RECEIVED
Jul 21 2026
SC Court of Appeals

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.

RESPONDENT DIAXAMED, LLC'S FINAL BRIEF

Robert E. Sumner IV
S.C. Bar No. 71728
BUTLER SNOW LLP
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Telephone: 843.277.3705
Email: robert.summer@butlersnow.com

Attorney for the Respondent DiaxaMed, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES ON APPEAL vi

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Procedural History 9

STANDARD OF REVIEW 10

ARGUMENT 12

I. The trial court correctly granted DiaxaMed's motion for JNOV on Sealevel's intentional interference with a contract claim because no enforceable contract exists as a matter of law and no evidence supports any other element of this claim. 12

A. The Supply Agreement is not an enforceable contract as a matter of law. 13

1. The Supply Agreement lacks essential and material terms. 13

2. The Supply Agreement is not a contract for the sale of goods under the UCC—but even if it is, the Agreement is still unenforceable. 15

B. Even if the Supply Agreement is enforceable, the trial court correctly concluded that no evidence supports the remaining elements required for a tortious interference with contract claim. 18

1. There is no evidence of a breach of the Agreement. 19

2. There is no evidence that DiaxaMed knew of the Agreement or intentionally procured its breach without justification. 22

3. There is no evidence supporting the tortious interference damages awarded by the jury. 26

II. The trial court properly granted directed verdict on Plaintiff's quantum meruit claim against DiaxaMed. 29

III. The trial court properly dismissed Plaintiff's promissory estoppel claim against DiaxaMed. 30

IV. In the alternative, if the Court reverses the trial court's Order granting Defendants' motion for JNOV, this Court should remand for a new trial or for the trial court to consider Defendants' motion for new trial rather than rendering judgment on the jury's verdict. 31

A. If this Court does not affirm the trial court's JNOV Order, it should remand for a new trial. 31

B. Alternatively, this Court should remand with instructions for the trial court to consider and rule on Defendants' motion for new trial. 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases

Brinkley v. S.C. Dep't of Corr.,
386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009).....31

Broach v. Carter,
399 S.C. 434, 732 S.E.2d 185 (Ct. App. 2012).....25

Camp v. Springs Mortg. Corp.,
310 S.C. 514, 426 S.E.2d 304 (1993) 12

Capital City Garage & Tire Co. v. Elec. Storage Battery Co.,
113 S.C.352, 101 S.E. 838 (1920) 11

Collins Music Co. v. Smith,
332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998)..... *passim*

Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC,
406 S.C. 596, 753 S.E.2d 840 (2012) 12, 19, 23, 26

Elam v. S.C. Dep't of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 31

Eldeco, Inc. v. Charleston Cnty. Sch. Dist.,
372 S.C. 470, 642 S.E.2d 726 (2007) 19, 22

Gamble v. Stevenson,
305 S.C. 104, 406 S.E.2d 350 (1991) 33

Gastineau v. Murphy,
331 S.C. 565, 503 S.E.2d 712 (1998) 10

Guider v. Churpeyes, Inc.,
370 S.C. 424, 635 S.E.2d 562 (Ct. App. 2006).....11

Gurwood v. GCA Servs. Grp., Inc.,
445 S.C. 324, 914 S.E.2d 149 (2025) 34

Hall v. UBS Fin. Servs. Inc.,
435 S.C. 75, 866 S.E.2d 337 (2021) 21

Hanahan v. Simpson,
326 S.C. 140, 485 S.E.2d 903 (1997) 11, 18, 22, 26

Jackson v. Bi-Lo Stores, Inc.,
313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993).....13

Jessup v. Hansen,
289 S.C. 54, 344 S.E.2d 618 (Ct. App. 1986)..... 31-32

Johnson v. Hoechst Celanese Corp.,
317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).....32

McPeters v. Yeargin Const. Co.,
290 S.C. 327, 350 S.E.2d 208 (1986) 17

Minter v. GOCT, Inc.,
322 S.C. 525, 473 S.E.2d 67 (1996) 27

Pampu v. Wingo,
446 S.C. 236, 918 S.E.2d 717 (Ct. App. 2025).....11

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.,
399 S.C. 322, 732 S.E.2d 166 (2012) 10-11

Road, LLC v. Beaufort Cnty.,
443 S.C. 11, 902 S.E.2d 366 (2024) 21

Rose Elec., Inc. v. Cooler Erectors of Atlanta, Inc.,
418 S.C. 424, 794 S.E.2d 382 (2016) 17, 29

Ross v. Holton,
640 S.W.2d 166 (Mo. Ct. App. 1982).....19, 28

Rush v. Blanchard,
310 S.C. 375, 426 S.E.2d 802 (1993) 31

S. Fire & Cas. Co. v. Teal,
287 F. Supp. 617 (D.S.C. 1968).....17

Sea Island Food Group, LLC v. Yaschik Dev. Co., Inc.,
433 S.C. 278, 857 S.E.2d 902 (Ct. App. 2021)..... 24-25

Small v. Pioneer Mach., Inc.,
329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997).....11, 18, 22, 26

Stevens & Wilkinson of S.C., Inc. v. City of Columbia,
409 S.C. 568, 762 S.E.2d 696 (2014) ..... *passim*

Taylor v. Medenica,
324 S.C. 200, 479 S.E.2d 35 (1996) 32

Trident Const. Co., Inc. v. Austin Co.,
272 F. Supp. 2d 566 (D.S.C. 2003)..... 16-17

Vinson v, Hartley,
324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).....32

Welch v. Epstein,
342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).....32

Woods v. State,
314 S.C. 501, 431 S.E.2d 260 (1993) 30

Statutes

S.C. Code Ann. § 15-32-520.....34

S.C. Code Ann. § 15-32-530.....35

S.C. Code Ann. § 15-33-135.....32

S.C. Code Ann. § 18-9-270.....31

S.C. Code Ann. § 36-2-201.....16

S.C. Code Ann. § 36-2-204.....15

S.C. Code Ann. § 36-2-207.....18

S.C. Code Ann. § 36-2-703.....16

S.C. Code Ann. § 36-2-708.....16

S.C. Code Ann. § 36-2-709.....16

S.C. Code Ann. § 36-2-710.....16

S.C. Code Ann. § 39-8-10, *et seq.* 22

Rules

Rule 50, SCRCP.....31

Rule 59, SCRCP.....31

ISSUES ON APPEAL

I. Did the trial court correctly grant DiaxaMed's motion for judgment notwithstanding the verdict ("JNOV") on Sealevel's intentional interference with a contract claim because no enforceable contract exists as a matter of law and no evidence supports any other element of this claim?

II. Did the trial court correctly grant directed verdict on Sealevel's quantum meruit claim against DiaxaMed?

III. Did the trial court correctly dismiss Sealevel's promissory estoppel claim against DiaxaMed?

IV. In the alternative, if the Court reverses the trial court's order granting Defendants' motion for JNOV, should this Court remand for a new trial or for the trial court to consider Defendants' motion for new trial rather than rendering judgment on the jury's verdict?

INTRODUCTION

This case concerns a Customer Supply Agreement between two parties—Plaintiff/Appellant Sealevel Systems, Inc. and Defendant/Respondent CreatiVasc Medical, Inc.—*to develop a medical device that never made it to market*.[1] (R. pp. 736-751); (R. p. 204, lines 4-6); (R. p. 371, lines 16-21). Under the Supply Agreement, Sealevel agreed to design, manufacture, sell, and deliver to CreatiVasc "hardware and software" (defined in the Agreement as the "Product") to be used in a component of a Hemoaccess Valve System that CreatiVasc hoped to develop (defined in the Agreement as the "System"). (R. p. 737, § 1). The System was intended to be an implanted medical device designed to address complications associated with kidney dialysis. (R. p. 209, line 2-p. 210, line 10). Further, Sealevel was to serve as the exclusive supplier of the Product to CreatiVasc if and when the System was developed and taken to market. (R. p. 737, § 1).

Though the Agreement included some terms that would govern the parties' relationship, it is undisputed that Sealevel and CreatiVasc never agreed on the following critical terms:

- Any specifications for the Product beyond that it was generically "hardware and software"— the Specifications exhibit contemplated in the Agreement was never attached, (*id.*), or

[1] "Sealevel" refers to Plaintiff/Appellant Sealevel Systems, Inc. "CreatiVasc" refers to Defendant CreatiVasc Medical, Inc. "DiaxaMed" refers to Defendant Diaxamed, LLC. "Brookhaven Vascular" refers to Brookhaven Vascular, Inc., successor in interest to Brookhaven Merger Corp. (collectively referred to as "Brookhaven" unless otherwise indicated), successor in interest to CreatiVasc. "Supply Agreement" or "Agreement" refers to the Customer Supply Agreement entered into between Sealevel and CreatiVasc in October 2014. (R. pp. 736-751).

- Any price or quantity of units of the Product that CreatiVasc had to purchase—which instead would be determined at a later time in writing by the parties, (R. pp. 737-738, §§ 3-4).

Unfortunately for all involved, the System never came to fruition and did not work. (R. p. 360, line 1-p. 367, line 9); (R. p. 447, lines 10-17); (R. pp. 874-880, 883-892). Thus, Sealevel and CreatiVasc never reached the critical next step of determining specifications for the Product or agreeing on price and quantities. (R. pp. 737-738, §§ 1, 3-4); (R. p. 195, line 3-p. 197, line 4); (R. p. 354, lines 1-15).

Defendant/Respondent DiaxaMed, LLC entered into an agreement to purchase specific assets of CreatiVasc's successor company, Brookhaven Vascular, Inc. However, DiaxaMed did not purchase the Supply Agreement. (R. pp. 778-791); (R. p. 493, lines 16-25); (R. p. 495, lines 2-5). The unrefuted evidence established that:

- At the time DiaxaMed purchased the assets of Brookhaven Vascular, DiaxaMed did not know about the Supply Agreement and had no interactions with Sealevel (R. p. 239, lines 11-17); (R. p. 250, lines 23-24); (R. p. 393, lines 22-24); (R. p. 482, lines 1-3); (R. p. 492, line 10-p. 493, line 7);
- No one—including DiaxaMed—made any money from the System (R. p. 486, lines 10-15); and
- No one—including DiaxaMed—ever purchased any product similar to Sealevel's Product (R. p. 449, lines 4-8); (R. p. 492, lines 22-25).

Nonetheless, Sealevel was unhappy that it received no compensation for its engineering services, so it filed suit against CreatiVasc and Brookhaven (and their principals) for (1) breach of contract, (2) quantum meruit, and (3) promissory estoppel. (R. pp. 35-45). Additionally, Sealevel

sued DiaxaMed for (1) intentional interference with contract, (2) quantum meruit, and (3) promissory estoppel. Sealevel argued a lone damage model for these claims—that it was entitled to payment for its "development fees" based on "engineering labor." (R. pp. 802-804).

The fatal flaws in Sealevel's underlying claims are that the Supply Agreement lacked the material terms required to be an enforceable contract under any standard and, more importantly, that CreatiVasc and its successor, Brookhaven, never got the System to work. Further, there is no evidence supporting the other elements of Sealevel's claims against DiaxaMed.

STATEMENT OF THE CASE

A. Factual Background

Sealevel is a company that provides electronic, design, and manufacturing services to large corporations. (R. p. 297, lines 10-14); (R. pp. 724-732). CreatiVasc was a company that specialized in developing and manufacturing advanced biomedical technology. (R. p. 203, line 24-p. 204, line 11); (R. p. 210, lines 21-24).

In approximately 2007, CreatiVasc acquired the patent to and began development of an implanted medical device known as the Hemoaccess Valve System. (R. p. 204, lines 4-6, lines 13-15); (R. p. 435, lines 14-19); (R. pp. 708-723). The System was intended to function as an accessory to an FDA-approved arteriovenous graft—a graft that connects an artery to a vein—to help address complications associated with dialysis. (R. p. 208, lines 1-13); (R. p. 209, lines 2-18). Because arteriovenous grafts are prone to clotting, dialysis patients frequently have to undergo surgeries to remove blood clots. (R. p. 202, line 21-p. 203, line 5); (R. p. 437, lines 8-10). The System, which consisted of two inflatable balloon valves on either side of the graft to monitor and regulate blood flow, was intended to significantly reduce the need for these surgeries. (R. p. 204, lines 6-11); (R. p. 438, lines 20-22).

Once implanted, the original, or "Gen One," 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. (R. p. 209, line 22-p. 210, line 6); (R. p. 437, line 21-p. 438, line 24). After creating a working prototype and conducting clinical trials for the Gen One System, CreatiVasc spent several years researching ways to improve the System such that it could be activated without the use of needles. (R. p. 213, line 3-p. 215, line 5); (R. p. 439, lines 4-8). One potential method CreatiVasc identified was a magnetically-activated saline pump that could inflate the balloons remotely using a hand-held actuator. (R. p. 439, lines 9-18). In early 2014, as CreatiVasc was developing a remote activation design that could be incorporated into a "Gen Two" version of the System, it began searching for a manufacturer to help develop the electronic components that would allow the System to be activated remotely. (R. p. 439, line 3-p. 440, line 17).

In September 2014, Steve Johnson, then the CEO of CreatiVasc, was introduced to Tom O'Hanlan, an engineer and the founder of Sealevel. (R. p. 245, lines 4-18); (R. p. 248, lines 14-23); (R. pp. 724-732).[2] Although the technology had yet to be developed, Sealevel committed to designing and manufacturing an external hand-held actuator and internal electronics to work in tandem with magnetic sensors inside the System. (R. p. 354, lines 1-7).

On October 28, 2014, Sealevel and CreatiVasc entered into the Supply Agreement. (R. p. 253, lines 12-18); (R. pp. 736-751). Section 1 of the Supply Agreement defined its "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

[2] Tom O'Hanlan's son, Ben O'Hanlan, was president of Sealevel during the relevant time period in this dispute. (R. p. 189, lines 5-10).

> materials associated with the manufacture of the Product, as well as assembling and testing the Product.

(R. p. 737, § 1). But when the Supply Agreement was executed, the "Specifications" identified as Exhibit A did not exist. (R. pp. 736-751); (R. p. 195, lines 12-16); (*see* R. p. 354, line 8- p. 355, line 12).

Additionally, the Agreement included a section regarding orders, delivery, and payment for the Product—but these specific terms were reserved for future agreement between the parties. (R. pp. 737-738, §§ 3-4). Specifically, the Agreement incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were actually attached or included in the Agreement. (R. pp. 736-751); (R. p. 196, lines 10-12), (R. p. 196, line 24-p. 197, line 1). Thus, there was no agreement on the Product's specifications, price, the number of units of the Product that CreatiVasc had to purchase, payment terms pursuant to an invoice in the form of Exhibit C, or delivery dates. (R. pp. 737-738, §§ 3-5); (R. p. 196, lines 6-9); (R. p. 196, line 24-p. 197, line 1). [3] Instead, the Agreement contemplated 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," and "the dates and quantities of the Product to be delivered and the current price for the Product" would be specified in separate Purchase Orders. (R. pp. 737-738, § 3). Notably, the Agreement did <u>not</u> contain any provision obligating CreatiVasc to pay Sealevel for its time spent on research and development of the Product. (R. pp. 736-751); (R. p. 373, line 19-p. 374, line 7).

Under the Agreement, CreatiVasc agreed that Sealevel would be the "exclusive supplier of the Product" to CreatiVasc and that CreatiVasc would not "directly or indirectly, purchase or order

[3] The Agreement was subsequently amended. (R. p. 36 ¶ 1); (R. pp. 775-777). But the amendment to the Agreement did not insert these terms. (R. pp. 775-777).

the Product, or any other good substantially similar to the Product, from any person or entity other than Sealevel." (R. p. 737, § 1). At trial, Sealevel's president, Ben O'Hanlan, admitted that this provision would only apply when the "revolutionary product… went to market." (R. p. 199, lines 11-15).

Because the sole difference between the Gen One and Gen Two Systems was its needleless function, the creation of the Gen Two System was contingent on the successful development of an external hand-held device that could couple with the System's internal valve pump. (R. p. 447, line 21-p. 448, line 6); (R. p. 475, lines 23-25). Sealevel and CreatiVasc eventually designed an early prototype of a device (called a "wand") that was supposed to interact with the internal valve pump system using magnets and an internal sensor. (R. p. 259, lines 3-11). Sealevel's proposal for making the device work was to install a remotely-powered sensor inside the System that could send a signal to the external hand-held device, which would relay information about the pressure in the balloon valves. (R. p. 445, lines 3-17).

However, CreatiVasc and Sealevel soon discovered that any internal sensor would need to be saline-proof due to the System's use of saline in the balloon valves. (R. p. 447, lines 1-9). The prospect of developing a saline-proof magnetic sensor proved to be an insurmountable hurdle for the Gen Two System. (R. p. 447, lines 10-17).

Further, the funding that CreatiVasc received to develop the System was quickly being depleted. (R. p. 448, lines 7-17); (R. p. 468, lines 14-21). In February 2015, CreatiVasc merged with Brookhaven, which made a commitment to fund the operation. (R. p. 468, line 14-p. 470, line 2); (R. pp. 805-873).[4] Brookhaven Vascular ultimately became the new name of the merged

[4] The merger agreement is between CreatiVasc, Brookhaven Medical, Inc., and Brookhaven Merger Corp. (R. pp. 805-873).

companies and, through this merger, Brookhaven "bought everything that CreatiVasc owned." (R. p. 409, lines 11-15); (R. p. 421, lines 6-12); (R. p. 430, lines 11-13); (R. p. 431, lines 13-25). But as of late 2016, Sealevel and CreatiVasc/Brookhaven had spent nearly two years working on the device and were unable to create a functional Gen Two System. (R. pp. 874-880, 883-892); (R. p. 357, line 20-p. 367, line 9). It was also apparent that neither Sealevel nor CreatiVasc/Brookhaven could engineer their way around the internal sensor issue. (R. pp. 889-890). Indeed, Tom O'Hanlan (Sealevel's founder) agreed at trial that there were hurdles to the project that could not be overcome. (R. p. 357, line 20-p. 358, line 1). Because CreatiVasc/Brookhaven had not been able to produce a System capable of being sufficiently reliable and functional to sell commercially, its focus on the development of the Gen Two System, as well as its relationship with Sealevel, began to wane. (R. p. 371, lines 16-21); (R. p. 447, lines 15-17), R. p. 450, lines 5-13).

In December 2016, DiaxaMed and Brookhaven entered into a contribution agreement under which DiaxaMed purchased specific assets owned by Brookhaven Vascular. (R. pp. 778-791); (R. p. 448, lines 18-21); (R. p. 482, lines 7-9); (R. p. 486, lines 6-9); (R. p. 487, lines 16-18); (R. p. 491, lines 12-19). DiaxaMed did not take an assignment or otherwise assume responsibilities under the Supply Agreement between CreatiVasc and Sealevel. (R. pp. 778-791); (R. p. 493, line 16-p. 494, line 7); (R. p. 495, lines 2-5). The Supply Agreement remained with Brookhaven Vascular. (R. p. 421, lines 6-12); (R. p. 429, lines 11-13). By January 2017 (the next month), Sealevel was aware that DiaxaMed had purchased Brookhaven's assets. (R. pp. 794-796); (R. pp. 893-894); (R. p. 370, lines 9-21).

At trial (and again in its brief), Sealevel asserted that DiaxaMed "must" have known about and deliberately excluded the Supply Agreement when DiaxaMed acquired Brookhaven's assets. (R. p. 564, line 14-p. 565, line 25); Sealevel's Brief at 39-40. But the unrefuted evidence

establishes that DiaxaMed's principal, Brian McMurray, did not know about the Supply Agreement and had no interactions with Sealevel—as corroborated by the testimony of other witnesses. (R. p. 482, lines 1-3); (R. p. 492, line 10-p. 493, line 7) (Brian McMurray testimony); (R. p. 239, lines 11-17) (former DiaxaMed employee Chad Clark testimony); (R. p. 250, lines 23-24) (Tom O'Hanlan testimony); (R. p. 393, lines 22-24) (former DiaxaMed employee Savannah Forrester testimony).

Immediately after acquiring CreatiVasc/Brookhaven's intellectual property, DiaxaMed shifted its focus to developing the Gen One System. (R. p. 449, lines 4-8); (R. p. 487, line 21-p. 488, line 3). This design predated Sealevel's involvement and did not rely on a remote actuator. (R. p. 237, line 23-p. 238, line 16); (R. p. 439, lines 4-12); (R. p. 488, lines 15-23); (R. p. 489, lines 3-6). Then on March 30, 2017, DiaxaMed terminated Johnson, the former CEO of CreatiVasc who helped spearhead the development of the Gen Two System and had created the relationship with Sealevel. (R. p. 449, lines 1-3); (R. p. 485, lines 20-23). DiaxaMed never used any of the technology developed by Sealevel in its continuing efforts to advance the System. (R. p. 449, lines 4-8); (R. p. 488, lines 8-14).

On June 26, 2017, Sealevel sent a letter to CreatiVasc/Brookhaven and enclosed an invoice for $321,540.00 for "design fees" (reflecting engineering labor and costs) that Sealevel purportedly incurred attempting to develop the Product. (R. pp. 802-804). This was despite the fact that Sealevel conceded that the Supply Agreement and amendments "don't contain any provisions that require CreatiVasc or any entity that's standing in CreatiVasc's shoes to pay Sealevel for its engineering time." (R. p. 373, line 19-p. 374, line 7). Instead, according to Sealevel, the invoice was sent to CreatiVasc/Brookhaven as a way to "get their attention." (R. p. 372, lines 21-24).

No version of the System has ever been developed, marketed, or sold. (R. p. 371, lines 16-21); (R. p. 486, lines 6-18). Sealevel conceded that it has "no evidence that the project -- that the product that was the subject of the customer supply agreement was ever developed, marketed, or sold by anyone." (R. p. 371, lines 16-21). Further, it is undisputed that DiaxaMed has generated no revenue from sales or any other source related to the System or the Product. (R. p. 486, lines 10-18).

B. Procedural History

On August 2, 2018, Sealevel filed this lawsuit against Defendants CreatiVasc, DiaxaMed, Brookhaven Vascular, Inc., Brookhaven Merger Corp., John Feltman (from Brookhaven), and Steve Johnson, asserting claims for declaratory judgment, breach of contract, intentional interference with a contract, quantum meruit, and promissory estoppel. (R. pp. 35-45).

The case proceeded to a jury trial, commencing on February 11, 2025, and concluding on February 13, 2025. (R. p. 134). After resting, Sealevel moved for a directed verdict on the declaratory judgment, asking the trial court to find that a contract exists and is still ongoing. (R. p. 501, lines 10-20). The trial court declined to issue a declaratory ruling. (R. p. 546, lines 6-7). Sealevel also withdrew its claims against Feltman and Johnson. (R. p. 529, lines 5-9); (R. p. 535, lines 2-6).

Defendants moved for a directed verdict on each of Sealevel's claims. (R. p. 502, line 14-p. 511, line 18). The trial court denied Defendants' directed verdict motions on the breach of contract and intentional interference with a contract claims, but (1) limited the breach of contract claim to CreatiVasc, Brookhaven Vascular, Inc., and Brookhaven Merger Corp., and (2) limited the intentional interference with a contract claim to DiaxaMed. (R. p. 541, line 9-p. 543, line 8); (R. p. 546, lines 2-4); (R. p. 546, lines 9-17). The trial court granted Defendants' directed verdict motion on Sealevel's quantum meruit claim and dismissed that cause of action. (R. p. 543, line 9-

p. 544, line 6); (R. p. 546, line 4). The trial court held its ruling on Sealevel's promissory estoppel claim in abeyance. (R. p. 546, lines 5-6).

After Defendants rested, they renewed their directed verdict motions as to Sealevel's breach of contract and intentional interference with a contract claims. (R. p. 553, line 25-p. 554, line 21). The trial court denied the motions. (R. p. 554, lines 22-24).

After deliberations, the jury found in Sealevel's favor on its breach of contract claim against CreatiVasc/Brookhaven in the amount of $321,540.00. (R. pp. 12-13). The jury additionally found in Sealevel's favor on its intentional interference with a contract claim against DiaxaMed in the amount of $400,000.00. (*Id.*) Last, the jury found Sealevel was entitled to punitive damages against DiaxaMed in the amount of $2,500,000.00. (*Id.*)

On February 24, 2025, Defendants timely filed post-trial motions. (R. pp. 75-98). In these motions, Defendants moved for JNOV, sought dismissal of Sealevel's promissory estoppel claim, alternatively requested a new trial under the thirteenth juror doctrine, and alternatively requested a new trial absolute or, alternatively, *nisi remititur*. (*Id.*) On May 23, 2025, the trial court held a hearing on the post-trial motions. (R. pp. 14-31); (R. pp. 655-707). On June 24, 2025, the trial court entered the Order granting Defendants' motion for JNOV and also dismissing Sealevel's promissory estoppel claim. (R. pp. 14-31).

On July 7, 2025, Sealevel filed a motion to reconsider the Order. (R. pp. 123-130). On July 18, 2025, the trial court denied Sealevel's motion to reconsider. (R. pp. 33-34).

Sealevel filed a Notice of Appeal on August 15, 2025. (R. pp. 131-133).

STANDARD OF REVIEW

"[A] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (alteration in original) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568,

503 S.E.2d 712, 713 (1998)). "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, [the court of appeals] must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." 399 S.C. at 331-32, 732 S.E.2d at 171. "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury. However, if only one reasonable inference can be drawn from the evidence, the motion must be granted." *Pampu v. Wingo*, 446 S.C. 236, 248-49, 918 S.E.2d 717, 724 (Ct. App. 2025) (citations omitted). In other words, "when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 429, 635 S.E.2d 562, 565 (Ct. App. 2006) (citation omitted).

Viewing reasonable inference in favor of the nonmovant "does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *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)). "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation." *Id.*

Finally, Sealevel's suggestion that the existence of a contract is always a question of fact for a jury is inaccurate. "Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (citing *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C.352, 362, 101 S.E. 838, 841 (1920)).

Thus, even viewing inferences favorably to Sealevel, Rule 50, SCRCP, does not permit verdicts resting on conjecture or on a damages theory that is legally unavailable. Where the

plaintiff's proof fails to supply evidence on an essential element—or supplies only a legally improper measure—the court must grant a motion for JNOV.

ARGUMENT

Sealevel's claims against DiaxaMed are solely for intentional interference with a contract (tried to the jury), quantum meruit (dismissed on directed verdict), and promissory estoppel (held in abeyance and then dismissed in the Order). (R. p. 546, lines 3-6). DiaxaMed only addresses those claims in this brief. However, DiaxaMed also adopts and incorporates by reference all arguments CreatiVasc/Brookhaven make in their brief. Because Sealevel's claims against DiaxaMed fail as a matter of law and are unsupported by evidence, the trial court properly granted Defendants' motion for JNOV.

I. The trial court correctly granted DiaxaMed's motion for JNOV on Sealevel's intentional interference with a contract claim because no enforceable contract exists as a matter of law and no evidence supports any other element of this claim.

To recover on a tortious interference with contract claim, a plaintiff must prove: (1) the existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the absence of justification; and (5) resulting damages. *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). Accordingly, the Order should be affirmed if Sealevel failed to present evidence on any element of tortious interference—most clearly, breach, procurement/absence of justification, and resulting damages—even if the Court were to assume arguendo a valid contract.

At its core, this case concerns a preliminary Supply Agreement premised on the anticipated success of CreatiVasc's developing a medical device. Had the System proven viable and commercially successful, CreatiVasc and Sealevel might have proceeded to future transactions for Sealevel's Product. But that contingency never materialized. The System was unsuccessful, and

everyone involved in this medical device development project lost their investments of time and capital. The trial court correctly concluded that the Supply Agreement is not an enforceable contract as a matter of law and that no evidence supports other required elements for this claim.

A. The Supply Agreement is not an enforceable contract as a matter of law.

1. The Supply Agreement lacks essential and material terms.

A claim for tortious interference with a contract "presupposes the existence of a valid, enforceable contract." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993). For a contract to be valid and enforceable, it must contain all essential and material terms of the parties' agreement. The South Carolina Supreme Court has explained:

> A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters.,* 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct.App.2007). Thus, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roof,* 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct.App.1986).

Stevens & Wilkinson of S.C., 409 S.C. at 578, 762 S.E.2d at 701 (emphasis in original).

A fatal flaw in Sealevel's tortious interference claim is that the Supply Agreement DiaxaMed allegedly "tortiously interfered" with does not contain all essential and material terms, as reflected in the plain language of the Supply Agreement. *Id.*; (R. pp. 736-751). Instead, the Supply Agreement is a classic "agreement to agree," in which Sealevel and CreatiVasc 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. (R. p. 427, lines 18-22) (Steve Johnson testifying that "this was seen as a speculative project where [Sealevel was] investing hours in time up front in the hopes that down the road when [the System] went to the market, they would be the exclusive and sole provider of the finished product, and that is when they would make their money back"); (R. p. 198, lines 12-23) (Ben O'Hanlan from Sealevel acknowledging that research and development

time goes into designing the Product, but that Sealevel could not request payment until the Product was delivered).

First, the Supply Agreement lacked any defined specifications describing the Product. The Supply Agreement's purpose was for Sealevel to "design, manufacture, sell and deliver" a Product for use in the System, but it failed to specify how the Product would be designed, manufactured, or sold—or even what, exactly, CreatiVasc would be purchasing beyond generic references to "hardware and software." (R. p. 737, § 1). Instead, the Supply Agreement deferred these critical details to a nonexistent set of "specifications" that were supposed to define the Product's design and manufacturing requirements. (*Id.*) But these "specifications"—which were supposed to be attached as Exhibit A to the Agreement—were still in development and did not yet exist. (R. p. 195, lines 12-19); (R. p. 354, lines 1-15). Thus, no Exhibit A describing the "specifications" for the Product is attached to, and therefore incorporated into, the Supply Agreement. (R. p. 737, § 1 & R. p. 747). Likewise, a "Warranty" provision was intended to establish the "Sealevel Standards" for manufacturing the Product in compliance with those "specification." (R. p. 738, § 8 & R. p. 751). But the "specifications" and "Sealevel Standards" referenced in that exhibit were never agreed to or incorporated into the Supply Agreement. (R. pp. 736-751).

Second, the Supply Agreement incorporated by reference an Exhibit B ("Purchase Order"), Exhibit C ("Invoice"), and Exhibit D ("Quotation"), none of which existed at the time or were ever included in the Agreement. (R. pp. 737-738, §§ 3-4 & R. pp. 748-750); (R. p. 196, line 1-p. 197, line 11). Consequently, there was no agreement on the price of the Product or any number of the Product's units that CreatiVasc had to purchase. (*Id.*) 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. (R. pp. 737-738, § 3). Relatedly, 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." (*Id.*)[5]

Therefore, the Supply Agreement failed to establish a binding contractual framework on the material issues of the specifications for the Product, the price of the Product, or the number of units (if any) CreatiVasc was required to purchase. The Supply Agreement instead left these essential terms open to future negotiation and was unenforceable.

2. The Supply Agreement is not a contract for the sale of goods under the UCC—but even if it is, the Agreement is still unenforceable.

Sealevel argues that the Supply Agreement was a contract for goods governed by South Carolina's codification of the Uniform Commercial Code ("UCC") and that under the UCC, a contract for goods "may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract" and "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 Ann. § 36-2-204(3).[6]

But there is a major disconnect in Sealevel's argument. Sealevel's damage model at trial was **not** based upon the sale of goods. It was solely based on Sealevel's alleged engineering services provided in attempting to develop the Product (time and expenses). (R. pp. 802-804). If the Supply Agreement was for the sale of goods, then why is Sealevel's damage model solely

[5] Without citing authorities or any other briefing, Sealevel complains that DiaxaMed "*admitted* in its Answer that the Supply Agreement 'was a valid and binding contract.'" Sealevel's Brief at 39. But whether the Agreement is enforceable is a question of law for this Court, not a fact to be admitted. *Stevens & Wilkinson of S.C.*, 409 S.C. at 578, 762 S.E.2d at 701. The Agreement speaks for itself, as Sealevel's counsel agreed repeatedly at trial. (*See, e.g.*, R. p. 254, line 25); (R. p. 256, lines 8-10); (R. p. 311, lines 19-20); (R. p. 592, lines 12-13).

[6] Sealevel incorrectly claims that the trial court "recognized that the UCC applies to the Supply Agreement…." Sealevel's Brief at 17. The court did not. The Order addressed Sealevel's argument regarding "consequential" and "incidental" damages set forth in the UCC without stating that the UCC applies to the Supply Agreement. (R. pp. 24-25).

based on engineering services it claims it performed in developing the Product? The reason is obvious: it is because the parties never reached an agreement on price, quantity, or anything else that would give rise to UCC damages models based on breach of a contract for the sale of goods. *See* S.C. Code Ann. § 36-2-703 (seller's remedies generally); § 36-2-708 (seller's remedies for nonacceptance or repudiation); § 36-2-709 (action for the price); § 36-2-710 (identifying seller's potential incidental damages, which do not include expenses incurred attempting to develop a product).

That Sealevel's damage model is solely based on its alleged **services** performed only underscores that the Supply Agreement was not an enforceable contract for the sale of goods subject to the UCC.[7] Notably, Sealevel's founder, Tom O'Hanlan, testified that the Agreement was the standard agreement Sealevel uses when it "co-develops" a product with another company, as opposed to a contract for the sale of goods. (R. p. 253, line 19-p. 254, line 5).

But even if the Supply Agreement was for the sale of goods and subject to the UCC, terms of agreements for the sale of goods must still be definite enough to form a binding, enforceable contract. In a similar case, the parties to an agreement never agreed to the price, time, or place of performance under the contract, and so the South Carolina District Court concluded it was not binding. *Trident Const. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566, 576 (D.S.C. 2003). The

[7] Sealevel also points to S.C. Code Ann. § 36-2-201(3), which provides that a contract that is "valid in other respects" even though not satisfying the written requirements of Section 36-2-201(1) is enforceable if the goods are to be specially manufactured for the buyer and the seller has "made either a substantial beginning of their manufacture or commitments for their procurement…." S.C. Code Ann. § 36-2-201(3). But Section 36-2-201(1) does not address a contract that is unenforceable for lacking material terms, and there is no evidence in this record that Sealevel manufactured "goods" or attempted to recover damages for the manufacture of these "specially manufactured" goods. Instead, Sealevel solely sought damages for "engineering labor," which undermines its argument that the Agreement was for the sale of goods subject to the UCC. (R. pp. 802-804).

District Court observed that "[u]nder South Carolina law, '[c]ertain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty. Where a contract does not fix a definite price, there must be a definite method for ascertaining it.'" *Id.* (quoting *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208, 211 (1986)). The court further explained:

> If the contract is silent on price, for instance, the agreement is not indefinite if a formula or method for ascertaining the price is understood and agreed upon. Nor will a contract fail for indefiniteness when the gaps that the parties have left may be implied from custom and usual forms and former course of dealing. Moreover, the subsequent action of the parties, such particularly as the acceptance of the "gaps" as expressed by the other party, may give the required definiteness to the agreement and establish sufficiently the intention of the parties. Generally speaking, it is only when the "gaps" are intended to be the subjects of future negotiations and the intention of the parties is that a completed contract shall await the completion of such negotiations that the contract will fail for indefiniteness; otherwise, the Courts will apply the rule of custom and reason in filling in the "gaps."

Id. (quoting *S. Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 621-22 (D.S.C. 1968)).

Here, the "gaps" in the Supply Agreement are gaping—with the price, units to be bought, and specifications to be determined by CreatiVasc and Sealevel in future negotiations and written agreements. *See id*.; Section I.A.1, *supra*. Thus, even if there was evidence of intent to be bound by an agreement, missing material terms in the Supply Agreement, such as missing price terms, are "fatal to finding an express contract…."[8] *Rose Elec., Inc. v. Cooler Erectors of Atlanta, Inc.*, 418 S.C. 424, 431, 794 S.E.2d 382, 386 (2016); *see also Stevens & Wilkinson of S.C.*, 409 S.C. at

[8] Sealevel points to a statement in its invoice to Brookhaven referencing a "$10,000 advance payment previously made by CreatiVasc" as proof that the CreatiVasc and Sealevel's conduct indicated the existence of an enforceable Agreement. Sealevel's Brief at 8; *see also id.* at 20. The only reference to this purported "advance payment" was Sealevel's invoice itself. (R. pp. 802-804). Sealevel did not put forth any testimony or other evidence regarding this alleged payment. In fact, in closing arguments, Sealevel's counsel told the jury that "I'm not sure what the 10,000 was, it might have been reimbursement for some expenses…." (R. p. 572, lines 7-9).

579, 762 S.E.2d at 701 (no contract existed even though the parties intended to be bound because the absence of material terms rendered the agreement unenforceable).[9] Thus, Sealevel is wrong in claiming a contract for the sale of goods can be completely devoid of critical material terms, yet still be enforceable. The trial court got it right in concluding the Supply Agreement is unenforceable.

B. Even if the Supply Agreement is enforceable, the trial court correctly concluded that no evidence supports the remaining elements required for a tortious interference with contract claim.

If this Court concludes that the Supply Agreement is an enforceable contract, there is still no evidence supporting any other element of Sealevel's tortious interference with contract claim—that DiaxaMed had knowledge of the Agreement, intentionally procured a breach of the Agreement without justification, or caused damages.

Sealevel convinced the jury that DiaxaMed tortiously interfered with the Supply Agreement based on sheer speculation and intrigue, as is further highlighted by its scant briefing on the tortious interference claim. Sealevel's Brief at 38-42. Indeed, in the tortious interference portion of Sealevel's brief, it repeatedly uses the word "inferences" with limited cites to the record for the obvious reason that there is no bona fide evidence supporting the elements of this claim. But surmise, conjecture, or speculation are not sufficient for Sealevel to sustain its burden to prove its intentional interference claim. *See Small*, 329 S.C. at 461, 494 S.E.2d at 841; *Hanahan*, 326

[9] Sealevel points to S.C. Code Ann. § 36-2-207(3) as further indicating that "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract." But Sealevel disregards the next part of that section, which states that "[i]n such case the terms of the particular contract consist of those terms on which the writings of the parties agree, **together with any supplementary terms incorporated under any other provisions of this act**." S.C. Code Ann. § 36-2-207(3) (emphasis added). Here, there are no "supplementary terms" because Sealevel and CreatiVasc never got to the next steps of determining specifications, price, or quantity.

S.C. at 149, 485 S.E.2d at 908. Because no evidence supports any remaining element of Sealevel's tortious interference claim, the JNOV Order should be affirmed for failure of any of the remaining elements listed below.

1. There is no evidence of a breach of the Agreement.

"An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery." *Eldeco, Inc. v. Charleston Cnty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (citations omitted); *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("The nexus between [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.") (quoting *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982)). There is no evidence of a breach of the Supply Agreement, so DiaxaMed could not have intentionally procured a breach. *Dutch Fork*, 406 S.C. at 604, 753 S.E.2d at 844.

The record establishes that the parties never reached the stage at which any contractual performance—let alone breach—could occur. The Supply Agreement contemplated future obligations *only if* certain conditions were met, including the development of a viable product, agreement on product specifications, agreement on pricing, and the submission of purchase orders. (R. pp. 737-738, §§ 1, 3). None of these conditions materialized. It is undisputed that Sealevel never successfully developed a commercially viable product capable of integration with the Gen Two System. (R. p. 447, lines 12-17); (R. p. 450, lines 5-13). Indeed, the Gen Two System's defining feature, a needleless function, depended entirely on the successful creation of an external handheld device that could interact with the System's internal valve pump. (R. p. 447, line 21-p. 448, line 6); (R. p. 475, lines 23-25). Although Sealevel and CreatiVasc produced an early

prototype "wand," the design required a saline-proof magnetic sensor within the System. (R. p. 259, lines 3-11); (R. p. 447, lines 1-9). The uncontroverted evidence showed that developing a saline-proof sensor was not feasible, effectively rendering the Gen Two System unworkable. (R. p. 447, lines 1-17). Without a viable Product, there was nothing to price, no purchase orders to submit, and no contractual obligation to perform (or that could be breached).

Additionally, there is no evidence CreatiVasc/Brookhaven breached the Supply Agreement by procuring or using an alternative supplier. The only conceivable breach would have been the manufacture or sale of the System incorporating a competing hand-held device that was not purchased from Sealevel. (R. p. 737, § 1). But Sealevel put forth no evidence at trial that this occurred.

Likewise, there is no evidence that CreatiVasc/Brookhaven ever engaged another company to develop or supply a competing device. (R. p. 492, lines 22-25). The undisputed testimony showed that no version of the System, whether using a hand-held device or needles, was ever developed, marketed, or sold. Multiple witnesses confirmed that no such transactions occurred, and Sealevel conceded that it had no evidence of any sales. (R. p. 238, lines 3-5); (R. p. 371, lines 17-21); (R. p. 486, lines 10-15).

Sealevel raises several "red herring" arguments that it contends constitute evidence of a breach of the Agreement. First, Sealevel contends that CreatiVasc/Brookhaven ordered six handheld "wands" but failed to remit full payment for even one. Sealevel's Brief at 4, 20, 22, 24. But Sealevel conceded that it never shipped the wands, leaving Sealevel without evidence of accepted goods, a contract price, or purchase-order terms necessary to establish a legally recoverable payment obligation under Sealevel's own theory. (R. p. 738, § 4); (R. p. 355, lines 13-21). Moreover, the undisputed evidence shows that CreatiVasc/Brookhaven determined that the

proposed design was not technically feasible. The wand depended on an internal sensor capable of functioning within a saline environment, and developing a saline-proof sensor was not achievable. (R. p. 447, lines 1-17). Because of that fundamental design failure, the parties never progressed to a point where performance was due under the Agreement.

Second, Sealevel claims that CreatiVasc/Brookhaven breached an implied duty of good faith and fair dealing. Sealevel's Brief at 30. But South Carolina law does not recognize a stand-alone cause of action for breach of the implied covenant of good faith and fair dealing. *Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 86, 866 S.E.2d 337, 342 (2021). Rather, the implied covenant is part of a contract claim and is "tied to the rights and duties the parties agreed upon in the contract" and "may not be relied upon to create new duties not expressly stated or otherwise implied" in the contract. *Road, LLC v. Beaufort Cnty*., 443 S.C. 11, 14, 902 S.E.2d 366, 367 (2024). The implied covenant governs the manner in which contractual obligations are performed; it does not create new contractual duties. 443 S.C. at 24, 902 S.E.2d at 372. Accordingly, there can be no breach of the implied covenant if there was no breach of the Supply Agreement.

Third, Sealevel's theory that CreatiVasc/Brookhaven breached the Supply Agreement's confidentiality provisions by providing confidential, proprietary information to DiaxaMed lacks any support in the record. Sealevel's Brief at 24, 31. Sealevel introduced no evidence that any confidential, proprietary information was disclosed, misused, or even accessed by anyone, including DiaxaMed. At most, the evidence showed that a former employee (Steve Johnson, who had previously been at CreatiVasc) turned over his work devices upon leaving DiaxaMed, consistent with company policy. (R. p. 403, line 21-p. 404, line 2). There was no testimony regarding the contents of those devices and no evidence that any Sealevel information was ever transmitted to DiaxaMed or anyone else. Further, there is no evidence that DiaxaMed used

"Sealevel's proprietary information" to "develop a Product similar to the device already developed by Sealevel." Sealevel's Brief at 9. To the contrary, the **only** evidence was that DiaxaMed never used any remote activation device similar to what Sealevel attempted to develop and instead reverted to trying to develop a Gen One System relying on a needle and subcutaneous port to activate the ballon valves rather than a remote actuator. (R. p. 439, lines 9-12); (R. p. 449, lines 4-8); (R. p. 487, line 21-p. 488, line 23).

Like its other arguments, Sealevel's confidentiality-breach argument rests entirely on speculation, not proof. *See Small*, 329 S.C. at 461, 494 S.E.2d at 841; *Hanahan*, 326 S.C. at 149, 485 S.E.2d at 908. Sealevel concedes this theory depends on rote speculation when it states that Brookhaven and DiaxaMed "*may or may not* have been (and still be) carrying on with the dialysis system using Sealevel's protected proprietary information." Sealevel's Brief at 1 (emphasis added). It is also telling that Sealevel did not bring a claim for trade secret misappropriation under the South Carolina Trade Secrets Act—because there was no appropriation of Sealevel's confidential, proprietary information. *See* S.C. Code Ann. § 39-8-10, *et seq*.

In short, there is no evidence that the Agreement (if it was enforceable, which it was not) was breached, and thus the tortious interference claim fails as a matter of law.

2. There is no evidence that DiaxaMed knew of the Agreement or intentionally procured its breach without justification.

Even if this Court were to conclude that CreatiVasc/Brookhaven breached the Agreement, there is no evidence that DiaxaMed knew of the Agreement at the time it purchased Creativasc/Brookhaven's assets or "intentionally procured" its breach without justification, which are required elements for a tortious interference with contract claim. *See Eldeco*, 372 S.C. at 480, 642 S.E.2d at 731. The trial court properly pointed out these failures when it asked counsel for

Sealevel, "how about the intentional procurement of his breach and absence of justification? What evidence do you have of that?" (R. p. 515, lines 14-15).

First, there is no evidence DiaxaMed had any knowledge of the Supply Agreement (or Sealevel in general) when it purchased CreatiVasc/Brookhaven's assets. *Dutch Fork*, 406 S.C. at 604, 753 S.E.2d at 844. Brian McMurray formed DiaxaMed for the purpose of purchasing the assets and intellectual property of CreatiVasc/Brookhaven. (R. p. 448, lines 18-21); (R. p. 486, lines 6-9). DiaxaMed did not take an assignment or otherwise assume CreatiVasc/Brookhaven's responsibilities under the Agreement, which remained with CreatiVasc/Brookhaven. (R. pp. 778-791); (R. p. 421, lines 6-12); (R. p. 429, lines 11-13); (R. p. 493, line 16-p. 494, line 7); (R. p. 495, lines 2-5).

As related to this routine business transaction, McMurray's unrefuted testimony was that he had no knowledge of the Supply Agreement or the technology—which "wasn't even looked at." (R. p. 492, lines 14-25); (R. p. 495, lines 4-5). Instead, upon acquiring CreatiVasc/Brookhaven's assets, DiaxaMed immediately shifted its focus to refining the Gen One version of the System, which design predated Sealevel's involvement. (R. p. 449, lines 4-8); (R. p. 487, line 21-p. 488, line 3). The evidence established that DiaxaMed did 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 System. (R. p. 495, lines 4-5).

Additionally, the unrefuted evidence established that DiaxaMed's principal, Brian McMurray, had no interactions with Sealevel. (R. p. 239, lines 8-18); (R. p. 250, lines 23-24); (R. p. 393, lines 22-24); (R. p. 482, lines 1-3); (R. p. 492, line 10-p. 493, line 7). Indeed, Sealevel's founding owner, Tom O'Hanlan, testified that he had never met Brian McMurray. (R. p. 245, lines 4-6); (R. p. 250, line 16-p. 251, line 1).

Sealevel repeatedly states that DiaxaMed structured the CreatiVasc/Brookhaven purchase to "take all assets and liability of CreatiVasc, ***except*** the Supply Agreement" and "deliberate[ly]" excluded the Agreement—which it claims proves DiaxaMed must have known about the Agreement. Sealevel's Brief at 6, 41 (emphasis in original). This argument is misleading. The contribution agreement between DiaxaMed and CreatiVasc/Brookhaven does not state that it excludes the Supply Agreement. It is instead **silent** regarding the Supply Agreement, so that the Agreement was not part of DiaxaMed's purchase of CreatiVasc/Brookhaven's assets. (R. pp. 778-791 & pp. 787-788). Moreover, the record reflects **why** CreatiVasc sold its assets to Brookhaven and ultimately, DiaxaMed: it had run out of money, and it could not get the System off the ground. (R. p. 447, lines 15-17); (R. p. 448, lines 7-17). DiaxaMed could not tortiously interfere with a Supply Agreement it had no knowledge of, and there is certainly no evidence DiaxaMed made a deliberate, underhanded decision to exclude Sealevel when it acquired Brookhaven's assets.

Second, and relatedly, there is no evidence that DiaxaMed intentionally procured any breach of the Agreement without justification. South Carolina courts recognize that not all interference with a contract is actionable. In *Sea Island Food Group, LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 287, 857 S.E.2d 902, 906 (Ct. App. 2021), this Court favorably cited federal authorities examining these elements of a tortious interference with a contract claim:

> The Fourth Circuit has noted that "[w]hat constitutes improper means [of interference] may be somewhat difficult to distill as a rule of law ...." *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993). "Interference with a contract is justified when it is motivated by legitimate business purposes." *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995). "Generally, 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." *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)). Examples of improper methods include slander, sabotage, violence, fraud, and misrepresentation or deceit. *See Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64.

Id.; *see Broach v. Carter*, 399 S.C. 434, 443, 732 S.E.2d 185, 189 (Ct. App. 2012) (party that entered into subsequent contract was justified because parties are free to contract as they choose and there was no evidence to refute that the parties acted in good faith when exercising the legal right to contract).

The evidence presented at trial showed that DiaxaMed simply:

- purchased assets from CreatiVasc/Brookhaven in an arm's-length transaction after Brookhaven had exhausted its operating capital;
- DiaxaMed did not take an assignment of CreatiVasc/Brookhaven's rights or obligations under the Supply Agreement;
- after acquiring CreatiVasc/Brookhaven's intellectual property, DiaxaMed shifted its focus to developing the Gen One System, a design that predates Sealevel's involvement and does not rely on a remote actuator hand-held device; and
- DiaxaMed never used **any** of the technology developed by Sealevel in its efforts to advance the Gen One System—and in fact, despite substantial financial investment, DiaxaMed has yet to produce a viable System.

(R. p. 439, lines 9-12); (R. p. 448, lines 7-21); (R. p. 449, lines 4-8); (R. p. 486, lines 10-18); (R. p. 487, line 21-p. 488, line 23); (R. p. 495, lines 2-5). The only reasonable inference from this evidence is that DiaxaMed acted to advance its own legitimate business interests.[10]

[10] Though not in the tortious interference portion of its brief, Sealevel suggests that because DiaxaMed's owner also owned ATEX—an entity that entered into a separate agreement with CreatiVasc in February 2015 (R. p. 490, lines 21-24)—DiaxaMed must have improperly excluded Sealevel from the asset transaction with Brookhaven. But the evidence does not support that leap. The testimony indicated that the ATEX agreement concerned a different component of the System (balloon valves) for use in the **Gen 1** device—not electronics for the **Gen 2** device CreatiVasc and Sealevel were trying to develop. (R. p. 405, lines 19-23); (R. p. 443, lines 8-18); (R. p. 466, lines 6-11). Indeed, Sealevel concedes that ATEX's separate supply agreement with

As specific to this element, Sealevel claims that DiaxaMed "obtained from CreatiVasc/Brookhaven all of its 'assets,' at least inferentially including Sealevel's valuable, confidential, proprietary engineering analysis and design." Sealevel's Brief at 39-40. Sealevel also contends that DiaxaMed must have benefitted "from Sealevel's research and engineering." Sealevel's Brief at 40. But one searches the record in vain to find any evidence that DiaxaMed "knew" about, obtained, or used Sealevel's confidential information. (R. p. 448, lines 18-21); (R. p. 482, lines 1-3); (R. p. 492, line 10-p. 493, line 7); (R. p. 495, lines 2-5); (*see also* R. p. 239, lines 11-17); (R. p. 250, lines 23-24); (R. p. 393, lines 22-24). The only way to make this leap is to stack inference upon inference so that it enters the realm of pure speculation, as opposed to drawing reasonable inferences from the evidence. *See Small*, 329 S.C. at 461, 494 S.E.2d at 841; *Hanahan*, 326 S.C. at 149, 485 S.E.2d at 908.

In short, there is no evidence DiaxaMed acted nefariously in making the legitimate business decision to acquire CreatiVasc/Brookhaven's assets and focus its attention on development of the Gen One System. DiaxaMed was under no obligation to acquire or assume the Supply Agreement and had every right to structure its transaction with CreatiVasc/Brookhaven accordingly. Purchasing assets in this manner is a routine and lawful business activity that the trial court correctly determined cannot support a claim for tortious interference.

3. There is no evidence supporting the tortious interference damages awarded by the jury.

Should the Court look past these many holes in Sealevel's intentional interference claim, the claim still fails on the final element: resulting damages. *Dutch Fork*, 406 S.C. at 604, 753 S.E.2d at 844; *Collins Music Co.*, 292 S.C. at 541, 357 S.E.2d at 486 ("To establish an action for

---

CreatiVasc/Brookhaven concerned "another, different component part of the … System (or a similar iteration of the System)." Sealevel's Brief at 5.

intentional interference with a contract, a plaintiff must establish not only that the defendant wilfully procured breach of an existing contract, but also that damages resulted from the breach."). The damages recoverable for tortious interference are (1) pecuniary loss of the benefits of the contract; (2) consequential losses for which the interference is the legal cause; and (3) emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. *Collins Music Co.*, 332 S.C. at 147-48, 503 S.E.2d at 482.

The jury awarded tortious interference damages of $400,000 against DiaxaMed. (R. p. 13). But this amount is an arbitrary figure that the jury appears to have just pulled from a hat, untethered to any evidence at trial. *See Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (1996) ("the general rule for recovery of damages… requires that the evidence should be such as to enable the factfinder to determine the amount of the damages with reasonable certainty. While proof with mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation."). The trial court rightly noted in its instruction to the jury: "Now, proof of this -- of the damages is not to the standard of a mathematical certainty, but the -- the amount of the damage cannot be left to -- to conjecture, guess, or speculation, okay?" (R. p. 607, lines 19-22).

At trial, Sealevel focused on only its purported "development fees" incurred developing the Product, as evidenced by an invoice it sent Brookhaven in June 2017. (R. pp. 802-804); (R. p. 377, line 7-p. 378, line 12). The invoice was for $321,540, reflecting Sealevel's purported engineering services and costs. (*Id.*)[11] This is the amount the jury awarded Sealevel in damages

[11] Notably, even the $321,540 damages model was highly speculative. Sealevel's president, Ben O'Hanlan, had no memory of the amount of work Sealevel allegedly put into developing the Product or whether it was paid for any of the purported work. (R. p. 192, lines 4-17). Tom O'Hanlan, the founder of Sealevel, testified that he thought he spent "hundreds" of hours on the project, but did not recall any specific number. (R. p. 291, lines 15-20). He later stated perhaps 300 to 400 hours and "guess[ed]" his rate for work would have been $125/hour. (R. p. 292, lines 1-19). He further "guess[ed]" that the rate and hours for other engineers working on the project

for its breach of contract claim against CreatiVasc/Brookhaven. (R. p. 12). But for tortious interference with contract damages, the jury did not award this amount, but instead the arbitrary figure of $400,000. Notably, in its brief, Sealevel spends considerable time defending the jury's **breach of contract damages award** (the $321,540 in "development fees" Sealevel claims to have incurred). Sealevel's Brief at 32-38; (R. pp. 802-804). But Sealevel does not say a word in defense of the jury's $400,000 **tortious interference damages award**. This omission in Sealevel's brief is understandable given the complete lack of evidence supporting this award.

Finally, Sealevel fails to distinguish any damages allegedly caused by DiaxaMed from those arising from the purported breach of contract by CreatiVasc/Brookhaven. Sealevel did not attempt to demonstrate any separate damage model for its tortious interference claim against DiaxaMed or explain how DiaxaMed caused any independent damages. A separate tort award on the same alleged losses is impermissibly duplicative. *Collins Music Co.*, 332 S.C. at 148, 503 S.E.2d at 482. A plaintiff "cannot collect double recovery (once from each defendant) for actual damages which are coextensive under the contract and tort claims." *Id.* (citing *Ross*, 640 S.W.2d at 173). Given that Sealevel only put forth evidence regarding its alleged "development fees" contract damages, the tortious interference damages award is at most an impermissible double recovery that cannot be awarded.[12]

---

and even testified "I'm just guessing." (R. p. 292, line 17-p. 296, line 8). When asked if Sealevel had records of hours worked, he stated "I – we would hope so." (R. p. 296, line 20-p. 297, line 1). But Sealevel did not put these purported records in evidence at trial.

[12] In regard to breach of contract damages, Sealevel attempts to conflate the Supply Agreement's indemnification provision with a contractual remedy in the event of a breach. Sealevel's Brief at 24-25 (citing R. p. 741, § 13(e)(ii) concerning damages under indemnification clause). But its reference to the indemnification provision is misplaced, as that clause concerns third-party claims and does not create a measure of damages between the contracting parties. (R. pp. 739-741, § 13). Likewise, Sealevel's reliance on UCC principles as supporting the breach of contract damages amount is unavailing. Even if the UCC applied (which it does not), nothing in the UCC permits recovery of speculative development costs not found in any contractual provisions. The Agreement

For all of these reasons, the trial court properly granted JNOV on Sealevel's tortious interference with contract claim.

II. The trial court properly granted directed verdict on Plaintiff's quantum meruit claim against DiaxaMed.

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *Rose Elec., Inc.*, 418 S.C. at 431, 794 S.E.2d at 386. "In order to recover under the theory of quantum meruit, a plaintiff must prove: '1) a benefit conferred by the plaintiff upon the defendant; 2) realization of that benefit by the defendant; and 3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.'" *Id.* (quotation omitted).

The trial court properly granted directed verdict on this claim as to DiaxaMed since there is no evidence DiaxaMed obtained any benefit from Sealevel's work on the Product. To the contrary, the unrefuted evidence established that:

- DiaxaMed has never used any of the technology developed by Sealevel in its efforts to advance the Gen One System (R. p. 488, lines 8-14);
- No version of the System has ever been developed, marketed, or sold (R. p. 238, lines 3-5); (R. p. 371, lines 16-21); (R. p. 486, lines 10-15); and
- DiaxaMed has generated no revenue from sales of the System or any other source (R. p. 486, lines 10-15).

As explained in Section I above, multiple witnesses confirmed the project was shelved and never commercialized, defeating any inference of retained benefit. And any claim by Sealevel that

---

sets forth how Sealevel was to be paid: CreatiVasc was to submit purchase orders, Sealevel was to issue an invoice, then CreatiVasc would remit payment. (R. pp. 737-738, §§ 3-4). The parties never reached the stage at which these steps would be taken. But in any event, none of this is relevant to the random tortious interference damages awarded by the jury.

Diaxamed obtained a benefit because it might someday use the technology is not evidence of realized and retained benefit; it is speculation.

In the face of this straight-forward and unrefuted evidence, this Court should affirm the trial court's directed verdict on this claim.

III. The trial court properly dismissed Plaintiff's promissory estoppel claim against DiaxaMed.

Sealevel oddly pleaded a promissory estoppel claim against DiaxaMed and addressed DiaxaMed in this portion of its brief—even though none of the elements of promissory estoppel would conceivably apply to DiaxaMed. The elements of promissory estoppel are: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made sustains injury in reliance on the promise. *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (1993).

The critical missing link for this claim is that DiaxaMed never made any promises to Sealevel at all. Instead, the sole interactions both leading to and after the Agreement were between CreatiVasc's representative and Sealevel's representative. There was no evidence at trial that anyone from DiaxaMed communicated to anyone at Sealevel at all—let alone evidence of any promises. Instead, the undisputed evidence established that DiaxaMed's owner, Brian McMurray, never met Tom O'Hanlan or anyone at Sealevel and certainly made no promises. (R. p. 239, lines 11-18); (R. p. 250, lines 23-24); (R. p. 393, lines 22-24); (R. p. 482, lines 1-3); (R. p. 492, line 10-p. 493, line 7). Promissory estoppel is not a vehicle to impose an obligation on a non-promisor, DiaxaMed, or to create a payment duty that the parties did not include in the Supply Agreement.

This Court should affirm the dismissal of the promissory estoppel claim against DiaxaMed.

IV. In the alternative, if the Court reverses the trial court's Order granting Defendants' motion for JNOV, this Court should remand for a new trial or for the trial court to consider Defendants' motion for new trial rather than rendering judgment on the jury's verdict.

If this Court reverses JNOV, it should not simply reinstate the verdict without addressing Defendants' preserved new-trial grounds. Defendants jointly filed a Motion for JNOV 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*. (R. pp. 14-32); (R. pp. 75-98). Because the trial court granted JNOV, the court ruled that the motion for new trial was rendered moot. (R. p. 30). If this Court reverses the trial court's Order, the motion for new trial will no longer be moot. Thus, in the alternative, if this Court reverses the Order, it should either remand for a new trial or remand with instructions for the court to rule on the motion for new trial. *See* S.C. Code Ann. § 18-9-270; Rules 50(d) & 59, SCRCP.

A. If this Court does not affirm the trial court's JNOV Order, it should remand for a new trial.

"A new trial may be granted … on all or part of the issues … in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. A trial court has "the duty to grant a new trial if the jury verdict is contrary to the fair preponderance of the evidence." *Jessup v. Hansen*, 289 S.C. 54, 56, 344 S.E.2d 618, 620 (Ct. App. 1986). A trial court may also grant a new trial "on the ground that the verdict is excessive or inadequate." *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (citing *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)). "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004).

Additionally, a new trial absolute is appropriate "if the verdict is inconsistent and reflects jury[] confusion." *Vinson v, Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996) (citing *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995)). The jury's verdict against DiaxaMed is unsupported by the evidence, is objectively excessive and the result of undue prejudice or passion, and reflects jury confusion; therefore, a new trial is mandated if the Order is reversed.

First, if this Court believes there is some evidence supporting the tortious interference verdict, the verdict is at a minimum contrary to the fair preponderance of the evidence for the reasons set forth above, requiring a new trial. *See* Section I, *supra*; *Jessup*, 289 S.C. at 56, 344 S.E.2d at 620.

Second, the tortious interference damages award of $400,000 and the punitive damages award of $2,500,000 are objectively excessive and reflect the jury's passion, caprice, prejudice, or confusion. As explained, the $400,000 actual damages award is based on no evidence in the record or ascertainable damages model. *See* Section I, *supra*.

As to the punitive damages award, "[i]n order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000) (citing S.C. Code Ann. § 15-33-135); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996)). "A conscious failure to exercise due care constitutes willfulness." *Id.* (citations omitted). The South Carolina Supreme Court has articulated the framework for reviewing punitive damages, instructing courts to consider:

> (a) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the

> award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) … "other factors" deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). "Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record." *Id*.

The $2,500,000 punitive damages award, which is more than six times the actual damages award, is extreme and untethered to any possible evidence in the record (let alone clear and convincing evidence) that DiaxaMed engaged in misconduct in willful, wanton, or in reckless disregard of Sealevel's rights. *See* Section I, *supra*. Without this evidence, punitive damages are not legally justified.

Third, given the lack of evidence supporting the verdict and the excessiveness of the damages awards, the verdict can only have been attributed to jury confusion, passion, caprice, prejudice, or some motive that falls outside the evidentiary record. Several factors indicate the jury's confusion or prejudice. Before rendering its verdict, the jury provided a note to the court asking if it could award Sealevel attorney's fees and other costs, none of which were part of the record. (R. p. 649, line 17-p. 650, line 11). Upon being instructed that it could only base its verdict on the evidence presented, the jury nevertheless returned an actual damages award against DiaxaMed that lacks any evidentiary foundation and then imposed a punitive damages award that appears to have been motivated by animus rather than a reasoned evaluation of the facts. (*Id.*; R. p. 651, line 16-p. 652, line 3); (R. pp. 12-13). Sealevel's counsel also attempted to inflame the jury by describing DiaxaMed as a "corporate raider" and argued punitive damages during closing argument rather than explaining any legally-cognizable theory of actual damages for the tortious interference claim. (R. p. 590, line 13-p. 596, line 1). Sealevel continues its inflammatory

rhetoric—unbacked by evidence—in its brief. Sealevel's Brief at 38-42. On this record, if this Court reverses, a new trial is warranted rather than reinstatement of the jury's verdict.

Even if this Court only believes that either the actual damages award or punitive damages award (but not both) is excessive or unsupported by sufficient evidence, this Court must remand the entire case for a new trial. *Gurwood v. GCA Servs. Grp., Inc.*, 445 S.C. 324, 337, 914 S.E.2d 149, 156-57 (2025). "If the appellate court reverses the liability and actual damages verdict on some other issue, then the court should remand for a new trial on all issues." *Id.* Further, if this Court only believes DiaxaMed is entitled to a remand on Sealevel's punitive damages claim, DiaxaMed has the right for the same jury to consider punitive damages that determined actual damages—and it hereby invokes that right. S.C. Code Ann. § 15-32-520(A). Because that jury has long been discharged, a new trial is required on all issues even if this Court agrees only that the punitive damages award is improper. *Gurwood*, 445 S.C. at 339-40, 914 S.E.2d at 158.

For these reasons, if this Court does not affirm the Order, it should remand for a new trial.

B. Alternatively, this Court should remand with instructions for the trial court to consider and rule on Defendants' motion for new trial.

In the alternative, this Court should remand for the trial court to consider and rule on Defendants' motion for 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*. (R. pp. 14-32); (R. pp. 75-98). As noted, the trial court granted JNOV, so it dismissed Defendants' motion for new trial as moot. (R. p. 17). Thus, if this Court reverses the Order but does not remand for a new trial outright, the time is ripe for the trial court to rule on Defendants' motion for new trial.[13] In this instance, the remand should include instructions to the trial court that the damages awarded against DiaxaMed

[13] If this Court were to reverse the dismissal of the quantum meruit and promissory estoppel claims, this would also require a remand for a new trial on those claims.

are excessive, are duplicative of the damages awarded against CreatiVasc/Brookhaven, and exceed the statutory cap for punitive damages.

First, as explained, the actual damages awarded of $400,000 against DiaxaMed is based on no ascertainable damages model, supported by no evidence, and is excessive. *See* Section IV.A, *supra*. Sealevel failed to admit evidence supporting **any** alleged damages beyond the "development fees" invoice in the amount of $321,540 it sent to Brookhaven. (R. pp. 802-804). If this Court accepts that this invoice for engineering services properly supported a cognizable breach of contract damages award, Sealevel still did not prove any damages beyond this—and certainly put on no evidence of tortious interference damages.

Second, relatedly, a plaintiff may not receive a double recovery for overlapping damages under a breach of contract and tortious interference claim. *Collins Music Co.*, 332 S.C. at 147-48, 503 S.E.2d at 482. Since Sealevel put on no evidence of damages beyond the $321,540 invoice and related testimony, then at a minimum, Sealevel could at most be entitled to $321,540 in damages jointly and severally from DiaxaMed and CreatiVasc/Brookhaven since otherwise Sealevel will obtain a double recovery.

Third, the punitive damages award is not only patently excessive, *see* Section IV.A, *supra*, but it also violates the statutory limits set forth in S.C. Code Ann. § 15-32-530(A). Section 15.32-530(A) provides that, absent the exceptions in subsections (B) and (C), "an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." As none of the exceptions in subsections (B) and (C) apply, the punitive damages award must, at a minimum, be reduced to three times any actual damages award on remand.

Thus, if this Court does not grant remand for a new trial outright, it should remand for the trial court to consider and rule on Defendants' motion for new trial and provide instructions that (1) the actual and punitive damages awarded against DiaxaMed are excessive, (2) Sealevel may not obtain a double recovery from the Defendants, and (3) any punitive damages are limited by the statutory cap.

CONCLUSION

For these reasons and the reasons set forth in CreatiVasc/Brookhaven brief and the trial court's Order, DiaxaMed requests that this Court affirm the trial court's JNOV Order in its entirety. Alternatively, if this Court reverses the trial court's Order, then DiaxaMed requests that this Court either remand for a new trial or else remand for the trial court to rule on Defendants' motion for new trial with the instructions set forth above rather than rendering judgment on the jury's verdict.

/s/ Robert E. Sumner IV
Robert E. Sumner IV (SC Bar No. 71728)
BUTLER SNOW, LLP
25 Calhoun St., Ste. 250
Charleston, SC 29401
Telephone: 843/277-3700
Email: robert.sumner@butlersnow.com

Attorney for Respondent Diaxamed, LLC

RECEIVED
Jul 21 2026
SC Court of Appeals

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.

RULE 211(B) *SCACR*, CERTIFICATION

I, Robert E. Sumner, IV, Esquire, hereby certifies and attests the Final Brief submitted by and on behalf of Respondent, DiaxaMed LLC complies with the requirements of Rule 211(b), *SCACR*.

s/ Robert E. Sumner IV
Robert E. Sumner IV
S.C. Bar No. 71728
BUTLER SNOW LLP
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Telephone: 843.277.3705
Email: robert.summer@butlersnow.com

Attorney for the Respondent DiaxaMed, LLC