

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-208586  
Case No. 2007-CP-23-3206

**RECEIVED**

APR 10 2014

**S.C. Supreme Court**

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

v.

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

**PETITIONER/RESPONDENT P.J. RICHARDSON'S PETITION FOR  
REHEARING**

Pursuant to Rule 221, SCACR, Petitioner/Respondent P.J. Richardson ("Richardson") requests rehearing of this Court's March 26, 2014, Memorandum Opinion No. 20014-MO-009 because he respectfully submits that the Court has misconstrued his argument. While at first glance it appears the issue raised by Richardson merely concerns how much money Richardson must pay for shares of North American Rescue Products, Inc. ("NARP") stock, *the real issue* is the meaning of the trial court's specific performance judgment, which will likely remain a subject of dispute between the parties in the absence of further consideration by and guidance from the Court.

Because it is vitally important to the parties to achieve some clarification regarding the meaning of the trial court's specific performance judgment and because clarification promotes judicial economy in related proceedings pending between these parties, this petition should be granted.

## **I. Procedural Background.**

Richardson had two claims submitted to the jury in this matter. One was for promissory estoppel, which asked the jury how much money Richardson would have to pay, pursuant to that theory, for NARP stock. The jury answered that question in the amount of \$2,936,300. Richardson also made a claim for specific performance. He also won on this claim and the trial court entered judgment on this claim and only on this claim. Richardson chose not to appeal the jury's finding with respect to his promissory estoppel claim.

Consideration of the trial court's charge to the jury illustrates the difference in the two claims submitted to the jury. With respect to Richardson's claim that a contract existed and could be specifically performed, the court charged:

A contract exist[s] when there is an agreement between two or more persons with consideration either to do or not to do some act. . . . For an agreement to be enforceable, the parties must agree by way of an offer to enter into an agreement and acceptance by the other party and under terms which are understood by each party.

(App. 810.) The court further charged on specific performance:

Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. In order to have specific performance, you have to find there was clear evidence of a valid agreement.

(App. 829.) The trial court's charge accurately set forth South Carolina law on specific performance and neither party took exception to the charge.

In support of this charge, the jury considered evidence of a contract to swap stock. Shares of NARP were to be swapped for shares of Richardson's company—Reeves Manufacturing, Inc. This contract was later amended to allow Richardson to exchange

seven and one-half (7.5) percent of the *proceeds from the sale of Reeves' stock* (this turned out to be \$415,988) for the requisite percentage of NARP stock. **A review of the verdict form shows that this contract, as amended with these terms permitting the exchange of money from Richardson rather than a stock swap, was determined to exist by the jury.** (*See* Verdict Form, App. 7-9). Richardson sold Reeves and testified that he has set aside the proceeds from the sale to exchange for a 7.5% share in NARP. (App. 526.)

As to Richardson's promissory estoppel claim, the court charged the jury as follows:

Promissory estoppel is a theory that holds a person is estopped [ ] and it can arise from the making of a promise, even without consideration.

(App. 824.) Thus, the trial court's promissory estoppel charge to the jury was *in addition to* the specific performance charge.

The trial court charged the jury on promissory estoppel because Richardson provided ample evidence to survive NARP's directed verdict motion. For example, Mr. Castellani testified at one point in the trial that he agreed to let Richardson acquire NARP stock. (App. 195.) Richardson also presented the testimony of Ms. Billie Richardson on the existence of a promise. Ms. Richardson testified as follows on direct:

Counsel: Okay. And were any promises made at that meeting?

...

Ms. Richardson: As I said, you know, 7 -- our 7 1/2 for his 7 1/2. You'll always have your 7 1/2.

Counsel: What does that mean, you'll always have your 7 1/2?

...

Ms. Richardson: In -- after the sale of Reeves, there was some pretty, pretty dark moments for me. Bob [Castellani—of NARP] was very reassuring, very comforting. And he said to me, you'll always have your 7 1/2. Simple as that.

Counsel: That was skipping ahead a little bit. I want to go back to Charleston, just to the Charleston meeting. Were any promises made between P. J. and Bob that you saw?

...

Ms. Richardson: Just that, you know, you have 7 1/2 percent ownership of my company and I have 7 1/2 percent ownership in your company. I don't know how -- I mean, it was just that basic to me. That, you know, I promise you this and you promise me that.

(App. 600-601.)

Further, in moving the trial court to amend the pleadings to conform to the evidence presented, Richardson argued with respect to the claims made in the Complaint:

... No sir, Your Honor, that would be an addition, we would be reserving our other claims of promissory estoppel. And also we have alternative claims for specific performances of damages that would apply to this claim as well, Your Honor.

(App. 656.) This colloquy further demonstrates the existence of the claims submitted to the jury: one for promissory estoppel and one for specific performance.

Hence, the jury returned a verdict supporting the alternative claims of **both** specific performance and promissory estoppel.

## **II. Analysis.**

This Court's Opinion incorrectly construes Richardson's decision not to appeal the trial court's denial of his motion for new trial *nisi*. Richardson did not have to appeal that ruling as the motion for new trial *nisi* only pertained to the promissory estoppel claim – i.e., the amount found by the jury that Richardson was to pay – which was **not the claim upon which judgment was entered in his favor**. Richardson chose not to appeal the jury's finding in that regard was because the ***judgment*** entered by the trial court was for ***specific performance of the contract involved***, not promissory estoppel. (App. 6, Judgment.) The jury found a binding contract existed between Richardson and NARP. Since Richardson prevailed under both theories, he was obviously entitled to elect the more favorable remedy to be entered as judgment, which the trial court did when it entered a judgment for specific performance. Under the specific performance judgment, Richardson is entitled to performance of the contract found by the jury to in fact exist.

Two omissions from the verdict form cloud what Richardson believes to be the correct outcome intended by the trial court. First, the verdict form failed to explicitly state the amount of the proceeds from the Reeves sale was \$415,988. Second, and with respect to the \$2,936,300 amount, the verdict form failed to make clear that this amount related only to Richardson's promissory estoppel claim. Richardson submits however, that his interpretation of the judgment is the only logical one in light of the record and the law. Richardson's accounting expert testified that if NARP were valued at \$80 million dollars, Richardson's share of 7.5% of stock in NARP would be worth \$3,000,120. (App.

576-577.) The jury logically considered this evidence when arriving at an amount to place on the verdict form for Richardson's promissory estoppel claim.

Moreover, the \$2,936,300 amount must pertain solely to Richardson's promissory estoppel claim because on a specific performance claim, neither the jury nor the court are empowered to substitute the amount contractually agreed by the parties (\$415,988) with a different contract term. See *Wright v. Patrick*, 262 S.C. 434, 441, 205 S.E.2d 175, 178 (1974) (noting that "[t]he discretionary power of an equity court to decree specific performance can never come into question or be exercised until and unless it first be factually established that there was a contract."); see also *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966) (noting that a court need only provide reasonable term in an agreement when the parties left the issue open). Therefore, the amount set forth by the jury – \$2,936,300 – as a matter of law can only relate to the promissory estoppel claim.

The motion for new trial *nisi* was made immediately following the discharge of the jury (App. 851-852) but before the trial court fashioned its judgment. Because the dollar amount provided by the jury was unrelated to the specific performance claim entered as judgment, Richardson had no reason to appeal the new trial *nisi* denial. Accordingly, after judgment was entered for specific performance Richardson chose not to pursue any appeal related to his promissory estoppel claim. He was satisfied with the specific performance judgment, believing it required him to pay \$415,988—as initially agreed to with NARP under the contract the jury found to exist.

But shortly after judgment was entered, NARP began misconstruing the judgment as one for specific performance of a contract, not for the payment of \$415,988, but

purportedly requiring payment of \$2,936,300. This price term was never agreed upon by Richardson as a term of any contract. After NARP appealed, Richardson cross-appealed out of an abundance of caution, fearing the Court of Appeals might misconstrue the verdict form and take NARP's view as to the meaning of the judgment. While the case was before the Court of Appeals, NARP moved for a limited remand to the trial court seeking for to ask the trial court to interpret Richardson's judgment. (*See App. 58, NARP Motion for Limited Remand.*) Richardson opposed this request, explaining instead that the judgment was for specific performance and that the Court of Appeals should interpret the judgment, not the trial judge. (*See Exhibit A, Richardson Return in Opposition to NARP's Motion for Limited Remand.*)<sup>1</sup> The Court of Appeals agreed and denied NARP's motion. (*See App. 61, Order of the Court of Appeals Denying NARP's Motion for Limited Remand.*) Unfortunately, the Court of Appeals mistakenly interpreted the judgment for specific performance, thus requiring Richardson to seek *certiorari* review from this Court.

Accordingly, this Court should grant rehearing and issue a ruling that the trial court's specific performance judgment was for the enforcement of Richardson's contract with NARP for Richardson to pay 7.5% of the stock proceeds from the sale of Reeves (i.e., \$415,988) in exchange for 7.5% of NARP stock. This is the contract the jury found to exist and the courts cannot impose a new contractual price term into a valid and binding contract. *See Patrick and Commercial Credit Corp., supra.*

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<sup>1</sup> This Court can take judicial notice of Richardson's filing related to the motion for limited remand before the Court of Appeals as public records. *See Doe v. Bishop of Charleston*, Opinion No. 27345 (S.C. Sup. Ct. filed Jan. 8, 2014) (Shearouse Adv. Sh. No. 1 at 57, n. 2) (noting the ability of courts to take judicial notice of underlying records in filings).

### III. Other Litigations and Conclusion.

The Court should be aware that the parties are involved in two other litigations arising from this matter; one pending in the Court of Appeals and one pending before the Business Court in the Greenville County Court of Common Pleas. In both of these related matters, the question as to the meaning of the trial court's specific performance judgment remains in dispute. The trial court never issued a ruling on the meaning of the judgment, and at the time Richardson did not believe it was necessary because he won on his specific performance claim and the only contract the jury found existed necessitated payment of \$415,988 under its express terms. Richardson submits that the Court of Appeals' ruling in this regard should be reversed, rather than vacated.

Therefore, in the interest of judicial economy and out of a need for clarity in the other litigations pending between these parties, Richardson requests that this Court grant rehearing, reverse the Court of Appeals' opinion, and explicitly find that Richardson's specific performance judgment requires him to pay \$415,988 for the NARP stock. That was the judgment of the trial court and the terms of the contract between the parties.

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April 10, 2014

# *Exhibit A*

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
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Steven H. John, Circuit Court Judge

Case No. 2007-CP-23-3206

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

**Respondent/Appellant's Memorandum in Opposition  
to the Motion for Limited Remand and  
to Hold Appellant Timelines in Abeyance**

Pursuant to Rule 224, SCACR, Respondent/Appellant P.J. Richardson

("Richardson") submits this memorandum in opposition to Appellant/Respondent North American Rescue Products, Inc.'s ("NARP") motion for a limited remand and to hold appellate timelines in abeyance. For the reasons set forth below, NARP's motion should be denied.

**I. NARP's Requested Relief is Inconsistent with Its Appeal.**

As stated in NARP's motion, its contention on appeal, as was its contention throughout the trial, is "that there is no binding contract between the parties." (NARP Mot. ¶ 6.) The motion presented to the Court, however, rests upon the exact opposite factual contention -- that a valid and enforceable contract exists and the judgment related to that contract should be marked as satisfied. NARP contends, incorrectly, that

the judgment being appealed only established a contractual right to purchase 7.5% of NARP's stock for \$2,936,000.00 in a lump sum and as a whole (as opposed to a right to purchase stock up to that amount), and upon restrictive, arbitrary timing terms imposed by NARP's counsel in a letter dated October 6, 2008, wholly apart from any language contained anywhere in the judgment or the jury's verdict. (Motion ¶ 7.) NARP argues that because Richardson did not comply with the terms arbitrarily imposed by its counsel upon the contract, which it contends on appeal does not even exist, that it has somehow "satisfied" the judgment.

If NARP is now conceding that some contract exists, it should not have appealed, but it did. NARP should not be allowed to simultaneously assert factually inconsistent positions in the trial court and on appeal. Cf. Cothran v. Brown 357 S.C. 210, 592 S.E.2d 629 (2004) (outlining the elements of judicial estoppel and noting it "is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding").<sup>1</sup> For these reasons, the Court should deny the motion.

## **II. NARP's Request is Futile as It is Not Entitled to the Relief Requested.**

NARP is not entitled to the relief it ultimately seeks in its remand motion; therefore, remand and a stay are futile and should be denied. This is true for two reasons.

First, assuming for sake of argument that NARP's characterization of the judgment as only granting specific performance of a contract to purchase 7.5% of

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<sup>1</sup> Richardson does not assert that counsel for NARP is trying to intentionally mislead the Court, the fourth element of a judicial estoppel claim.

NARP's stock for \$2,390,000.00 is correct, NARP is not entitled to the relief it claims in the remand motion. NARP's claim is not grounded in the language of the judgment or even the jury's verdict. Rather, NARP's argument rests upon arbitrary and unreasonable conditions or terms of its own making that compelled Richardson to act within a time arbitrarily set by NARP. The terms were not stated in the written judgment of the trial court, but imposed by a letter of NARP's counsel dated October 6, 2008. Because the terms are no part of the judgment, any alleged failure by Richardson to comply with the terms cannot constitute a "satisfaction" of the judgment.

Second, NARP's characterization of the judgment entered by the trial court is incorrect. As Richardson will argue more fully on appeal, the judgment of the trial court is plain on its face. It entered a judgment for specific performance in favor of Richardson. It did not enter a judgment requiring Richardson to pay NARP a specific sum for a specific percentage of NARP's stock in an all or nothing deal. The judgment certainly does not state that Richardson had to pay a specific amount by any arbitrary date NARP might happen to set in an entirely separate letter from counsel at an arbitrary place designated by NARP and with a specific form of payment arbitrarily chosen by NARP.

As noted by our supreme court, "[i]t is the settled rule of this Court that an appeal will not lie from a verdict; it must be from a judgment . . . ." Hanner v. Hillcrest Land Co., 165 S.C. 298, 163 S.E. 727, 728 (1932). It is the terms of the judgment that control and that judgment is for "specific performance," a cause of action alleged in Richardson's complaint with a request for specific relief, not a contract of

NARP's own imagining which is says it is repudiating on appeal and which it repudiated at trial.

**III. Nothing is Pending in the Trial Court Requiring a Remand to that Court.**

NARP's motion is procedurally defective in any event and should be denied. Nothing is pending in the trial court upon which the trial court may act should the Court remand the case. Hence, there is no reason for a remand.

**Conclusion**

For the reasons set forth above, NARP's motion should be denied.

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December 8, 2008

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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/Appellant 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):

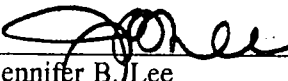
Pleadings:

Respondent/Appellant's Memorandum in Opposition to  
the Motion for Limited Remand and to Hold Appellant  
Timelines in Abeyance

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December 8, 2008

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner/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):

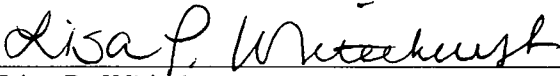
Pleadings:

**Petitioner/Respondent P.J. Richardson's Petition for Rehearing**

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April 10, 2014