

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Before the Master-in-Equity

SC COURT OF APPEALS

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2007-CP-23-3206
Appellate Case No. 2012-212748

North American Rescue Products, Inc., ...

Appellant,

v.

P.J. Richardson, ...

Respondent.

RESPONDENT P.J. RICHARDSON'S FINAL BRIEF

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Statement of Issues on Appeal

Did the lower court correctly determine that P.J. Richardson did not have to post a bond, deposit monies into court, or restrict his assets during the pendency of the underlying appeal which is now awaiting ruling on petitions for certiorari before the South Carolina Supreme Court?

Counter-Statement of the Case and Facts

Respondent P.J. Richardson (“Richardson”) includes his own statement of the case and facts and does not agree to be bound by those of Appellant North American Rescue Products, Inc.’s (“NARP”). Due to the shared interests between two companies and the importance of cross-selling their products between various customers, Frank Castellani (for himself and his company, NARP) and Richardson (for himself and his company, Reeves Manufacturing, Inc. - “Reeves”) executed an agreement on January 1, 2000 (“2000 Agreement”). *NARP v. Richardson*, 396 S.C. 124, 127, 720 S.E.2d 53, 55 (Ct. App. 2011)¹. The 2000 Agreement formalized the business relationship between the two companies, and allowed Castellani to offset some of his personal risk associated with his company. *Id.* (see also 2000 Agreement; R. 223.) Under the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other’s respective products. (2000 Agreement; R. 223.) The parties performed under the 2000 Agreement for four years, assisting each other in growing both NARP and Reeves.

On July 29, 2004, Castellani and Mr. and Mrs. Richardson met in Charleston, South Carolina. During this meeting, the parties agreed to modify the 2000 Agreement. *NARP v. Richardson*, 396 S.C. at 127, 720 S.E.2d at 55. They agreed to reduce their

¹ Both parties have petitioned the South Carolina Supreme Court for certiorari to review the prior decision of this Court.

percentage of ownership from 25% to 7.5%. *Id.*; (see also Tr. pp. 237-238; R. 174-175.) The agreement was modified because Richardson was about to sell Reeves to a third party. *NARP v. Richardson*, 396 S.C. at 127-128, 720 S.E.2d at 55-56; (see also Tr. pp. 378-380; R. 183-184.) Thus, the parties agreed that Richardson could acquire his 7.5% ownership interest in NARP from proceeds from the pending sale of Reeves. *NARP v. Richardson*, 396 S.C. at 127-128, 720 S.E.2d at 55-56; (see also Tr. pp. 601; 664-666; R. 199; R.202-203.) Both Castellani and Richardson testified an agreement was reached. *NARP v. Richardson*, 396 S.C. at 127-128, 720 S.E.2d at 55-56; (see also Tr. pp. 237-238; 342-343; 355; R. 174-175; R. 177-178; R. 179.) As it turned out, 7.5% of the sale price of Reeves was \$415,988. *Id.* at 134, 720 S.E.2d at 59.

Richardson remained ready, willing, and able to perform the contract as modified. (Tr. ____ pp. 372-377; R.181-183.). Richardson stated that “[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves. (Tr. pp. 372-373; R. 181-182.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement, and he was prepared to do so. (Tr. p. 588; R. 195.)

NARP filed suit on May 17, 2007, seeking a declaration that Richardson was not entitled to purchase 7.5% of the stock of NARP at one cent per share. (Compl.; R. 156.) NARP amended the complaint to assert a claim of breach of fiduciary duty against Richardson as a former member of the NARP board. (Amend. Compl.; R. 152.) Richardson answered and counterclaimed. (Rev. Amended Answer & Counterclaim; R. 159.) In his counterclaim, Richardson alleged breach of contract and sought specific performance of an agreement giving him a 7.5% ownership position in NARP, or

alternatively, money damages for NARP's failure to honor the agreements. (*Id.* at ¶¶ 38-69; R. 138-142.)

The matter was tried before a jury on August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. (Tr. pp. 719-727; R. 205-213.) Counsel for Richardson presented the motion to amend stating "the claim that we would like to pursue is that the 2000 agreement as modified orally in Charleston." (Tr. p. 719-720; R. 205-206.) The modification of the agreement in Charleston "changed the amount of the respected [sic] shares from 25 percent . . . to 7.5." (Tr. p. 719-720; R. 205-206.) Further, the modification of the contract "was done in the context of the pending sale of Reeves." (*Id.*) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(Tr. p. 720; R. 206.) The trial court granted Richardson's motion to amend, and the amendment ruling was not challenged on appeal by NARP.

Based on the evidence outlined above, the matter was submitted to the jury on a special verdict form, posing specific questions and requiring the jury to give answers. (Special Verdict Form; R. 118-121.) The jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified,

and that none of the parties' later agreements terminated the right of Richardson to acquire 7.5% of NARP's stock. (Special Verdict Form; R. 118-121.) Specifically the Special Verdict Form provided:

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?
2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?
3. Can both parties perform under the 2000 Agreement as amended in Charleston?

(Special Verdict Form at ¶ 1-3; R. 118.) The jury answered each of the above special interrogatories in the affirmative. (*Id.*) Moreover, the special verdict form inquired as to whether any other agreement "end[ed] both parties' rights to acquire 7.5% of the capital stock of each other?" (*Id.* at ¶ 5; R. 119.) The jury answered "No." (*Id.*) Based on the jury's answers to the special interrogatories, the trial court then entered judgment in favor of Richardson "under the specific performance doctrine." (Judgment; R. 117.)

In another part of the jury verdict form, the jury was asked what price Richardson should pay for the percentage share of NARP. The jury answered \$2,936,000. (Special Verdict Form; R. 118-121.) Richardson's position is this dollar figure pertained to Richardson's cause of action for promissory estoppel, which the trial court presented to the jury as an alternative form of relief. However, the trial court did not utilize any dollar number in entering the judgment in favor of Richardson for specific performance. Richardson's position is this is because the parties' Charleston agreement provided a price term. (Judgment; R. 117.) 7.5% of the sale price of Reeves—\$415,988—for 7.5% of the stock of NARP.

Following trial, post-trial motions for judgment notwithstanding the verdict and to alter or amend the verdict were made immediately after the return of the verdict. (Tr. pp. 912-18; R. 214-220.) The trial court denied all such motions. (*Id.*) The trial court prepared the judgment that day and judgment was entered September 2, 2008. (Judgment; R. 117.)

NARP moved to alter or amend the judgment on September 15, 2008. (NARP Motion to Alter or Amend; R. 148.) Among other things, in its motion NARP claimed that the jury did not find that NARP had breached any contract and that Richardson failed to demonstrate that he was ready to pay for the 7.5% stake in NARP. (*Id.*) However, NARP withdrew its post-trial motion by notice filed September 23, 2008. (Notice of Withdrawal of Motion to Alter or Amend; R. 151.) Thereafter, NARP served and filed its notice of appeal on October 3, 2008, which was received by Richardson on October 6, 2008. (NARP Notice of Appeal; R. 147)

In conjunction with its prior notice of appeal to this Court, NARP sent to counsel for Richardson a purported tender of NARP stock on October 6, 2008 which was actually a settlement demand for Richardson to tender \$2,936,300.00 as payment for 7.5% of NARP's stock no later than October 10, 2008, at 4 p.m., supposedly as required by NARP's characterization of the trial court's judgment for specific performance.² (October 6, 2008 letter from Curtis Stogdhill; R. 122.) In exchange, NARP would agree

² This demand letter was not presented to the trial court and no motion was ever made by NARP to the trial court asking the trial court to modify its judgment. Although this letter was not presented to the trial court, it was part of the appellate record because it was attached as an exhibit to NARP's motion for limited remand (which was denied), dated November 19, 2008 and filed in the Court of Appeals. (NARP Motion for Limited Remand; R. 114.; January 27, 2009 Order Denying Motion; R. 77.) NARP also designated these materials in this appeal. NARP's characterization of the trial court's judgment set forth in this letter was the basis for Richardson's cross appeal.

to drop its appeal. (*Id.*) Richardson rejected NARPs' settlement demand but did offer to pay the contractual amount for the shares of NARP stock as recognized by the judgment of specific performance—\$415,988. (October 9, 2008 letter from John M. Campbell, Jr.; R. 76.) Richardson then cross-appealed on October 13, 2008, to challenge NARP's mischaracterization of the trial court's judgment reflected in the October 6 demand letter, in case for some reason this Court were to agree with NARP's counsel's characterization of the judgment. (Richardson's Notice of Cross-Appeal; R. 145)

This Court heard NARP's appeal and Richardson's cross-appeal despite NARP's effort to have the cross-appeal dismissed and its attempt to have the matter remanded to the trial court in order to have the judgment marked satisfied. (NARP Motion to Dismiss and NARP Motion for Limited Remand; R. 79, R. 114.) In its Opinion, this Court agreed with Richardson, the trial court, and the jury to the extent that it concluded an enforceable contract existed between the parties. *NARP v. Richardson*, 396 S.C. at 127, 720 S.E.2d at 55. Instead of enforcing the valid agreement it found to exist, however, this Court concluded that the parties had not included a price term in their contract and that the number contained on the verdict form should be used for that purpose. *Id.*

Both parties petitioned this Court for rehearing. This Court denied the requests for rehearing. Both parties then petitioned the South Carolina Supreme Court to accept certiorari to review this Court's November 9, 2011 Opinion. NARP still contends that no valid, enforceable contract existed and Richardson contends that this Court unlawfully imposed a new term into the parties contract that neither agreed to—a price term of \$2,936,3000.00. The petitions for certiorari remain pending as of the filing of this brief. After the issuance of this Court's Opinion, and after it filed a petition for writ of

certiorari, NARP sent Richardson another purported “tender” of the stock on November 11, 2011. (November 11, 2011 Letter from Curtis Stogdhill; R. 76) This purported tender was also as a settlement offer which Richardson rejected. NARP had at this point in time entered into a transaction affecting its stock valuation post-judgment, which Richardson has now challenged in subsequent litigation. Further, NARP did not, in this particular settlement offer, include an offer to drop its petition for writ of certiorari. (*Id.*)

On December 5, 2011, NARP moved the South Carolina Court of Common Pleas, Greenville County for an order requiring Richardson to show cause as to why he had not performed the contract, whether he has the intent and ability to perform the contract pursuant to the judgment, and why Richardson should not be required to deposit monies, including post-judgment interest, into court or post a bond with the lower court. By Order date July 6, 2012, the lower court issued an order denying NARP’s motion. (July 6, 2012 Order from the Honorable Charles B. Simmons, Jr.; R. 1). The lower court found that Richardson had assets in excess of the \$2,936,300.00 amount referenced in this Court’s November 9, 2011 Opinion. (*Id.* at p. 2.) The lower court also found that there was no evidence that Richardson had transferred or concealed assets or had any intent to do so. (*Id.*) Based upon these findings, the lower court held that Richardson did not have to pay monies into court or post a bond during the pendency of the appeal and that Richardson’s assets did not have to be restricted pending the appellate proceedings. (*Id.* at pp. 2-3.) NARP did not move to alter or amend the lower court’s July 6, 2012 Order. NARP’s current appeal followed.

Argument

I. NARP's arguments to 1) contest Richardson's ability to perform and/or 2) require Richardson to post a bond, pay monies into court, or restrict his assets are barred by the law of the case doctrine.

This Court previously denied NARP's attempt to have the judgment marked "satisfied" in this matter on the basis that Richardson did not have the intent to perform the contract. (Order denying Motion for Limited Remand; Motion for Limited Remand; Return to Motion for Limited Remand, R. 77). NARP did not challenge this Court's ruling. Thus, the law of the case doctrine bars the relief that NARP now seeks in this appeal.

On November 19, 2008, while the first appeal in this case was pending before this Court, NARP moved to have this Court remand the appeal in order to have the judgment "marked satisfied" on the basis that Richardson was allegedly not "'ready, willing, and able' to perform the contract found by the jury and ordered specifically performed by the trial court." (NARP Motion for Limited Remand at pp. 2-3; R. p. 115-116.) NARP based this argument on the fact that its "tender" letter offer made on October 6, 2008 had been rejected by Richardson. Richardson opposed the motion on the basis that even if NARP's characterization of the judgment as one granting specific performance of a contract to purchase 7.5% of NARP's stock for \$2,390,000.00 were correct, NARP placed arbitrary and unreasonable conditions or terms of its own making on the judgment in its "tender offer," and thus NARP was not offering to settle the matter in accordance with the judgment. (Richardson Return in Opposition to Motion for Limited Remand at p. __; R. p. 123.)³

³ Further, Richardson established, by response to NARP's purported October 6, 2008 "tender" letter, that he was ready, willing, and able to perform the contract ordered specifically performed by the trial court by paying NARP \$415,988 for the 7.5% interest

By Order dated January 27, 2009, this Court denied NARP's motion for limited remand.⁴ (January 27, 2009 Order; R. p. 77.) NARP did not seek rehearing on this issue following the issuance of this Court's November 9, 2011 Opinion. NARP could not and did not seek certiorari on the issue before the South Carolina Supreme Court. Therefore, the decision respecting NARP's motion is final.

Despite this Court's prior ruling, NARP moved the trial court to have Richardson show cause as to: 1) why he had not performed the contract and whether he had the intent and ability to perform the contract pursuant to the judgment and 2) why he should not be required to deposit monies and post judgment interest into court or post a bond with the trial court. (December 5, 2012 Rule to Show Cause Order; R. p. 4.) All of these issues have been decided by this Court's January 27, 2009 Order denying NARP's motion for limited remand. NARP is prohibited from attempting to raise these issues again given its failure to seek rehearing on the Court's prior ruling.

It is well settled that when a party fails to challenge a ruling of the Court of Appeals, that ruling becomes the law of the case between the parties. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 353 S.C. 249, 251 n.1, 578 S.E.2d 8, 9 n.1 (2003) (where a party fails to challenge a holding by the Court of Appeals, the ruling is the law of the case); *State v. Barroso*, 328 S.C. 268, 271, 493 S.E.2d 854, 855 (1997) (same). NARP has abandoned

in NARP as agreed upon by the parties' contract. (October 9, 2008 Letter from John M. Campbell, Jr.; R. 76.)

⁴ The January 27, 2009 Order from this Court denying the motion for limited remand did not articulate the grounds for the denial. In its November 9, 2011 Opinion, this Court held that Richardson had to pay \$2,936,300 for the shares of NARP stock. Hence, the basis for the denial of the motion for limited remand must have been that NARP added arbitrary and unreasonable conditions upon the judgment via its settlement offer letter and that NARP failed to demonstrate that Richardson refused to perform the judgment.

the issues concerning whether Richardson has failed to perform the contract pursuant to the judgment because it did not challenge this Court's prior ruling denying its motion for limited remand. *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) (appellate court will affirm ruling if offended party does not challenge that ruling; failure to challenge ruling is abandonment of the issue and precludes consideration on appeal because an unchallenged ruling is law of the case). Accordingly, NARP's appeal should be dismissed pursuant to South Carolina Appellate Court Rule 260(a) or the Opinion of the trial court affirmed pursuant to Rule 220(c).

II. The issues presented by Appellant are not preserved for appellate review.

NARP has filed this appeal following the trial court's July 6, 2012 Order denying its request for the trial court to require Richardson to post a bond, deposit monies into court, or restrict Richardsons' assets. However, none of the grounds that NARP attempts to raise before this Court now in its appeal brief were expressly ruled upon by the lower court, and NARP failed to file a Rule 59(e), SCRCF motion to preserve the grounds. Other of NARP's arguments are unpreserved for other, additional reasons.

A. NARP has not properly challenged Richardson's ability to perform in this appeal.

Throughout its initial brief, NARP states that it sought a ruling from the lower for Richardson to "show cause why he had not performed the judgment and whether he had the intent or ability to do so." (NARP Initial Appellant Brief at p. 3.) NARP also argues that "Richardson has an existing and immediate obligation to perform the judgment entered by the trial court"; "the appeal did not stay Richardson's obligation to perform the judgment"; and "Richardson has an existing obligation to perform the appealed judgment that is not stayed by the appeal." (NARP Initial Appellant Brief at pp. 4-5.)

First, NARP has not listed the question of performance of the judgment in its “Statement of Issues.” Pursuant to Rule 208(b)(1)(B), SCACR, these points should not be considered. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642-43 (2011) (holding that issues were not preserved because, among other reasons, the issues were not set out specifically in the statement of issues in the appellate brief). The Court noted that “[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” *Id.* (citing *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). Second, as stated above, this Court has already ruled that Richardson did not have to perform the judgment during the pendency of the appellate proceedings by denying NARP’s prior attempt to have the judgment marked satisfied. At issue still (at this point by virtue of the pending petitions for writs of certiorari) is what the trial court’s judgment actually should be construed to mean. Thus, although the trial court found he had sufficient assets to pay monies for the NARP stock even if the amount required to be paid were finally decided to be \$2,936,300, Richardson is not under any existing obligation to perform.

B. The trial court did not rule on the grounds NARP now seeks to raise to this Court.

In order for an issue to be preserved for appellate review, the issue must have been raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, if an issue is raised to a trial court but the court fails to rule upon an issue, the party must file a Rule 59(e) motion to alter or amend the order to provide a chance for the trial court to rule upon any issues not previously addressed. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80

(2004) (stating an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review, and that a party must file a Rule 59(e), SCRCp, motion to preserve an issue on which the trial court fails to rule).

NARP's stated issues on appeal all concern the argument that "[t]he trial court erred in refusing to require Richardson to secure payment of the judgment during the pendency of the appeal." (NARP Initial Appellant Brief at p. 4.) NARP contends that the lower court erred because: "(1) Richardson's wife is not a party to this lawsuit and is not subject to the judgment; (2) she has unfettered access to all assets and no duty to pay the judgment; and (3) if Richardson dies during the pendency of the appeal, sole ownership of all assets immediately transfers to his wife with no corresponding duty to pay the judgment." (*Id.*) None of these grounds were expressly ruled upon by the trial court. No Rule 59(e) motion was filed by NARP.

The trial court denied NARP's request to require Richardson to post a bond or pay monies into Court, stating "based on those records and the testimony of Mr. Richardson, it appeared that he [Mr. Richardson] has assets in excess of the \$2,936,300.00 amount referenced in the Court of Appeals' decision." (July 6, 2012 Order at p. 2; R. 1.) Accordingly, the trial court found that Richardson had sufficient assets to pay the amount referenced in this Court's prior Opinion. The Order makes no reference to the fact that Ms. Richardson is not a party to the lawsuit or subject to the judgment. The Order does not refer to any assets being jointly held with Ms. Richardson or that she has unfettered access to the assets. The Order makes no reference to the fact that Mr. Richardson might die during the pendency of the appeal and all assets would go to Ms. Richardson. While NARP arguably raised one or more of these points to the trial court, the trial court simply

did not rule upon any of them. NARP did not move the trial court to alter or amend its Order in light of the trial court's failure to rule upon these grounds. As a result, none of the issues NARP raises before this Court were ruled upon by the trial court and the issues are not preserved for appellate review. This Court should thus issue an order dismissing NARP's appeal.

III. The specific performance judgment was in favor of Richardson and he is not required to execute on the judgment pending final review by the South Carolina appellate courts.

Following the judgment, NARP attempted to settle the issues in the prior appeal by letter dated October 6, 2008 in which NARP stated it would tender the stock to Richardson in exchange for the payment of \$2,936,300.00 within certain conditions and NARP would dismiss its appeal. (*See* October 6, 2008 letter from Curtis Stodghill; R. 122) Following the issuance of this Court's Opinion, NARP again attempted to settle this case and added conditions to its second purported "tender" which are not found on the judgment. (November 11, 2011 Letter from Curtis Stodghill; R. 76.) NARP's stated intent to "tender" the shares of stock cannot be construed as an effort to execute on the judgment, as the judgment was in favor of Richardson. Moreover, Richardson, as the judgment holder, is not required to execute on the judgment during the pendency of the appeal. Finally, the judgment as currently postured is contested as to its meaning and both this Court and the trial court have now effectively ruled that Richardson need not have accepted the NARP "tender" offers.

A. Only Richardson can execute upon the judgment.

The South Carolina Code provides:

Writs of execution for the enforcement of judgments shall conform to this Title. *The party in whose favor judgment has been given*

and, in case of his death, his personal representatives duly appointed *may at any time within ten years after the entry of judgment proceed to enforce such judgment as prescribed by this Title.*

S.C. Code Ann. § 15-39-20 (1976) (emphasis added). As the Code makes clear, it is the party in whose favor the judgment was entered that has the right to execute on the judgment. *Id.*; see also *Linda Mc Co. v. Shore*, 390 S.C. 543, ___, 703 S.E.2d 499, ___ (2010) (detailing that judgment holder is the party that may execute upon a judgment).

In this action, the face of the judgment makes it clear who holds the judgment—Richardson. The judgment states “Judgment for the Defendant [Richardson] under specific performance doctrine.” (Judgment; R. p. 117) Because the judgment was entered in favor of Richardson, he is the party that may execute upon it. To date, Richardson has not attempted to do so outside of settlement efforts nor is he is not required to execute upon the judgment at this time.

B. Richardson is not required to execute on the judgment during the pendency of the appellate proceedings.

Richardson did not seek to execute on the judgment, as both parties appealed from the judgment. A judgment holder is not required to execute upon a judgment while it is pending appeal. *Wilder Corp. v. Wilke*, 324 S.C. 570, 582, 479 S.E.2d 510, 516 (Ct. App. 1996). (“[N]o authority defines execution of a judgment as an essential part of the judgment itself.”) Instead, the holder of the judgment may wait until the appellate proceedings are final should he so desire, and the decision to wait will not affect the validity of the judgment. See *id.* (“[N]either lack of execution nor appeal prevents setoff pursuant to the clear language of the bond for title.”).

Before this Court and the Supreme Court, NARP contends that Richardson was not entitled to the stock at all and, in the alternative, that Richardson had to pay \$2,936,300.00 for the shares—an amount not found on the face of the judgment or in the parties' contract. In contrast, Richardson asks the Supreme Court to accept certiorari to reverse this Court's Opinion and order instead that Richardson should pay \$415,988 for the 7.5% interest in NARP. Due to these uncertainties, Richardson, within his rights to do so, has not sought to execute on the judgment. The judgment of the trial court should thus be affirmed.

C. The judgment is not capable of execution as currently postured and any performance at this juncture would be “hollow.”

As detailed herein, both parties appealed the judgment in the underlying matter. Both parties have now petitioned the South Carolina Supreme Court to consider the issues previously before this Court. NARP on the one hand argues that Richardson is not entitled to any ownership interest in NARP, and in the alternative, that Richardson owes \$2,936,300.00 for the 7.5% interest in NARP. In contrast, Richardson argues, based on the plain language of the judgment and the agreement found to exist by the jury, that he is to pay \$415,988 for his 7.5% interest in NARP. These issues are not finally decided. Rule 2, SCACR (If a petition for writ of certiorari is filed, the Court of Appeals may not send the remittitur until notified that the petition has been denied by the Supreme Court. If the Supreme Court grants the writ of certiorari, the Court of Appeals may not send the remittitur).

Further, additional litigation is now pending arising out of NARP's decision to sell much of the assets of NARP before the appellate proceedings concluded in this matter. Because of this post-judgment action of NARP, any execution or performance by

Richardson at this time would ring “hollow.” While this matter was pending before this Court previously, NARP undertook efforts to sell the assets of NARP to another entity, thereby diluting the worth of the shares to which Richardson is entitled under the judgment. NARP actions have resulted in further litigation captioned as *Richardson v. NARP, et. al.*, civil action number 2011-CP-23-7518 and *Richardson v. Stodghill, et. al.*, civil action number 2012-CP-23-6969. Richardson has sued NARP and others for their actions in devaluing his shares during the pendency of the appeal and Richardson seeks money damages against NARP and others as a result. This is yet another reason the judgment is not, as a practical matter, capable of execution as the issues are currently postured. The stock to which Richardson is entitled has been materially devalued.

The trial court in the case at bar was fully aware of the litigation against NARP and others in reaching his decision to deny NARP’s request for a bond or other security. “I’m also mindful of the companion suit that [Richardson’s attorney] has brought against the corporation alleging serious misgivings on their part.” (Tr. of Testimony before the Honorable Charles B. Simmons, Jr. at p. 21; R. 30.) Counsel for Richardson argued at the rule to show cause hearing that NARP’s attempt to require a bond to be posted or funds to be deposited with the court was a “gotcha game” and that NARP had been “gutted of its money.” (*Id.* at p. 20, R. 29.) As argued by counsel for Richardson and demonstrated by the pleadings in the second action, the stock certificates are a “worthless piece of paper.” (*Id.* at p. 20, R. 29.) Thus, another reason the trial court was correct in not requiring performance of the judgment or the posting of any security is NARP’s actions in devaluing its stock.

The South Carolina Supreme Court has previously held that a judgment will be stayed and no bond required when requiring a party to perform on a judgment might be altered by circumstances following an appeal. In *Thompson v. Watts*, the Supreme Court addressed an order of the trial court which stayed a judgment pending appeal. 278 S.C. 230, 231, 294 S.E.2d 245, 246 (1982). Appellant contracted with respondent to sell shares in a small engine service company and respondent paid for a portion of the shares and executed a promissory note for the remaining amount. *Id.* at 230-31, 294 S.E.2d at 245. Respondent defaulted on his obligations under the note. *Id.* Respondent sued to rescind the note and also brought a fraud claim. *Id.* Appellant counterclaimed for foreclosure and judgment on the note. The parties tried the fraud claim and the foreclosure counterclaim first. *Id.* S.C. at 231, 294 S.E.2d at 245-46. The appellant sought and received a deficiency judgment against the respondent-debtor. *Id.* No appeal was taken from that judgment. *Id.* The respondent's rescission action was to be tried separately but the trial court later dismissed that count and the respondent appealed the order dismissing his rescission count. *Id.* The respondent sought to avoid execution of the judgment pending resolution of his appeal arising out of the rescission action. *Id.* at 231, 294 S.E.2d at 246. The trial court granted the respondent's request. *Id.* Appellant argued that the trial court erred in staying its ability to execute on that judgment pending resolution of the appeal and a final decision on the rescission question. *Id.*

The Supreme Court, in affirming the order of the trial court permitting stay of the judgment, held that should respondent prevail on his rescission claim, the victory would be "hollow," as the assets at issue would be gone. The same is true here in two respects: 1) NARP could prevail on its claim that no contract exists or 2) Richardson could prevail

on is claims against NARP and others in the second suit. Requiring performance at this stage in these proceedings could later prove to ring hollow as the case was in *Thompson*. For these additional reasons, the trial court's order here should be affirmed.

IV. Even if NARP could execute upon the judgment currently, Rule 62(c) makes the decision of whether a bond must be posted discretionary, and the trial court acted within its discretion in declining to make Richardson post a bond.

Rule 62(c) provides the trial court with discretion as to when a bond is required.

A. The lower court properly concluded no bond was required and that Richardson did not have to pay monies into court or restrict his assets based on the record before the trial court.

The judgment in this case was for specific performance in favor of Richardson. (Judgment; R. 117.) There can be no question that specific performance is a form of injunctive relief in equity. *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009) (citing *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006)). The obligation to deliver documents or convey an instrument would fall upon NARP once Richardson undertook efforts to execute upon the judgment. Thus, the question at issue is whether the trial court properly declined to require the posting of a bond or the payment of monies into court stemming from the judgment for specific performance for Richardson. In order to answer this question, the Court should examine the language of Rule 62. Specifically, Rule 62(c) provides:

Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court *in its discretion* may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond *or otherwise as it considers proper for the security of the rights of the adverse party*.

Rule 62(c), SCRCP (emphasis added). In interpreting the South Carolina Rules of Civil Procedure, our courts apply the same rules of construction used to interpret statutes, and if a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the court is obligated to follow and to enforce the stated meaning. *Narruhn v. Alea London Ltd., et. al.*, Op. No. 27270 (S.C. Sup. Ct. filed June 12, 2013) (Shearouse Adv. Sh. No. 26 at 96) (citing *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 107-08, 727 S.E.2d 407, 416 (2012)).

The plain language of Rule 62(c) demonstrates that the trial court has discretion as to whether to require a bond. Here, the trial court examined financial statements from Richardson and heard testimony from Richardson. (Tr. of Testimony Before the Honorable Charles B. Simmons, Jr.; Richardson Financial Statements (sealed); R. 10-32; R. 33-72.) After doing so, the trial court concluded that Richardson had sufficient assets to pay the amount contained in this Court's November 9, 2011 Opinion and that there was no risk Richardson would transfer or conceal assets. (July 6, 2012 Order at p. 2.; R. 1.) Thus, the trial court was satisfied that Richardson possessed sufficient assets and he did not need to post a bond or pay money into the court during the pendency of the appeals. There are helpful examples under South Carolina law in analogous contexts where trial courts have declined to require a party to post a bond.⁵

In *Long v. Lea*, the South Carolina Supreme Court affirmed the order of the trial court finding that no bond was required to be posted. 177 S.C. 231, 233-34, 181 S.E. 6, 7 (1935). The allegations of the suit in *Long* concerned the management of a life estate and

⁵ It should be noted that both of the following cases address a procedural posture where the *judgment holder* is attempting to gain security for the judgment, *not the party against whom judgment was entered*, as the case is here. Nonetheless, the cases are instructive to show that the trial court properly exercised his discretion in this matter.

the trial court concluded that the life tenant had indeed committed negligent acts in managing the estate. *Id.* at 235, 181 S.E. at 8. The plaintiffs, the remaindermen of the life estate, sought an accounting and asked for the life tenant to show cause as to why a bond should not be posted. *Id.* at 233-34, 181 S.E. at 7. Upon reference to the master, the master found a bond should be posted. *Id.* at 235, 181 S.E. at 7. The life tenant appealed to the trial court, which concluded that no bond was needed during the remainder of the life tenancy as the life tenant had sufficiently demonstrated the ability to satisfy any monetary obligations found to be due and owing to the estate, and further, that she had sufficient personal real estate assets to satisfy any further amounts due the estate and its remaindermen *Id.* at 236, 181 S.E. at 8. Thus, the trial court concluded the estate and the remaindermen were properly protected by the showing made by the life tenant at the rule to show cause hearing. *Id.* The remaindermen appealed the order and the Supreme Court affirmed, finding that the trial court properly weighed the testimony and exercised his discretion. *Id.* at 239-240, 181 S.E. at 9.

Similarly, in *Matthews v. Nance*, the South Carolina Supreme Court upheld an order staying execution of a judgment pending appeal without the posting of a bond. 49 S.C. 322, 322, 27 S.E. 100, 101 (1897). The defendant Nance, sheriff of Abbeville County, was subject to a preemptory mandamus order directing him to sell property. *Id.* at 323, 27 S.E. at 101. The sheriff applied in chambers to a justice of the Supreme Court to stay execution of the mandamus order directing the sale of the property pending the conclusion of the underlying appeal. *Id.* at 323-24, 27 S.E. at 101. The Court upheld the order declining to require a bond pending appeal, holding that judges “have wide discretion in giving such order in the premises as he thinks proper to carry out that

intention, with or without security; in this case that discretion, in our opinion, has not been abused.” *Id.* at 324, 27 S.E. at 101. The Court based its ruling concerning the bond, in part, on the severe penalties that can result from the sale of a large asset during the pendency of an appeal arising out of the ordered transfer of the asset. *Id.*

Like the above cases, the trial court properly declined to require a bond to be posted or otherwise require security in the form of paying monies into court or restricting the use of Richardson’s assets pending appeal. The trial court considered evidence and properly exercised his discretion in this regard.

B. Cases interpreting Rule 62(c) of the Federal Rules of Civil Procedure support the trial court’s decision to not require a bond, payment of monies into court, or the restriction of assets pending appeal.

When it appears that no South Carolina authority is directly on point with respect to the interpretation of a rule of civil procedure, since South Carolina’s Rules of Civil Procedure are based on the Federal Rules, our courts will look to the construction placed on the Federal Rules of Civil Procedure. *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (citing See H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* (2d ed. 1985)); see also *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 475 n.10, 674 S.E.2d 154, 162 n.10 (2009).

Rule 62(c) of the Federal Rules of Civil Procedure provides in pertinent part:

While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.

Fed. R. Civ. P. 62(c). In interpreting this rule, the federal courts have determined that Rule 62(c) “codifies the inherent power of the courts to make whatever order is deemed necessary to preserve the status quo and ensure the effectiveness of the eventual

judgment.” 11 Charles Wright & Alan Miller, Federal Practice & Procedure § 2904 (3d ed. 2004) (citing *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1003 (5th Cir. Ala. 1969)); *see also Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com.*, 260 U.S. 212, 219 (U.S. 1922) (citing former Equity Rule 74, the precursor to Rule 62(c)). This includes the power to suspend or modify an injunction during the pendency of the appeal, although the moving party is required to show “(1) that he will likely prevail on the merits of the appeal; (2) that he will suffer irreparable injury if the stay is denied; (3) that other parties will not be substantially harmed by the stay; and (4) that the public interest will be served by granting the stay.” *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 519 (W.D.N.C. 1999) (citing *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970)). An application for the stay of an injunction pending appeal “necessarily goes to the discretion of the court.” Wright & Miller § 2904 (citing *Brady v. National Football League*, 779 F. Supp. 2d 1043, 1046 (D. Minn. 2011)).

Rule 62(c) of the Federal Rules of Civil Procedure further provides that that the court may condition the modification or suspension of the injunctive relief on the posting of a bond “or other terms that secure the opposing party’s rights.” Fed. R. Civ. Pro. 62(c). The discretion granted under the rule is consistent with the inherent power of the court to preserve that status quo, and that discretion includes the power to decline to impose a bond in its entirety. *See e.g. Exxon Corp. v. Esso Worker’s Union*, 963 F. Supp. 58, 60 (D.Mass. 1997) (“Exxon’s solvency and clear ability to satisfy the judgment if affirmed on appeal militate in favor of waiving the customary bond requirement. Accordingly, the court will not require Exxon to post a bond.”); *see also International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) (approving, under Rule 62(c), the district

court setting a bond amount at zero in the absence of evidence regarding likelihood of irreparable harm).

Decisions from federal courts, in examining issues concerning whether a bond is necessary under Rule 62(d) also demonstrate that, in its discretion, a court may choose not to require a bond in either of two polar circumstances:

(i) when the judgment debtor can currently easily meet the judgment and demonstrates that it will maintain the same level of solvency during appeal and (ii) when “the judgment debtor’s present financial condition is such that the posting of a full bond would impose undue financial burden.”

Poplar Grove Planting & Ref. Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979). The court can determine whether to waive the posting of a bond by using the factors laid out in *Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988):

(1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) *whether “the defendant’s ability to pay the judgment is so plain that the cost of a bond would be a waste of money”*; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. at 459 (internal citations omitted) (emphasis added). Thus, the above federal court decisions are instructive and support the trial court’s discretionary decision here under Rule 62(c), SCRCP.

Conclusion

Based on the above, this Court should dismiss NARP’s appeal because 1) the issues presented have previously been decided by this Court, 2) the grounds NARP seeks to raise are not preserved, or 3) NARP cannot lawfully attempt to execute on a judgment

in favor of Richardson. The Court should also affirm the Order of the trial court and hold that Richardson did not have to post a bond, deposit monies into the court, or restrict assets, as the trial court properly exercised its discretion.

Respectfully submitted,

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November 25, 2013

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
Appellate Case No. 2012-212748

North American Rescue Products, Inc., ... Appellant,
v.
P.J. Richardson, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent P.J. Richardson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

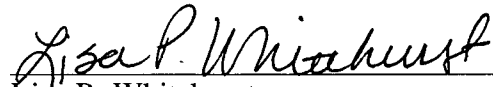
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