

**JULY 2009**



**California  
Bar  
Examination**

**Performance Test A**

**INSTRUCTIONS AND FILE**

**FARLEY v. DUNN**

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## **FARLEY v. DUNN**

### **INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**Sundquist & Davis**  
Attorneys at Law  
12 Manning Blvd.  
Columbia City, Columbia

**MEMORANDUM**

**To:** Applicant  
**From:** Wendy Davis  
**Date:** July 28, 2009  
**Re:** **Farley v. Dunn**

Our firm represents Dunn Insurance Company (“Dunn”), which is headquartered in Columbia. Dunn insures a wide variety of activities, including commercial trucking. Dunn has been sued by Farley Trucking, Inc. (“Farley”). Farley is a large, interstate trucking company also located here in Columbia. Farley, an apparently sophisticated company, aided by its insurance broker, seeks to elevate the status of a one-page letter into a three-year contract for millions of dollars of commercial general liability insurance coverage, and, in the process, unilaterally rewrite important terms of the insurance contract that was subsequently signed by the parties.

We are now prepared to file a motion for summary judgment, seeking dismissal of the entire lawsuit. Following the guidelines set forth in the attached memorandum regarding persuasive briefs in support of motions for summary judgment, please draft a Statement of Uncontested Facts and a persuasive brief in support of our motion in which we argue that the one-page letter is not enforceable as a contract, varies the one-year term of the policy, and is not a sufficient basis for Farley’s fraud allegation.

## **Sundquist & Davis**

Attorneys at Law  
12 Manning Blvd.  
Columbia City, Columbia

### **MEMORANDUM**

**To:** Attorneys  
**From:** Executive Committee  
**Re:** **Persuasive Briefs in Support of Motions for Summary Judgment**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs in support of motions for summary judgment to be filed in state court shall conform to the following guidelines.

All of these documents shall start with a Statement of Uncontested Facts that itemizes the facts that are material to support our motion and explains why each of the material facts is undisputed. The attorney must sift through the facts in the file and draft a statement that persuasively shows that there is indeed no genuine issue of material fact. This requires a careful comparison of the opposing side's characterization of the facts in the file. The format and style shall be as follows:

Fact #1: The May 1, 2005 memorandum was signed by the President of the company.

Undisputed Because: The President of the company admitted this fact in paragraph 2 of her affidavit.

Fact #2: The meeting between James and Spellman occurred on March 1, 2006.

Undisputed Because: This fact is alleged in paragraph 10 of the plaintiff's complaint and is admitted in paragraph 14 of the defendant's answer.

Following the Statement of Uncontested Facts, the attorney must then argue, applying the law to the facts, and move on to show that, in light of the uncontested facts, our client is entitled to judgment as a matter of law.

This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position the attorney is advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER:** DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER:** A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

1 Victoria Cooper, Esq.  
2 State Bar No. 7579  
3 Michaels & Farnsworth, LLP  
4 515 Francesca Way  
5 Marion, Columbia  
6 (555)337-2021  
7 Attorneys for Plaintiff

8  
9

10 **SUPERIOR COURT OF COLUMBIA**  
11 **IN AND FOR THE COUNTY OF CHESTER**

12 Farley Trucking, Inc., Civil Action  
13 Plaintiff, No. 89765

14 v.

15

16 **COMPLAINT**

17 Dunn Insurance Company,  
18 Defendant

19 \_\_\_\_\_ /

20 **THE PARTIES**

21 1. Plaintiff, Farley Trucking, Inc. (“Farley”), is a corporation organized and existing  
22 under the laws of Columbia, with its principal place of business in Columbia City,  
23 Columbia.

24 2. Upon information and belief, Defendant, Dunn Insurance Company (“Dunn”), is  
25 an insurance corporation incorporated under the laws of Columbia, with its principal  
26 place of business located in Columbia City, Columbia.

27 3. Upon information and belief, Dunn insures certain types of liabilities, including  
28 liabilities associated with the commercial trucking industry.

29



1 14. As of May 23, 2007, Dunn has neither requested an increase in coverage nor  
2 a decrease in the policy deductible.

3 15. After Farley received the Notice, representatives from Bradford met with  
4 representatives from Dunn. The Bradford representatives learned from this meeting that  
5 Dunn claimed that their notice of non-renewal was because the terms of Dunn's  
6 reinsurance agreements would not allow them to lay off the risk they assumed in the  
7 Policy.

8 16. Dunn knowingly misrepresented its intention to renew and willfully placed its  
9 own pecuniary interest before that of its policyholder in failing to renew the Policy at the  
10 fixed premium rate through August 1, 2009, as it contracted to do in the Agreement.

11 17. Due to Dunn's breach of the Agreement, Farley was forced to purchase  
12 insurance similar to that previously provided under the Policy for the period August 1,  
13 2007 through August 1, 2009, at a cost to Farley significantly in excess of the fixed  
14 premium rate provided for in the Agreement.

15 **BREACH OF CONTRACT**

16 18. Farley repeats and realleges the allegations contained in paragraphs 1  
17 through 17 as if fully set forth herein.

18 19. Dunn was obligated under the Agreement to renew the Policy at the fixed  
19 premium rate of .0940 per 100 payroll miles for a period of three consecutive years  
20 beginning August 1, 2006 and ending August 1, 2009.

21 20. Dunn sent Farley a notice of non-renewal of the Policy effective August 1,  
22 2007 — two years before their obligation expired.

23 21. Thus, Dunn has breached the terms of the Agreement.

24 22. As a result of such breach, Farley has suffered, and will continue to suffer  
25 damages.

26 23. Farley, therefore, is entitled to an award of compensatory and consequential  
27 damages in an amount to be proven at trial.

28 **FRAUDULENT INDUCEMENT**

29 24. Farley repeats and realleges the allegations contained in paragraphs 1  
30 through 23 as if fully set forth herein.

31 25. Farley has justifiably relied upon the Agreement entered into on July 11, 2006.



Bradford Insurance Brokers, Inc.  
456 Peal Street  
Columbia City, Columbia

July 11, 2006

Scott Gordon, President  
Dunn Insurance Company  
717 Security Drive  
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance

Dear Mr. Gordon:

I enjoyed meeting with you yesterday and wanted to follow up our conversation concerning the proposed Farley Trucking, Inc. insurance policy with a brief summary of our discussion. We are in agreement that you will provide a rate of .0940 per 100 miles for the period of August 1, 2006 through August 1, 2009 with a minimum deposit of \$987,800 for the referenced account for the 12 month period August 1, 2006 through August 1, 2007.

This rate will not change unless:

- 1) There is a material change in operation;
- 2) There has been a claim in excess of \$500,000;
- 3) Farley requests an increase in coverage or a decrease in deductible.

If there are any questions, please contact me. I look forward to working with you.

Sincerely,

Bradford Insurance Brokers, Inc.

**Jennifer Barba**

Jennifer Barba  
Vice President

**EXHIBIT A**

Dunn Insurance Company  
717 Security Drive  
Columbia City, Columbia

**POLICY OF INSURANCE**

Policy No. GYC 3427

**NAMED INSURED:** Farley Trucking, Inc.

**TERM:** The policy term shall be one year, from August 1, 2006 to August 1, 2007.

**PREMIUM:** \$987,800 per year, adjustable at a rate of .0940 per 100 payroll miles.

\* \* \*

**COVERAGE:** Dunn will provide \$5 million commercial general liability coverage per occurrence.

\* \* \*

23. This policy constitutes the entire agreement between the insured and the insurer concerning this insurance.

24. Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums.

25. We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy.

Mark Jones

For Farley Trucking, Inc.  
Date: July 20, 2006

Scott Gordon

For Dunn Insurance Company  
Date: July 20, 2006

**EXHIBIT B**

Dunn Insurance Company

717 Security Drive  
Columbia City, Columbia

May 23, 2007

Mark Jones  
Farley Trucking, Inc.  
987 Broadway  
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance No. GYC 3427

Dear Mr. Jones:

This letter is to advise you that Dunn Insurance Company is not renewing the 2006-2007 Policy No. GYC 3427.

We are willing to consider renewal options for this account. However, any renewal option we may offer may contain changes in limits, premiums, terms and conditions. If you wish to proceed on this basis, please forward completed signed, dated renewal submission including all pertinent information.

I look forward to hearing from you or your insurance broker.

Sincerely,  
Dunn Insurance Company

**Scott Gordon**

Scott Gordon  
President

cc: Jennifer Barba, Bradford Insurance Brokers, Inc.

**EXHIBIT C**

1 Wendy Davis, Esq.  
2 State Bar No. 5862  
3 Sundquist & Davis  
4 12 Manning Blvd.  
5 Columbia City, Columbia  
6 (555)337-1091  
7 Attorneys for Defendant

8  
9  
10 **SUPERIOR COURT OF COLUMBIA**  
11 **COUNTY OF CHESTER**  
12  
13

14 Farley Trucking, Inc.,  
15 Plaintiff,

Civil Action  
No. 89765

17 v.  
18 Dunn Insurance Company,  
19 Defendant

**DEFENDANT’S ANSWER**  
**AND**  
**AFFIRMATIVE DEFENSES**

20 \_\_\_\_\_/

21 **THE PARTIES**

- 22 1. Defendant admits the allegations of paragraph 1.  
23 2. Defendant admits the allegations of paragraph 2.  
24 3. Defendant admits the allegations of paragraph 3.

25 **JURISDICTION AND VENUE**

- 26 4. Defendant denies that this Court has jurisdiction over this action as Plaintiff  
27 has failed to state a claim upon which any relief may be granted.  
28 5. Defendant denies that this Court has venue over this action as Plaintiff has  
29 failed to state a claim upon which any relief may be granted.  
30

1 **BACKGROUND**

2 6. Defendant admits the allegations of paragraph 6.

3 7. Defendant admits the allegations of paragraph 7.

4 8. Defendant admits that Exhibit A is a true and correct copy of the July 11, 2006  
5 letter but denies the remaining allegations of paragraph 8.

6 9. Defendant admits that Exhibit B is a true and correct copy of portions of the  
7 policy purchased by Plaintiff from Defendant but denies the remaining allegations of  
8 paragraph 9.

9 10. Defendant admits the allegations of paragraph 10.

10 11. Defendant admits that Exhibit C is a true and correct copy of the non-renewal  
11 notice but denies the remaining allegations of paragraph 11.

12 12. Defendant admits the allegations of paragraph 12.

13 13. Defendant admits the allegations of paragraph 13.

14 14. Defendant admits the allegations of paragraph 14.

15 15. Defendant denies the allegations set forth in paragraph 15.

16 16. Defendant denies the allegations set forth in paragraph 16.

17 17. Defendant denies the allegations set forth in paragraph 17.

18 **BREACH OF CONTRACT**

19 18. Defendant repleads its response to the allegations contained in paragraphs  
20 1-17 as though they were set forth herein verbatim.

21 19. Defendant denies the allegations of paragraphs 19 through 23.

22 **FRAUDULENT INDUCEMENT**

23 20. Defendant repleads its response to the allegations contained in paragraphs  
24 1-17 as though they were set forth herein verbatim.

25 21. Defendant denies the allegations in paragraphs 25-27.

26 **PRAYER FOR RELIEF**

27 Defendant denies that Plaintiff is entitled to any of the relief it has sought, including but  
28 not limited to, the alleged compensatory and consequential damages, or any award of  
29 attorneys' fees.

30

31

1 **DEFENDANT’S DEFENSES**

2 The Complaint fails to state a claim upon which relief may be granted.  
3 Plaintiff’s rights and claims, if any, are barred by the statute of frauds.  
4 WHEREFORE, Defendant requests that Plaintiff’s request for relief be denied in its  
5 entirety.

6 Sundquist & Davis

7  
8 February 8, 2009

**WENDY DAVIS**

9 by: Wendy Davis, Esq.  
10 Counsel for Defendant  
11 Dunn Insurance Company

1 Victoria Cooper, Esq.  
2 State Bar No. 7579  
3 Michaels & Farnsworth, LLP  
4 515 Francesca Way  
5 Marion, Columbia  
6 (555)337-2021  
7 Attorneys for Plaintiff

8  
9  
10  
11 **SUPERIOR COURT OF COLUMBIA**  
12 **IN AND FOR THE COUNTY OF CHESTER**

13  
14  
15 Farley Trucking, Inc.,  
16 Plaintiff,

Civil Action  
No. 89765

17  
18 v.

19  
20 Dunn Insurance Company,  
21 Defendant

**AFFIDAVIT OF MARK JONES**

22 \_\_\_\_\_/  
23  
24 Mark Jones, being first duly sworn, states the following upon personal knowledge:

25  
26 1. I am the Risk Manager of Plaintiff Farley Trucking, Inc. (“Farley”), a  
27 commercial trucking company.

28 2. Farley is a publicly-traded Columbia-based company involved in various lines  
29 of business, including the commercial trucking of goods throughout the United States.

30 3. I have been employed by Farley in this capacity during all relevant times and  
31 during those times purchased complex insurance programs from a multitude of  
32 insurance companies to cover different lines of business and risks with different layers  
33 of coverage.



1 Wendy Davis, Esq.  
2 State Bar No. 5862  
3 Sundquist & Davis  
4 12 Manning Blvd.  
5 Columbia City, Columbia  
6 (555)337-1091  
7 Attorneys for Defendant

8  
9 **SUPERIOR COURT OF COLUMBIA**  
10 **COUNTY OF CHESTER**  
11

12  
13 Farley Trucking, Inc.,  
14 Plaintiff,

Civil Action  
No. 89765

15  
16 v.

17  
18 Dunn Insurance Company,  
19 Defendant

**AFFIDAVIT OF SCOTT GORDON**

20 \_\_\_\_\_/  
21  
22 Scott Gordon, being first duly sworn, states the following upon personal knowledge:  
23

- 24 1. I am President of Defendant Dunn Insurance Company (“Dunn”).  
25 2. Plaintiff Farley Trucking, Inc. (“Farley”) purchased from Dunn a commercial  
26 general liability policy (the “Policy”) that provided for \$5,000,000 in policy limits per  
27 occurrence.  
28 3. The term of the policy was from August 1, 2006 through August 1, 2007.  
29 4. In the spring of 2007, Farley sought renewal of the Policy, or the issuance of a  
30 new one-year policy, at the 2006-2007 rate.  
31 5. On May 23, 2007, Dunn sent Farley a notice of non-renewal of the Policy,  
32 effective August 1, 2007.

1           6. Dunn did not agree in word or substance to provide insurance coverage to  
2 Farley for 3 years pursuant to the July 11, 2006 letter, or otherwise.

3           7. Farley failed to object entirely to the non-renewal of the Policy until one and  
4 one-half years later when it first asserted its claim under the July 11, 2006 letter through  
5 this legal action.

6

7

Scott Gordon

8

Scott Gordon

9           Subscribed and sworn to  
10 before me this 8<sup>th</sup> day of February, 2009

11

12           Don Ramos

13           Notary Public

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**JULY 2009**



**California  
Bar  
Examination**

**Performance Test A**

**LIBRARY**

## FARLEY v. DUNN

### LIBRARY

Columbia Civil Code § 1350.....	27
<b>First Data POS, Inc. v. Willis Group</b> (Columbia Supreme Court, 2001).....	28
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<b>Dana v. Piedmont Motors</b> (Columbia Supreme Court, 1974).....	38

**COLUMBIA CIVIL CODE § 1350**

**§ 1350. Obligations which must be in writing.**

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:

\* \* \* \*

- (4) Any contract for sale of lands, or any interest in, or concerning lands;
- (5) Any agreement that is not to be performed within one year from the making thereof;
- (6) Any promise to revive a debt barred by a statute of limitation; and
- (7) Any commitment to lend money.

## **First Data POS, Inc. v. Willis Group**

Columbia Supreme Court (2001)

In 1992, appellant First Data POS, Inc. ("First Data") purchased COIN Banking Systems ("COIN"), a software development company, from appellees the Willis Group ("Willis"). The parties executed a Stock Purchase Agreement (the "Agreement") in which First Data agreed to pay Willis \$2.5 million in exchange for all of COIN's stock. The Agreement provided that Willis might receive additional payments, so long as COIN's post-acquisition business generated certain levels of revenue over the three-year period following the Agreement's execution (the earnout provision). The Agreement expressly stated that First Data was under no obligation to carry on the current business of COIN, or even to maintain COIN as a business entity, but rather that First Data was authorized "at any time without limitation and without notice to Willis to reorganize or merge COIN out of existence or cease the sale of any of the products or services of COIN." Finally, the Agreement contained a standard merger clause, which stated that:

[The] Agreement ... constitutes the entire agreement between the parties with respect to the subject matter contained herein and supercedes all prior agreements and understandings, both oral and written by and between the parties hereto with respect to the subject matter hereof.

Approximately three years after the Agreement's execution, Willis filed suit alleging that during the precontractual negotiations, First Data had misrepresented its intention to increase COIN's business after it acquired the company, and that those misrepresentations had induced Willis to enter into the Agreement and to sell COIN's stock for less than its then-current market value. Willis' complaint against First Data alleged fraudulent misrepresentation and breach of contract. The Court of Appeals reversed the trial court's granting of summary judgment as to Willis' civil fraud and breach of contract counts.

Summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law. Col. R. Civ. P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial.

The proper construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A Court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. If the language remains ambiguous after applying the rules of construction, only then may extrinsic evidence be considered to resolve the ambiguity.

The Agreement's terms state with absolute clarity that First Data was under no obligation to continue carrying on COIN's business and could, at any time and without notice to Willis, "reorganize or merge COIN out of existence or cease the sale of any of COIN's products or services." Despite this express contractual provision, Willis' claim is based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution. It has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract. Therefore, the Court of Appeals erred by basing its ruling upon such contradictory parol evidence.

The Court of Appeals also erred by concluding that the Agreement's merger clause did not preclude Willis' claim that First Data's precontractual representations amounted to fraud or fraudulent misrepresentation. As explained above, the Agreement's unambiguous merger clause states that it was the parties' intention that the Agreement

supercede all precontractual agreements and representations, both oral and written, concerning First Data's acquisition of COIN's stock.

It is axiomatic that contracts must be construed to give effect to the parties' intentions, which must whenever possible be determined from a construction of the contract as a whole. Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud.

The rational basis for merger clauses is that where parties enter into a final contract all prior negotiations, understandings, and agreements on the same subject are merged into the final contract, and are accordingly extinguished.

It follows from these well established precepts of contract law and the precedent based thereon that any impressions held by Willis that were based upon First Data's purported precontractual representations that it would increase COIN's business after the acquisition were superceded by the merger clause contained in the parties' Agreement, which expressly put Willis on notice that the Agreement's terms superceded any and all prior representations not contained therein.

Thus, Willis' claim that they were deceived by First Data's precontractual misrepresentations has no basis. Under the express terms of the Agreement, Willis could not have reasonably placed their reliance upon any precontractual representation that was not also included in the Agreement's language, and thus Willis could not have been deceived by such precontractual representations. Without deception, of course, there can be no fraud claim.

Accordingly, the Court of Appeals erred in ruling that the contractual merger clause did not preclude Willis' claim that First Data had committed fraud in making precontractual representations regarding the future business operations of COIN Banking Systems. As a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based upon precontractual representations.

Judgment reversed.

## Hieke v. George D. Warthen Bank

Columbia Court of Appeals (1999)

Alleging that appellee-defendants George D. Warthen Bank (the "Bank") had breached an agreement to loan them \$80,000, appellant-plaintiffs Jane and Ray Hieke ("Hieke") brought suit to recover in fraud and contract. The Bank answered and counterclaimed, seeking to recover on notes which were allegedly in default. After discovery, the Bank moved for summary judgment on their own counterclaim as well as on Hieke's main claim. The trial court granted summary judgment in favor of the Bank and Hieke appeals.

Construing the evidence most favorably for Hieke, they borrowed \$40,000 from the Bank pursuant to an *oral* extension of a \$120,000 line of credit, but were subsequently denied the additional \$80,000 when they sought to borrow it. However, such a commitment to lend Hieke money would have to be evidenced by a *writing* signed by the Bank. Columbia Civil Code §1350. The fact that the Bank did loan Hieke \$40,000, as evidenced by a note, would not serve to take the alleged oral agreement outside the Statute of Frauds.

A contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to supply contractual elements that are missing. Further, for such a contract, oral evidence is not permitted to prove provisions that are inconsistent with the writing.

In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract. The act of lending Hieke \$40,000 may be entirely consistent with an agreement to lend them an additional \$80,000, but neither is it inconsistent with the lack of an agreement to lend them any additional sum whatsoever. The lending of \$40,000 in no way tends to prove that the Bank agreed to the oral contract that Hieke seeks to enforce. To hold that the mere act of lending *any* sum to a borrower will serve

to render enforceable an alleged oral agreement to lend some *additional* sum would negate §1350 and have the anomalous effect of subjecting the lenders of this state to potentially fraudulent claims despite the protection ostensibly afforded them under the Statute of Frauds. It follows that the trial court correctly granted summary judgment in favor of the Bank as to Hieke's contract claim.

The trial court likewise correctly granted summary judgment in favor of the Bank as to Hieke's fraud claim. Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by §1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

With regard to the Bank's counterclaim, there is no dispute either as to the execution of the notes or as to Hieke's default thereon. In the original and supplementary evidence offered in support of the motion for summary judgment, the Bank showed the amounts of unpaid principal and interest that were owing on the notes. In opposition, Hieke offered nothing to demonstrate the existence of any *genuine* issue of *material* fact. It follows that summary judgment was properly granted in favor of the Bank.

Judgments affirmed.

**Callaway v. DeMaio Swine Breeders, Inc.**

Columbia Court of Appeals (1998)

Callaway Farms ("Callaway") brought suit against DeMaio Swine Breeders, Inc. ("DeMaio") for fraud and bad faith in selling diseased swine. The trial court granted summary judgment, dismissing Callaway's claims. For the following reasons, we affirm.

In 1992 and 1993, Callaway operated a large swine breeding herd with approximately 5000 sows in Wilkes County, Columbia. Callaway regularly introduced new breeding stock into its herd supplied by DeMaio. DeMaio is in the business of raising and selling swine breeding stock.

From 1989 through 1994, Callaway and DeMaio executed numerous written contracts documenting Callaway's purchase of breeding stock from DeMaio. Each contract contains a limitation of liability in the case of disease, stating:

DEMAIO CANNOT AND DOES NOT GUARANTEE THE ABSENCE OF ANY PATHOGENS OR DISEASES IN THE BREEDING STOCK SOLD BY DEMATIO. PATHOGENS OR DISEASES MAY BE PRESENT AT TIME OF SALE OR MAY APPEAR LATER.

The contracts recommend that the buyer have the swine tested at the buyer's expense prior to delivery. In the case of diseased swine, the contracts provide that replacement of the swine is the buyer's sole remedy. On the front page, in bold red letters, the contracts provide:

DEMAIO GIVES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SWINE OR THEIR PROGENY. DEMATIO GIVES NO WARRANTIES OF MERCHANTABILITY, HEALTH OR FITNESS FOR A PARTICULAR PURPOSE.

Each contract contains a merger clause, stating that “[t]his contract supersedes all prior written or oral agreements related to the swine sold hereunder, and this contract cannot be amended except in a writing which refers to this contract and which is signed by both parties.” Moreover, the contracts provide a blank for the purchaser to state any promises or representations made by the seller not otherwise specified in the contract. In each of the contracts, Eugene Callaway, Jr., an officer of Callaway, wrote “none” in the blank.

In early 1993, Callaway considered replacing DeMaio with Pig Improvement Company (PIC) as their supplier of breeding stock. Callaway decided against this move, however, when it learned from a PIC veterinarian that PIC's herds had tested positive for Porcine Reproductive and Respiratory Syndrome (PRRS), a swine disease caused by a virus. In sows, PRRS may cause abortions and birth of stillborn, underweight, or defective pigs. PRRS is highly contagious and widespread. Callaway explained to DeMaio's sales personnel that it wanted to avoid PRRS and that was the reason they had decided to stay with DeMaio over PIC. Clinton Day, a DeMaio salesman, replied: “Well, that is a pretty good reason to stay with us.”

Callaway's herds tested negative for PRRS on March 1, 1993. On March 11, 1993, Callaway received nineteen boars from DeMaio. The animals had no clinical signs of PRRS at the time of shipment or delivery. As was the conventional practice, a Callaway farm manager signed the invoices upon delivery.

On April 9, 1993, Callaway's herds developed the PRRS virus. No swine were introduced to the Callaway herds from any source other than DeMaio.

Callaway filed suit alleging fraud and seeking damages in excess of \$2,000,000. DeMaio filed a motion for summary judgment that the trial court granted.

This court exercises a complete and independent review of the trial court's grant of summary judgment, and applies the same legal standards used by the trial court. As

such, we must view all evidence and make all reasonable inferences in favor of the nonmovant. This court should affirm the trial court's grant of summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Col. R. Civ. P. 56(c).

The Columbia common law tort of fraud has five elements: (1) a false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to the plaintiff. In granting summary judgment, the trial court found that Callaway's reliance upon Mr. Day's statement was not justifiable in light of the contractual provisions disclaiming liability for diseases.

Callaway asserts that the trial court improperly granted summary judgment on the fraud claim, stressing that the question of justifiable reliance was one for the jury. In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish that his reliance is justifiable.

DeMaio's contract with Callaway devotes over fifty lines of text to disclaimers as to pathogens and diseases and buyer's responsibilities as to testing and quarantine. The contract expressly states that "[o]rganisms which cause swine diseases (called pathogens) are present in every swine herd, including DeMaio's swine herds." The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds.

In red letters, in a paragraph labeled "BUYER'S UNDERSTANDING," the buyer must attest that he "ha[s] discussed the purchase of DeMaio breeding stock with DeMaio, and ha[s] read this Contract, and, in particular, ...the 'Pathogen and Disease — Statement and Limited Replacement Policy', and 'Testing and Quarantine — Buyer's Responsibility' on the back of this page." The contract also has a space for the buyer to fill in any additional representations made by DeMaio representatives.

The situation is complicated somewhat by the fact that the alleged misrepresentation by Mr. Day was made after the contracts were signed. On delivery, one of Callaway's farm managers signed a delivery invoice stating that:

The Warranties and Remedies, if any, applicable to the swine delivered with this invoice are determined in the contract between you, the Buyer, and DeMaio Swine Breeders, Inc. Please refer to that contract for the warranties, exclusive remedies, and statements regarding the swine, including their fertility, diseases and soundness. Acceptance of the swine here delivered is a reconfirmation of that contract and its terms.

We agree with the trial court that, by signing this invoice, Callaway reaffirmed the sales contract and all of its provisions, including the merger clause. As such, Callaway could not justifiably rely on the intervening representation of Mr. Day as a matter of law.

AFFIRMED.

## **Dana v. Piedmont Motors**

Columbia Supreme Court (1974)

A suit in tort by a buyer against a seller for an alleged fraudulent misrepresentation by the seller's agent resulted in a jury verdict and judgment for the buyer, and on appeal by the seller the Court of Appeals affirmed. We determine the judgment of the Court of Appeals should be affirmed.

In this case, the buyer, Ryan Dana ("Dana"), contended that he purchased a used automobile with the understanding that the vehicle had never been wrecked. The seller, Piedmont Motors, denied that this representation was made by its agent (salesman) to the buyer. The buyer, Dana, signed a sales agreement which contained the words, "No other agreement, promise or understanding of any kind pertaining to this purchase will be recognized." In addition, the purchase agreement stated that the car is sold "as is." Subsequent to the purchase, the buyer discovered that the automobile had been wrecked, tendered the car to the seller, gave notice of rescission of the contract and brought the present action in tort for fraud and deceit.

In our review of the case, we accept the jury's factual determination that the seller's agent knowingly misrepresented the car as never having been wrecked. The decisive issue we address is whether the language of the merger clause that "no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized," was legally effective to prevent the buyer from claiming that he relied on the seller's misrepresentation. It has been recognized that §2-202 of the Uniform Commercial Code was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions. Thus, in contract actions, the effect of merger and disclaimer clauses must be determined under the provisions of the Uniform Commercial Code.

However, under Columbia law, traditionally two actions have been available to a buyer in which to sue a seller for alleged misrepresentation in the sale. The buyer could affirm

the contract and sue in contract for breach or he could seek to rescind the contract and sue in tort for alleged fraud and deceit. Our threshold question in this tort case is to determine whether the adoption of the Uniform Commercial Code left available in Columbia a buyer's historic remedy in tort. The passage of the Uniform Commercial Code by the legislature evinced an intent to have that body of law control all commercial transactions. While the Code, however, is an attempt to make uniform the law among the various jurisdictions regarding commercial transactions, the draftsmen realized that it could not possibly anticipate all situations. Thus, §2-721 of the Code states:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

In addition, it provides that:

Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission nor a claim for a rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

The commentary by the drafters of the Uniform Commercial Code on this section states: "Thus the remedies for fraud are extended by this section to coincide in scope with those for nonfraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible." See Official Comment, Uniform Commercial Code, §2-721.

We conclude from this language that neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code in Columbia.

Having decided that a remedy in tort still exists in Columbia for actual fraud, we turn next to the seller's contention that the disclaimer language used here prevented any reliance by the buyer on the alleged fraudulent misrepresentation, and consequently the buyer's action must necessarily fail. The seller contends that there is no fraud on which the buyer relied that prevented him from knowing the contents of the contract, and, therefore, the buyer is bound by the terms of the contract.

We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract.

Judgment affirmed.