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

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

RECEIVED

APR 21 2014

S.C. Supreme Court

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

v.

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

RESPONDENT-PETITIONER'S RETURN TO PETITIONER/RESPONDENT'S PETITION FOR REHEARING

Respondent/Petitioner (NARP) respectfully submits this return to the petition for rehearing filed by Petitioner/Respondent (Richardson). NARP has also filed a petition for rehearing, and granting NARP's petition would moot all issues raised in Richardson's petition. Doing so would also end immediately and with finality the "other litigations" noted in Richardson's petition for rehearing, thereby bringing to an end all litigation between the parties.

As demonstrated below, Richardson's petition for rehearing is barred by the law of the case doctrine, and his arguments are otherwise not preserved for review. In any event, as also demonstrated below, Richardson's arguments have no merit.

ARGUMENT

I. Richardson's Petition for Rehearing is barred by the law of the case doctrine.

This Court held that Richardson's appeal was not properly before the Court of Appeals on four grounds. Richardson does not challenge these rulings and, therefore, they are the law of this case. *Holly Hill Lumber Co. v. McCoy*, 43 S.E.2d 143, 143 (S.C. 1947); *accord Mazloom v. Mazloom*, 709 S.E.2d 661, 661 (S.C. 2011). Thus, this Court should deny Richardson's petition for rehearing.

First, this Court held that the Court of Appeals "misconstrued Richardson's argument as alleging error by the trial court; however, Richardson only alleged error in NARP's interpretation of the judgment." (Memo. Op. at 2). Richardson never challenges this ruling in his rehearing petition. Thus, his petition should be denied.[1]

Second, this Court held that "Richardson failed to allege any error in the interpretation of the judgment to the trial court, instead raising the issue for the first time on appeal." (Memo. Op. at 2, citing case for rule that issue must first be raised to and ruled upon by trial court to be preserved for appeal). Richardson does not challenge this ruling in his rehearing petition and, therefore, his petition should be denied.

Third, this Court held that Richardson's new trial nisi remittitur motion did not preserve the issue for appeal, because that motion concerns whether the verdict was excessive, not the

[1] This Court's ruling is manifestly correct. In his appellant's brief, Richardson stated that he cross-appealed "to challenge NARP's mischaracterization of the trial court's judgment ..." and later stated that "[b]ecause of the position that NARP has taken as to the meaning of the judgment as entered by the [trial] Court, Richardson filed this cross-appeal ..." (Final Brief of Respondent/Appellant P.J. Richardson at 5 and 10). Richardson reiterated this in his respondent's brief, stating that he cross-appealed "to challenge NARP's mischaracterization of the trial court's judgment ..." and later stating that he cross-appealed "[b]ecause of the position that NARP took as to the meaning of the judgment as entered by the [trial] Court ..." (Final Responsive Brief of Respondent/Appellant P.J. Richardson at 4 and 12). Finally, *in his certiorari petition*, Richardson stated that he "cross-appealed on October 13, 2008, to challenge NARP's characterization of the trial court's judgment ...." (Richardson's Cert. Pet. at 10).

meaning of the judgment. (Memo. Op. at 2). Richardson does not challenge this ruling in his rehearing petition and, therefore, his petition should be denied.

Fourth, this Court held that Richardson alleged no error in the trial court's denial of the new trial nisi remittitur motion and, therefore, it is the law of the case. (Memo. Op. at 2). Richardson agrees that he did not appeal the denial of his nisi remittitur motion. (See Richardson's Rhg. Pet. at 5, 6). Thus, his petition should be denied.[2]

II. Richardson's arguments regarding "omissions" from the verdict form are not preserved for appeal.

Richardson complains that two omissions from the verdict form "cloud what [he] believes to be the correct outcome intended by the trial court." (Richardson's Rhg. Pet. at 5). First, Richardson complains that the verdict form failed to state explicitly that the amount of proceeds from the sale of Richardson's company was $415,988. (*Id.*). Second, he complains that the verdict form failed to make it clear that the $2,936,300 amount related only to his promissory estoppel claim – in other words, Richardson claims that the verdict form was defective because Question 8 did not specify that it related only to promissory estoppel. (*Id.*; see also R. 5). These arguments are not preserved for review.

It is axiomatic that any question regarding a verdict form must first be raised to the trial court. *Gause v. Smithers*, 742 S.E.2d 644, 650 (S.C. 2013), *citing and applying Johnson v. Hoechst Celanese Corp.*, 453 S.E.2d 908, 912 (S.C. App. 1995). It is undisputed that Richardson did not raise any "verdict form" issues to the trial court. It is also axiomatic that any claim that the judgment is unclear must first be raised to the trial court in a post-trial motion. See, *e.g.*, *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy

[2] Richardson argues that his new trial *nisi* remittitur motion applied only to his promissory estoppel claim and, since he elected the contract remedy that he alleges the judgment gave him, he did not appeal from the denial of his *nisi* remittitur motion. Nothing in Richardson's post-verdict motion, however, limits his motion to his promissory estoppel theory. (See R. 866-867).

in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal). It is undisputed that Richardson did not make any such motion. Finally, it is equally axiomatic that an issue cannot be raised for the first time on rehearing. *Herron v. Century BMW*, 719 S.E.2d 640, 643 (S.C. 2011). Richardson never raised this issue to the trial court, to the Court of Appeals, or to this Court in his certiorari petition. For each of the foregoing reasons, Richardson's "cloud" arguments are not preserved for review and, therefore, his rehearing petition should be denied. Moreover, as shown later, his argument on the meaning of the judgment is not preserved for review and has no merit.

III. Richardson's arguments regarding NARP's remand motion are incomplete, inaccurate, and irrelevant.

Richardson describes NARP's motion for a limited remand as "seeking for to ask [sic] the trial court to interpret Richardson's judgment." (Richardson Rhg. Pet. at 7). That remand motion, however, was for the purpose of having the trial court consider a motion to mark the judgment satisfied based on Richardson's refusal of NARP's tender of the stock at the price ordered in the judgment, *i.e.*, $2,936,300.

Richardson successfully opposed the motion, contending that the Court of Appeals should interpret the judgment, *not the trial court*. (Richardson Rhg. Pet. at 7). Richardson got what he asked for – he wanted the Court of Appeals to interpret the judgment – the Court of Appeals did so – and he should not be heard to complain of the answer.[3] In any event, NARP's remand motion is irrelevant to whether this Court should grant Richardson's petition for rehearing – it bears no relationship whatsoever to this Court's rulings.

[3] Richardson attaches his return to NARP's motion as Exhibit A to rehearing petition. For the convenience of the Court, NARP attaches its motion and reply, without attachments, as Exhibits A and B to this return.

IV. Richardson's interpretation of the judgment is manifestly without merit, and the plain meaning of the judgment is that Richardson was to buy 7.5% of NARP's stock for $2,936,300.00.

The trial court attached the jury verdict form to a Form 4, endorsed the Form 4 with the statement of "Judgment for the Defendant under specific performance doctrine," and filed this document as the judgment of the court. (R. 1-5). Richardson argues that the real issue is the meaning of this judgment. (Richardson's Rhg. Pet. at 1).

The meaning of a judgment is determined like the meaning of any other written instrument. Applying those rules of construction to the judgment permits only one conclusion, to-wit: Richardson was to purchase 7.5% of NARP's stock for $2,936,300.00.

A. The Rules for Construing a Judgment

A trial court's judgment is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the judgment itself, read as a whole and giving effect to every word in the judgment, not just isolated parts. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the judgment is not ambiguous, there is no room for construction and the judgment must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If the judgment is ambiguous, then the court may review the record to determine the judge's intent. *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985).

B. The judgment is not ambiguous – a plain reading of the judgment permits only one conclusion, to-wit: Richardson was to purchase 7.5% of NARP's stock for $2,936,300.00.

The first step in construing the judgment is to read the judgment without reference to anything else. The only reasonable reading of the judgment is that the court ordered Richardson was to buy 7.5% of NARP's stock for $2,936,300.00, the price found by the jury. There simply is no other way to read the trial court's judgment. Nothing in the judgment hints at any other meaning so as to create an ambiguity. In particular, nothing in the judgment hints that Richardson was to pay some other price for NARP's stock, including the $415,988.00 argued by Richardson.

C. Assuming any ambiguity in the judgment, the record conclusively demonstrates the trial court's intent to enter a judgment that Richardson buy 7.5% of NARP's stock for $2,936,300.00.

From the very beginning of the trial, the judge made it crystal clear that the jury would decide this case, and he would enter judgment in accordance with the jury's decision. In his preliminary charge to the jury, the judge told the jury that this was a contract case with "competing claims" between the parties and that the jury was "called upon to sit through that and come up with a verdict" in the case. (R. 58). He thereafter admonished the parties to discuss settlement because "[o]nce a *jury resolution* comes about in this particular case, somebody's going to be happy [and] somebody's going to be sad." (R. 78) (emphasis added). The judge immediately followed this comment to the parties with further preliminary instructions to the jury that it would render the verdict in this case. (R. 79-83, *passim*).

After the end of the evidence on the first day of trial, the judge told the parties that if the jury found the parties did not enter the Termination Agreement, then they would be back under the 2000 Agreement. (R. 192). The jury, however, found that the parties did enter the

Termination Agreement. (R. 2, Ques. 4). Thus, the judge could not have intended to put the parties back under the 2000 Agreement as argued by Richardson. Any doubt about this evaporates upon consideration of the judge's intent as demonstrated by the subsequent trial proceedings.

A question arose during the proceedings on the propriety of permitting Richardson to present expert testimony on the fair market value of NARP's stock. The trial judge ruled the expert could testify. In so ruling, the judge specifically noted the jury would have to decide whether Richardson could purchase NARP's stock and, if so, the price he would have to pay for that stock. (R. 582-583). In denying both parties' directed verdict motions at the close of the evidence, the trial judge repeatedly ruled that the jury would decide all questions in this case. (See R. 683; 686-690, and 693-697, *passim*).

The trial judge's jury charge also conclusively demonstrates his intent that the jury would decide all questions in this case. First, he charged the jury that it would decide the facts of the case and then apply the law to those facts. (R. 822). He then charged the jury that it was to decide whether any contract between the parties was ambiguous and was also to decide the terms of any contract between the parties. (R. 828-829; 831-833; 844-845). Finally, the judge instructed the jury that it would decide the question of specific performance .(R. 844). The judge then concluded his charge: "All right, ladies and gentlemen, I told you the law that you have to apply to the facts of this case." (R. 844-845).

During its deliberations, the jury sent a question to the trial judge. Question 8 on the verdict form asked whether Richardson was entitled to buy 7.5% of NARP's stock and, if so, what Richardson should pay for the stock. (R. 5, Ques. 8). The jury asked that if it found Richardson was entitled to buy NARP's stock, was he "required to purchase [the] stock at

current market value." (R. 922) (emphasis in original). The trial court advised the jury that it "must assign some value for the stock if" Richardson was entitled to buy the stock. (Id.). Here again, the trial judge made it clear that the jury would decide all questions in this case, including the price to be paid by Richardson. (See R. 582-583).

The jury returned its verdict at 3:05 p.m. on August 29, 2008, finding that Richardson was to buy the stock for $2,936,300.00. (R. 859; 5, Ques. 8). The parties made several post-verdict motions. In denying these motions, the trial judge repeatedly held that there was sufficient evidence to support the jury's verdict, including the purchase price of $2,936,300.00. Importantly, the trial judge also held there was nothing inconsistent about any of the jury's answers to any of the questions in the verdict form – a finding that Richardson does not challenge. (R. 864-868). Thereafter, and on the same day as the jury's verdict, the trial judge attached the verdict form to a Form 4 and wrote thereon: "Judgment for the Defendant [PJ] under specific performance doctrine." (R. 1-5). This document was then entered as the judgment of the court.

The fundamental question in this case was whether Richardson could buy 7.5% of NARP's stock and, if so, at what price. The judgment unambiguously says Richardson was to buy the stock for $2,936,300.00. Assuming any ambiguity in the judgment (and there is none), the record conclusively demonstrates the trial judge intended to enter judgment based on the price found by the jury. In short, Richardson's argument that the purchase price was $415,988.00 is manifestly without merit.

D. Richardson's interpretation of the judgment is not preserved for review and has no merit.

Richardson's fundamental argument is that the judgment unambiguously granted him the right to purchase 7.5% of NARP's stock for $415,988.00 – but that number does not

appear anywhere in the judgment. Thus, Richardson's argument hinges upon going outside the four corners of the judgment. To get outside the four corners of the judgment, however, it must first be found that the judgment is ambiguous or unclear. *Petition of White* and *Weil*, both *supra*. Thus, Richardson necessarily argues the judgment is ambiguous, but this argument is not preserved for appeal.

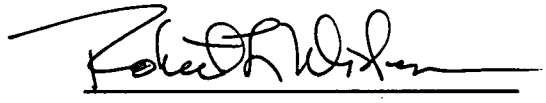
It is axiomatic that an appellant cannot argue the meaning of an ambiguous or unclear judgment unless he first raised the issue in the trial court by post-trial motion. See, *e.g.*, *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal). Richardson never made any such motion in the trial court. Thus, he cannot make any such argument on appeal. This is why Richardson argues the order is unambiguous, but he necessarily treats the order as ambiguous when he goes outside the four-corners of the judgment to argue its meaning. Accordingly, Richardson's argument that the judgment grants him the right to purchase 7.5% of NARP's stock for $415,988.00 is not preserved for review.

In any event, Richardson's argument has no merit. As shown earlier, the judgment unambiguously requires Richardson to pay $2,936,300.00 for NARP's stock. Moreover, as also shown earlier, any assumed ambiguity evaporates upon consideration of the trial judge's intent as demonstrated by the record in this case.

CONCLUSION

For all of the foregoing reasons, Richardson's petition for rehearing should be denied. In conjunction therewith, NARP respectfully submits that its petition for rehearing should be granted, and this Court should issue an amended opinion that reverses the Court of Appeals and remands for the entry of judgment in favor of NARP, thereby ending with finality all litigation between the parties.

Respectfully Submitted,



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April 21, 2012
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EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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SC Court of Appeals

Case No. 07-CP-23-3206

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

v.

P. J. Richardson,.....Respondent-Appellant.

MOTION FOR LIMITED REMAND AND TO HOLD
APPELLATE TIMELINES IN ABEYANCE PENDING A RULING ON REMAND

Pursuant to Rule 224, SCACR, and Rule 60(b), SCRCP, the Appellant-Respondent (Plaintiff) moves for a limited remand to make a motion under Rule 60(b)(5), SCRCP, to have the judgment marked satisfied. To best serve judicial economy, Plaintiff further requests that the time for perfecting this cross-appeal (except for production of the already ordered trial transcript) be held in abeyance pending a ruling on remand, so that any appeal from any order on remand can be consolidated with this cross-appeal. The grounds for this motion are as follows:

(1) Plaintiff commenced this action against the Respondent-Appellant (Defendant) seeking a declaratory judgment that there was no agreement between the parties for Defendant to own or acquire stock in Plaintiff, and for breach of fiduciary

duty. Defendant answered and counterclaimed for breach of contract and specific performance, demanding a jury trial on his counterclaims.

(2) The case was tried before a jury without objection by Defendant. The trial court submitted the case to the jury under a special verdict form. Defendant did not object to this procedure or to the form or content of the special verdict form.

(3) The jury answered the questions on the special verdict form and found that Defendant was "entitled to receive 7.5% of the outstanding capital stock of [Plaintiff] North American Rescue Products, Inc." for the price of $2,936,300.00. (Tab A at 4, Ques. 8). The trial court denied all post-trial motions by both parties.

(4) The trial court entered judgment for Defendant by attaching the Special Verdict Form to a standard judgment form and ordering thereon: "Judgment for the Defendant under specific performance doctrine." (Tab A). Thus, the trial court granted Defendant specific performance of the contract found by the jury.

(5) Defendant did not make any motions challenging the above-noted entry of judgment on the jury's special verdict.

(6) Both parties have appealed. The principal thrust of Plaintiff's appeal will be that there is no binding contract between the parties and, therefore, Plaintiff is entitled to judgment on all counterclaims by Defendant. It is unknown what issues Defendant will raise in its cross-appeal.

(7) On October 6, 2008, by hand delivery of a letter to Defendant's Counsel, Plaintiff gave notice that, on October 10, 2008, it would tender performance of the judgment of specific performance entered by the trial court on the jury's special verdict, to-wit: it would deliver 7.5% of its stock to Defendant in exchange for the $2,936,300.00

found by the jury and ordered specifically performed by the trial court. (Tab B). On October 9, Defendant rejected the tendered performance, thus making it clear that Defendant is not "ready, willing and able" to perform the contract found by the jury and ordered specifically performed by the trial court.

Based on the foregoing circumstances, Plaintiff seeks leave to move before the trial court under Rule 60(b)(5), SCRCP, to have the judgment marked satisfied. It is likely that the party losing the Rule 60(b)(5) motion will appeal to this Court. In the interest of judicial economy, any such appeal should be consolidated with the current cross-appeal. For this reason, Plaintiff further requests that the timelines for perfecting the currently pending cross-appeal be held in abeyance pending a decision on remand.

Respectfully Submitted,

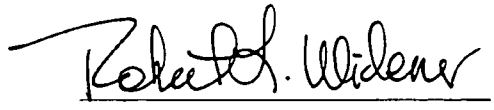

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EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 07-CP-23-3206

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

v.

P. J. Richardson,.....Respondent-Appellant.

REPLY TO RETURN TO MOTION FOR LIMITED REMAND AND TO HOLD APPELLATE TIMELINES IN ABEYANCE PENDING A RULING ON REMAND

I. Plaintiff's remand motion is not procedurally defective.

Defendant contends the remand motion should be denied, because there is nothing pending in the trial court. (Ref. at 4, Arg. III). This argument is manifestly without merit. Rule 60(b), SCRCP plainly contemplates a motion *after* commencement of an appeal (as here), and requires the would-be movant to first obtain leave of the appellate court.[1] *A priori*, there is nothing pending in the trial court at that time. The current motion complies precisely with Rule 60(b); the first sentence of the motion "moves for a limited remand *to make a motion* under Rule 60(b)(5), SCRCP." (Motion at 1) (emphasis added).

[1] Rule 60(b), SCRCP provides in pertinent part: "*During the pendency of an appeal*, leave to make the motion must be obtained from the appellate court." (Emphasis added).

II. The trial court entered a judgment of specific performance on the contract found by the jury.

The case was tried to the jury under a special verdict form. The jury found a contract for $2.9 Million (Motion Tab A at 4). The trial court immediately heard and denied all post-trial motions by Defendant. Thereafter, the trial court entered judgment by attaching the completed verdict form to a Form 4 Judgment and handwriting thereon: "Judgment for the Defendant under specific performance doctrine." (Motion Tab A at 1).

Defendant contends the judgment is "plain on its face." (Ret. at 3). Plaintiff agrees. The trial court plainly granted Defendant specific performance on the contract found by the jury. Nothing permits any other conclusion.

Defendant posits alternative "faces" for the judgment, but he never shows that face plainly. First, he suggests the judgment was for "a right to purchase stock *up to that amount.*" (Ret. at 2) (emphasis added). Second, he suggests the judgment was *not* for him "to pay [Plaintiff] a specific sum for a specific percentage of [Plaintiff's] stock in an *all or nothing deal.*" (Ret. at 3) (emphasis added). These suggestions hint at a judgment for some other sum and/or some other percentage of stock, perhaps at his option to decide the amount or percentage of stock, but he never states this plainly. Nothing in the judgment or the attached jury verdict remotely supports these suggestions.

Third, and perhaps to make his position somewhat more precise, Defendant suggests the specific performance judgment is for "a cause of action alleged in [Defendant's Counterclaim] with a request for specific relief." (Ret. at 3). Curiously, Defendant never plainly identifies this

counterclaim/cause of action. More importantly, nothing in the judgment or the attached jury verdict supports this suggestion.[2]

The only cause of action that fits Defendant's "specific relief" definition is the Eleventh Defense and Counterclaim in his Revised Amended Answer and Counterclaim. (Tab 1 at pp.6-10). There, Defendant alleged alternative contract theories and sought specific performance of them. (Id.).

Defendant demanded a jury trial on his counterclaims. The case was placed on the jury roster, called to trial at a jury tem of Common Pleas, and tried before a jury, all without any objection by Defendant. The trial court charged the jury on contract law and submitted all contract issues to the jury, including the question of whether there was a contract and, if so, for how much (again without any objection by Defendant). The jury specifically found that the only contract was for $2.9 Million. Thus, without any objection by Defendant, the jury considered and rejected the theories upon which Defendant now relies to construe the judgment, which is not subject to construction in any event, because it is "plain on its face."

In short, the only contract for which the trial court could grant specific performance was the $2.9 Million contract found by the jury in the verdict form attached to the judgment. There is no finding of any other contract for which the trial could have granted specific performance. See *Ingram v. Kasey, Assocs.*, 531 S.E.2d 287, 291 (S.C. 2000) (to order specific performance, the court must find there is an agreement).[3]

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[2] Though unclear, Defendant may be suggesting or attempting to create some type of ambiguity in the judgment. Any such suggestion or attempt manifestly fails because *inter alia*: (1) the judgment is "plain on its face" and grants specific performance of the $2.9 Million contract found by the jury; and (2) Defendant waived any "ambiguity" issue by failing to make a post-trial motion on that basis. *Nelums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (any contention that order or judgment is unclear must first be raised to the trial court in a Rule 59(e) motion).

[3] Quoting *Hanner v. Hillcrest Land Co.*, 163 S.E. 727, 728 (S.C. 1932), Defendant asserts: "[i]t is the settled rule of this Court that an appeal will not lie from a verdict; it must be from a judgment...." (Ret. at 3). The purpose of this assertion/quotation is unclear. *Hanner* plainly and only holds that an appeal cannot be commenced until after judgment has been entered on a verdict. Here, judgment has been entered on the verdict.

III. Plaintiff properly tendered performance of the judgment entered by the court.

At various places throughout his Return, Defendant complains that Plaintiff's tender of judgment was ineffective, because it imposed an "arbitrary" time, place, and form of payment. (Args. I and II at Ret. 2, 2-3).

The tender required any payment by check to be "collected funds," e.g. a certified check. (Motion at Tab B). Any reasonable payor or payee would expect (and even demand) that a check for $2.9 Million be in "collected funds." There is manifestly nothing arbitrary about this.

The tender identified the Greenville office of Plaintiff's attorney as the place of tender. There is manifestly nothing arbitrary about this. The case was tried in Greenville; Defendant maintains a residence (condominium) in Greenville; and his attorney's office is in Greenville.

There is manifestly nothing arbitrary about the tender's time of performance. To obtain specific performance, the party seeking it must show he "has been *and remains able and willing* to perform [his] part of the contract. *Ingram*, 531 S.E.2d at 291 (emphasis added). The Supreme Court has rejected Defendant's implicit assertion that he is entitled to some "reasonable time" after obtaining the judgment of specific performance to perform his part of the contract. *Id.* at 291, n.1, *rev'g* 493 S.E.2d 856 (S.C. App. 1997).

Defendant has never suggested what would be a reasonable time, place, or form of payment, nor does he do so here. More importantly, he has never said he was or remains "ready, willing, and able" to perform the contract found by the jury under *any* reasonable circumstances, nor does he do so here. The reason is clear. Defendant either cannot or will not pay the $2.9 Million found by the jury at any reasonable time or place with any commercially reasonable form of payment. This is precisely why the judgment should be marked satisfied.

Plaintiff remains "ready, willing, and able" to perform the contract found by the jury. Plaintiff challenges Defendant to tell this Court that he is "ready, willing, and able" to do so at *any* reasonable time in the very near future, at *any* reasonable place, and with *any* commercially reasonable form of payment. If he does so, Plaintiff will appear and perform at that time and place. If he does not, his complaints about arbitrariness are meaningless and spurious.

IV. There is nothing inconsistent about tendering performance of a judgment during the pendency of an appeal from that judgment.

Plaintiff specifically advised Defendant that it would withdraw the current appeal if he accepted the tendered performance of judgment. There is nothing inconsistent about this. If Defendant accepts the challenge made in Argument III, *supra*, and the parties close thereon, Plaintiff will withdraw the current appeal. There is nothing inconsistent about this either.

Defendant misstates Plaintiffs' position to create a non-existent inconsistency. Plaintiff continues to assert there is no binding contract with Defendant, but its tender is not based on the contrary or "repudiating" position that a binding contract does exist. (Ret. at 1, 3-4). Rather, its tender is based on the existence of the judgment on the contract found by the jury.

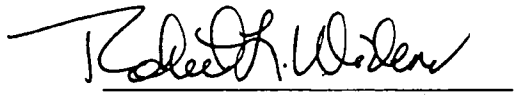
As a party to the judgment, Plaintiff has the absolute right to satisfy it rather than continue the current appeal, even if it believes the judgment is wrong. In like manner, Defendant has the right to accept the tender and forego his appeal, or reject the tender and appeal to establish a different judgment or otherwise reverse it, but the judgment entered on the contract found by the jury must be marked satisfied under either choice by Defendant.[4]

[4] Defendant seemingly asserts that Plaintiff's tender is barred by the doctrine of judicial estoppel, because Plaintiff's appeal is pending before this Court. (Ret. at 2). Judicial estoppel requires a showing *inter alia* of two "totally inconsistent" by the same party, taken in the same proceeding, as part of "an intentional effort to mislead the court." *Cothran v. Brown*, 592 S.E.2d 629, 632 (S.C. 2004). Defendant concedes there has been no intentional effort to mislead the court (Ret. at 2, n.1), thereby negating any claim for judicial estoppel. Moreover, Plaintiff's positions are not inconsistent and, in particular, they are not "totally inconsistent." Rather, they are alternative positions that hinge entirely upon whether Defendant accepts the tender of the judgment he obtained against Plaintiff.

V. Conclusion

For all of the foregoing reasons, and for the reasons set forth in Plaintiff's motion, it is respectfully submitted that this Court should grant the limited remand motion for Plaintiff to make its Rule 60(b)(5), SCRCP motion.

Respectfully Submitted,



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December 29, 2008
Columbia, SC

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 the Respondent/Petitioner's Return to Petitioner/Respondent's Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on April 21, 2014 addressed to the attorneys of record, as follows:

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