THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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

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

v.

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

P.J. RICHARDSON'S RETURN TO NARP'S PETITION FOR REHEARING

Petitioner/Respondent P.J. Richardson ("Richardson") files this return in opposition to Respondent/Petitioner North American Rescue Product Inc.'s ("NARP)" petition for rehearing. This Court should deny NARP's petition for the reasons set forth below.

First, this Court expressly rejected NARP's arguments by affirming the Court of Appeals in its March 26, 2014, Memorandum Opinion with respect to the trial court's denial of NARP's direct verdict motions. Second, the trial court properly denied NARP's directed verdict motions because ample evidence existed with respect to Richardson's specific performance and promissory estoppel claims, warranting submission of those claims to the jury. Third, this Court should grant Richardson's petition for rehearing to clarify that Richardson will pay $415,988 for his 7.5% share in NARP based on the trial court's specific performance judgment and the jury's finding that a contract existed between NARP and Richardson and the contract was capable of performance.

Law/Analysis

I. This Court's March 16, 2014, Memorandum Opinion provides a clear indication that it rejected all of NARP's arguments seeking a reversal of the judgment in favor of Richardson.

This Court ruled against NARP in *toto* in affirming the Court of Appeals' opinion with respect to the trial court's denial of NARP's directed verdict motions. NARP's contention that this Court's opinion leaves some debate as to NARP's arguments is without basis.

In issuing a memorandum opinion this Court can overrule any exceptions made on appeal without explanation. *See, e.g., In re Memorandum Opinions by Court of Appeals*, 322 S.C. 53, 55 n.1, 471 S.E.2d 456, 457 n.1 (1993) (citing *Miller v. Atlantic Coast Line Railroad Co.*, 140 S.C. 123, 224, 138 S.E. 675, 708 (1926) ("It has formerly been deemed adequate for the opinion to show in any decisive way clearly how the case was decided, and the reasons therefore. This may be done by reference to other decided cases, to an extract from a text-book, to a decree, or charge, or sometimes merely overruling the exceptions. . . . If the Court makes it clear what disposition has been made of the case, and the reasons for its action, nothing more is essential.")); *see also* Rule 220(b)(1), SCACR.

Accordingly, the Court does not have to revisit its Opinion as NARP suggests "so that NARP may understand the Court's ruling and, if necessary, file an informed petition for rehearing." (NARP Petition for Rehearing at p. 2.) The Court overlooked nothing on NARP's argument that it was entitled to a directed verdict on Richardson's specific performance and promissory estoppel claims—it rejected the argument entirely. NARP's petition for rehearing should be denied.

II. This Court properly affirmed the trial court's denial of NARP's directed verdict motions.

A. NARP's motion for directed verdict on Richardson's specific performance claim was denied because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated.

NARP contends it should have obtained a directed verdict based on the written document containing a "termination" provision. This Court correctly rejected NARP's arguments because ample evidence existed that the document containing the purported termination provision was only a single portion of an overall three-step agreement. Further, ample evidence existed demonstrating that the full three-step agreement was ambiguous and never fully executed, and that the parties continued to be bound by the 2000 Agreement as orally amended in Charleston.

1. Richardson presented sufficient evidence to support the jury's finding that the "termination" clause did not end his right to purchase 7.5% of NARP.

This Court and the Court of Appeals properly rejected NARP's arguments contending that the document containing the termination provision ended Richardson's right to purchase 7.5% of NARPs' stock as a matter of law. "Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury." *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (internal citations omitted).

There was conflicting testimony as to the meaning, force, and effect of the document containing the termination provision. Richardson offered evidence that the document containing the termination provision was merely one phase of an

interdependent three-part agreement, which agreement was never fully executed. (App. 1033, 1034, 1035, 1043; 301, 380, 477.) In contrast, NARP offered some testimony claiming that the document signed in November 2004 containing the termination provision was the end-all-be-all and that the document forever ended the parties' rights under the 2000 Agreement as modified. (App. 917.) NARP's evidence, however, refuted its own position respecting termination. (App. 911, 1034, 1035.) Further, Bob Castellani of NARP testified the "Termination Agreement" alone did not represent what was agreed upon in Atlanta (App. 291.) An e-mail from Castellani on May of 2005, months after the date of the termination provision document, referenced his "share" of the Reeves sale (App. 1043), again demonstrating that the parties had not terminated all rights with respect to shares in each other's companies. Nor had the parties ended their relationship for good, based on any termination provision document. Hence, NARP's directed verdict motion was properly denied.

2. The document containing the termination provision was ambiguous and cannot be construed against Richardson.

NARP argues that this Court should grant rehearing in order to have any ambiguities in the purported "termination agreement" construed against Richardson because NARP contends that Richardson's attorney drafted the agreement. (App. 306.) This argument ignores the record evidence that NARP's attorney, Curt Stodghill, worked on two segments of the failed three-part agreement—pertaining to the reaffirmance of the right to purchase 7.5% of stock and the charitable donation. (App. 306.) These two portions of the agreement and the document containing the termination provision were intended to operate together. Therefore, the purported ambiguities should not be read

against Richardson. Both parties, with the help of counsel, drafted the overall draft agreements, and their varying pieces.

Further, the failed three-part transaction cited by NARP is not in an adhesion contract setting. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) ("[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable."). The contract terms should not be construed against Richardson. *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F.Supp. 416, 426 n.10 (D.C. S.C. 1995) (stating that the rule of construction that construes ambiguities against a contract drafter is "not automatically applied when there is no evidence of adhesion or unequal bargaining power"). In addition, since the Termination Agreement is in the nature of a waiver or release, such documents are to be construed strictly *against* waiver. *Fisher v. Stevens*, 584 S.E.2d 149 (Ct. App. 2003). Hence, the varying interpretations merely necessitated that the evidence be submitted to the jury to determine the parties' intent. The trial court correctly did so.[1]

Moreover, the November 2004 Termination Agreement was ambiguous standing alone. The trial court properly stated "the terms of [of the Termination Agreement] were absolutely ambiguous. Read as a whole, it borders on being completely un-understandable." (App. 428.) The Termination Agreement twice references an exception

[1] NARP's argument on rehearing also fails to recognize that contracts can have multiple parts and be made of several documents or oral agreements. Thus, the inclusion of a merger clause does not eliminate the fact that the document with the merger clause and termination provision was just one part of the overall contract. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). ("[T]he instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.")

to its scope concerning Richardson's right to purchase 7.5% of NARP stock from NARP and it forecasts the execution of an agreement reaffirming the rights of the earlier 2000 Agreement as modified. These references indicate an intent ***not*** to make the 7.5% agreement part of the document containing the termination provision.

In addition, the November 2004 "termination" document referenced a future date in the document showing that the document with the termination provision was not the only document making up the entire agreement of the parties. It specifically referenced a future date of December 15, 2004 and the option agreement to then be executed as yet another step in this three-tiered agreement stating:

> 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 have granted RJP an option to purchase 7.5% of the capital stock of NARP.

(App. 911.) NARP's proposed solution to this problem is to say this language in the Termination Agreement is meaningless. This position ignores the law. An interpretation of a contract which gives reasonable meaning to all contract provisions will be preferred to one which leaves a portion of the writing useless, meaningless or inexplicable. 17A Am. Jur. 2d Contracts, Section 377 (2004). Thus, the trial judge properly submitted the issue to the jury for its consideration.

If NARP believed the jury's special verdict conclusion with respect to the termination provision document was inconsistent with other parts of its verdict, it was incumbent upon NARP to make a motion for new trial based on such inconsistency before the jury departed. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554-55, 560 S.E.2d 894, 896 (2002) (holding a party waived its right to object to an

inconsistent verdict by failing to raise the objection prior to the jury being discharged). NARP did not do so, and in fact has never raised inconsistency of verdict as an issue. As a result, the issue is not properly preserved for this Court to consider at this late stage.

Since the parties' three-pronged agreement never materialized, the parties were bound by and were operating under the prior 2000 Charleston agreement, as amended. The jury found the amended contract existed and could be performed. The trial court, based on the jury's finding, entered judgment for specific performance in Richardson's favor. This Court and the Court of Appeals correctly affirmed the trial court's decision to allow the issue of whether Richardson had the right to buy 7.5% of NARP's stock to go to the jury. The jury found the rights were not terminated.

Accordingly, the ambiguity of the termination provision and the differing views of the parties as to the force and effect of the document containing the termination provision created a jury issue as to the parties' intent. The trial court properly sent this issue to the jury, which concluded the termination provision did not end Richardson's right to purchase NARP stock. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. at 234, 482 S.E.2d at 555-56.

B. Sufficient evidence was presented at trial warranting the denial of NARP's directed verdict motion as to Richardson's promissory estoppel claim.

In seeking rehearing, NARP argues that any promises or agreements between NARP and Richardson were extinguished by a document purportedly containing a termination provision and merger clause. Richardson presented sufficient evidence that he reasonably relied on NARP's promises regarding his ability to purchase 7.5% of NARP's stock and that the termination agreement was never finalized. The trial court

properly denied NARP's directed verdict motion on Richardson's promissory estoppel claim on presented the issue to the jury.

The elements of promissory estoppel are: "(1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise." *Powers Const. Co., Inc. v. Salem Carpets, Inc.*, 283 S.C. 302, 306, 322 S.E.2d 30, 33 (Ct. App. 1984).

Richardson presented ample evidence to establish a promissory estoppel claim in order to survive NARP's directed verdict motion. NARP's Castellani testified that after the Termination Agreement, he agreed to let Richardson acquire NARP stock. (App. 195.) Richardson, in reliance on this promise, then sold Reeves Company and set aside the proceeds from the sale of Reeves so he could exchange them for a 7.5% share in NARP. (App. 526, 545.) Richardson rightfully relied on the promise that NARP would sell him the shares. NARP has failed to perform by not tendering the proper shares for the proper purchase amount. Therefore, this Court properly upheld the trial court's denial of NARP's directed verdict motion.

Further, 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.)

As demonstrated by the evidence, Richardson reasonably relied on the promise to permit him to purchase part of NARP's stock, and Richardson's reliance was foreseeable and expected by NARP. Therefore, sufficient evidence was presented to establish every element of a promissory estoppel claim warranting submission of the claim to the jury. NARP's petition for rehearing should be denied.[2]

III. This Court should grant Richardson's petition for rehearing for the purpose of issuing an amended opinion expressly noting that the specific performance judgment necessitates that Richardson pay $415,988 pursuant to the contract the jury found to exist.

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[2] In addition, the argument NARP seeks to advance to this Court was not made to the trial court. At no time before the trial court level did NARP argue there had been no "reasonable reliance." (App. 664.) Instead, at the trial, and in the face of conflicting evidence, NARP argued the Termination Agreement enabled the sale of Reeves, and that this should have worked an "estoppel" against Richardson. (App. 671.) This is not an argument that Richardson's *promissory estoppel claim* was destroyed by the merger language in the Termination Agreement as now purportedly offered by NARP.

The trial court submitted two of Richardson's claims to the jury in this matter. One was for promissory estoppel, which asked the jury how much money Richardson would have to pay for NARP stock if the jury did not find a binding and enforceable contract existed. In connection with the promissory estoppel claim, 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.

This Court's Opinion misconstrued Richardson's decision not to appeal the trial court's denial of his motion for new trial *nisi* as a preservation error. Richardson did not have to appeal that ruling as the motion for new trial *nisi* only pertained to the promissory estoppel claim. 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. (App. 6, Judgment.) The jury found a binding contract existed between Richardson and NARP. Since Richardson prevailed under both theories, he was lawfully 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.

The $2,936,300 number on the verdict form can only relate 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). Hence, the amount set forth by the jury—$2,936,300—as a matter of law can only relate to the promissory estoppel claim.

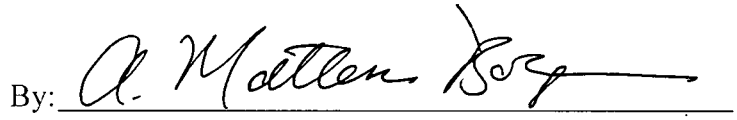
This Court's Opinion further fails to recognize that Richardson's motion for new trial *nisi* was made immediately following the discharge of the jury (App. 851-852) but before the trial court fashioned its judgment. Because the dollar amount provided by the jury was unrelated to the specific performance 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.

Conclusion

This Court should deny NARP's petition for rehearing. The trial court correctly denied NARP's direct verdict motions as sufficient evidence was presented that Richardson and NARP entered into an agreement to justify the trial court submitting Richardson's specific performance and promissory estoppel claims to the jury. The jury found that agreement to exist and to be capable of performance. Thus, the trial court correctly entered judgment for specific performance in favor of Richardson.

This Court should, however, grant Richardson's petition for rehearing. Accordingly, the Court should issue an amended opinion explicitly finding 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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Rivers S. Stilwell
SC Bar No. 002108
E-Mail: rivers.stilwell@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for P.J. Richardson

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Columbia, South Carolina

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PROOF OF SERVICE

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 Return to NARP's Petition for Rehearing

Counsel Served:

Robert L. Widener, Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, SC 29211

Bernie W. Ellis, Esquire
McNair Law Firm, PA
Post Office Box 447
Greenville, SC 29602

Lisa P. Whitehurst

Lisa P. Whitehurst
Administrative Assistant

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