

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Before the Master In Equity

Charles B. Simmons, Jr., Master In Equity

Case No. 2007-CP-23-3206

North American Rescue Products, Inc.,.....Appellant,

v.

P. J. Richardson,.....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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INTRODUCTION

Richardson opens his respondent's brief with a seven (7) page Statement of the Case that is devoted primarily to rearguing the issues that he lost in the first appeal before this Court, most notably that he had a contractual right to purchase 7.5% of NARP's stock for \$415,988. (Init. Resp. Br. 1-7, *passim*). This is a futile attempt to change the rulings of the jury, the trial court, and this Court that "Richardson must pay \$2,936,300 for seven and one-half percent of NARP's stock." *North American Rescue Prods., Inc. v. Richardson*, 720 S.E.2d 53, 61 (S.C. App. 2011), hereinafter cited in short form as *NARP*.

REPLY ARGUMENTS

I. NARP's arguments in this appeal are not barred by the law of the case doctrine.

In his Argument I, Richardson contends that this Court's denial of a prior motion for limited remand on the issue of whether Richardson had rejected a proper tender of performance "bars the relief that NARP now seeks in this appeal." (Init. Resp. Br. at 8). This argument is manifestly without merit and reflects a fundamental misunderstanding of the law of the case doctrine.

The law of the case doctrine, as Richardson correctly notes, provides that an unchallenged ruling by a court is the law of the case. (See Init. Resp. Br. at 9-10 and cited authorities). The only issue raised to this Court in NARP's motion for a limited remand was whether this Court should grant a limited remand so that NARP could then "move before the trial court under Rule 60(b)(5), SCRCF, to have the judgment marked satisfied" because Richardson had refused NARP's tender of the stock at the price found by the jury and the trial court. (R. 0116). This Court denied the motion, so the only

potential “law of this case” is that NARP is not entitled to remand during the pendency of the appeal to make the Rule 60(b) motion.

The present appeal has nothing to do with any issue of remand or any Rule 60(b) motion to have the judgment marked satisfied – no such relief was requested in the present appeal. Rather, the present appeal involves the trial court’s denial of different relief that was premised upon this Court’s ruling in agreement with the jury and that trial court that “Richardson must pay \$2,936,300 for seven and one-half percent of NARP’s stock.” *NARP*, 720 S.E.2d at 61. This Court’s ruling did not even exist at the time that NARP made the limited remand motion and, therefore, the denial of that motion does not and cannot bar the relief requested here under the law of the case doctrine or any other doctrine. There simply has been no ruling by this Court on the issue in this appeal that could trigger application of the law of the case doctrine.

II. NARP’s arguments in this appeal are preserved for appellate review.

In his Argument II, Richardson contends that NARP’s appellate arguments are not preserved for review because: (1) the question of performance of the judgment was not in NARP’s statement of the issues; (2) NARP failed to make a Rule 59(e) motion. (Init. Resp. Br. at 10-13). These arguments are manifestly without merit and reflect a fundamental misunderstanding of the error preservation rules.

There are three issues in this appeal, *i.e.*, did the trial court err in failing to require Richardson to do one of three things during the pendency of the appeal: post a bond; deposit the judgment amount; or restrict Richardson’s use of his assets. All three of these issues are identified in the NARP’s Statement of Issues. (Init. App. Br. at 1). The observations in NARP’s brief that the appeal did not stay the judgment are simply

indisputable statements of law made in support of the requested relief. The SCACR does not require an appellant to state every facet of every argument on every issue in the statement of issues. Were this the rule, the Statement of Issues would be as long or longer than the brief itself. Moreover, it is clear that Richardson understands all of the issues presented in NARP's brief and, therefore, there is no violation of the SCACR.

As to Richardson's "59(e)" arguments, they are nonsensical. Richardson argues that the following matters are not preserved for review, because the trial court did not rule on them specifically and NARP did not make a 59(e) motion:

1. that Richardson's wife is not a party to the lawsuit and not subject to the judgment;
2. that Richardson's wife has unfettered access to all of the assets and no duty to pay the judgment; and
3. that if Richardson dies during the pendency of the appeal, she immediately acquires sole ownership of all assets with no corresponding duty to pay the judgment.

(Init. Resp. Br. at 12). There was no need for the trial court to "rule" on any of these matters, because they are undisputed facts that flow from the also-undisputed fact that all assets are held by Richardson and his wife as joint tenants in common with the right of survivorship. Thus, there was no need to make a 59(e) motion – no appellate court has ever required a 59(e) motion to preserve the right to rely on undisputed facts in an appellate argument.

III. Richardson has an enforceable obligation to pay for NARP's stock.

The jury, the trial court, and this Court found that "Richardson must pay \$2,936,300 for seven and one-half percent of NARP's stock." *NARP*, 720 S.E.2d at 61 (emphasis added). In his Argument III, Richardson argues that only he can enforce the

order of specific performance. This argument is foreclosed by this Court's ruling in *NARP* that Richardson "must pay" for the stock. Moreover, this argument is foreclosed by the law of specific performance.

Specific performance does not lie unless there is a mutuality of obligation to perform the contract. See *Alala v. Peachtree Plantations, Inc.*, 355 S.E.2d 286, 290 (S.C. App. 1987). Having obtained the decree of specific performance, Richardson is obligated to perform the contract. Thus, Richardson is in error when he argues that only he can enforce the contract found by the jury, the trial court, and this Court.

Moreover, specific performance does not lie unless there is a mutuality of remedy, *i.e.*, that both parties to the contract are entitled to specific performance:

The right to a specific performance, if it exists at all, is, and necessarily must be, mutual: in other words, it is and must be held, and be capable of being enjoyed, alike by both parties in every agreement to which the jurisdiction [to grant specific performance] extends.

Prudential Ins. Co. v. Berry, 151 S.E. 63 (S.C. 1930). Thus, since the trial court decreed specific performance, NARP is entitled to the same relief on the contract found by the jury, the trial court, and this Court.¹

¹ In *Alala, supra*, this Court found that South Carolina did not require "mutuality of remedy" for the decreeing of specific performance:

[O]ur Supreme Court appears to have rejected this [mutuality of remedy] rule in *Columbia Water Power Co. v. City of Columbia*, 5 S.C. 226 (1873). We are aware of no case decided since then in South Carolina recognizing the rule, and no such case has been called to our attention.

355 S.E.2d at 289 (underlining added). Respectfully, this Court mis-read *Columbia Water*, which merely held that the assignment of a contract does not destroy its mutuality nor prevent specific performance. 5 S.C. at 257. In any event, as noted earlier, the Supreme Court later held in *Berry* that specific performance does not lie absent mutuality of remedy – no case has overruled *Berry*, and research reveals no subsequent Supreme Court decision eliminating the requirement of mutuality of remedy. Finally, even if mutuality of remedy is no longer a requirement for specific performance, the mutuality of obligation remains a requirement. *Alala, supra*. Thus, since Richardson obtained a decree of specific performance, it necessarily includes a finding of mutual obligation and, therefore, Richardson is obligated to perform the contract found by the jury, the trial court, and this Court.

IV. The trial court erred in not requiring Richardson to post a bond, deposit the judgment, or restrict the use of assets during the pendency of the appeal.

In his Argument IV, Richardson argues the trial court did not err in failing to require Richardson to secure payment of the contract found by the jury, the trial court, and this Court during the pendency of the appeal. Richardson notes that evidence supports the trial court's finding that, at the time of the hearing in this case, Richardson had sufficient assets to pay the judgment. This fact, however, does not end the inquiry.

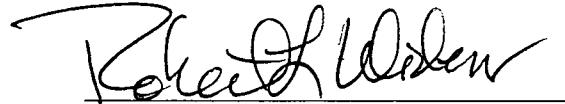
As Richardson correctly observes, the purpose of the relief sought by NARP is to "preserve the status quo and ensure the effectiveness of the eventual judgment." (Init. Resp. Br. at 21) (citations omitted). Richardson has placed his assets in the unfettered discretion of his wife, such that the status quo of Richardson's ability to pay could change during the pendency of the appeal. Moreover, Richardson's conduct in this case has demonstrated that he is willing to undertake any action to advance his own personal interests to the detriment of NARP – throughout this dispute and litigation, Richardson claimed a right to purchase 7.5% of NARP's stock of one penny per share, a frivolous and fraudulent claim that he abandoned only when pressed on cross-examination at trial. See *NARP*, 720 S.E.2d at 57, n.1 and accompanying text. Under these circumstances, NARP is entitled to some security for the "effectiveness of the eventual judgment."²

² Richardson correctly notes that NARP has petitioned the Supreme Court for certiorari upon the ground that the trial court and this Court erred in failing to rule that NARP was entitled to a directed verdict that there was no buy-sell agreement between NARP and Richardson for NARP's stock. It is for this reason that NARP has not insisted on immediate payment by Richardson. Nevertheless, since most certiorari petitions are denied, and since the Supreme Court more often than not affirms this Court when certiorari is granted, the most likely outcome is that the "eventual judgment" in this case will be the finding by the jury, the trial court, and this Court found that "Richardson must pay \$2,936,300 for seven and one-half percent of NARP's stock." *NARP*, 720 S.E.2d at 61. To secure this eventual judgment, NARP is entitled to a bond, deposit of the judgment or, at the very least, a restriction on the use of Richardson's assets during the pendency of the appeal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appealed order should be reversed and Richardson should be required to post a bond or deposit the judgment found by the jury, the trial court, and this Court to secure payment of the eventual judgment in this case. In the alternative, and at the very least, the use of Richardson's assets should be restricted during the pendency of the appeal to provide some security for the effectiveness of the eventual judgment.

Respectfully Submitted,



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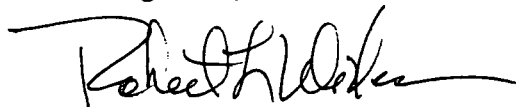
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November 5, 2013
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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Appellate Case No. 2012-212748

North American Rescue Products, Inc.,.....Appellant,

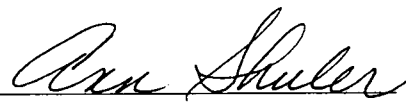
v.

P. J. Richardson,.....Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Redacted Final Brief of Appellant, Non-Redacted, Sealed Final Brief of Appellant and the Final Reply Brief of Appellant by depositing copies of each in the United States Mail, postage prepaid, on November 5, 2013 addressed to the attorneys of record, as follows:

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