

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

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MAY - 5 2014

S.C. Supreme Court

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

v.

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

**NARP'S REPLY TO
RICHARDSON'S RETURN TO
NARP's PETITION FOR REHEARING**

Respondent/Petitioner (NARP) respectfully submits this Reply to the Return filed by Petitioner/Respondent (Richardson) to NARP's Petition for Rehearing.

I. Reply to Arguments I and III

In his Argument I, Richardson mischaracterizes NARP's rehearing argument as being that this Court's opinion "leaves some debate as to NARP's arguments." This is not NARP's argument. Rather, NARP argued that this Court's opinion does not state the reasons for affirming the denial of NARP's directed verdict motion – Richardson does not dispute this and he cites authority that an appellate court's memorandum opinion must state "the reasons therefore [for its ruling]" and "the reasons for its actions." (See Richardson Ret. at 2). NARP has argued only that this Court should state the reasons for its ruling.

In Argument III, Richardson makes no “return” arguments to NARP’s petition for rehearing. Rather, he makes arguments in support of his petition for rehearing. This is not the proper use of a “return,” which is a document intended to respond to arguments made in the opposing party’s petition. Therefore, this Court should disregard Argument III in its entirety. In “reply” to these improper arguments, NARP relies upon and incorporates herein its arguments made in its Return to Richardson’s Petition for Rehearing.¹

I. Reply to Argument II

In his Argument II, Richardson touts the conflicting testimony from the parties on the meaning of the Termination Agreement. (Ret. at 3-4). This testimony, however, is irrelevant to the question of whether the Termination Agreement was ambiguous. That question must be decided by reference to only the agreement itself. If, and only if, a reading of the agreement reveals an ambiguity, then the parties’ testimony on the meaning of the agreement becomes relevant.

Richardson’s only attempt to identify any ambiguity arising from the agreement itself is the reference to the “Dec 15” agreement. (Ret. at 5-6). This does not give rise to any ambiguity in the agreement itself. It simply states that the Termination Agreement does not apply to the “Dec 15” agreement – there is nothing ambiguous about that. Richardson’s real argument is that the Termination Agreement was contingent upon the parties entering into the “Dec 15” agreement at some later date. There is no such provision in the Termination Agreement. If Richardson wanted there to be such a contingency, he should have put it in the Termination Agreement when he drafted it. *Lee v. The University of South Carolina*, Op. No. 27372 (S.C.

¹ To the extent Richardson makes any “rehearing” arguments in Argument III that were not set forth in his Petition for Rehearing, those arguments are untimely and not properly before this Court. It is axiomatic that arguments for rehearing must first be made in the Petition for Rehearing and cannot be raised for the first time in any subsequent filings.

Sup. Ct. filed Apr. 2, 2014) (Shearhouse Adv. Sh. No. 13 at 25, 29) (In construing a contract, “[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.”). If Richardson did not protect some desired right to a future agreement, the courts cannot protect him from his failure to do so. *Id.* (“A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.”).

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

Richardson argues that the effectiveness of the Termination Agreement was contingent upon the parties entering into two other agreements – the so-called “three-step agreement.”³ There is no such condition or contingency in the Termination Agreement, which makes no reference to any requirement of a “three-step agreement.” Moreover, at the time Richardson requested NARP to sign the Termination Agreement, Richardson knew he had not agreed and would not agree to the “charitable donation” step of the three-step agreement. Thus, one must

² Richardson also argues NARP should have but did not challenge the jury’s verdict as inconsistent and, therefore, the issue is not preserved for appeal. (Ret. at 6-7). This argument is nonsensical. NARP has appealed the denial of its directed verdict motion – the jury’s verdict is wholly irrelevant to this question.

³ Richardson also argues that the Termination Agreement must be construed in conjunction with the other two agreements. The other agreements were never executed. The rule argued by Richardson, and the cases cited in support of that argument, are limited to situations in which there is more than one *executed* agreement. Thus, Richardson’s argument is manifestly without merit.

ask why Richardson requested NARP's president to sign the Termination Agreement. Richardson's actions, which speak louder than his words, demonstrate why.

Richardson knowingly obtained the Termination Agreement from NARP's president (Castellani) to ensure that Castellani would have no rights to any stock in Richardson's company (RMI). (R. 332, 351). Thus, after obtaining the Termination Agreement, Richardson became the sole owner of the stock in his company and no one could object to his tax strategy in selling RMI's assets and his personal goodwill related to RMI's business. (R. 342). After achieving this sole authority to sell the assets and goodwill under his tax strategy, Richardson now seeks to disavow the Termination Agreement. The law cannot permit this.

Richardson also argues that, after the sale of RMI's assets and his personal goodwill, he set aside \$415,000 of the proceeds (Richardson's calculation of 7.5% of the proceeds⁴) so that he could perform the alleged contract that he could 7.5% of NARP's stock for 7.5% of the proceeds from the sale of RMI's assets and his personal goodwill. Richardson's own actions, which speak louder than his words, conclusively demonstrate the falsity of this assertion.

After the Termination Agreement and after Richardson sold RMI's assets and his personal goodwill, Richardson and Castellani continued to discuss the possibility of Richardson buying 7.5% of NARP's stock. Richardson never said the parties already had an agreement whereby he could buy 7.5% of NARP's stock for \$415,000, and he never tendered the "set aside" money in demand of the stock. Furthermore, Richardson did not "set aside" any money – the \$415,000 remained and was always co-mingled with Richardson's other funds and it was never set aside separately. (R. 541-542).

In December 2005, thirteen (13) months after the Termination Agreement and eleven (11) months after the sale of RMI's assets, NARP stated the parties should abandon all talks

⁴ NARP has never agreed with Richardson's calculation of the 7.5% of the proceeds from the sale.

about Richardson purchasing 7.5% of NARP's stock. Richardson did not respond by saying the parties already had an agreement whereby he could purchase 7.5% of NARP's stock for \$415,000, and he never tendered the "set aside" money in demand of the stock. Rather, fifteen months later in April 2007, Richardson fraudulently asserted a contract to buy 7.5% of NARP's stock for one-penny per share – an attempted fraud that Richardson abandoned at trial.

NARP brought the current action in response to Richardson's attempted fraud. Richardson's answer did not claim the parties had an agreement for \$415,000, and he did not tender the "set aside" money in demand of the stock. The first hint of a "\$415,000" agreement appeared in Richardson's amended counterclaim in July 2008, more than three and one-half years after the Termination Agreement and the sale of RMI's assets and Richardson's personal goodwill. Preventing this type of chicanery is precisely why contracts contain merger clauses and, more importantly, it is precisely why the courts enforce contracts as written, regardless of their wisdom or folly, and regardless of a party's apparent failure to protect his own interests.

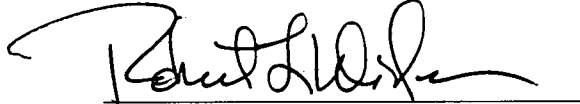
As to promissory estoppel, Richardson relies solely upon testimony that occurred before the Termination Agreement. That agreement, however, terminated and merged all prior agreements, discussions, etc. There is no evidence of any promissory estoppel after the Termination Agreement.

CONCLUSION

There is no ambiguity in the Termination Agreement. That agreement fully terminated and extinguished all prior agreements, discussions, etc. between the parties. It is undisputed that there was no promissory estoppel or agreement after the Termination Agreement. Accordingly, the trial court erred in denying NARP's directed verdict motion. Therefore, NARP respectfully

submits that this Court should grant rehearing and issue an amended opinion that reverses the Court of Appeals and remands for the entry of judgment in favor of NARP.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert L. Widener", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the NARP's Reply to Richardson's Return to NARP's Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on May 5, 2014 addressed to the attorneys of record, as follows:

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