the evidence shows that CreatiVasc ordered the Product, Sealevel created it, Sealevel was ready to deliver it, CreatiVasc then stopped responding to Sealevel, and CreatiVasc refused to pay for the Product as agreed. This Court should reverse the trial court’s JNOV and reinstate the jury’s verdict that CreatiVasc breached its contract with Sealevel.

C. Respondents admitted that the Agreement was valid and binding because it was valid and binding.

Like it disclaims the specifications it submitted and the purchase order that it placed, CreatiVasc also distances itself from its own admission: “Defendants admit that the Customer Supply Agreement was a valid and binding contract at the time the parties entered into such agreement.” (R. at __, Answer ¶ 28). CreatiVasc’s Brief attempts to parse out a distinction between a “valid” contract and an “enforceable” one, arguing that it could admit the contract was valid while really meaning that it was unenforceable. (CreatiVasc Br. at 20-21).

Semantics aside, the point is that even CreatiVasc acknowledged that the Agreement was more than valid: it was binding. While this may not mean the contract is enforceable as a matter of law entitling Sealevel to summary judgment, the admission certainly is *evidence as to whether the parties intended to be bound*, requiring submission to the jury on the existence of a contract. *See Associated Receivables Funding, Inc. v. Dunlap, Inc.*, 905 S.E.2d 816, 823 (Ct. App. 2024) (“If agreement is manifested by words, the contract is said to be express. If it is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound.”).

In light of the standard for JNOV, CreatiVasc’s admission that the Supply Agreement

is “binding” further evidenced intent, and it required submission to the jury.

II. The Record contains evidence of breach and recoverable damages, rendering JNOV improper.

Like DiaxaMed, CreatiVasc defends the trial judge’s improper ruling that there was “no evidence” of breach and “no evidence” of damages. (CreatiVasc Br. at 21–30). Sealevel incorporates its arguments in Sections I(b)(i) and I(b)(iii) of its Reply to DiaxaMed, as well as the ample evidence in the Record that CreatiVasc ordered the Product, Sealevel successfully created and tried to deliver the Product, CreatiVasc stopped responding to Sealevel, and CreatiVasc refused to compensate Sealevel for the value of the Product.

CreatiVasc characterizes the trial court’s error of law in citing (and discussing) incorrect and inapplicable sections of the UCC as a mere “scrivener’s error.” (R. at __, JNOV Order at 11). But the trial court did not merely mistakenly mistype a code section, which would be a transcribing error. Instead, the JNOV Order block-quotes and discusses two sections of the UCC that apply only to *buyer’s* remedies, while ignoring and failing to consider that Sealevel was the *seller* under the UCC. (R. at __, JNOV Order at 11). Neither the UCC nor the Agreement limits Sealevel’s recovery with regards to incidental or consequential damages. Instead, the UCC expressly permits a **seller** to recover from a breaching buyer not only its actual damages, but also incidental damages, which include “any commercially reasonable charges, expenses or commissions . . . otherwise resulting from the breach.” S.C. Code § 36-2-710. And what constitutes “reasonable” in the context of damages is undeniably a jury question, where evidence exists to support loss. *See also* S.C. Code § 36-2-204(3) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if . . . there is a reasonably certain basis for giving an appropriate remedy) (emphasis added); *see also* S.C. Code § 36-2-305 (“The parties if they so intend can conclude a contract for sale even

though the price is not settled. In such a case the price is a reasonable price . . ."). Finally, the JNOV Order's citation to the UCC was more than an incorrect and erroneous effort to weigh the evidence; it was an implicit acknowledgement that the UCC applies to the Agreement and the parties' relationship because they were predominantly engaged in the sale and purchase of a good.

It is particularly problematic that CreatiVasc "ghosted" Sealevel, refusing to discuss or agree on a price, and then later claimed that, because the parties never agreed, then the price should be: *free*. At trial, CreatiVasc essentially doubled down on this position, insisting that because it never made itself available to discuss price (after ordering the Product) or to take delivery, Sealevel was incapable of proving damages. According to CreatiVasc, Sealevel's efforts to quantify the loss it suffered in terms of engineering hours was nothing more than "a retrospective tally of its own engineering time and material costs" rather than a legitimate measure of damages resulting from CreatiVasc's delivery dodging. (CreatiVasc Br. at 28).

CreatiVasc's maneuvering is precisely *why* the amount of damages is left up to the reasonable discretion of the jury when there is evidence of loss caused by CreatiVasc's actions. "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. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). Sealevel quantified its losses in terms of valuable lost time spent creating something CreatiVasc demanded but wrongly disclaimed. (R. at __, Trial Tr. 158:15-20, 159:1-161:8). The South Carolina Supreme Court has been clear that a cause of action does not fail where the wrongful

acts of the defendant make the precise amount of damage difficult to ascertain:

[P]erplexity attending the determination of the question and amount of damages rarely, if ever, defeats a cause of action. In such cases **courts ordinarily depend upon the wisdom and fairness of the good men and true who compose the jury....**

This is especially true where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult. In such cases, the degree of proof necessary to make a reasonable estimate of damages is relaxed in favor of the injured party.

Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 644 (1950) (emphasis added); see also *Johnston v. Brown*, 290 S.C. 141, 145 348 S.E.2d 391, 394 (Ct. App. 1986) (*rev'd in part* on other grounds by *Johnston v. Brown*, 292 S.C. 478, 357 S.E.2d 450 (1987)); see also *Hodges v. State Farm Mut. Auto. Ins. Co.*, 488 F.Supp. 1057, 1065 (D.S.C. 1980) (“Where a wrongdoer creates a situation that makes proof of exact amount of damages difficult, . . . ‘juries are allowed to act upon probable and inferential as well as direct and positive proof.’”).

As discussed at length in Sealevel’s opening Brief and its Reply to DiaxaMed, the existing evidence on breach and damages required submission to the jury. This Court should reverse the trial judge’s grant of JNOV.

III. and IV. The evidence supports an alternative recovery by Sealevel in equity.

Sealevel incorporates herein its arguments on quantum meruit and promissory estoppel as set forth in its Reply to DiaxaMed, which are in Sections II. and III.

As to CreatiVasc in particular, and with regards to quantum meruit, the evidence shows that CreatiVasc entered into the Agreement, acknowledged it was binding, commanded performance by Sealevel, received highly technical information from Sealevel, which was the result of hundreds (if not thousands) of hours of Sealevel’s engineering time, and then transferred Sealevel’s confidential information as an “asset” in a sale to DiaxaMed.

(e.g. R. at __, Pl.'s Trial Exs. 4, 11, 12, 14, 26). And then CreatiVasc ghosted Sealevel.

CreatiVasc argues that there was no enforceable contract and so it is off the hook. But equity does not allow CreatiVasc to behave as if there *was* a contract and then disclaim all obligation for Sealevel's performance, which it had demanded. Instead, equity provides for actions for quasi-contract, including quantum meruit. *See Costa and Sons Const. Co., Inc. v. Long*, 306 S.C. 465, 468, 412 S.E.2d 450, 452 (Ct. App. 1991) ("The general law is that where, as here, an express contract fails because the minds of the parties did not meet as to the essential terms, the laborer or contractor may still recover the reasonable value of the labor and materials furnished."). "Implied in law or quasi-contracts are not considered contracts at all, but are akin to restitution which permits recovery of that amount the defendant has been benefitted at the expense of the plaintiff in order to preclude unjust enrichment." *Id.* at n. 1 (citing *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 366 S.E.2d 12 (Ct. App.1988)); *see also Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 (Ct. App.1984).

And Sealevel's promissory estoppel claim only becomes more viable if CreatiVasc is right that the Agreement is an unenforceable agreement to agree. Here, if the Agreement is unenforceable, the evidence shows the parties contemplated a relationship in which Sealevel would create the Product for CreatiVasc. (*See, e.g.*, R. at __, Pl.'s Trial Ex. 4). The evidence shows that CreatiVasc requested, in an unambiguous writing with detailed specifications, that Sealevel provide five or six of the Product to CreatiVasc. (R. at __, Trial Tr. 98:8-101:18, 135:5-13, 222:13-21, 317:14-22; Pl.'s Trial Exs. 11, 12). The evidence shows that CreatiVasc expected Sealevel to rely on that request, in part based on CreatiVasc's \$10,000 down payment for the Product. (R. at __, Pl.'s Trial Ex. 26). The evidence shows Sealevel reasonably relied on that request, expending hundreds (if not thousands) of hours of engineering time

to successfully create the Product. (R. at __, Trial Tr. 158:15–20, 159:1–161:8; Pl.’s Trial Ex. 26). Lastly, the evidence shows that after Sealevel successfully created the Product and tried to deliver it, CreatiVasc stopped responding, damaging Sealevel. (R. at __, Trial Tr. 57:1–5).

The trial judge was wrong to (i) grant directed verdict to CreatiVasc as to Sealevel’s claim against it for quantum meruit and (ii) dismiss Sealevel’s claim for promissory estoppel against CreatiVasc because evidence existed to support the elements of both causes of action. Rule 50, SCRCPP, is clear that the trial judge may not grant directed verdict where facts are in dispute, but only where “upon a trial the case presents only questions of law.” *See also Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 490, 649 S.E.2d 494, 494 (Ct. App. 2007) (“A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability.”). This Court should reverse the trial court’s error as an alternative ground for recovery, in the event that it does not reinstate the jury’s verdict.

CONCLUSION

For the reasons set forth in Sealevel’s Briefs, including the trial court’s error of law as to contract formation and damages, as well as its factual errors in light of conflicting evidence, this Court should reverse the trial court’s JNOV Order and reinstate the jury’s verdict in Sealevel’s favor.

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Respectfully submitted,

FORD WALLACE THOMSON, LLC

s/ Ainsley Fisher Tillman

Ainsley F. Tillman, S.C. Bar No. 70551

Ainsley.Tillman@FordWallace.com

Robert E. Byrd, S.C. Bar No. 106284

Robert.Byrd@FordWallace.com

715 King Street

Charleston, South Carolina 29403

www.FordWallace.com

(843) 277-2011

and

WESLEY D. FEW, LLC

/s/Wesley D. Few

Wesley D. Few, S.C. Bar No. 15565

Post Office Box 9398

Greenville, South Carolina 29604

(864) 527-5906 | wes@wesleyfew.com

Attorneys For Appellant Sealevel Systems, Inc.

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