THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 10 2014
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-208586
Lower Court Case No. 2007-CP-23-3206
Memorandum Opinion No. 2014-MO-009

North American Rescue Products, Inc.,.....Respondent/Petitioner,

v.

P. J. Richardson,.....Petitioner/Respondent.

RESPONDENT-PETITIONER'S PETITION FOR REHEARING

Respondent-Petitioner (NARP) respectfully submits this petition for rehearing pursuant to Rule 221(a), SCACR.

Both parties petitioned this Court for a writ of certiorari to review the Court of Appeals' opinion. This Court granted both petitions, dispensed with briefing, and vacated the Court of Appeals' opinion in part and vacated it in part. This Court ruled specifically on the issues raised by Petitioner-Respondent (Richardson), finding that the issues were not properly before the Court of Appeals and therefore vacating the Court of Appeals' opinion on Richardson's cross-appeal to the Court of Appeals. This Court never mentioned nor specifically ruled upon the issues raised by NARP, but it affirmed the remaining portions of the Court of Appeals' opinion. It thus appears that this Court rejected NARP's arguments, but the basis for doing so is unstated.

Rule 221(a), SCACR provides that a petition for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." It is not possible for NARP to do so in this case, because this Court's opinion never addresses the "points" raised by NARP. Accordingly, NARP's first ground for rehearing is that this Court should issue an amended opinion that rules specifically on the "points" raised by NARP so that NARP may understand this Court's ruling and, if necessary, file an informed petition for rehearing. As a second ground for rehearing, NARP respectfully resubmits its Petition for a Writ of Certiorari as grounds for rehearing as if set forth verbatim herein. For the convenience of the Court, the substantive portions of NARP's certiorari petition are reproduced herein at pages 6 - 22, *infra*, followed by a "Conclusion To Petition For Rehearing" at page 23 *infra*.

At trial, Richardson's claims hinged on his allegation that the parties reached an oral agreement during a meeting in Charleston on July 29, 2004. According to Richardson, NARP agreed to sell him 7.5% of NARP's stock in exchange for 7.5% of the proceeds from an anticipated sale of Richardson's company (RMI). NARP denied these allegations and presented contrary proof. The following facts, however, are undisputed:

1. Richardson drafted an agreement entitled "Agreement of Termination, Settlement and Release" (the Termination Agreement).

2. On November 5, 2004, Richardson signed the Termination Agreement and then forwarded it to NARP, requesting that NARP's president (Castellani) sign and return the Termination Agreement.

3. Castellani signed the Termination Agreement on November 8, 2004 and returned it to Richardson. Even the jury agreed that the parties had entered into Termination Agreement. (R. 2 at ¶ 4).

4. The Termination Agreement contained termination provisions and a merger clause that plainly and repeatedly extinguished all negotiations, discussions, agreements, etc. between the parties that pre-dated the Termination Agreement, which included any agreement, negotiations, or discussions that took place at the Charleston meeting on July 29, 2004.

5. Nothing in the Termination Agreement makes its provisions or effectiveness conditional or contingent upon any future event or any future agreement.

6. After the execution of the Termination Agreement, the parties never reached any agreement for any sale of NARP's stock to Richardson – the parties discussed several possibilities, but it is undisputed that they never reached any agreement and that Richardson rejected all proposals by NARP.

Despite these undisputed facts, the trial court denied NARP's directed verdict motion, finding that the agreement was ambiguous. The trial court, however, never identified how the agreement was ambiguous.[1] See *Bardsley v. Government Employees Ins. Co.*, 747 S.E.2d 436, 440 (S.C. 2013) ("[W]hen a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient."). In affirming the trial court, the Court of Appeals also did not identify how the agreement was ambiguous. See *North American Rescue Prods. v. Richardson*, 720 S.E.2d 53 (S.C. App. 2011) (hereinafter cited in short form as *NARP*). This Court's opinion also does not identify any ambiguity in the Termination Agreement. Thus, despite this Court's admonition in *Bardsley, supra*, no court has identified any ambiguity in the Termination Agreement.

The question of whether a contract is ambiguous is a question of law for the court and, therefore, this Court reviews that question *de novo* without any deference to the trial court or the Court of Appeals. *Lee v. The University of South Carolina*, Op. No. 27372 (S.C. Sup. Ct. filed Apr. 2, 2014) (Shearhouse Adv. Sh. No. 13 at 25, 28). In *NARP*, the Court of Appeals reviewed the facts and procedural history, including a recitation of the termination provisions and merger clause in the Termination Agreement, and then stated:

[1] The trial court's ruling is quoted in the Court of Appeals' opinion. See *North American Rescue Prods. v. Richardson*, 720 S.E.2d 53, 58-59 (S.C. App. 2011)

> To complicate matters further, the parties concede that no written option agreement dated December 15, 2004 existed at the time of the Termination Agreement. Moreover, the parties never entered into an option agreement dated December 15, 2004.

NARP, 720 S.E.2d at 57. This observation is in reference to paragraphs 3 and 4 of the Termination Agreement, both of which stated:

> It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec] , 2004 pursuant to which NARP and RAC [Richardson's company] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

(R. 924a-924b, ¶¶ 3 and 4). The "[15 Dec]" part of the quote above represents a handwritten notation made in blanks set forth in the Termination Agreement. It is undisputed that Richardson wrote in the date of "15 Dec."

Nothing in the Termination Agreement made its provisions contingent upon the parties entering into a "15 Dec" agreement, which did not exist at the time of the Termination Agreement, or any other agreement. If Richardson desired any such contingency, it was his responsibility to make it part of the Termination Agreement. He did not, so there is no such contingency. *Lee,* 2014 Adv. Sh. No. 13 at 29 (In construing a contract, "[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."). If Richardson did not protect some desired right to a future agreement, the courts cannot protect him from his failure to do so. *Id.* ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

The existence of an ambiguity must be determined from the language used in the four corners of the contract. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). Nothing in the Termination Agreement creates any ambiguity, including the

"15 Dec" notation by Richardson. It simply, plainly, and only stated that any such agreement was not subject to the release provisions of the Termination Agreement. At most, the reference to the non-existent December 15, 2004 agreement in the November 2004 Termination Agreement, was an agreement to agree in the future which, as a matter of law, is not an enforceable agreement. *Ellis v. Taylor*, 449 S.E.2d 487, 489 (S.C. 1994). If Richardson had some expectation or hope that the parties would enter a "15 Dec" agreement, that does not and cannot create any ambiguity. *McMaster v. Strickland*, 409 S.E.2d 440, 442 (S.C. App. 1991) (the decision to take a chance on something happening in the future which will make a current contract more favorable or palatable is not a basis for invalidating that contract if the future event does not take place unless a condition or contingency to that effect is placed in the contract).[2]

The one fact upon which the parties fully agree in this case is that they discussed the matter after the Termination Agreement was signed, but they never reached any agreement of any kind after the Termination Agreement. Since the Termination Agreement plainly extinguished all prior discussions and agreements, and since there is no evidence of any agreement or promissory estoppel after the Termination Agreement, NARP was entitled to a directed verdict on Richardson's claims.

[2] The Court of Appeals stated that there was evidence indicating the Termination Agreement was part of an "overreaching, three-step agreement between the parties." *NARP*, 720 S.E.2d at 58. That "evidence," however, is not part of the Termination Agreement and, therefore, it cannot and does not create any ambiguity in the Termination Agreement.

NOTE: Pages 6-22, *infra*, are a verbatim recitation of the substantive parts of the certiorari petition submitted by NARP, which is included herein as grounds for rehearing. Page 23 is a new "Conclusion for this Rehearing Petition."

QUESTIONS PRESENTED

1. The Court of Appeals erred in affirming the trial court's denial of NARP's directed verdict motion on Richardson's contract claim.

2. The Court of Appeals erred in affirming the trial court's denial of NARP's directed verdict motion on Richardson's promissory estoppel claim.

STATEMENT OF THE CASE

This is a contract case. The case was tried to a jury and the trial court entered judgment on the jury's verdict. Both parties timely appealed, and the Court of Appeals affirmed. Both parties timely petitioned for rehearing, and the Court of Appeals denied both petitions. Both parties now seek a writ of certiorari from this Court.

At trial, the Petitioner/Respondent (Richardson) pursued theories of contract and promissory estoppel. The Respondent/Petitioner (NARP) moved for a directed verdict on these claims, which the trial court denied. The Court of Appeals affirmed this denial, and NARP submits this was error for the reasons set forth below.

STATEMENT OF THE FACTS

This dispute arises from two written contracts, the "2000 Agreement" and the subsequent "Termination Agreement." The 2000 Agreement was between NARP and Reeves Manufacturing, Inc. (RMI). (R. 923-924). Richardson was the President of RMI; Castellani was the President of NARP. (R. 924). Under the 2000 Agreement, NARP and RMI agreed *inter alia* to cross-sell each other's emergency medical and rescue products to each other's customers, and to pay each other commissions subject to their respective rights to terminate such commissions.

(R. 923). Importantly, the 2000 Agreement provided that RMI would issue 25% of its capital stock to Castellani and NARP would issue 25% of its capital stock to Richardson. (R. 923). It is undisputed that this stock was never issued.

The 2000 Agreement was entered into on January 1, 2000. (R. 924). At some point prior to July 29, 2004, Richardson began exploring the possibility of selling RMI to a third party. Castellani and Richardson met in Charleston on July 29, 2004, to discuss the 2000 Agreement between RMI and NARP. At this meeting, it is undisputed that the parties orally amended the 2000 Agreement to reduce the stock-swap from 25% to 7.5%. Richardson testified the parties also orally amended the 2000 Agreement at this meeting to provide that NARP would accept 7.5% of the net proceeds from a sale of RMI in exchange for 7.5% of its stock. Castellani denied any such agreement was reached in Charleston or at any other time. (R. 139-141, 164-165, 188-189, 276-279, 284-285, 662-663).

After the Charleston Meeting, the parties continued to discuss the possibility of Richardson acquiring 7.5% of NARP's stock. The discussions centered around a three-part agreement whereby: (1) the 2000 Agreement would be terminated; (2) Richardson would make a contribution to a charity of Castellani's choice based on the fair market value of NARP's stock; and (3) Richardson would thereafter be allowed to purchase 7.5% of NARP's stock for a penny per share. The parties never finalized this agreement. The parties also discussed another three-part agreement whereby: (1) the 2000 Agreement would be terminated; (2) Castellani would contribute 7.5% of NARP's stock to a charity; and (3) Richardson would have the right to purchase the stock from the charity at fair market value. Again, the parties never finalized this agreement. Richardson admitted that he rejected all proposals for either of these three-part agreements.

Richardson entered an agreement with a third-party to sell the assets and good will of RMI. The sale closed in January 2005. Prior thereto, on November 5, 2004, Richardson signed a Termination Agreement drafted by his attorneys and requested Castellani to also sign it – Castellani did so on November 8, 2004. (R. 383; 924(c)).

The Termination Agreement was dated November 5, 2004 and specified that it was an agreement between NARP, Castellani, RMI, and Richardson. (R. 924(a)). Importantly, Richardson expressly admitted at trial that there was nothing in the Termination Agreement was unclear – that it terminated the 2000 Agreement – that it settled all potential claims under the 2000 Agreement – that it released all potential claims under the 2000 Agreement – and that all prior discussions and agreements, oral or written, were merged into the Termination Agreement. (R. 332-334, 339).

The expressed purpose of the Termination Agreement was to "terminate *any* purported agreements, understandings, or arrangements *in any way arising out of or relating in any manner to* the 2000 [Agreement]." (R. 924(a), ¶ B) (emphasis added). The Termination Agreement contained four paragraphs that expressly terminated any and all aspects of the 2000 Agreement:

> 1. Termination of the 2000 [Agreement]. The parties agree that the 2000 [Agreement] and *any and all* agreements, understandings, undertakings, or arrangements that *in any way arose or may have arisen out of or relate in any manner* to the 2000 [Agreement], *are hereby terminated.*
>
> 2. Settlement. *All* claims and potential claims *of any nature whatsoever* that have been, could have been, or in the future could be asserted *by the parties arising out of or relating in any manner to the 2000 [Agreement] are hereby settled, compromised and released . . ..*

3. RMI and [Richardson] Release. NARP and [Castellani] hereby *remise, release and forever discharge* each of RMI and [Richardson], along with their respective directors, [etc.] of and from *all, and all manner of, actions, causes of action, suits*, debts, dues, sums of money, accounts, reckonings, bonds, bills, *covenants, contracts*, controversies, *agreements, promises*, trespasses, damages, judgments, executions, *claims and demands whatsoever*, whether *in law or equity*, which NARP and/or [Castellani] had, now have, or which any [related person] can, shall, or may have against RMI and [Richardson] or [related persons] *arising out of or relating to the 2000 [Agreement]* from *the beginning of time to the date of this [Termination] Agreement. . ..*

4. NARP and [Castellani] Release. RMI and [Richardson] hereby *remise, release and forever discharge* each of NARP and [Castellani], along with their respective directors, [etc.] of and from *all, and all manner of, actions, causes of action, suits*, debts, dues, sums of money, accounts, reckonings, bonds, bills, *covenants, contracts*, controversies, *agreements, promises*, trespasses, damages, judgments, executions, *claims and demands whatsoever*, whether *in law or equity*, which RMI and/or [Richardson] had, now have, or which any [related person] can, shall, or may have against NARP and [Castellani] or [related persons] *arising out of or relating to the 2000 [Agreement]* from *the beginning of time to the date of this [Termination] Agreement. . ..*

(R. 924(a) – 924(b), ¶¶ 1-4) (underlining in original) (italics added). It would be impossible for any agreement to more completely capture and terminate any and all aspects of the 2000 Agreement, including any agreements related to the 2000 Agreement. Thus, assuming one were to accept the truth of Richardson's testimony about the oral amendment of the 2000 Agreement at the July 29, 2004 meeting in Charleston, that oral amendment was captured and terminated by paragraphs (1), (2), and (4) of the November 5, 2004 Termination Agreement. This is the plain meaning of the Termination Agreement's express provisions. Were there any doubt about this, it

is expressly removed by paragraph (6) of the Termination Agreement, a classic merger clause which provided in full as follows:

> 6. Entire Agreement. This Agreement sets forth the *entire agreement and understanding* of the parties relating to the subject matter contained herein, and *merges all prior discussions and agreements, both oral and written, between the parties.*

(R. 924(b), ¶ 6) (underlining in original) (italics added). Here again, assuming one were to accept the truth of Richardson's testimony about the oral amendment of the 2000 Agreement at the July 29, 2004 meeting in Charleston, that oral amendment was again captured and terminated by the merger clause in paragraph (6) of the November 5, 2004 Termination Agreement.

Nothing in the Termination Agreement made its termination provisions conditional upon the happening of any event, the existence of any other agreement, or the entering or execution of any other agreement. (R. 924(a) – 924(c), *passim*). Nothing in the Termination Agreement made it conditional upon the three-part agreement that had been discussed earlier but never entered.

The "Release" Paragraphs of the Termination Agreement (¶¶ 3 & 4 quoted above) contained a proviso that provided in full:

> . . . It is specifically agreed and understood by the parties that *the foregoing release* is not intended to, and shall not, release any of the parties from that certain, *separate Option Agreement*, dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

(R. 924(b), ¶¶ 3 and 4) (emphasis added). The "15 Dec" date was handwritten into the blank of the Termination Agreement by Richardson. (Id.). It is undisputed that this Option Agreement did not exist at the time of the Termination Agreement. It is undisputed that the parties never entered an Option Agreement dated "15 Dec" or on any other date. Nothing in the Termination

Agreement made its provisions that terminated the 2000 Agreement and any related agreements contingent upon the existence of this option agreement or upon the parties entering any such option agreement – it merely and only provided that any such option agreement survived the release provisions of the Termination Agreement. (R. 924(a) – 924(c), *passim*). Thus again, assuming one were to accept the truth of Richardson's testimony about the oral amendment of the 2000 Agreement at the July 29, 2004 meeting in Charleston, this "15 Dec Option Agreement" proviso did not save this oral amendment from the termination provisions or the merger clause of the Termination Agreement.

Armed with this Termination Agreement, Richardson closed the sale of RMI's assets and goodwill in January 2005 for $9.1 Million Dollars as the "full stockholder" and "sole owner" of RMI. (R. 342-343, 346-347). Moreover, as Richardson admitted at trial, the Termination Agreement prevented NARP and Castellani from claiming an ownership interest in RMI prior to the closing of the RMI assets sale. (R. 351). After the Termination Agreement, and after the RMI asset sale closing, the parties continued to discussed the possibility of Richardson acquiring 7.5% of NARP's stock. These discussions continued to center around a charitable donation measured by the fair market value of NARP's stock. It is undisputed that the parties never entered any agreement. (R. 345). During these discussions, Richardson never asserted that he had the right to purchase 7.5% of NARP's stock for 7.5% of the net proceeds from his sale of RMI's assets, and he never tendered those proceeds in demand of any such right. (R. 353).

In December 2005, Castellani's attorney wrote Richardson's attorney, noting that the parties had not discussed anything further since July 2005. He had then suggested that Richardson simply retain all RMI sales proceeds and disclaim any interest in NARP. He

concluded that since he had heard nothing further since July 2005, that Richardson had reached the same conclusion. (R. 1059).

One month later, in January 2006, Richardson's attorney responded that Richardson had not abandoned the idea of obtaining an interest in NARP. He said he would get back to Castellani's attorney in the first quarter of 2006 with a "plan." Importantly, this letter makes no mention of any right to purchase 7.5% of NARP's stock for 7.5% of the RMI sales proceeds. (R. 1060).

Fifteen months later, in April 2007, Richardson's attorney wrote Castellani's attorney. Richardson did not assert any right to purchase 7.5% of NARP's stock for 7.5% of the net proceeds from the sale of RMI's assets. Rather, he claimed the right to purchase 7.5% of NARP's stock for one penny per share under a purported October 4, 2004 Stock Option Agreement between Richardson and NARP. (R. 1061-1062). To fully understand how outrageous and fraudulent this claim was, a brief digression is required.

As noted earlier, before the execution of the Termination Agreement at Richardson's request, the parties had discussed the possibility of Richardson obtaining 7.5% of NARP's stock by making a contribution to a charity of Castellain's choosing in an amount to be agreed upon, whereupon NARP would grant Richardson an option to purchase 7.5% of its stock for one penny per share. During these discussions, a proposed draft of this "Stock Option Agreement" was forwarded to Richardson for his consideration. Unbeknownst to anyone, including NARP and Castellani, Richardson signed this agreement, dated it as October 4, 2004, stuck it in a drawer or file, and never advised NARP or Castellani that he had signed or accepted this agreement – Castellani never signed this option agreement. (R. 290-292; 355-356; 926-929; see signed agreement at R. 926-929). Richardson continued to discuss other alternatives with NARP and

proposed agreements that differed from the October 4, 2004 agreement. In response to this October 4 "option agreement" that Richardson secretly signed, Richardson's attorney sent NARP's attorney a counterproposal that contained terms different from that of the October 4 "option agreement." (R. 316-317; 930-952; 953-977). Thus, as a matter of fundamental principles of contract law, Richardson rejected any assumed offer of the "October 4 option agreement" by making these counterproposals. In like manner, Richardson's secret signing of the "October 4" option agreement was never communicated to NARP and, therefore, it was not and could not be an acceptance of any assumed offer of the "October 4" option agreement.

Presented with this outrageous and fraudulent claim of an "October 4 Stock Option Agreement," NARP commenced the present action for a declaratory judgment that Richardson had no right to purchase 7.5% of NARP's stock for one penny per share. (R. 6-7). Richardson responded with an Answer and Counterclaim that made the following substantive claims:

1. Richardson admitted that he demanded the right to purchase 7.5% of NARP's stock for a penny per share based on a binding agreement between the parties. (R. 9, ¶ 5).

2. Assuming that NARP relied upon a mutual mistake of fact or proved a mutual mistake of fact [an issue not raised in NARP's complaint], Richardson was entitled to be returned to his prior position under the 2000 Agreement of owning 25% of NARP's stock. (R. 11-12, ¶ 23; R. 15, ¶ 57).

3. In 2004, the parties began to rethink the 25% stock swap agreement set forth in the 2000 Agreement, amended that agreement to 7.5%, and reduced it to writing in the "October 4 Stock Option Agreement," which gave Richardson the right to purchase 7.5% of NARP's stock for a penny per share. Richardson admitted the parties had entered into the November 5, 2004 Termination Agreement, but alleged the "October 4, 2004 Stock Option Agreement" for a penny per share was

kept intact under the Termination Agreement, and further alleged he was entitled to specific performance of the "October 4 Stock Option Agreement." (R. 13-15, ¶¶ 37-41, 44-55).[3]

4. NARP promised to sell Richardson 7.5% of its stock for one penny per share, and Richardson is entitled to enforce this promise under the doctrine of promissory estoppel. (R. 16, ¶¶ 60-64).

Richardson never alleged that the parties had orally amended the 2000 Agreement at the Charleston meeting such that he could purchase 7.5 % of NARP's stock for 7.5% of the net proceeds from his sale of RMI's assets, the only theory that he now pursues.

Richardson subsequently served an Amended Answer and Counterclaim in response to an Amended Complaint. In this Answer, he continued to rely on the "October 4, 2004 Stock Option Agreement," but he radically changed the theory. Now he alleged that the parties reached a "new arrangement" in a meeting in Atlanta, after having previously agreed to reduce the stock-swap from 25% to 7.5%. Under this "new arrangement," Castellani agreed to release his interest in RMI for 7.5% of the proceeds from the sale of RMI's assets, "which was imminently to occur," and Richardson agreed to release his interest in NARP for an option to purchase 7.5% of NARP's stock for a penny per share. Richardson further alleged that the parties memorialized this Atlanta agreement by entering the Termination Agreement and the "October 4, 2004 Stock Option Agreement." (R. 28-30, ¶¶ 47-56, 60-64). This allegation was patently false – the Atlanta meeting took place on October 29, 2004 (R. 1047), so the "October 4, 2004 Stock Option Agreement" could not have memorialized anything from the Atlanta meeting. Also, the Termination Agreement exempts a "15 Dec" option agreement, but it does not mention an

[3] Contrary to this allegation, as explained earlier, the Termination Agreement did not mention or reserve the October 4 Option Agreement. Rather, it excepted the non-existent December 15, 2004 agreement from the operation of the release provisions in the Termination Agreement.

October 4, 2004 option agreement, nor does it state any option agreement was to be for one penny per share. Finally, the Amended Answer again claimed promissory estoppel based on the alleged promise to sell 7.5 % of NARP's stock for one penny per share. (R. 31-32). Importantly, Richardson never alleged that the parties had agreed in the Charleston meeting that Richardson could buy 7.5% of NARP's stock for 7.5 % of the net proceeds from the sale of RMI's assets.

Two weeks later, realizing he could never prove the "October 4, 2004 Option Agreement" was a valid contract, Richardson filed a "Revised Amended Answer and Counterclaim." Richardson, however, continued to claim the following: (1) the parties had earlier agreed to reduce the stock-swap from 25% to 7.5%; (2) in the Atlanta meeting, the parties reached the same agreement alleged in the Amended Answer, but there was no reference to the "October 4, 2004 Stock Option Agreement" as memorializing the Atlanta agreement; (3) Richardson again admitted entering into the Termination Agreement but alleged it reserved his right to an option to purchase 7.5% of NARP's stock for one penny per share. (R. 40-41, ¶¶ 52-58). Again, the Termination Agreement does not reference any "penny per share" agreement. Finally, Richardson's "Revised" claims continued to allege promissory estoppel based on the alleged "penny per share" promise. (R. 43-44). And again, the "Revised" Answer does not mention any agreement in Charleston whereby Castellani agreed that Richardson could purchase 7.5% of NARP's stock for 7.5% of the net proceeds from the sale of RMI's assets.

One month later, the trial commenced and Richardson again radically changed his theory. First, the "October 4, 2004 Stock Option Agreement" that had been the centerpiece of Richardson's demand letter and his first two answers evaporated – he admitted it had never been entered by the parties. (R. 290-292, 355-356). Second, Richardson told a completely different story about the Atlanta meeting – that meeting had been a discussion of the three-part deal

involving a charity donation, a deal that Richardson admitted had never been entered because he refused to do so. Finally, the tangled trail of Richardson's theory looped back in time to the Charleston Meeting. That meeting now became the source of a new and different promise that did not involve any option agreement for a penny a share and did not dovetail with the execution of the Termination Agreement and its exclusion of an option agreement from its provisions. Rather, Richardson was now alleging there had been a straightforward promise of a bilateral contract to sell 7.5% of NARP's stock to Richardson for 7.5% of the net proceeds from Richardson's sale of RMI's assets. As demonstrated later, however, this latest story did not and could not survive the execution of the Termination Agreement and therefore, NARP is entitled to judgment as a matter of law.

STANDARD OF REVIEW

The question of whether a contract is ambiguous is a question of law for the court. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). Thus, this Court may review the question *de novo* without any deference to the jury, the trial court, or the Court of Appeals.

To the extent there are factual issues, the evidence is viewed in the light most favorable to Richardson. This does not mean the court should ignore facts unfavorable to Richardson (most notably the express terms of the Termination Agreement). The question is whether a verdict for Richardson is reasonable when the evidence is viewed in his favor. *Love v. Gamble*, 448 S.E.2d 876 (S.C. App. 1994).

ARGUMENT

The only contract theory or promise now pursued by Richardson is based on the final leg of the tangled trail of his theories, that being his claim that Castellani agreed at the July 29, 2004,

Charleston Meeting to amend the 2000 Agreement and sell him 7.5% of NARP's stock for 7.5% of the net proceeds from Richardson's sale of RMI's assets. (See Richardson's Cert. Pet., *passim*). As noted above and further demonstrated below, the Termination Agreement plainly captured and terminated any and all agreements or promises that related in any manner to the 2000 Agreement, and it also captured and extinguished all agreements and discussions that occurred before November 5, 2004. Thus, NARP is entitled to judgment on Richardson's claims as a matter of firmly established principles of contract law.

I. The Court of Appeals erred in affirming the trial court's denial of NARP's directed verdict motion on Richardson's contract claim.

A. The Termination Agreement unambiguously captured and terminated all agreements, contracts, and promises that existed or may have existed prior to November 5, 2004.

It is undisputed and Richardson admitted that the parties never reached an agreement after the execution of the Termination Agreement. Thus, any contract claim arises solely upon the basis of the oral amendments to the 2000 Agreement allegedly entered into by the parties at the July 2004 meeting in Charleston. As demonstrated in the Statement of the Facts, however, the Termination Agreement plainly captured and extinguished any and all matters in any way related to the 2000 Agreement. Moreover, the merger clause of the 2000 Agreement captured and extinguished all agreements and discussions in any manner related to any claim Richardson might have had for an ownership interest in NARP. Thus, NARP was entitled to judgment as a matter of law on any contract claims based on anything occurring before the November 5, 2004 effective date of the Termination Agreement.

B. The Termination Agreement is not ambiguous.

The trial court found the Termination Agreement was ambiguous and therefore denied NARP's directed verdict motion. The Court of Appeals affirmed without identifying or

discussing any ambiguity in the Termination Agreement – the Court skipped this essential first step of contract analysis and went directly to the conflicting evidence on the meaning of the Termination Agreement. This was error.

The question of whether a contract is ambiguous is a question of law for the court. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). The existence of an ambiguity is be determined from the language used in the four corners of the contract. *Id.* When that language plainly sets forth the parties' rights and obligations, there is no ambiguity and the courts must enforce the contract as written, regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. *Id.* Courts do not exist to and cannot relieve parties from the results of their unambiguous contract. *Id.* When an agreement contains a merger clause, the agreement is fully integrated and extinguishes all contemporaneous and prior agreements. *Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. App. 1984). Here, the Termination Agreement contained an express merger clause, and its termination provisions repeatedly, expressly, and plainly extinguished any and all claims in any manner related to the 2000 Agreement. Thus, the Court of Appeals erred in considering any evidence on the meaning of the Termination Agreement, because the Agreement was not ambiguous. Accordingly, NARP was entitled to a directed verdict on all contract claims.

C. The reference to a "15 Dec" Option Agreement did render the Termination Agreement ambiguous, and any such ambiguity must be construed against Richardson as the drafting party.

The Court of Appeals may have found the Termination Agreement was "ambiguous" due to the reference to the "15 Dec" option agreement.[4] It is undisputed that this option agreement

[4] The Court did not make any express finding or ruling on the question of ambiguity, but, in describing the Termination Agreement, the Court stated: "To complicate matters further, the parties concede that no written option agreement dated December 15, 2004 existed at the time of the Termination Agreement. Moreover, the parties never entered an option agreement dated December 15, 2004." (Appx. 5).

did not exist on the November 5, 2004 effective date of the Termination Agreement – it is also undisputed that the parties never entered an option agreement dated "15 Dec" or otherwise.

Richardson (through his counsel) drafted the Termination Agreement in its entirety. Thus, if there is any ambiguity in the Termination Agreement, it must be "construed liberally and interpreted strongly in favor of the non-drafting party [NARP]." *Southern Atl. Fin. Servs., Inc. v. Middleton,* 590 S.E.2d 27, 29 (S.C. 2003); *accord Springs and Davenport, Inc. v. AAG, Inc.,* 683 S.E.2d 814 (S.C. App. 2009). As the drafting party, Richardson had "the greater opportunity to prevent mistakes in meaning [and is therefore] responsible for any ambiguity and should be the one to suffer from the shortcomings." *Id.* If Richardson believed or intended that some present or past written or oral undertaking or understanding was to survive the Termination Agreement, it was his duty to make this clear in the Termination Agreement. Having failed to include any such "outward expression," he cannot now rely on any such "secretly held intention." *Blakeley v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976).

Nothing in the Termination Agreement made its provisions conditional upon the existence or future execution of the "15 Dec" option agreement or any other event or agreement. Thus, any expectation or hope that Richardson had about any such agreement does not and cannot create any ambiguity. *McMaster v. Strickland*, 409 S.E.2d 440, 442 (S.C. App. 1991) (the decision to take a chance on something happening in the future which will make a current contract more favorable or palatable is not a basis for invalidating that contract if the future event does not take place unless a condition or contingency to that effect is placed in the contract). Moreover, and at best, the reference to the non-existent, future-dated option agreement indicated the existence of an agreement to agree in the future. Such agreements, however, are not

enforceable if, as here, the material terms are left to future determination. *Ellis v. Taylor*, 449 S.E.2d 487, 489 (S.C. 1994).

D. There is no evidence of any written option agreement and any alleged oral option agreement is barred as a matter of law.

It is uncontested that the parties never entered a written option agreement. There is no evidence of any oral option agreement after the date of the Termination Agreement. Were there any such evidence, an oral option agreement is unenforceable as a matter of law.

NARP is a Delaware corporation. Thus, as a matter of law, any option to purchase stock from NARP had to be in a writing that was approved by NARP's Board of Directors and set forth the specific terms of the option (*e.g.*, amount of stock, the duration of the option, the consideration paid for the option).[5] It is undisputed that Richardson and NARP never entered a written option agreement meeting these requirements. More importantly, Richardson admitted that, after the Termination Agreement, the parties never reached the option agreement referenced in the Termination Agreement, be it dated December 15 or otherwise, nor did they ever reach any other agreement whereby he could purchase stock in NARP (R. 385). Richardson also knew there was no option or other agreement granting him the right to purchase NARP's stock at the time he asked Castellani to sign the Termination Agreement. For each of these reasons, as a matter of law, there was no contract between Richardson and NARP whereby Richardson owned, purchased, or had the option or right to purchase any stock from NARP.

[5] Under Delaware law, an option to purchase stock from a corporation must meet these requirements. 8 Del. C. § 157; *Grimes v. Alteon, Inc.*, 804 A.2d 256 (Del. 2002). South Carolina law has statutorily adopted the "internal affairs doctrine," which precludes South Carolina from regulating the internal affairs of a foreign corporation authorized to do business in South Carolina, like NARP here. S.C. Code Ann. § 33-15-105(c). An option to purchase stock from a corporation is firmly established as an internal affairs matter. *Mariasch v. Gillette Co.*, 521 F.3d 68, 72 (1st Cir. 2008), *citing, quoting, and applying inter alia Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 129 (1933) *and Beard v. Elster,* 160 A.2d 731, 735 (Del. 1960). Thus, the requirements of Delaware law for options to purchase stock from a corporation must be met in South Carolina, and it is undisputed such did not happen in this case.

II. The Court of Appeals erred in affirming the trial court's denial of NARP's directed verdict motion on Richardson's promissory estoppel claim.

Promissory estoppel arises only upon proof of the following elements: (1) an unambiguous promise by the promisor, *i.e.,* NARP here; (2) reasonable reliance on the promise by the promisee, *i.e.*, PJ here; (3) reliance by the promisee (PJ) was expected by and foreseeable to the promisor (NARP); and (4) injury caused to the promisee (PJ) by his reasonable reliance, *i.e.*, detrimental reliance. *Rushing v. McKinney*, 633 S.E.2d 917 (S.C. App. 2006). The only "promise" in the evidence is the testimony of an oral amendment to the 2000 Agreement arising out of the July 2004 meeting in Charleston. Any such promise was plainly captured and extinguished by the termination provisions in the Termination Agreement as well as the merger clause in the Termination Agreement.

There is no evidence of any promise after the date of the Termination Agreement. There is evidence of negotiations about the three-part agreement involving a charitable contribution by Richardson, but he admitted that he rejected all such offers. Therefore, there was no unambiguous promise, because the offers were conditional. Moreover, to the extent the offers were a promise, Richardson rejected them and therefore cannot claim detrimental reliance. In addition, given the adversarial nature of the discussions, the involvement of attorneys, and the use of written draft agreements, no reasonable person could believe an oral promise was binding. These same circumstances establish that NARP would not expect or foresee that Richardson would rely on any oral statements. Moreover, there is no evidence of any detrimental reliance on any promise made after the Termination Agreement, *i.e.*, there is no evidence that Richardson suffered any injury in reliance on any "promises" made after the Termination Agreement.

CONCLUSION

Richardson drafted the Termination Agreement – signed the Termination Agreement – and requested and received NARP's signature on the Termination Agreement. He then used the Termination Agreement to sell his business free of any ownership interest by NARP or Castellani. He then tried to enforce a contract for a penny per share. He then realized he could not enforce that non-existent agreement. Now, he wants to enforce alleged agreements and promises that were specifically and repeatedly terminated, settled, discharged, and released by the Termination Agreement. To that end, he now disavows the Termination Agreement. Preventing this type of chicanery is precisely why this Court has repeatedly required courts to "enforce contracts as written, regardless of the wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *E.g., U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric*, 480 S.E.2d 447, 450 (S.C. 1997), *citing C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n*, 373 S.E.2d 584 (S.C. 1988). For this reason, and for the reasons set forth above, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and remand for judgment in favor of NARP.

Respectfully Submitted,

s/

Robert L. Widener
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

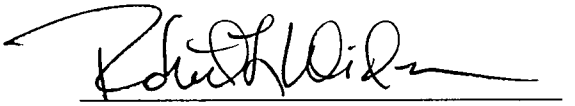
Bernie W. Ellis
McNair Law Firm, P.A.
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940
Attorneys for Respondent/Petitioner

April ___, 2012
Columbia, SC

CONCLUSION TO PETITION FOR REHEARING

For all of the foregoing reasons, it is respectfully submitted that this Court should issue an amended opinion that reverses the Court of Appeals and remands for the entry of judgment in favor of NARP. In the alternative, it is respectfully submitted that this Court should issue an amended opinion that rules on the issues raised by NARP so that NARP may determine whether this Court has overlooked or misapprehended any of NARP's issues and arguments.

Respectfully Submitted,



Robert L. Widener
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Bernie W. Ellis
McNair Law Firm, P.A.
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940

ATTORNEYS FOR RESPONDENT/PETITIONER

Columbia, SC
April 10, 2014

RECEIVED

APR 10 2014

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Memorandum Opinion No. 2014-MO-009
Submitted February 21, 2014 – Filed march 26, 2014

North American Rescue Products, Inc.,..... Respondent/Petitioner,

v.

P. J. Richardson,..... Petitioner/Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served North American Rescue Products, Inc.'s Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on April 10, 2014 addressed to the attorneys of record, as follows:

Rivers Stillwell, Esq.
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
Post Office Box 10084
Greenville, South Carolina 29603

C. Mitchell Brown, Esq.
A. Mattison Bogan, Esq.
NELSON MULLINS RILEY &
SCARBOROUGH, LLP
Post Office Box 11070
Columbia, South Carolina 29211-1070

Ann Shuler