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 REPLY IN SUPPORT OF HIS PETITION FOR REHEARING

Petitioner/Respondent P.J. Richardson ("Richardson") files this reply in support of his petition for rehearing. This Court should grant Richardson's petition and amend its March 26, 2014, Memorandum Opinion ("Opinion") to note that the judgment in favor of Richardson is for specific performance of a contract where Richardson may pay $415,988 for a 7.5% interest in NARP pursuant to the 2000 amended contract the jury found capable of performance.

I. The issues Richardson raised in his cross-appeal were properly preserved for review by this Court and the Court of Appeals.

Issue preservation concepts and the law of the case doctrine are not applicable to the grounds Richardson raised in his cross-appeal. NARP's contentions otherwise must be rejected.

A. NARP previously lost the argument before the Court of Appeals regarding issue preservation respecting its interpretation of the judgment and did not challenge the Court of Appeals' ruling in its

Petition for Writ of Certiorari, and thus NARP's arguments respecting issue preservation are themselves barred.

Richardson's view has been that because he won below, he did not have to challenge the trial court's interpretation of the judgment. The trial court made no interpretation—instead, the trial court entered judgment for Richardson for specific performance. (App. 6; Judgment.) Richardson prevailed on both his promissory estoppel claim and his specific performance claim and the trial court entered judgment in Richardson's favor for specific performance only. Hence, no interpretation by the trial court regarding its judgment was necessary. It was only after judgment was entered that NARP sent a letter, under the guise of an offer to compromise, with its ***own*** interpretation of the judgment that Richardson was forced to file a cross-appeal to protect his interests out of an abundance of caution. (App. 1053.) Because of NARP's interpretation, Richardson cross-appealed out of an abundance of caution. The Court of Appeals agreed further input from the trial court was unnecessary on interpreting the judgment and denied NARP's motion for limited remand whereby NARP attempted to have the judgment marked satisfied. The Court of Appeals further found that Richardson's cross-appeal was valid. NARP moved to dismiss Richardson's cross-appeal, Richardson opposed the motion, and the Court of Appeals denied NARP's motion to dismiss. (*See* Exhibit A, NARP's motion to dismiss; Exhibit B, Richardson's return in opposition to NARP's motion, Exhibit C, NARP's reply; and Exhibit D, Court of Appeals' Order denying NARP's motion to dismiss.) NARP failed to challenge the Court of Appeals' ruling regarding the validity of Richardson's cross-appeal in a petition for certiorari to this Court.

Richardson's decision to cross-appeal was justified and preserved the issues he raised. As Richardson feared might happen, the Court of Appeals actually adopted NARP's interpretation of the trial court's judgment, contrary to law. NARP would have it be the case that the Court of Appeals' determination in this regard is completely unreviewable by this Court. (*See* NARP Return to Richardson's Petition for Rehearing at pp. 2-4.) This cannot be the law. This Court has the power to review the Court of Appeals' decision by way of granting petitions for writs of certiorari. It granted Richardson's petition and thus may review, and reverse, the Court of Appeals' erroneous interpretation of the trial court's judgment. It is proper for this Court to interpret the trial court's order based on NARP's actions. *See, e.g., Wayburn v. Smith*, 263 S.C. 518, 522, 211 S.E.2d 560, 561 (1975) (demonstrating appellate courts may interpret an order of the lower court); *Management Recruiters of Greenville v. R.J.R. Mech., Inc.*, 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct. App. 1991) (construing a judgment of the trial court by determining the trial court's intent and carefully reviewing the order); *Petition of White*, 299 S.C. 406, 412, 385 S.E.2d 211, 215 (Ct. App. 1989) (illustrating that an appellate court may interpret a judgment by a trial court by stating "[a]s a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the parties or the court, as gathered, not from an isolated part of the contract or judgment but from all its parts").

Further, the law recognizes that despite having been a "winning" party below, a party can be aggrieved by a judgment or order. *State v. Gregorie*, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court's order remanding the case to the magistrate for a new trial,

as the remand implicated double jeopardy); *Cobb v. Benjamin*, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party's requested relief).

Here, the trial court ordered, "[j]udgment for the defendant [Richardson] under specific performance doctrine." (App. 6; Judgment.) This judgment for specific performance clearly requires the parties to perform under a contract. The parties and this Court need only to look to the record to find the terms of the contract. Despite the ease in finding the terms the parties agreed to as recognized by the jury, NARP has continued to argue that the trial court's award of specific performance incorporated a brand new term fundamentally rewriting the contract by changing an essential term—the price—to an amount regarding which there was no meeting of the minds between the parties. NARP effectively desires this Court to order specific performance of a verdict form, not a contract. No support exists in the law for this concept. Again, the fact that the Court of Appeals adopted NARP's erroneous reading of the judgment further demonstrates why Richardson had to cross-appeal and why the issues raised in his cross-appeal were fully preserved.

B. Richardson did not have to raise any issue regarding the trial court's denial of his new trial nisi motion.

Richardson prevailed on two claims in this action. Richardson's new trial nisi motion was directed at his promissory estoppel claim. At the time Richardson made his post-trial motion, the trial court had not entered its judgment. It was not necessary to appeal from the denial of the new trial nisi motion given the trial court's entering of judgment for specific performance of a contract that contemplated an amount that Richardson would pay for his 7.5% share in NARP—$415,988.

The judgment was clear. Specific performance for Richardson. The contract, the only contract, capable of performance was the 2000 contract as amended in Charleston. Richardson's cross-appeal was necessary to prevent NARP from gaining a result it did not obtain at trial. The Court of Appeals forced a contractual price term upon the parties that was never agreed to. This Court should grant rehearing and issue an amended opinion making it clear the price that Richardson should pay—$415,988—consistent with the terms of the parties' contract.

II. The judgment for specific performance is unambiguous, consistent with the jury's findings, and supported by the Record.

The trial court submitted a special verdict form to the jury. (App. 7.) That verdict form contained written questions for findings which might properly be made under the pleadings and evidence based on the claims the trial court submitted to the jury. (*Id.*) The trial court then entered the form of the judgment based on the jury's answers to the interrogatories contained on the special verdict form. (App. 6.) Based on the pleadings and the answers to the interrogatories, the trial court entered judgment in favor of Richardson "under the doctrine of specific performance." (*Id.*)

A. The judgment was properly entered and is unambiguous on its face.

It is clear that the trial court properly ordered relief—by way of specific performance—in favor of Richardson. The starting point of the examination is Rule 49 of the South Carolina Rules of Civil Procedure which provides in pertinent part:

> **(a) Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court ***may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence***; or it may use such other method of submitting the issues and requiring the

> written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. . . .

Rule 49(a), SCRCP (emphasis added).

Following the jury's return of the special verdict, the trial court is charged with preparing the form of the judgment. Rule 58, SCRCP. It is well settled that "[a] judgment is effective only when reduced to writing and entered into the record." *Johnson v. S.C. Dep't of Prob.*, 372 S.C. 279, 284, 641 S.E.2d 895, 898 (2007) (citing Rule 58(a)(2), SCRCP). Rule 58 provides:

> **(a) Entry Upon Verdict or Decision.** Subject to the provisions of Rule 54(b): . . .
> **(2)** upon a decision by the court granting other relief, or ***upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment***, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, ***and after review and approval by the court, the clerk shall promptly enter it.***
>
> ***Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.*** Entry of the judgment should not be delayed for the taxing of costs.

Rule 58, SCRCP (emphasis added).

Here, the trial court submitted a special verdict form containing written questions as to factual findings that might be made under the evidence presented at trial. On the special verdict form, the trial court inquired of the jury "[c]an [b]oth parties perform under the 2000 Agreement as amended in Charleston?" (App. 7.) The jury responded, "Yes." The trial court also inquired as to whether any other agreement "end[ed] both

parties' rights to acquire 7.5% of the capital stock of each other?" (App. 8.)[1] To which the jury answered "No." (*Id.*) On the same day the jury answered the special interrogatories, the trial court entered judgment for Richardson under the specific performance doctrine. (App. 6.)

The trial court correctly and lawfully entered a judgment in favor of Richardson under the doctrine of specific performance. The language of the judgment is unambiguous. But NARP created a question post-trial—not through a post-trial motion but under the guise of an offer letter—as to the meaning to be given to the portion of the verdict form containing the amount of $2,936,300. (App. 1053.) As the record demonstrates, this is an amount that does not appear in any agreement reached by the parties or in any contract recognized by the jury as being capable of performance. Rather, this amount was provided by the jury in connection with Richardson's promissory estoppel claim and only appeared on the verdict form. The number NARP relies upon does not appear on the judgment. The judgment did not need to provide a dollar figure related to the specific performance claim as the price term was agreed upon to by the parties in the contract that appears in the record and the jury found that contract could be performed.

[1] NARP also relies upon the jury's answer as to whether the parties entered into a contract in 2004 entitled "Termination, Settlement, and Release" agreement. (*See* App. 7.) NARP's analysis is incomplete. The jury found this agreement did not terminate the parties' rights under the 2000 agreement as amended in Charleston whereby Richardson would pay $415,988 for 7.5% in NARP. (App. 8.) Further, the record reveals that the 2004 document containing the termination and release was incapable of performance. Thus, this agreement is of no moment on what price Richardson would pay for the 7.5% share in NARP.

B. The judgment did not have to contain a price term in order for it to be enforced.

The trial court did not have to, nor did it, utilize the part of the verdict form containing a price amount for the purchase of NARP's stock. Instead, the jury answered questions that the parties had a contract, and that contract provided for a swap of the percentage ownership of each company's stock. The value of the percentage share of Reeves had been reduced to a sum certain in light of its recent sale—$415,988. Accordingly, the amount provided for by the jury on the verdict form was not needed by the trial court in awarding judgment in favor of Richardson for specific performance. The dollar figure was only needed if the jury found the 2000 amended agreement could not be performed and the trial court entered judgment for promissory estoppel.

A court need not include the price in the judgment itself when ordering specific performance because the contract provides the price and the record includes the terms of the contract. Trial courts frequently order specific performance without reciting the terms of the contract in their orders—because those terms are already of record. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 806 (Ct. App. 2009) (stating the master-in-equity ordered the specific performance of an oral contract and looking to the evidence to determine the oral contract and the admissibility of the evidence); *Campbell v. Carr*, 361 S.C. 258, 263-66, 603 S.E.2d 625, 627-29 (Ct. App. 2004) (stating the master-in-equity ordered specific performance of the contract and looking to the contract for the price to determine if the price was adequate). A review of the records on appeal in *Fesmire* and *Campbell* indicates the masters ordered specific performance of the contracts there without setting forth the exact terms of those contracts in their orders, as the contracts were in evidence and already in the record. This is all that occurred here.

In this case, the parties agreed in Charleston that Richardson could purchase 7.5% of NARP stock for 7.5% of the proceeds of the sale price of Richardson's company (Reeves). Therefore, the parties had a meeting of the minds regarding price. The jury so found. NARP may not now destroy this contract by changing an essential term after the fact by trying to create ambiguity where none exists.

Further, this Court and the parties need to merely look to the record to determine the terms of the contract. *McMaster v. Strickland*, 322 S.C. 451, 455, 472 S.E.2d 623, 626 (1996) (looking to the record for support for the award of attorneys' fees); *Reese v. Holmes*, 26 S.C. Eq. (5 Rich. Eq.) 531, 549, 1852 WL 2575 *12 (1852) (looking to the record to interpret a judgment in order to give the judgment its intended efficacy). The record includes the initial 2000 Agreement entered into by Richardson and Robert Castellani, NARP's founder, who formed a close relationship during the development of their companies. (App. 909.) In the 2000 Agreement the parties contracted to exchange a 25% interest in each other's companies. (App. 909.) The record also includes evidence of a meeting in Charleston in July 2004, where Richardson and Castellani agreed to reduce their percentage of ownership from 25% to 7.5%. (App. 238-239.) This modification occurred because Richardson was about to sell his company, and the parties agreed Richardson could acquire his 7.5% interest in NARP in exchange for the monetary value of 7.5% of the proceeds from the pending sale of Richardson's company. (App. 373, 376.) This percentage of the proceeds from the sale of Richardson's company equaled $415,988, a definite and essential term of the contract. (App. 381.)

Following the trial, the jury specifically found the 2000 Agreement entered into by Richardson and NARP could still be performed as modified by the parties during their

meeting in Charleston. (App. 7.) This contract was still in place and was not ended by the parties' 2004 termination, settlement and release agreement, as also found by the jury. (App. 8.) Therefore, the 2000 Agreement as amended in Charleston is the contract to be performed under the trial court's judgment for specific performance. Richardson would pay $415,988 for his share in NARP under that contract.

Conclusion

This Court should grant Richardson's petition for rehearing to correctly recognize the judgment entered by the trial court as detailed above and in Richardson's petition for rehearing. Failing to amend the Opinion of this Court will cause further disagreement between the parties and unnecessarily elongate the other litigation matters pending in the South Carolina trial courts.[2] Respectfully submitted,

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[2] Richardson has sued NARP due to NARP's dilution of the assets of NARP following the judgment in this case but while the matter was pending in the appellate courts. Thus, no matter what price Richardson must pay for the stock, in the other action(s) now pending in the trial courts, it will have to be determined what relief Richardson is entitled to due to NARP's actions in devaluing Richardson 7.5% share in the company before the issues in this case were final.

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May 2, 2014
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Exhibit A
(NARP's Motion to Dismiss)
(without internal exhibits)

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.

APPELLANT-RESPONDENT'S MOTION TO DISMISS
APPEAL OF RESPONDENT-APPELLANT

"Only a person aggrieved by a ruling may appeal." *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) (emphasis added), *applying* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") *and* S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."). Appellant-Respondent (NARP) moves to dismiss the appeal of Respondent-Appellant (PJ) under this fundamental rule of law. PJ "appeals" but he does not allege any error by the trial court, nor does he seek reversal of any ruling by the trial court. Rather, he repeatedly argues this Court should affirm the judgment that he appealed. Accordingly, he does not claim to be aggrieved and, therefore, his appeal must be dismissed.

BACKGROUND FACTS

This case presented the question of whether the Respondent-Appellant (PJ) had the right to purchase 7.5% of Appellant-Respondent's (NARP's) stock and, if so, at what price. The trial court submitted these questions to the jury under a special verdict form with numerous questions. (See Tab A). The jury found that PJ was entitled to purchase 7.5% of NARP's stock and found he should pay $2,936,300.00 for the stock. (Tab A at p. 4, Question 8). After receiving the jury's answers, the trial court simply attached the verdict form to a Form 4 Judgment Form and wrote thereon: "Judgment for [PJ] under specific performance doctrine." (Tab A). It is thus clear that the trial court ordered specific performance of the contract and price found by the jury. There is no other reasonable reading of the judgment.

Long before either party filed its Initial Brief of Appellant, NARP tendered 7.5% of its stock at $2,936,300.00 in satisfaction of the appealed judgment. PJ rejected this tender, contending the price was $415,000.00. NARP moved this Court for a limited remand to make a Rule 60(b) motion before the trial court based on PJ's rejection of the tender. PJ successfully opposed this motion in this Court.

On appeal, PJ treats the appealed judgment as if the trial court ordered NARP to sell 7.5% of its stock to him for $415,000.00. Based on this reading of the judgment, PJ repeatedly argues in his Brief of Appellant that this Court should affirm the judgment that he appealed. Thus PJ does not claim to be aggrieved by the appealed order, which is the threshold requirement for being an appellant. [1]

[1] The only price set forth by the jury in the verdict form is $2,936,300.00. (Tab A at p. 4, Question 8). PJ never mentions this price in his brief, but he contends the price should be $415,000.00, which is a price that: (1) can be found only by reference to testimony in the transcript; (2) was disputed at trial by NARP; (3) was never found by the jury or the trial court; and (4) most importantly, is not set forth anywhere in the judgment or verdict form. It is inconceivable that the trial court intended to order specific performance of a sales contract without setting a price in the judgment, and the only price appearing anywhere in the verdict or judgment is $2,936,300.00.

ARGUMENT

The right to appellate review "is restricted to persons or parties aggrieved by the decision below." *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970) (emphasis added); *accord First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) *and Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997). Appellate courts have a "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court." *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (emphasis added); *accord Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997). A party is "aggrieved in a legal sense" if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), *citing Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) *and Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); *accord Powell v. Bank of America*, 665 S.E.2d 237, (S.C. App. 2008).

On appeal, PJ asserts the "trial court correctly and lawfully entered a judgment in [his] favor" and repeatedly argues (9 times) that "this Court should affirm the trial court's judgment." (Tab B at 20 & 21, *and at* 11, 12, 14, 16, 18) (emphasis added). He never argues that the appealed order has caused any harm to his person or property. (Tab B, *passim*). Thus, this Court has a "duty to reject [his] appeal." *Cisson*, 177 S.E.2d at 605; *accord Carson*, 486 S.E.2d at 6-7.

If an appellant takes a position on appeal that renders him not aggrieved by the appealed order, then he has no right to appeal and the appeal must be dismissed. *Bivens*, 173 S.E.2d at 152. PJ's position on appeal is that the appealed order should be affirmed, thereby rendering him not aggrieved by the appealed order.

If a reversal of the trial court's judgment would not benefit or improve the appellant's position, then the appellant is not aggrieved and cannot appeal. *Cisson v. McWhorter*, 177 S.E.2d

603, 605 (S.C. 1970); *accord Knight v. Autumn*, 245 S.E.2d 602, 604 (S.C. 1978) *and Bivens*, 173 S.E.2d at 152. PJ does not seek reversal; he argues only that this Court should affirm.

PJ admits (9 times) that his dispute with NARP over the meaning of the appealed order is the basis for his appeal. (Tab B at 2, 5 & n.1, 10- 12, 14, 18). This is not the stuff of appeals. As an appellant, PJ's only permissible dispute is with the appealed order, and PJ never argues there is anything wrong with the order. His brief reads like a respondent's brief, but no issue over the meaning of the appealed order is properly before this Court. This issue has never been presented to the trial court, nor has it been raised in NARP's Brief of Appellant (which is limited to questions of whether the trial court erred in denying NARP's directed verdict motions). PJ cannot thrust this issue upon this Court by filing an appellant's brief in which he never claims to be aggrieved by the appealed order.

CONCLUSION

Only an aggrieved party may appeal. PJ does not claim to be aggrieved. Accordingly, this Court has a "duty to reject" PJ's appeal. For this reason, and for the reasons set forth above, it is respectfully submitted that the appeal of Respondent-Appellant should be dismissed.

Respectfully Submitted,

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Exhibit B
(Richardson's Return in Opposition to NARP's Motion to Dismiss)
(without internal exhibits)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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.

P.J. RICHARDSON'S RETURN TO NORTH AMERICAN RESCUE PRODUCT'S MOTION TO DISMISS

Pursuant to Rule 240, SCACR, P.J. Richardson ("Richardson") hereby files his return to North American Rescue Products, Inc.'s ("NARP") motion to dismiss Richardson's cross-appeal. For the reasons outlined herein, if this Court should issue an order expressly stating that it agrees with Richardson's interpretation of the judgment, Richardson will agree he is not aggrieved and will voluntarily dismiss his appeal. Failing that, this Court should deny NARP's motion for the reasons outlined below.[1]

Background

Following the jury verdict in this matter, the trial court entered judgment in favor of Richardson and ordered NARP to specifically perform the contract entered into

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[1] Should this Court grant NARP's motion to dismiss, Richardson will be forced to petition the South Carolina Supreme Court for a writ of certiorari. This would result in the appeal then being active in both courts since NARP's appeal challenging whether the trial court erred in denying its directed verdict motions would still be ongoing in this Court. Such a division in the appeal would not serve judicial efficiency or economy.

between the parties as modified in Charleston. That contract provided that in consideration for a 7.5% share of the proceeds of the sale of Reeves Company Richardson would get a 7.5% share in NARP—a "like for like" exchange. (Tr. p. 238; R. p. ___.) 7.5% of the proceeds of the sale of Reeves Company amounted to $415,988. The judgment entered by the trial court stated "[j]udgment for the Defendant [Richardson] under specific performance doctrine." (See Judgment, Exhibit A.) Thus, the contract ordered to be performed is the "like for like" exchange orally modified contract.

However, NARP has continually attempted to add conditions not included in the contract to the trial court's judgment ordering specific performance and to interpret the judgment otherwise. NARP seeks to change one of the contract's essential terms—the price—and attempts to require Richardson to pay over $2.9 million for the 7.5% interest in NARP. NARP argues the judgment requires Richardson to pay over $2.9 million for the 7.5% stock interest in NARP, while Richardson contends it need only pay the $415,988 described above.[2] Thus, NARP contends the judgment requires

[2] In furtherance of its position that Richardson must pay over $2.9 million for his interest in NARP, NARP relies on a single special interrogatory presented to the jury on its verdict form—not the actual judgment. (See Special Verdict Form at interrogatory no. 8.a., Exhibit B.) In response to this interrogatory the jury stated that Richardson would have to pay $2,936,300 for 7.5% of the outstanding capital stock in NARP. (Id.) This interrogatory was relevant only if the jury found that the termination provision ended the parties' rights under the 2000 agreement as modified in Charleston. However, the jury found that the parties' rights were not terminated under the Agreement and that the 2000 Agreement as modified was fully enforceable. (See Special Verdict Form at interrogatory nos. 1, 2, 3, and 5, Exhibit B.) As a result, the price for the 7.5% interest in NARP that Richardson was to pay was the 7.5% share of the sale of the proceeds of Reeves. Thus, the $2,936,300 figure is irrelevant. The trial court recognized that this number was not relevant when it entered a judgment stating simply "[j]udgment for the Defendant [Richardson] under specific performance doctrine. (Judgment, Exhibit A.) If NARP had an objection to the special

Richardson to pay over $2.5 million more than Richardson believes the judgment requires or could require. Certainly, a $2.5 million dispute such as this makes Richardson an "aggrieved" party if NARP's contention regarding the meaning of the judgment were correct.

Law/Analysis

I. This Court has already ruled on the issues NARP seeks to put before this Court in its motion to dismiss.

A. NARP's motion to dismiss is an improper attempt to seek rehearing of this Court's prior order denying its motion for limited remand.

On November 19, 2008, NARP moved this Court for a limited remand of the appeal in order to have the trial court mark the judgment satisfied. (See NARP Mot. for Limited Remand at p. 3, Exhibit C.) NARP requested this relief because it wrote a letter to undersigned and asked that Richardson pay $2,936,000 for the 7.5% interest in NARP. (Id. at p. 2-3.) Richardson did not pay this amount but instead appealed because the demand would have required Richardson to pay $2.5 million more for his interest in NARP in contravention to the judgment in the case and the terms of the parties' contract. This Court denied NARP's motion for limited remand by Order dated January 27, 2009. (See Order of the Honorable Jasper M. Cureton, Jr. dated

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interrogatories or wished to seek clarification from the trial court as to their meaning or effect on the judgment, it should have raised this objection or question at trial. NARP failed to raise any objection or question regarding the interrogatories or verdict form at trial and it is barred from attempting to do so now on appeal. See Liberty Mut. Ins. Co. v. Gould, 266 S.C. 521, 529-30, 224 S.E.2d 715, 718 (1976) (holding a party may not on appeal complain of error when the party failed to object to the jury charge and special interrogatories at trial); SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (stating that it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error).

January 27, 2009, Exhibit D.) The denial order did not set forth an express basis, nor is that required.

The South Carolina Appellate Court Rules do not permit rehearing on petitions or motions unless the appellate court's orders finally determine the parties' rights on appeal. See Rule 221(c), SCACR. Here, the denial of the motion for limited remand did not finally determine the issues on appeal in this matter. Thus, a rehearing petition would not be appropriate. However, NARP has now recast its rehearing petition as a "motion to dismiss." Yet, a careful reading of the motion, Richardson's return, and NARP's reply shows that it is simply another attempt by NARP to have this Court give approval to NARP's far-fetched interpretation of the unambiguous judgment in this case. (See Exhibit C; see also Richardson's Return to the Motion for Limited Remand, Exhibit E and NARP's Reply, Exhibit F.) The Court did not approve of NARP's first attempt to have this Court condone NARP's unilateral alteration of the judgment in this case and the Court should not permit it now. As a result, this Court should deny the motion and not allow NARP to circumvent the rules and essentially seek rehearing of its prior denied motion by recasting its motion under a different name.

B. If this Court agrees with Richardson's position and issues an order expressly stating its agreement as to the judgment to be enforced, Richardson will voluntarily dismiss his appeal.

Richardson does not want to burden this Court with an unwarranted appeal or any unnecessary filings. Richardson will voluntarily dismiss his appeal if this Court will note its express agreement that the judgment of the trial court only requires that Richardson pay $415,988 for the 7.5% interest in NARP. As stated above, the Court's first order on NARP's attempt to re-write the judgment simply stated that the motion

for limited remand was "denied." (See Order of the Honorable Jasper M. Cureton, Jr. dated January 27, 2009, Exhibit D.) However, if this Court were to issue an order expressly stating that the reason it denied the motion for limited remand (and this motion to dismiss) was because the judgment as entered by the trial court does not require Richardson to pay over $2.9 million for its interest in NARP, and is instead a judgment under the specific performance doctrine of the orally modified contract as described herein, then Richardson will voluntarily dismiss its appeal because such an express order will end NARP's attempt to enforce an judgment that does not exist.

NARP claims that Richardson is not aggrieved because Richardson asks for the judgment of the lower court to be affirmed. (See NARP Motion to Dismiss at p. 3.) However, NARP leaves out the critical detail that the parties differ as to what the judgment means. Under NARP's interpretation, Richardson would have to pay over $2.5 million more for his 7.5% share in NARP. Such a position greatly aggrieves Richardson in that he would have to pay significantly more money for the interest in NARP than he ever bargained for and/or agreed to. The contract cannot be rewritten now; not by the Court or the opposing party. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) ("[A] court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction.").

The disagreement between the parties is one that can easily be resolved by the Court by the issuance of an express order. The issuance of an order of this type is

warranted here because the procedural history in this case is clear. At trial, the jury answered the questions posed. It concluded, among other things, that NARP had given Richardson the right to 7.5% of its stock and that Richardson had, in turn, given NARP the right to 7.5% of the stock of Reeves Manufacturing, Richardson's former company. The jury concluded that Richardson could fulfill his part of this agreement by giving a cash equivalent, rather than actual Reeves Manufacturing stock, due to the sale of Reeves. The jury found that the parties could perform under the 2000 agreement, as later modified, and that none of the parties' later agreements terminated the right of Richardson to acquire 7.5% of NARP's stock. (Special Verdict Form, Exhibit B.) Specifically on these items, the Special Verdict Form provided:

1. Did North American Rescue Products, Inc. and P.J. Richardson give each other the right to acquire 7.5% of each other's stock?

2. Do you find that North American Rescue Products agreed to let P.J. Richardson acquire 7.5% of the capital stock of North American Rescue Products, Inc. in exchange for money, rather than the issuance of 7.5% of capital stock?

3. Can both parties perform under the 2000 Agreement as amended in Charleston?

4. Did the parties (North American Rescue Products, Inc. and P.J. Richardson) enter into a contract, that is the November 2004 Termination, Settlement, and Release Agreement?

(Special Verdict Form, Exhibit B.) The jury answered each of the above special interrogatories in the affirmative. (Id.) Moreover, the special verdict form inquired as to whether any other agreement "end[ed] both parties' rights to acquire 7.5% of the capital stock of each other?" (Id. at ¶ 5.) The jury answered "No." (Id.) Based on the jury's answers to the special interrogatories, the trial court then entered judgment in

favor of Richardson "under the specific performance doctrine." (Judgment, Exhibit A.)

The record is also full of evidence demonstrating what price Richardson was to pay pursuant to his contract—the only contract capable of being performed—with NARP and the other express terms of the agreement. In the year 2004, the parties modified their agreement that was previously identified as the "Outline of the Business Relationship Between North American Rescue Products, Inc. and Reeves Manufacturing." (Agreement dated January 1, 2000, Exhibit G; see also Tr. p. 206, Exhibit H.) The modified agreement provided that Richardson could acquire a 7.5% share of NARP in exchange for the proceeds of the sale of Reeves—$415,988. (Tr. pp. 355-356; 585; 417; 420; 425; 540-544; 237-238; 331, Exhibit I.) At trial, Richardson stated that the amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (Tr. p. 420; 540-544 at Exhibit I.) Castellani, on behalf of NARP, testified that the meeting in Charleston resulted in a reduction of the percentage of shares from 25% to 7.5%—a "like for like" exchange. (Tr. p. 238 at Exhibit I.) Castellani also agreed that the parties "did that deal and then [ ] hugged and kissed and sealed the deal[.]" (Id.) Later, at trial, Castellani testified that "[w]e agreed to this in Charleston." (Tr. p. 331 at Exhibit I.) Richardson also agreed that there was a "meeting of the minds in Charleston." (Tr. p. 585 at Exhibit I.) Thus, the parties' agreement was clear and both understood the agreement. Moreover, Richardson testified that the money from the sale of Reeves was in his account and could he "cut a check for that money to Bob [Castellani] today if he would take it" if Castellani would give Richardson his 7.5% interest in NARP. (Tr. p. 609; 590, Exhibit J.) This case

could easily be put to a close but NARP has attempted to muddy the waters with its own interpretation of the judgment.

Accordingly, in the interests of judicial economy and efficiency, if this Court issues an order stating that the judgment requires the parties to specifically perform the contract actually entered into—7.5% of the proceeds of the sale of Reeves in exchange for a 7.5% share in NARP—Richardson will dismiss his appeal.[3]

II. Richardson is an aggrieved party; therefore, his appeal should not be dismissed.

Notwithstanding the points above, Richardson is clearly aggrieved by the interpretation NARP has taken with respect to the judgment in this case. Richardson had a contract requiring him to pay only $415,988 for his interest in NARP. Now NARP is demanding that he pay $2,936,000 under the same contract. Such a unilateral alteration of the contract and the judgment in this case cannot be permitted.

The law recognizes that despite having been a "winning" party below, a party can be aggrieved by a judgment or order in light of the effect or position or interpretation given to the judgment or order by the court or opposing party. State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court's order remanding the case to the magistrate for a new trial, as the remand implicated double jeopardy); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party's

[3] If this Court issues such an order, the only issues remaining before this Court are those raised by NARP as to whether the trial court erred in denying NARP's directed verdict motions. The trial court did not err in submitting the matter to the jury.

requested relief). Moreover, Richardson's appeal is proper as it arises in a context that requires this Court to interpret the trial court's judgment ordering specific performance and it is proper for this Court to interpret the trial court's order. See Wayburn v. Smith, 263 S.C. 518, 522, 211 S.E.2d 560, 561 (1975) (demonstrating appellate courts may interpret an order of the lower court); Management Recruiters of Greenville v. R.J.R. Mech., Inc., 304 S.C. 399, 401, 404 S.E.2d 908, 909 (Ct. App. 1991) (construing a judgment of the trial court by determining the trial court's intent and carefully reviewing the order); Petition of White, 299 S.C. 406, 412, 385 S.E.2d 211, 215 (Ct. App. 1989) (illustrating that an appellate court may interpret a judgment by a trial court by stating "[a]s a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the parties or the court, as gathered, not from an isolated part of the contract or judgment but from all its parts").

Here, the trial court ordered, "[j]udgment for the defendant [Richardson] under specific performance doctrine." (See Judgment, Exhibit A.) This judgment for specific performance clearly requires the parties to perform under a contract. The parties and the Court need only to look to the record to find the terms of the contract. Despite the ease in finding the terms the parties agreed to, NARP now argues the trial court's award of specific performance incorporated a brand new term fundamentally rewriting the contract by changing an essential term—the price—to an amount regarding which there was no meeting of the minds between the parties. In its motion to dismiss, NARP argues Richardson is not an aggrieved party and should not be permitted to "thrust this issue [of interpreting the judgment] upon this Court." However, it is

NARP's novel spin with regard to the judgment that thrusts this issue upon this Court and necessitates this appeal by Richardson.

Richardson clearly falls within the definition of an aggrieved party, which is "[a] party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." BLACK'S LAW DICTIONARY 1144 (7th ed. 1999). Richardson is adversely affected by the judgment, according to NARP's interpretation, and thus, must appeal. Were a court to follow NARP's flawed logic and ignore the contract's price achieved by a meeting of the minds, Richardson's right to purchase NARP stock would be compromised, and the trial court judgment would be in error. Therefore, Richardson is an aggrieved party, and Richardson's appeal should not be dismissed.

Further, prevailing parties are permitted to appeal "where the order of judgment in question is apparently favorable but is actually adverse." 5 Am. Jur. 2d *Appellate Review* § 243 (2007); see also State v. Gregorie, 339 S.C. 2, 4, 528 S.E.2d 77, 78 (2000) (holding appeal was proper when defendant won below but was aggrieved by the circuit court's order remanding the case to the magistrate for a new trial as the remand implicated double jeopardy); Cobb v. Benjamin, 325 S.C. 573, 580, 482 S.E.2d 589, 592 (Ct. App. 1997) (holding party was aggrieved and appeal was proper even though judgment essentially provided the party's requested relief). Again, if a court were to adopt NARP's interpretation of the judgment, then the judgment would not be favorable to Richardson and would be in error. Therefore, Richardson must appeal and this is Richardson's opportunity to do so.

III. Richardson's interpretation of the judgment is the only reasonable reading of the judgment.

In its motion to dismiss, NARP claims its interpretation of the trial court's judgment that the order of specific performance authorized the sale of NARP's stock for a price set by the jury, is the only reasonable reading. As detailed herein, this contention is erroneous. First, for a court to compel specific performance there must be a valid agreement. Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Therefore, it is nonsensical for NARP to argue that the trial court intended to remove an essential term from this valid agreement and introduce a new price set by a jury, to which there was no meeting of the minds between the parties.

NARP argues that the trial court must have intended to introduce this new price to the agreement because "[i]t is inconceivable that the trial court intended to order specific performance of a sales contract without setting a price in the judgment." (NARP Motion to Dismiss p. 2 n.1.) However, a court need not include the price in the judgment itself when ordering specific performance because the contract provides the price and the record includes the terms of the contract. Trial courts frequently order specific performance without reciting the terms of the contract in their orders—because those terms are already of record. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 806 (Ct. App. 2009) (stating the master-in-equity ordered the specific performance of an oral contract and looking to the evidence to determine the oral contract and the admissibility of the evidence); Campbell v. Carr, 361 S.C. 258, 263-66, 603 S.E.2d 625, 627-29 (Ct. App. 2004) (stating the master-in-equity ordered

specific performance of the contract and looking to the contract for the price to determine if the price was adequate). A review of the records on appeal in Fesmire and Campbell indicates the masters ordered specific performance of the contracts there without setting forth the exact terms of those contracts in their orders, as the contracts were in evidence and already in the record. This is all that occurred here.

In this case, the parties agreed in Charleston that Richardson could purchase 7.5% of NARP stock for 7.5% of the proceeds of the sale price of Richardson's company (Reeves). Therefore, the parties had a meeting of the minds regarding price. The jury so found. NARP may not now destroy this contract by changing an essential term after the fact by trying to create ambiguity where none exists.

Further, as stated, this Court and the parties need to merely look to the record to determine the terms of the contract. McMaster v. Strickland, 322 S.C. 451, 455, 472 S.E.2d 623, 626 (1996) (looking to the record for support for the award of attorneys' fees); Reese v. Holmes, 26 S.C. Eq. (5 Rich. Eq.) 531, 549, 1852 WL 2575 *12 (1852) (looking to the record to interpret a judgment in order to give the judgment its intended efficacy). The record includes the initial 2000 Agreement entered into by Richardson and Robert Castellani, NARP's founder, who formed a close relationship during the development of their companies. (Exhibit G.) In the 2000 Agreement the parties contracted to exchange a 25% interest in each other's companies. (Exhibit G.) The record also includes evidence of a meeting in Charleston in July 2004, where Richardson and Castellani agreed to reduce their percentage of ownership from 25% to 7.5%. (Tr. pp. 237-38 at Exhibit I.) This modification occurred because Richardson was about to sell his company, and the parties agreed Richardson could acquire his

7.5% interest in NARP in exchange for the monetary value of 7.5% of the proceeds from the pending sale of Richardson's company. (Tr. p. 417, 420 at Exhibit I.) This percentage of the proceeds from the sale of Richardson's company equaled $415,988, a definite and essential term of the contract. (Tr. p. 425 at Exhibit I.)

Following the trial, the jury specifically found the 2000 Agreement entered into by Richardson and NARP could still be performed as modified by the parties during their meeting in Charleston. This contract was still in place and was not ended by the parties' 2004 termination, settlement and release agreement, as also found by the jury. Therefore, the 2000 Agreement as amended in Charleston is the contract to be performed under the trial court's judgment for specific performance.

Conclusion

Accordingly, if this Court issues an order expressly agreeing with Richardson's position as to the meaning of the judgment, Richardson will dismiss his appeal. Failing that, this Court should deny NARP's motion to dismiss because Richardson is clearly aggrieved by the interpretation NARP attempts to give to the judgment which would result in Richardson having to pay over $2.5 million more for his 7.5% interest in NARP, and because NARP's motion is really an improper attempt to obtain rehearing of its previously rejected motion to remand.

Respectfully submitted,

Signatures Attached

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January 7th, 2010
Columbia, South Carolina

Exhibit C
(NARP's Reply to Richardson's Return in Opposition to Motion to Dismiss)
(without internal exhibits)

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.

APPELLANT-RESPONDENT'S REPLY TO RESPONDENT-APPELLANT'S RETURN TO APPELLANT-RESPONDENT'S MOTION TO DISMISS APPEAL OF RESPONDENT-APPELLANT

In its Motion to Dismiss, Appellant-Respondent (NARP) sets forth the controlling statute, rule, and case law on the requirement that a would-be appellant must be "aggrieved" by the appealed order. (Motion at 1, 3; see also n.7, *infra*). Respondent-Appellant (PJ) never mentions nor discusses these controlling authorities. (Return, *passim*). Rather, PJ asserts he is "aggrieved" by *NARP's interpretation* of the appealed order and, therefore, he is entitled to appeal NARP's interpretation of the order. (Return, *passim*). Research reveals no authority supporting this theory, and PJ cites none. Moreover, South Carolina's statute, rule, and case law clearly establish that appeals lie only from orders and decisions by a trial court that aggrieve the would-be appellant. (See n.7, *infra*).

The motion to dismiss presents a narrow question: Can PJ appeal when he claims he is not aggrieved by the appealed order? PJ argues in his Brief of Appellant and in his Return to Motion to Dismiss that he is not aggrieved by the appealed order; he asks this Court to affirm that order. Having taken this position, he has no right to appeal the order and his appeal must be dismissed. *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (Appellate courts have a "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court.") (emphasis added); *accord Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997); see also *Bivens v. Knight*, 173 S.E.2d 150, 153 (S.C. 1970) (dismissing appeal because appellant took position on appeal that rendered him not aggrieved by the appealed order).

This Reply reviews the numerous assertions and arguments made in the Return. This review demonstrates that the PJ's appeal must be dismissed because he claims he is not aggrieved by the appealed order.

I. The Opening Paragraph of the Return (p. 1).

PJ asserts he will dismiss his appeal if this Court resolves the "order interpretation" dispute between the parties, *i.e.*, if this Court gives him the ruling sought in his appeal. (Return at 1). He repeats this "offer" throughout his Return. (Return at 4, 5, 5-6, 8, 10, 13). This is a meaningless offer from a party who has no right to appeal in the first place, because he does not claim to be aggrieved by the appealed order. (Return at 1). Moreover, any ruling on the parties' dispute must first come from the trial court; an issue cannot be raised on appeal if it was not first presented to and ruled upon by the trial court. *Simpson v. World Fin. Corp. of S.C.*, 623 S.E.2d 877, 879 (S.C. App. 2006). Here, the trial court has never been presented with or ruled upon the parties' dispute and, therefore, PJ cannot raise this issue for the first time on appeal.

After the jury's verdict, PJ moved the Court for a JNOV on the stock price set by the jury, and the trial court denied the motion:

> [PJ]: Your Honor, I guess the only thing I can think of looking at this [the verdict form] is we'd ask for a JNOV based on the 13th jury doctrine for the Court *to reform the verdict in that the basis for the number* [$2.9 Million] is something that I can't see already in evidence.
>
> [Court]: In the amount?
>
> [PJ]: Yes, sir, Your Honor.
>
> [Court]: I do find there is *sufficient evidence* in the record which would *support the jury's verdict in the amount set forth* based upon the evidence presented. The different dates as far as the evaluation over a period of years that the jury could have used in this particular matter to arrive at that verdict. And I find it's well *within their discretion and the facts and evidence* in this case. And would respectfully decline to so grant your motion.

(Tab A, Trial Transcript at 915-916) (emphasis added). Rather than appeal (or even mention) the denial of this motion, PJ acts as if the motion was granted and "appeals" to ask this Court to affirm this imaginary granting of his post-verdict motion.

In an appended footnote, PJ asserts that granting the motion to dismiss will result in the parties' respective appeals moving forward on a different time line, and "[s]uch a division in the appeal would not serve judicial efficiency or economy." (Return at 1, n.1). This is not a valid reason for denying the motion to dismiss. Were it valid, there could never be a dismissal of a cross-appeal. In any event, the "division in the appeal" is easily remedied: (1) this Court could order that the time for PJ to seek rehearing of a dismissal order is held in abeyance until this

Court rules on NARP's appeal; or (2) PJ could request such an abeyance, to which NARP would and hereby does consent. This approach makes sense because, if NARP prevails in its appeal, the meaning of the judgment becomes a moot issue (NARP appeals the denial of its directed verdict motions and, if granted, the judgment would be changed to an outright "no contract" judgment for NARP).

II. The "Background" Section of the Return (pp. 1-3).

The opening paragraph of this section, and the appended footnote 2, summarizes PJ's interpretation of the judgment. The second paragraph attacks NARP's motion to dismiss as an attempt to change the "contract" between the parties. (Return at 2-3). NARP's motion to dismiss has nothing to do with any contract issues. It is based solely on PJ's attempt to appeal an order when he does not claim to be aggrieved by that order. The underlying issue revolves around the meaning of the judgment (not the meaning or terms of any contract). This underlying issue (meaning of the order) must first be presented to and decided by the trial court before there can be any appeal on that issue.

III. The "Law/Analysis" Section of the Return (pp. 3-13).

A. NARP's prior motion for a limited remand did not seek any ruling from this Court on the meaning of the appealed order, nor does its motion to dismiss PJ's appeal.

In his Argument I(A) (Return at 3-8), PJ describes NARP's prior remand motion and its current motion to dismiss as an attempt "to have this Court give approval to NARP's far-fetched interpretation of the unambiguous judgment in this case" and "to have this Court condone NARP's unilateral alteration of the judgment in this case." (Return at 4). He thus argues the motion to dismiss is an impermissible request for a rehearing on this Court's denial of the prior remand motion. This argument is without merit.

NARP's remand motion never asked this Court to "approve" or "accept" NARP's reading of the appealed order. It simply asked that this Court to remand the case so that NARP could make a Rule 60(b) motion. NARP explained the parties' differing views of the judgment to explain the basis for the Rule 60(b) motion. (See Remand Motion, Exhibit C to Return).

NARP's current motion to dismiss also does not ask this Court to "approve" or "accept" NARP's reading of the appealed order. Rather, it simply asks this Court to apply the well-established statute, rule, and case law that a party cannot appeal unless he is "aggrieved" *by the appealed order*. PJ argues he is not aggrieved *by the appealed order*. Therefore, his appeal must be dismissed. *Bivens,* 173 S.E.2d at 153 (dismissing appeal because appellant took position on appeal that rendered him not aggrieved by the appealed order).

In short, NARP's remand motion did not seek any ruling from this Court on the meaning of the judgment, nor does its current motion to dismiss. Thus, NARP's current motion to dismiss is not a request for a rehearing on the remand motion. It presents an entirely different issue that did not exist at the time of the remand motion, because PJ had not yet filed his Appellant's Brief and taken the position that he is not aggrieved by the appealed order.

In his Argument I(B), PJ reviews the jury's verdict and the evidence to construct and support his interpretation of the judgment. He returns to this task in his Argument III. NARP addresses this issue later in connection with its reply to PJ's Argument III. Also in his Argument I(B), PJ makes two assertions that warrant a brief response here.

First, PJ argues that NARP's motion to dismiss "leaves out the critical detail that the parties differ as what the judgment means." (Return at 5). This is simply wrong. NARP notes the disagreement between the parties on the meaning of the judgment in its motion to dismiss. (Motion to Dismiss at 2, 4). In any event, the meaning of the judgment is irrelevant to the

motion to dismiss. Second, PJ argues he is aggrieved by NARP's interpretation because: "The contract cannot be rewritten now; not by the Court or the opposing party." (Return at 5). The motion to dismiss is not an attempt to rewrite anything, much less the "contract." The underlying issue is the meaning of the judgment, not the contract. The judgment defines the contract in actions over the questions of whether a contract exists and, if so, the terms of that contract. If there is any "rewriting" here, it is PJ's attempt to rewrite South Carolina's law that only a party aggrieved *by the order* can appeal, which is the basis of the motion to dismiss.

B. PJ is not an "aggrieved" party as required by South Carolina's law, and his cited authorities do not support his argument that he is an aggrieved party.

In his Argument II (Return at 8-11), PJ cites several authorities in support of his argument that: (1) he is aggrieved by NARP's reading of the order; and (2) he therefore can appeal to this Court and challenge NARP's reading of the order. This argument fails for two reasons. First, PJ ignores the statute, rule, and firmly established Supreme Court precedent upon which the motion to dismiss rests. Second, PJ's authorities do not support his argument.

Rather than address South Carolina's statute, rule, and case law on being "aggrieved" by the appealed order, PJ relies upon Black's Law Dictionary and American Jurisprudence. (Return at 10). Both are fine treatises but neither establishes South Carolina law and neither supports PJ's arguments.

PJ correctly quotes the seventh edition of Black's Law Dictionary as defining an aggrieved party as: "[a] party whose personal, pecuniary, or property rights have been adversely affected by *another person's actions* or by a court's decree or judgment." (Return at 10, *citing* BLACK'S LAW DICTIONARY 1144 (7th ed. 1999)) (emphasis added). PJ apparently believes the emphasized language establishes South Carolina law. It does not and cannot; that law is set forth in the statute, rule, and South Carolina cases decided under the statute and rule. See n.7, *infra*.

Moreover, Black's gives a general definition of the term; it does not attempt to define "aggrieved" for appellate purposes. Under South Carolina appellate law, an appellant must be aggrieved by the appealed order. *Id.* Black's reference to "another person's actions" simply recognizes the general rule that if one person aggrieves (harms) another, the injured person may have a claim against the other person, but this does not translate into a party being able to appeal without claiming to be aggrieved by the appealed order.

PJ also cites and partially quotes 5 AM. JUR. 2D *Appellate Review* § 243 (2007) for the proposition that "prevailing parties are permitted to appeal 'where the order of judgment in question is apparently favorable but is *actually adverse.*'" (Return at 10) (emphasis added). PJ does not claim the appealed order is "actually adverse," so the cited authority does not support his position here. Moreover, a fuller quotation of Am. Jur. supports the motion to dismiss:

> As a general rule, the *prevailing party may not appeal* a decision in its favor.
>
> One who has received in the trial court *all the relief that he or she sought* therein is *not aggrieved by the judgment and thus has no standing to appeal.* . . . However, a party who prevails at trial, but receives a judgment *only partly in his or her favor*, or a *judgment which he or she believes is less favorable that it should be*, may appeal. Thus, a plaintiff who has not received all the damages he or she sought may appeal as to the adequacy of damages, or the exclusion of testimony whose inclusion could affect the amount of damages awarded. ...
>
> The prevailing party in the lower court may also appeal where the order or judgment in question is apparently favorable but is *actually adverse.*

5 AM. JUR. 2D *Appellate Review* § 243 (2007) (emphasis added). Here, PJ claims he was the "prevailing party" and that he received "all the relief that he ... sought." Thus, he is "not aggrieved" by the order and "has no standing to appeal." PJ does not claim the appealed order ruled "only partly in his ... favor"; he does not claim the appealed order is "less favorable than it should be"; and he does not claim the appealed order "is actually adverse." In short, the rule in Am. Jur. supports dismissal of this appeal.

PJ also argues that a party who won in the trial court "can be aggrieved by a judgment or order in light of the effect or position or interpretation given to the judgment or order by the court or opposing party." (Return at 8). There is no doubt that a party can be aggrieved by a court's interpretation of an order, but that is not the situation here. PJ does not claim the trial court misinterpreted the appealed order, nor can he, *because the trial court has never been asked to interpret the order*. Moreover, PJ's cited authorities (two cases) do not support the argument that a party can be aggrieved by an opposing party's interpretation of an order such that he can appeal that interpretation directly without first presenting the issue to a trial court.

In *State v. Gregorie*, 528 S.E.2d 77 (S.C. 2000) (cited in Return at 8 and 10), the defendant was convicted of speeding in magistrate's court. The defendant appealed to the circuit court, which reversed the conviction because the state did not introduce any evidence of the applicable speed limit. Rather than dismiss the charges, the circuit remanded the case to the magistrate for a new trial. The defendant appealed the new trial order. He was aggrieved by the new trial order, because a new trial would be in violation of the constitutional prohibition against double jeopardy. The Supreme Court agreed and reversed the new trial order. *Gregorie* was nothing more than a straightforward appeal by a party who was aggrieved by the appealed order. It had nothing to do with any interpretation of any order by any party.

In *Cobb v. Benjamin*, 482 S.E.2d 589 (S.C. 1997) (cited in Return at 8 and 10), this Court addressed whether a covenant not to execute relieved the underinsured (UIM) carrier from any obligation to pay UIM benefits under the following facts:

1. The plaintiff was injured in an accident while driving her car, for which she had UIM coverage. 482 S.E.2d at 590.

2. The at-fault driver was a permissive user of a car belonging to another, resulting in liability coverage from the insurance on the borrowed car. This "borrowed car policy" had liability limits of $15,000. *Id.*

3. The plaintiff's medical bills exceeded $16,000, so she entered a covenant not to execute with the "borrowed car" liability carrier, whereby she released the at-fault driver but reserved the right to pursue her UIM coverage. *Id.* at 590-591.

4. After this settlement, plaintiff discovered that the at-fault driver had his own liability coverage with his own insurer (the "at-fault driver liability policy"). *Id.* at 591.

5. Plaintiff made claims against her UIM Carrier and the "at-fault driver liability policy," and both denied coverage. *Id.*

6. The UIM Carrier defended on two alternative grounds: (a) a "no coverage" defense based on the plaintiff's failure to exhaust all liability coverage, including the "at-fault driver liability policy"; and (b) an alternative "limited coverage" defense based on any coverage being limited to the plaintiff having damages that exceeded the combined coverage under the "borrowed car policy" and the "at-fault driver policy." *Id.* at 591, 592.

7. The trial court held that the release of the at-fault driver also released his "at-fault driver policy." *Id.* at 591. The plaintiff appealed and this Court affirmed. *Id.* at 591-592.

8. The trial court also held that UIM coverage was available but only to the extent that plaintiff's damages exceeded the combined coverage under the "borrowed car"and "at-fault driver" policies. In other words, the trial court rejected the UIM Carrier's "no coverage" defense but accepted its alternative "limited coverage" defense. *Id.* at 591, 592

The UIM Carrier appealed the denial of its "no coverage" defense. The plaintiff argued the UIM Carrier was not "aggrieved" by the order, because the court had granted the UIM Carrier its

alternative "limited coverage" defense. *Id.* at 592. This Court summarily rejected the plaintiff's "not aggrieved" argument, because the UIM Carrier had pled in the alternative and the trial court's rejection of the primary "no coverage" defense aggrieved the UIM Carrier. *Id.* at 592-593. Thus, contrary to PJ's description of *Cobb*, this Court did not hold the judgment "essentially provided the [UIM Carrier's] requested relief." (Return at 8-9, parenthetical description of holding in *Cobb*). Rather, this Court specifically rejected the argument that the UIM Carrier "was granted the relief [it] requested and is therefore not 'aggrieved.'" *Cobb*, 482 S.E.2d at 592. This Court held the UIM Carrier was aggrieved, because the trial court rejected the primary and more complete "no coverage" defense. In short, *Cobb* was nothing more than a straightforward appeal by a party who was aggrieved by the appealed order, and it had nothing to do with any interpretation of any order by any party.

PJ also argues his "appeal is proper as it arises in a context that requires this Court to interpret the trial court's judgment ordering specific performance, and it is proper for this Court to interpret the trial court's order." (Return at 9). PJ correctly cites three cases for the general proposition that an appellate court has the power to interpret a trial court's order on appeal, but this proposition is irrelevant here. PJ does not claim to be aggrieved by the appealed order, and his cited cases do not support the argument that a party can appeal when aggrieved by the interpretation of an opposing party.

In *Wayburn v. Smith*, 211 S.E.2d 560 (S.C. 1975) (cited in Return at 9), the Supreme Court interpreted the appealed order to reject the *respondent's* argument for *affirmance.*[1] In

[1] In *Wayburn*, the circuit court refused a reference of all issues for trial by the master-in-equity, finding that some issues were at law and required a jury trial. The parties that moved for the reference were aggrieved by this refusal, appealed, and argued for reversal. The Supreme Court found that all issues were in equity, reversed the trial court, and remanded for a non-jury trial of all issues.

Management Recruiters of Greenville v. R.J.R. Mech., Inc., 404 S.E.2d 908 (S.C. App. 1991)[2] (cited in Return at 9), this Court interpreted the appealed order to reject the *appellant's* argument for *reversal*. In *Petition of White*, 385 S.E.2d 211 (S.C. App. 1989) (cited in Return at 9), the parties disagreed over the meaning of a prior court order on child support. The parties presented their disagreement to the trial court, which construed the order in favor of the father. The mother was aggrieved by the trial court's construction of the prior order and appealed. This Court construed the prior order (not the appealed order) in accepting the *appellant's* argument for *reversal* of the appealed order. In each of these cases, the appellant argued for reversal not affirmance. In short, these cases do not support PJ's contention that he can appeal without being aggrieved by the appealed order.

C. PJ's interpretation of the appealed order is irrelevant to the issue presented in the motion to dismiss and is not a basis for resisting the motion to dismiss.

In his Argument III (Return at 11-13), PJ focuses on a recurring theme throughout his Return: his argument that his reading of the appealed order is correct. This issue is not properly before this Court, because it was not raised to or ruled upon by the trial court, and because PJ argues he is not aggrieved by the appealed order.

PJ relies on four cases in asserting his view of the appealed judgment. These cases do not support PJ's position that he can appeal from NARP's interpretation of the appealed judgment, which is the only and controlling issue under NARP's motion to dismiss PJ's appeal.

In *Fesmire v. Digh*, 683 S.E.2d 803 (S.C. App. 2009) (cited in Return at 11), the trial court ordered specific performance of an oral land sale contract under alternative theories that sufficient writings and/or sufficient part performance took the oral contract out of the statute of

[2] In *Management Recruiters*, the trial court awarded treble damages and attorney's fees to the respondent and against the appellant under the South Carolina Personnel Placement Services Act. The appellant was aggrieved by this award, appealed, and argued for reversal. This Court affirmed.

frauds. The *appellant* (seller) in *Fesmire*, unlike PJ here, appealed and *sought reversal* of the trial court's ruling. This Court reversed, finding the trial court erred in admitting the writings to prove the contract, and finding there was insufficient evidence of part performance.

In *Campbell v. Carr*, 603 S.E.2d 625 (S.C. App. 2004) (cited in Return at 11-12), the trial court ordered specific performance of a written land sale contract. The *appellant* (seller) in *Campbell*, unlike PJ here, appealed and *sought reversal* of the appealed order. This Court reversed because the price was inadequate and the seller suffered from mental illness at the time of the contract, thereby making it inequitable to order specific performance.

In *McMaster v. Strickland*, 472 S.E.2d 623 (cited in Return at 12), the trial court awarded attorney's fees to the prevailing party in an action for specific performance of a written land sales contract. The *appellant* (losing party), unlike PJ here, appealed and *sought reversal* of the fee award. This Court reviewed the evidence and affirmed the award of fees.

The appellants in *Fesmire*, *Campbell*, and *McMaster*, unlike PJ here, appealed, claimed to be aggrieved by the appealed orders, and sought reversal of the appealed orders. *Fesmire*, *Campbell*, and *McMaster* teach that when an appellant seeks reversal of the appealed order, the appellate court will review the sufficiency of the evidence that supports the appealed order. Here, PJ does not seek reversal of the appealed order, so there is no basis for reviewing the evidence underlying the appealed order.

In *Reese v. Holmes*, 26 S.C. Eq. (5 Rich. Eq.) 531 (S.C. App. Eq. 1852) (cited in Return at 12), the Court affirmed the trial court in a one-sentence per curiam opinion: "We concur in the [trial court's] decree; and it is ordered, that the same be affirmed, and that the appeal be dismissed." 5 Rich. Eq. at 579. The report of this opinion includes a copy of the trial court's

very long and detailed order. The issue was who owned the property (slaves) of a decedent. The trial court ruled in favor of the decedent's daughter under the following legal analysis:

1. The decedent's estate was settled by a prior order of a Virginia court, and this order was *res judicata* as to all parties to the current litigation.[3]

2. The Virginia order was ambiguous.[4]

3. Therefore, the South Carolina court looked to the Virginia record to determine the holding of the Virginia order and the scope of its res judicata effect.

4. The South Carolina court determined that the Virginia court's prior and binding order required an award of the property to the decedent's daughter.

Here, PJ relies upon the evidence presented at trial to construe the appealed judgment in his favor. PJ, however, never claims the appealed judgment is ambiguous. Rather, he claims the appealed order is unambiguous. (Return at 4). Thus, PJ has specifically disavowed the predicate for reviewing the trial evidence, an ambiguous order. *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Moreover, PJ cannot claim the appealed judgment is ambiguous, because he did not first seek clarification from the trial court. See *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).

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[3] The trial court did not use the term "res judicata." Rather, it relied on a statement of law describing that doctrine: "The principle of *Muse vs. Edgerton* is, that the parties to the record are concluded by the record, from averring that any other right existed in them, or any of them, at the time of the proceeding, that the record itself imports." 5 Rich. Eq. at 541.

[4] The trial court did not use the term "ambiguous." Rather, it posed the issue: "This is the [Virginia] decree. If there is any thing equivocal in it, are we to stop there, and give it no effect beyond those things that are explicit, and clearly expressed? or are we at liberty to go into the record for its construction?" 5 Rich. Eq. at 549. The trial court found the Virginia decree was equivocal (ambiguous) and concluded it could review the record to determine the intent and scope of the Virginia court's ruling.

D. PJ's interpretation of the appealed order is manifestly without merit.

The meaning of the appealed order is irrelevant to the instant motion to dismiss. Accordingly, NARP will not burden this Court with a point-by-point refutation of PJ's arguments on the meaning of the appealed order unless requested by this Court. Two matters warrant a brief observation: (1) PJ does not argue the appealed order is ambiguous; and (2) a simple reading of the appealed order shows there is no ambiguity.

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 go beyond the four corners of the judgment to determine the authoring judge's intent. *Id.* PJ never argues the appealed order is ambiguous. Therefore, his attempt to go outside the judgment to show its meaning is manifestly without merit. (It is noteworthy and telling that PJ argues the appealed order is not ambiguous but finds it necessary to go outside the judgment and review the disputed evidence at trial to support his "reading" of the order).[5]

[5] Under PJ's theory and argument, the trial judge intended the following enforcement procedure for the appealed order: (a) ignore the jury's expressly stated stock price in Question 8; (b) order the trial transcript; (c) review the disputed testimony; (d) resolve that dispute; and (e) determine the terms of the contract, including the price. Nothing in the judgment hints at any such intent by the trial judge. To the contrary, the judgment plainly grants specific performance of the attached special verdict form, which plainly states PJ is entitled to buy the stock for $2.9 Million. (See n.6, *infra*).

The judgment is the Form 4 and the verdict form. The trial judge attached the verdict form to the Form 4 and wrote thereon: "Judgment for [PJ] under specific performance doctrine." (Exhibits A and B to Return). The judge then entered the judgment. It is thus clear that the trial court based its judgment on the verdict form. When read as whole, the judgment unambiguously orders specific performance at a price of $2,936,300 under the plain language of the judgment. This ends the inquiry and precludes PJ's attempt to rely on his interpretation of the disputed evidence presented at trial. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474; see also *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same).[6]

CONCLUSION

Only a party aggrieved by an order may appeal that order. PJ does not claim to be aggrieved by the appealed order in his Brief of Appellant or in his Return to the Motion to Dismiss. To the contrary, PJ argues he is not aggrieved by the appealed order and requests this Court to affirm the appealed order. As a result, this Court has a "duty to reject" PJ's appeal under the controlling statute and rule, as well as under firmly established Supreme Court

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[6] PJ ignores Question 8 and the jury's answers:

> 8. Is [PJ] entitled to receive 7.5% of the outstanding capital stock of [NARP]?
> [YES]
>
> a. If you answer YES, what should [PJ] pay to [NARP] for 7.5% of the common capital stock?
> $2,936,300.00

(Exhibit B to Return at 4). PJ asserts his interpretation of the appealed order, which is contrary to the above-quoted explicit finding by the jury, is based on undisputed evidence. This is simply wrong. There were substantial factual disputes at trial on the key matters, including whether NARP agreed in Charleston to accept cash from PJ for its stock. PJ argues that Question 8 (above) "was relevant only if the jury found that the termination provision ended the parties' rights under the 2000 agreement as modified in Charleston." (Return at 2, n.1). Nothing supports this assertion. Neither party objected to Question 8; neither party requested that it be answered only under the conditions now imagined by PJ; nothing in the Verdict Form supports this imaginary instruction; and the trial court never instructed the jury to approach Question 8 in this imaginary manner. Importantly, the Verdict Form demonstrates the trial court knew how to impose conditions on whether or not to answer a particular question, and further demonstrates it did not impose the conditions now imagined by PJ on Question 8. See Verdict Form Questions 5(a), 6(a), 7(a), 7(b)(i), and instructions for answering Questions 8 and 9 (Exh. B to Return at pp. 2-4).

precedent.[7] For this reason, and for the reasons set forth above and in Appellant-Respondent's Motion to Dismiss, it is respectfully submitted that the appeal of Respondent-Appellant should be dismissed.

Respectfully Submitted,

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February 4, 2010

[7] Appellate courts have a "duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court." *Cisson v. McWhorter*, 177 S.E.2d 603, 605 (S.C. 1970) (emphasis added); *accord Carson v. Adgar*, 486 S.E.2d 3, 6-7 (S.C. 1997). "Only a person aggrieved by a ruling may appeal." *Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997) (emphasis added), *applying* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.") *and* S.C. Code Ann. § 18-1-30 (1976) ("Any party aggrieved may appeal in the cases prescribed in this Title."). The right to appellate review "is restricted to persons or parties aggrieved by the decision below." *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970) (emphasis added); *accord First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998) *and Burns v. Gardner*, 493 S.E.2d 356, 361 (S.C. App. 1997). A party is "aggrieved in a legal sense" if the order causes injury to his person or property by denying some personal or property right or by imposing a burden or obligation upon the party. *Bivens v. Knight*, 173 S.E.2d 150, 152 (S.C. 1970), *citing Parker v. Brown*, 10 S.E.2d 625 (S.C. 1940) *and Bowles v. Dannin*, 2 A.2d 892 (R.I. 1938); *accord Powell v. Bank of America*, 665 S.E.2d 237 (S.C. App. 2008).

Exhibit D
(Court of Appeals' Order Denying NARP's Motion to Dismiss)

30528/01500
ecd 2/23/10

The South Carolina Court of Appeals

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Re: North American Rescue v. Richardson
2008105026

Dear Counsel:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton A. J.

February 19, 2010."

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

CLERK

TAG/mpm

cc: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

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

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 Reply in Support of His Petition for Rehearing

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