

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

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S.C. Supreme Court

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

v.

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

RESPONDENT/PETITIONER'S
BRIEF OF PETITIONER

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STATEMENT OF ISSUES

1. The Court of Appeals erred in affirming the trial court's denial of Respondent/Petitioner's directed verdict motion on Petitioner/Respondent's contract claim.
2. The Court of Appeals erred in affirming the trial court's denial of Respondent/Petitioner's directed verdict motion on Petitioner/Respondent's promissory estoppel claim.
3. The Termination Agreement entered by the parties is not ambiguous, and any ambiguity must be construed against Petitioner/Respondent as the drafting party.
4. The Termination Agreement expressly terminated and precludes the claims made by Petitioner/Respondent, and there is no evidence of any contract or promissory estoppel after the Termination Agreement.
5. There could be no option agreement granting Petitioner/Respondent an option to purchase the stock of Respondent/Petitioner, because no such agreement complied with controlling principles of Delaware law.

STATEMENT OF CASE

This is a contract case. It centers around two written agreements between the parties: the January 2000 "Outline of Business Relationship" (the 2000 Agreement); and the subsequent November 2004 "Agreement of Termination, Settlement, and Release" (the Termination Agreement). The defendant (Richardson) claims a right to buy 7.5% of the capital stock in the plaintiff (NARP) for \$415,988.00 under an alleged July 2004 oral amendment to the 2000 Agreement. NARP claims that Richardson has no right to buy any of its stock, because the Termination Agreement terminated the 2000 Agreement and any related agreements, and there is no evidence of any such right arising after the Termination Agreement.

The fundamental question is whether the Termination Agreement is enforceable as written because, if it is, it precludes all of Richardson's claims. NARP contends that the Termination Agreement is not ambiguous and must be enforced as written. Richardson contends that the Termination Agreement is ambiguous and therefore cannot be enforced as written.

Richardson and NARP were parties to the 2000 Agreement. Reeves Manufacturing, Inc. (RMI), a company wholly owned by Richardson, was also a party, as was Bob Castellani (Castellani), the president and principal owner of NARP. (Appx. 909-910). The 2000 Agreement outlined the business relationship between NARP and RMI, and it further provided for a stock swap whereby RMI would issue 25% of its stock to Castellani, and NARP would issue 25% of its stock to Richardson. (Id.). It is undisputed that the parties later amended this Agreement orally to reduce the stock percentage from

25% to 7.5%. It is also undisputed that NARP and RMI never issued any stock to Richardson and Castellani, respectively.

In November 2004, at the request of Richardson, the same four parties executed the "Termination Agreement." (Appx. 911-913). The stated purpose of this agreement was to terminate the 2000 Agreement and any agreements or understandings arising out of or in any manner related to the 2000 Agreement. (Appx. 911 at "Whereas" paragraphs). The Termination Agreement provided as follows:

1. The 2000 Agreement and anything related to that Agreement was terminated.
2. Any claims and potential claims between the parties to the 2000 Agreement were settled, compromised, and released.
3. NARP and Castellani released RMI and Richardson from any claim arising out of or related to the 2000 Agreement.
4. RMI and Richardson released NARP and Castellani from any claim arising out of or related to the 2000 Agreement.
5. The release provisions of the Termination Agreement did not apply to "that certain, Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP."

(Appx. 911-912 at ¶¶ 1-4). The Termination Agreement also had a merger clause stating that it was the parties' entire agreement. (Appx. 912 at ¶ 6). It is undisputed that the "15 Dec" option agreement did not exist at the time of the Termination Agreement and that the parties never entered any such agreement after the Termination Agreement.

In January 2005, Richardson sold RMI's assets and his related "goodwill" to a third-party. (Appx. 497). In that sale, Richardson represented that he was the only owner of RMI. (Appx. 347). This was true given the parties' execution of the Termination Agreement in November 2004, which *inter alia* terminated Castellani's right to any stock from RMI.

Over two years later, in April 2007, Richardson demanded that NARP sell him 7.5% of its stock for one-penny per share. (Appx. 1047-1048). He based this demand on an alleged written option agreement dated October 4, 2004 that was signed by Richardson but not by anyone else. (Id.; Appx. 918-921). In response, NARP commenced the present action in May 2007, seeking a declaratory judgment that Richardson's asserted right to purchase 7.5% of NARP's for one penny per share did not exist and that Richardson had no right to purchase any NARP stock. (Appx. 11-12). Richardson answered and counterclaimed, asserting ever-changing facts and theories on his alleged right to buy 7.5% of NARP's stock in three different versions of his answer and counterclaim. (Appx. 14-22; 27-38; 39-50). At trial, Richardson's testimony revealed yet more changing facts and theories.

The case was tried before a jury on August 25-29, 2009. NARP moved for a directed verdict, arguing *inter alia* that the Termination Agreement ended all rights and claims between the parties that may have existed prior to its date, and there was no evidence to support any claim arising after its date. The trial court denied the motion and submitted the case to jury under a Special Verdict Form. The jury answered the questions on the verdict form, and the trial judge entered judgment by attaching the

verdict form to a Form 4 Judgment and writing thereon: “Judgment for the Defendant [Richardson] under specific performance doctrine.” (Appx. 6-10).

NARP appealed the denial of its directed verdict motions. Richardson cross-appealed, arguing that NARP was misreading the judgment as requiring him to pay \$2,936,300.00 for 7.5% of NARP’s stock and that the Court of Appeals should “affirm” Richardson’s reading of the judgment that he could buy the stock for \$415,988.00. The Court of Appeals affirmed the denial of NARP’s directed verdict motion but held that NARP was correctly reading the judgment, *i.e.*, Richardson must pay \$2,936,300.00 for 7.5% of NARP’s stock. See *North American Rescue Prods. v. Richardson*, 720 S.E.2d 53 (S.C. App. 2011). Both parties petitioned for rehearing – the Court of Appeals denied both petitions.

Both parties petitioned this Court for a writ of certiorari. In Memorandum Opinion No. 2014-MO-009, this Court granted both petitions, dispensed with further briefing, affirmed the denial of NARP’s directed verdict motion, and vacated the Court of Appeals’ rulings on Richardson’s appeal because the issues were not properly before the Court of Appeals. Both parties petitioned for rehearing. This Court granted rehearing, withdrew its Memorandum Opinion, and directed the parties to brief the issues

STATEMENT OF FACTS

Richardson’s pleadings and testimony in this case reveal an ever-changing story that continued to change until the end of the trial. His current story, which he now tells on appeal, is that he and Castellani met on July 29, 2004 in Charleston (referred to as the Charleston Meeting) and orally amended the 2000 Agreement in two ways. First, the parties reduced the stock swap percentage from 25% to 7.5%. This is undisputed.

Second, the parties agreed that Richardson could buy 7.5% of the stock directly from NARP by paying NARP 7.5% of the proceeds from Richardson's sale of RMI, which Richardson calculated to be \$415,988.00 (referred to as the \$415K contract). Castellani denied any such agreement, and Richardson never claimed any such agreement until the end of the trial.

I. Background Facts Leading to the Dispute Between the Parties

The Defendant (Richardson) owned RMI, which designed, manufactured, and sold emergency medical and rescue products to civilian first responders. (Appx. 909). Castellani owned NARP, which designed, manufactured, and sold emergency medical and rescue products to the U.S. military. (Id.). Richardson and Castellani met in the mid 1990's at a convention held by the National Disaster Management System. (Appx. 436). A business relationship gradually developed between their companies, which Richardson and Castellani formalized on January 1, 2000, by entering the 2000 Agreement. (Appx. 437). Under this Agreement, RMI was to issue 25% of its stock to Castellani, and NARP was to issue 25% of its stock to Richardson. (Id.). The companies operated under the 2000 Agreement but never issued the stock.

At some point, but no later than January 2004, Richardson decided to retire and told Castellani. On January 23, 2004 Castellani emailed Richardson's attorney and said that he wanted his 25% of RMI's stock to be treated the same as Richardson's 75%, *i.e.*, "If he moves his share to a holding company my (sic) should go too. If he use (sic) his shares to merge with another company I should have the same options, ect (sic)." (Appx. 1013). Thus, Richardson knew that Castellani wanted to participate as a stockholder in any deal that Richardson might make with another party for RMI.

Sometime in the spring of 2004, Richardson attended a defense trade show in Paris. (Appx. 458-459). He met the CEO of DHS, who told him that the Carlisle Group had just bought a significant part of DHS. (Appx. 459). Richardson commented that it “would be great to talk to somebody like that.” (Id.). Five weeks later, in June 2004, the CEO of DHS called Richardson and expressed an interest in buying RMI. (Id.).

On July 29, 2004, Castellani and Richardson met in Charleston – the parties refer to this event as “the Charleston meeting.” By this time, Richardson was having significant discussions with DHS about buying RMI. (Appx. 465). He had told Castellani about this potential sale earlier, and it was a topic of discussion at this meeting. (Id.). It is undisputed that the parties agreed in Charleston to reduce the stock swap from 25% to 7.5%. (Appx. 469). This had the effect of increasing Richardson’s “take” from any potential sale of RMI for his retirement. Richardson now claims that this meeting also resulted in an oral amendment to the 2000 Agreement such that Richardson would still receive 7.5% of NARP’s stock, but Castellani would receive a cash payment equal to the after-tax value of 7.5% of the RMI sales proceeds, which Richardson later calculated to be \$415,988.00. Richardson never tendered this amount to Castellani prior to the commencement of the present action. (Appx. 391). Castellani denied any such agreement. (Appx. 281-282).

After the Charleston meeting, because the stock swap under the 2000 Agreement would have tax consequences, the lawyers for the parties began discussing what to do with the “stock swap” in light of the potential sale of RMI to DHS. (Appx. 1014). During these discussions, Richardson never claimed that the parties already had a contract for Richardson just to pay cash from the RMI sales proceeds directly to Castellani or NARP.

One proposal was that Castellani would donate 7.5% of NARP's stock to a charity, and then Richardson would then buy the stock from the charity for fair market value. During these discussions, an alternative possibility arose whereby Richardson would donate 7.5% of the RMI sales proceeds to a charity, and NARP would issue an option to Richardson granting him the right to buy 7.5% of NARP's stock for one penny per share. To this end, on October 4, 2004, Castellani's attorney emailed a draft stock option to Richardson's attorney. (Appx. 1016-1031). Although Richardson's attorney sent back a draft option with proposed changes to Castellani's attorney, Richardson secretly signed the draft option originally sent by Castellani's attorney without telling anyone, and placed in a drawer. (Appx. 295-297, 360-361; 918-921). He would later demand the right to purchase 7.5% of NARP's stock for one penny per share based on this secretly signed option.

On October 29, 2004, the parties met in Atlanta to continue their discussions about how to handle the stock swap required by the 2000 Agreement in light of the impending sale to RMI. Again, Richardson never claimed that the parties already had a \$415K contract, and he never mentioned the secretly signed October 4 option agreement. Richardson claimed that when he left this meeting, he believed the parties had reached the following three-part agreement subject to the details being worked out: (1) terminate the 2000 Agreement; (2) Richardson would donate 7.5% of the RMI sales proceeds to a charity; and (3) NARP would issue Richardson a stock option for 7.5% of NARP's stock at one penny per share. Richardson could not recall whether the Dobson Ministries had been identified as the charity in the Atlanta meeting, but he recalled expressing concern

over the tax implications of making a cash donation to a charity and claiming a tax deduction for it. (Appx. 481, 487).

Richardson drafted the Termination Agreement and, on November 5, 2004, he emailed the Termination Agreement to Castellani. Richardson had already signed the agreement, and he requested that Castellani also sign it and return it to him. (Appx. 491). On November 13, 2004, Richardson again emailed Castellani and reminded him to sign the Termination Agreement and return it to him. (Appx. 1035). Castellani did so. Neither request made the Termination Agreement conditional upon the occurrence of any event, including but not limited to the "15 Dec" option agreement referenced in the Termination Agreement as not being subject to the release provisions of the Termination Agreement.

Richardson did not believe the Termination Agreement was ambiguous when the parties entered into it, and he understood that it terminated all prior agreements. (Appx. 337-340). He also believed that the option referred to in the Termination Agreement was something to be negotiated in the future. (Appx. 341-342). He understood that the termination of all prior agreements was effective immediately. (Appx. 330-332).

On January 5, 2005, Richardson closed the sale of RMI to DHS. (Appx. 497).

The total purchase price was \$9.1 Million and the sale was structured as follows:

1. Richardson represented that he was the 100% owner of RMI, which was true given the recent execution of the Termination Agreement.
2. DHS paid RMI \$3.85 Million for its assets.
3. DHS paid Richardson \$5.2 Million for his goodwill.

(Appx. 325-326, 346-348). As a result, RMI continued to exist but it was an empty shell with no assets. Richardson later changed the name of RMI to Extol. According to

Richardson's calculation, 7.5% of the total after-tax proceeds from the sale was \$415,988.00. (Appx. 1012). This figure became the basis for Richardson's claim of a \$415K contract, a claim that he never made until the end of trial.

The parties continued to discuss the possibility of Richardson acquiring 7.5% of NARP's stock. Still, Richardson did not claim that he already had a \$415K contract that was reached in the July 2004 Charleston Meeting, and he did not mention the secretly signed October 4 option agreement. Richardson ultimately refused to make a cash donation to Dobson Ministries, allegedly because he was concerned about the implications of taking a tax deduction for the donation. (Appx. 392-393).

On April 22, 2005, Castellani proposed an agreement that did not involve a charitable donation by Richardson. Castellani would donate 7.5% of NARP's stock to Dobson Ministries, and Dobson would then sell the stock to Richardson for \$336,000.00, which was the fair market value of the stock at the time. Richardson also refused this offer. (Appx. 356-357; 1040-1042). The parties continued their discussions, and NARP advised Richardson that the value of NARP was increasing and, therefore, the price at which Richardson could obtain 7.5% of NARP's stock was going up as well. (Appx. 358). During these discussions, Richardson never claimed that he already had a \$415K contract from the July 2004 Charleston Meeting, nor did he mention the secretly signed October 4 option agreement. The parties never reached an agreement.

On December 6, 2005, NARP's attorney wrote Richardson's attorney, noting that he had not heard anything from Richardson since July 2005, and asking whether Richardson had decided to abandon the discussions and any attempt to acquire NARP's stock. (Appx. 1045). Richardson's attorney responded with a January 4, 2006 letter

stating Richardson had not reached any such decision and planned to “get back” to NARP in the first quarter of 2006. (Appx. 1046). Nothing in the letter hinted at any claim based on a \$415K contract or the secretly signed October 4 option agreement.

Fifteen months later, Richardson’s attorney “got back” to NARP in a “follow-up” letter dated April 17, 2007. By this time, the value of 7.5% of NARP’s stock had increased from \$336,300.00 – the price that Richardson had rejected in April 2005 – to being worth several million dollars. It is here that Richardson began telling his ever-changing story in an attempt to turn back the clock and acquire NARP’s stock for pennies on the dollar of NARP’s fair market value.

The April 17 letter offered several reasons for the delay in getting back to NARP, then advised that Richardson “now desires to exercise his option to purchase” 7.5% of NARP’s stock “[u]nder the terms of the [secretly-signed] October 4, 2004 Option Agreement” between Richardson and NARP at one penny per share. (Appx. 1047-1048). NARP’s attorney responded with a May 17, 2007 letter that denied Richardson had any right to any ownership interest in NARP and forwarded a courtesy copy of the complaint for declaratory judgment used to commence the present action. (Appx. 1049-1051).

When questioned at trial about the secretly-signed October 4 option agreement and the April 17 letter demanding the right to exercise that option, Richardson admitted that there never was a valid option agreement and that the demand in the April 17 letter was erroneous. (Appx. 512-513). He viewed the April 17 letter and its demand on the non-existent option agreement as “an opening up of the negotiations that had been signed.” (Appx. 511). Richardson apparently took the same view of judicial proceedings

– the first two versions of his counterclaim relied on the non-existent option agreement to allege a right to purchase 7.5% of NARP's stock for one penny per share.

II. Trial Court Procedural History

Richardson filed three different versions of his counterclaim on his right to acquire 7.5% of NARP's stock. Each version was based on different facts and different theories. The last version was filed one month before the start of trial. No version of the counterclaim mentioned the \$415K contract upon which Richardson now relies. In his deposition, Richardson testified that he needed the Termination Agreement to facilitate the sale of RMI to DHS, but he disavowed this story only three months later at trial, claiming he did not want or need the Termination Agreement for anything related to that sale.

A. Richardson's Answer and Counterclaim

Richardson filed his original answer and counterclaim in August 2007. (Appx. 14-22). He claimed a right to purchase 7.5% of NARP's stock for one penny per share under the following story:

1. The parties entered the "2000 Agreement" in January 2000, and this Agreement entitled Richardson to 25% of NARP's stock. (Appx. 17-18, ¶¶ 32, 35).
2. In the fall of 2004, the parties reduced the stock percentage from 25% to 7.5%, and then put this in writing in an October 4, 2004 Option Agreement. (Appx. 18, ¶¶ 38-40).
Note: This is the draft option that Richardson had secretly signed without telling anyone and placed in his file.
3. The Option Agreement granted Richardson the right to purchase 7.5% of NARP's stock for one-penny per share. Id. at ¶ 41).
4. In November 2004, the parties executed the Termination Agreement and released all obligations owed under the 2000 Agreement. (Appx. 19, ¶¶ 44-46).

5. The October 4, 2004 Option Agreement (penny per share) was preserved by the Termination Agreement and remained fully intact under the Termination Agreement. (Id. at ¶¶ 47-49).
6. If the Option Agreement and Termination Agreement were not enforceable, then Richardson was entitled to be restored to his prior position under the 2000 Agreement as owning 25% of NARP's stock. (Appx. 20, ¶ 57).

In short, Richardson's first answer and counterclaim continued the claim made in the April 2007 letter that he had a valid option to purchase 7.5% of NARP's stock for one penny per share. In making this claim, he relied on the existence and validity of the Termination Agreement. And he never mentioned any claim that he had a \$415K contract as a result of the Charleston Meeting.

Richardson also counterclaimed for promissory estoppel. He alleged that Castellani had promised Richardson that he could buy 7.5% of NARP's stock for one penny per share, and that he had relied on this promise to his detriment. (Appx. 21).

B. Richardson's Deposition Testimony

Richardson gave his sworn deposition in May 2008. In that deposition, he explained that it was getting down to "crunch time" with the RMI sale to DHS, and the purpose of having Castellani sign the Termination Agreement was to facilitate that sale. (Appx. 331-332, 337). He would disavow this testimony at trial, explaining it as follows: "At that time, that's what I could remember. So I told you that." (Appx. 335). Miraculously, only three months later, Richardson "remembered" at trial that he did not need the Termination Agreement for any reason related to the sale of RMI to DHS. (Appx. 336).

C. Richardson's Amended Answer and Counterclaim

Richardson filed the second version of his counterclaims on July 12, 2008. (Appx. 27-38). The story changed – the Atlanta Meeting was mentioned for the first time and became a key fact – but Richardson continued to rely upon the “secretly signed” October 4, 2004 Option Agreement under the following new story:

1. The parties entered the 2000 Agreement in January 2000, and this Agreement entitled Richardson to 25% of NARP's stock. (Appx. 32-33, ¶¶ 45, 48).
2. The parties later agreed to reduce the stock swap from 25% to 7.5%. (Appx. 33, ¶ 51).
3. In the fall of 2004, the parties met in Atlanta and reached a two-part agreement whereby Castellani agreed to release his interest in RMI for 7.5% of the proceeds from the impending sale of RMI, and Richardson agreed to release his interest in NARP for an option agreement giving him the right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 33-34, ¶¶ 52-53).
4. The parties memorialized Richardson's right under this “Atlanta agreement” in the [secretly-signed] October 4, 2004 Option Agreement giving Richardson the right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 34, ¶¶ 54-56).
5. The parties also executed a “companion document,” that being the Termination Agreement. (Id. at ¶ 58). Under this Termination Agreement, the parties released each other from the obligations owed under the 2000 Agreement but preserved Richardson's option right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 34-35, ¶¶ 60-61).
6. Alternatively, if the foregoing agreement is not enforceable, then Richardson would revert to his prior ownership interest of 7.5% in NARP. (Appx. 36, ¶ 71).

As in his first counterclaim, Richardson also claimed promissory estoppel relying solely on the alleged right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 36-37). Again, Richardson did not mention or claim that the parties had agreed to the \$415K contract in the July 2004 Charleston Meeting. And again, Richardson relied on

the existence and validity of the Termination Agreement to claim a right to acquire 7.5% of NARP's stock.

D. Richardson's Revised Amended Answer and Counterclaim

Richardson filed the third version of his counterclaims on July 25, 2008, thirty-two days before trial. (Appx. 39-50). Again, there were changes to Richardson's story. The Atlanta Meeting became the sole source of the alleged new agreement. Specific references to the "secretly signed" October 4, 2014 Option Agreement disappeared and were replaced by references to "draft" option agreements. Still, Richardson continued to rely on a right to purchase NARP's stock for one penny per share:

1. The parties entered the 2000 Agreement in January 2000, and it entitled Richardson to 25% of NARP's stock. (Appx. 44-45, ¶¶ 45, 48).
2. The parties later agreed to reduce the stock percentage from 25% to 7.5%. (Appx. 45, ¶ 51).
3. Throughout the fall of 2004, the parties discussed treating Richardson's ownership interest in NARP as an option to purchase 7.5% of NARP's stock, exchanging draft options to this effect. (Id. at ¶ 52).
4. In October of 2004, the parties met in Atlanta and reached a two-part agreement whereby Castellani agreed to release his interest in RMI for 7.5% of the proceeds from the impending sale of RMI, and Richardson agreed to release his interest in NARP for an option agreement giving him the right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 46, ¶¶ 53-54).
5. In November 2004, the parties executed a "companion document," *i.e.*, the Termination Agreement. (Id. at ¶ 55).
6. The Termination Agreement, as agreed in the Atlanta Meeting, released the parties from the obligations owed under the 2000 Agreement. But, as also contemplated in the Atlanta Meeting, the Termination Agreement reserved Richardson's right to purchase 7.5% of NARP's stock for one penny per share. (Id. at ¶¶ 57-58).

As in his first counterclaim and amended counterclaim, Richardson also claimed promissory estoppel relying solely on the alleged right to purchase 7.5% of NARP's stock for one penny per share. (Appx. 48-49). Again, Richardson did not mention or claim that the parties had agreed to the \$415K contract in the July 2004 Charleston Meeting. And again, Richardson relied on the existence and validity of the Termination Agreement.

E. Richardson's Trial Testimony

The trial was conducted over five days, August 25-29, 2008. (Appx. 62). Richardson testified three different times during the trial. His story continued to change.

NARP called Richardson to the stand as part of its case-in-chief. On direct examination by NARP's counsel, Richardson testified as summarized below.

Richardson admitted that the "secretly signed" October 4, 2004 Option Agreement was never fully executed, and there never was an option agreement between the parties giving him the right to buy 7.5% of NARP's stock for one penny per share. (Appx. 295, 296). He thus disavowed the contract claim made in the various versions of his counterclaim.

The result of the Atlanta Meeting was not the agreement described in his amended and revised amended counterclaims. Rather, Richardson testified that the parties left the Atlanta Meeting with a three-part proposal to be worked out: (1) the Termination Agreement; (2) an option agreement giving Richardson the right to purchase 7.5% of NARP's stock for one penny per share; and (3) Richardson would donate 7.5% of the proceeds from the RMI sale to a charity selected by Castellani. (Appx. 298; see also Appx. 508-509, 56-517). This "donation" proposal was never mentioned in any of

Richardson's counterclaims. The deal never came to fruition, because Richardson refused to comply with the "charity" part of the deal. (Appx. 357-358; see also Appx. 392-393; 481, 487, 501, 520). Importantly, Richardson admitted that he never told anyone during the various discussions that he thought he had a right to simply buy the stock for a set price directly from NARP. (Appx. 358). In other words, Richardson never told anyone that he believed that the parties had already reached the \$415K contract in the July 2004 Charleston Meeting.

As to the execution of the Termination Agreement, and despite his assertion that it should have been executed with the other two parts of the Atlanta proposal (Appx. 306), Richardson admitted that he had signed the Termination Agreement, forwarded it to Castellani and requested that he sign it and return it to Richardson. (Appx. 335, 340-341; see also Appx. 489-492; 1035). Despite his prior deposition testimony that the purpose of obtaining the Termination Agreement was to facilitate the sale of RMI to DHS, Richardson denied this at trial. (Appx. 329). He now testified that the primary purpose of the Termination Agreement was the three-part deal to resolve the stock ownership issues. (Appx. 334).

Richardson also denied needing the Termination Agreement for any reason related to the RMI sale to DHS: it was not a required document – no one asked for a release from Castellani – it was never given to DHS as part of the closing package. (Appx. 336). This is not surprising, since Richardson had told DHS he was the 100% owner of RMI. The Termination Agreement made this representation true after it had been made to DHS and before the closing of the sale to DHS.

The Termination Agreement also prevented Castellani from demanding his shares in RMI before the sale to DHS. (Appx. 356). This was very important. Castellani had earlier indicated an interest in participating as a shareholder in any RMI deal. (Appx. 1013). The execution of the Termination Agreement meant that Richardson did not have to include Castellani in the sale of RMI in any way. (Appx. 356). It also meant that Castellani could not challenge the apportionment of the purchase price between assets and goodwill, nor could he challenge the tax strategy in structuring the sale to DHS.

On the third day of trial (August 27), Richardson was asked if Castellani had actually agreed in Charleston to accept a cash payment in lieu of stock in RMI. Richardson admitted that Castellani had not agreed to this. (Appx. 524-526) Upon re-direct by his attorney, Richardson testified for the first time that he “thought” Castellani had agreed at the Charleston Meeting that Richardson could buy the stock directly from NARP by writing a check for 7.5% of the proceeds from the RMI sale, *i.e.*, the \$415K contract. (Appx. 544). In all of his prior testimony, Richardson had said that was what he “wanted” to do and he had “assumed” and “believed” and was under the “impression” that was how it would happen, but he never testified that Castellani had agreed to it. (See Appx. 304, 471, 477-478, 501, 525). In fact, he admitted that when he proposed this to Castellani, Castellani said no. (Appx. 526). It is nevertheless Richardson’s current theory, never mentioned in any of the three versions of his counterclaims, that he and Castellani agreed in the Charleston Meeting that Richardson could buy the stock directly from NARP by paying 7.5% of the proceeds from the RMI sale directly to NARP. Castellani squarely denied this claim. (Appx. 281-282).

In short, Richardson's story has changed at every turn in this case about every aspect of this case. All of this chicanery is precluded by the express terms of the Termination Agreement, which should be enforced as written, regardless of Richardson's wisdom or folly in signing it and then asking Castellani to sign it, and regardless of any failure by Richardson to protect his ever-changing alleged "rights" when he drafted the Termination Agreement.

Importantly, Richardson never claimed the Termination Agreement was ambiguous or invalid. (Appx. 342). To the contrary, his pleadings and testimony asserted the Termination Agreement was valid and terminated the 2000 Agreement, so long as he got what he wanted under his ever-changing story. In other words, Richardson wanted the Termination Agreement enforced to the extent it terminated Castellani's right to any stock in RMI, but he claimed the Termination Agreement should not be enforced against him if it did not protect his alleged right to acquire stock in NARP.

STANDARD OF REVIEW

The question of whether a contract is ambiguous is a question of law that is reviewed *de novo* on appeal. *Lee v. University of S.C.*, 757 S.E.2d 394 (S.C. 2014). The first step in this question of law is for the court to identify the ambiguity specifically. *Bardsley Government Employees Ins. Co.*, 747 S.E. 2d 436, 440 (S.C. 2013). The trial court and the Court of Appeals erroneously skipped this first step and found the Termination Agreement was ambiguous without any reasoning and without identifying the ambiguity. *Id.*

The question of whether a party is entitled to a directed verdict is also a question of law that is reviewed *de novo* on appeal. *Estate of Haley ex rel. Haley v. Brown*, 634

S.E.2d 62, 68-69 (S.C. App. 2006); *McEntire v. Mooregard Exterminating Servs., Inc.*, 578 S.E.2d 746, 748 (S.C. App. 2003).

ARGUMENTS

The Termination Agreement is not ambiguous and therefore must be enforced according to its terms. It captured and extinguished all prior contracts, agreements, discussions, promises, etc., including any all claims that related in any manner to the 2000 Agreement. There is no evidence of any contract or promissory estoppel arising after the date of the Termination Agreement. Accordingly, NARP is entitled to a directed verdict on Richardson's contract claim and promissory estoppel claim.

Absent the Termination Agreement, Castellani could have insisted on participating in the DHS sale a shareholder, which would have been to Castellani's financial advantage and Richardson's disadvantage for several reasons. First, Richardson calculated 7.5% of the sales proceeds by excluding the escrow amount of \$500,000.00. (Appx. 1012). As a shareholder, Castellani would have received 7.5% of this amount (less taxes) and Richardson would have lost the same amount.

Second, Richardson calculated 7.5% of the asset purchase amount of the sale as follows: (1) RMI received the funds and paid taxes; (2) RMI paid the after-tax funds to Richardson, who then paid personal taxes on that amount; and (3) Richardson then calculated 7.5% of this after-tax amount as payable to Castellani, who then would have to pay his own personal taxes. (Appx. 1012). As a shareholder, Castellani would have received 7.5% directly from RMI and therefore avoided the personal taxes paid by Richardson.

Third, Castellani could have challenged the apportionment of the total sales price between goodwill and assets. The “goodwill” portion of the sales price was paid directly to Richardson, thereby benefitting Richardson by avoiding the corporate tax level before he paid his personal taxes on the funds. For every dollar transferred from the goodwill price to the asset price, Castellani’s 7.5% would have increased by the difference between Richardson’s personal tax rate and the lower corporate tax rate for RMI. Richardson’s “take” would have been decreased by the same amount.

In short, Richardson’s ability to exclude Castellani from the DHS sale as a result of the Termination Agreement yielded financial gain to him and financial loss to Castellani. Having achieved this, Richardson now wants out of the Termination Agreement.

I. NARP is entitled to a directed verdict on Richardson’s contract claim.

There is no evidence of any contract or agreement between the parties arising after the Termination Agreement. Thus, if the Termination Agreement is valid, NARP is entitled to a directed verdict on Richardson’s contract claim.

The trial court found that the Termination Agreement was ambiguous, and the Court of Appeals agreed. But neither court ever identified specifically any ambiguity within the four corners of the Termination Agreement that created a jury question on the force and effect of the Termination Agreement.

As demonstrated below, the Termination Agreement is not ambiguous and it extinguished all agreements, discussions, etc. between the parties that arose before the Termination Agreement. Accordingly, NARP is entitled to a directed verdict on Richardson’s contract claim.

A. The Termination Agreement extinguished all agreements, discussions, negotiations, etc. that were in any manner related to or arose out of the 2000 Agreement between the parties, including the 2000 Agreement itself and any amendments to the 2000 Agreement.

The Termination Agreement is a simple and straightforward agreement between the parties to the 2000 Agreement. (Appx. 911). Its plainly stated purpose is to terminate all aspects of the 2000 Agreement and any related matters: “The parties desire to terminate any purported agreements, understandings or arrangements in any way arising out of or relating in any manner to the [2000 Agreement].” (Id. at ¶ B) (emphasis added). To this end, the parties agreed that “the [2000 Agreement] and any and all agreements, understandings, undertakings or arrangements that in any way arose or may have arisen out of or relate in any manner to the [2000 Agreement], are terminated.” (Id. at ¶ 1) (emphasis added). Richardson testified that he fully understood the Termination Agreement and that its purpose was to get rid of the 2000 Agreement. (Appx. 338-339).

The parties settled all claims and potential claims related in any manner to the 2000 Agreement: “All claims and potential claims of any nature whatsoever that have been, could have been, or in the future could be asserted by the parties arising out of or relating in any manner to the [2000 Agreement] are hereby settled, compromised and released” (Appx. 911 at ¶ 2) (emphasis added). The parties also released each other from any claims related in any manner to the 2000 Agreement: “[The parties] hereby remise, release and forever discharge [each other] from all, and all manner of, actions, causes of action, suits, . . . covenants, contracts, controversies, agreements, promises, . . . claims and demands whatsoever, whether in law or equity, which [the parties] had, now have, . . . or may have against [each other] arising out of or relating to the [2000

Agreement] from the beginning of time to the date of this [Termination Agreement].” (Appx. 911-912, ¶¶ 3 & 4) (emphasis added).¹

The Termination Agreement also contained a classic merger clause that extinguished all prior agreements, etc.: “This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties.” (Appx. 912, ¶ 6) (emphasis added). Finally, each party represented and warranted that he had “not assigned any of its purported rights or claims under the [2000 Agreement] to any other person or entity.” (Appx. 913, ¶ 8).

In short, the Termination Agreement obliterated the 2000 Agreement and anything related in any manner to the 2000 Agreement, including but not limited to any prior discussions, promises or agreements. Thus, the Termination Agreement plainly captured and extinguished the alleged \$415K oral amendments to the 2000 Agreement that Richardson now claims were reached in the July 2004 Charleston Meeting. The Termination Agreement also plainly captured and extinguished any “promises” allegedly made by Castellani which could be the basis for any promissory estoppel claim. It is undisputed that there is no evidence of any promissory estoppel or contract after the execution of the Termination Agreement and, therefore, NARP is entitled to a directed verdict on all contract and promissory estoppel claims made by Richardson.

¹ These “release” paragraphs excepted the “separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.” (Appx. 912, ¶¶ 3 & 4). This exception from the release paragraphs appears to be the basis for Court of Appeals’ finding that the Termination Agreement was ambiguous. As demonstrated later, no ambiguity arises from this exception to the “release” paragraphs.

B. The Termination Agreement is not ambiguous.

The question of whether a contract is ambiguous is a question of law for the court. *Lee v. University of S.C.*, 757 S.E.2d 394, 397 (S.C. 2014); *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139, 144 (S.C. App. 2009). The existence of an ambiguity is be determined from the language used in the four corners of the contract. *Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 545 (S.C. App. 2008). When that language plainly sets forth the parties' rights and obligations, there is no ambiguity and the courts must enforce the contract as written without regard to anything outside the four corners of the contract. *Id.* at 542-543. Courts cannot alter an unambiguous contract by construction or make a new contract for the parties; rather, courts "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." *Lee*, 757 S.E.2d at 397 (citations omitted). This is particularly true when (as here) the contract contains a merger clause. *Wilson v. Landstrom*, 315 S.E.2d 130, 134 (S.C. App. 1984) (merger clause renders the agreement fully integrated and extinguishes contemporaneous and prior agreements).

A contract is ambiguous only if it is capable of more than one meaning or its meaning is unclear. *Bardsley v. Government Employees Ins. Co.*, 747 S.E.2d 436, 439 (S.C. 2013). "[W]hen a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient." *Id.* at 440.

1. The trial court and the Court of Appeals did not identify how the Termination Agreement was ambiguous as required by this Court's opinion in *Bardsley, supra*.

The trial court summarily ruled that the Termination Agreement was ambiguous and therefore denied NARP's directed verdict motion: "[T]he terms of that contract [Termination Agreement] are absolutely ambiguous. Read as a whole, it borders on being completely un-understandable." (Appx. 428). This is nothing more than a "simple finding of ambiguity absent any reasoning," and the trial court never "set forth how [the Termination Agreement was] capable of more than one meaning or [was] obscure in meaning." *Bardsley*, 747 S.E.2d at 439.

The Court of Appeals also failed to explain how the Termination Agreement was ambiguous. The court reviewed the facts and procedural history, including a recitation of the termination provisions and merger clause in the Termination Agreement, and then stated:

To complicate matters further, the parties concede that no written option agreement dated December 15, 2004 existed at the time of the Termination Agreement. Moreover, the parties never entered into an option agreement dated December 15, 2004.

North American Rescue Prods. v. Richardson, 720 S.E.2d 53, 57 (S.C. App. 2011). This observation is in reference to paragraphs 3 and 4 of the Termination Agreement, both of which stated:

It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

(Appx. 911-912, ¶¶ 3 and 4). The "[15 Dec]" part of the quote above represents a handwritten notation made in blanks set forth in the Termination Agreement. It is

undisputed that Richardson wrote in the date of “15 Dec.” There is nothing unclear about these paragraphs – they simply and only state that the release provisions of the Termination Agreement do not apply to the “15 Dec” option agreement. Nevertheless, it appears that the Court of Appeals found that the “15 Dec” provisions made the Termination Agreement ambiguous.

2. The exemption of the “15 Dec” option agreement from the release provisions of the Termination Agreement did not create any ambiguity in the Termination Agreement.

When Richardson left the October 29 Atlanta Meeting, he was determined to get the Termination Agreement executed and in his hands: “the only part of our agreement that we had intended to complete as a result of the Atlanta meeting is the settlement agreement [the Termination Agreement].” (Appx. 310) (emphasis added). To that end, he had his attorney draft the Termination Agreement and, on November 5, he signed the Termination Agreement and forwarded it to Castellani, requesting that Castellani sign it and return it. Nothing in Richardson’s request made the Termination Agreement conditional upon the execution of any other agreement or the occurrence of any other event. When he did not receive the executed Termination Agreement from Castellani, he again requested on November 13 that Castellani sign and return the Termination Agreement. Again, nothing in his request made the Termination Agreement conditional upon the execution of any other agreement or the occurrence of any other event. More importantly, nothing in the Termination Agreement itself made any of its provisions conditional upon any other event or agreement, including but not limited to the execution of the “15 Dec” option agreement that was excepted from the release provisions of the Termination Agreement.

It is undisputed that that the “15 Dec” option agreement did not exist when the parties entered the Termination Agreement. It is also undisputed that the parties never entered into any option agreement before or after the Termination Agreement, dated “15 Dec” or otherwise.² At most, given the non-existence of the “15 Dec” option agreement,” the reference to it in the Termination Agreement indicated a possible agreement to agree in the future. Such provisions in a contract are not enforceable if, as here, material terms are left to future determination, but the remainder of the contract is enforced as written. *Ellis v. Taylor*, 449 S.E.2d 487, 488-489 (S.C. 1994).

Richardson drafted the Termination Agreement. If he desired that the Termination Agreement be conditional upon the happening upon some event, including but not limited to the execution of the “15 Dec” option agreement or some other agreement, it was his responsibility to place that condition in the Termination Agreement. *Southern Atl. Fin. Servs., Inc. v. Middleton*, 590 S.E.2d 27, 29 (S.C. 2003).³ The same is true if Richardson intended that some pre-existing agreement survive the Termination Agreement. *Id.* Having failed to include any such “outward expression” in the

² There could not be any “oral” option agreement as a matter of law. NARP is a Delaware corporation. As a matter of Delaware law, any option to purchase stock from NARP had to be in a writing that was approved by NARP’s Board of Directors and set forth the specific terms of the option (*e.g.*, amount of stock, the duration of the option, the consideration paid for the option). 8 Del. C. § 157; *Grimes v. Alton, Inc.*, 804 A.2d 256 (Del. 2002). It is undisputed that Richardson and NARP never entered a written option agreement meeting these requirements. These requirements are binding in South Carolina, because South Carolina law has statutorily adopted the “internal affairs doctrine,” which precludes South Carolina from regulating the internal affairs of a foreign corporation authorized to do business in South Carolina, like NARP here. S.C. Code Ann. § 33-15-105(c). An option to purchase stock from a corporation is firmly established as an internal affairs matter. *Mariasch v. Gillette Co.*, 521 F.3d 68, 72 (1st Cir. 2008), *citing, quoting, and applying inter alia* *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 129 (1933) and *Beard v. Elster*, 160 A.2d 731, 735 (Del. 1960). Thus, the requirements of Delaware law for options to purchase stock from a Delaware corporation must be met in South Carolina, and it is undisputed such did not happen in this case.

³ Assuming the “15 Dec” language created some ambiguity, and it did not, it must be “construed liberally and interpreted strongly in favor of the non-drafting party [NARP].” *Southern Atl. Fin. Servs., Inc. v. Middleton*, 590 S.E.2d 27, 29 (S.C. 2003). As the drafting party, Richardson had “the greater opportunity to prevent mistakes in meaning [and is therefore] responsible for any ambiguity and should be the one to suffer from the shortcomings.” *Id.*

Termination Agreement, Richardson is bound by it because the courts cannot and will not consider the “secret intentions” of a contracting party. *Lee*, 757 S.E.2d at 397; *Blakeley v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976). Richardson alone must bear the consequences of his failure to do so. *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). In short, Richardson failed to protect his alleged rights, but the courts must nevertheless enforce the Termination Agreement as written. *Lee*, 757 S.E.2d at 397 (courts “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”).

C. NARP is entitled to a directed verdict on Richardson’s contract claim.

The Termination Agreement obliterated the 2000 Agreement and anything related to it, including but not limited to the \$415K contract that Richardson now claims was reached in the Charleston Meeting. The paragraphs referencing the non-existent “15 Dec” option agreement did not render the Termination Agreement ambiguous – those paragraphs simply and only stated that the release provisions of the Termination Agreement did not apply to the “15 Dec” option agreement. Nothing in the Termination Agreement made its provisions conditional upon the happening of some future event, including but not limited to the execution of the “15 Dec” option agreement that did not exist at the time of the Termination Agreement. If Richardson believed the Termination Agreement was or should be conditional upon such an event, it was his responsibility to

ensure that contingency was placed in the Termination Agreement. Having failed to do so, it is respectfully submitted that this Court has no choice but to enforce the Termination Agreement as written, “regardless of its wisdom or folly, apparent unreasonableness, or [Richardson’s] failure to guard [his alleged] rights carefully.” *Lee*, 757 S.E.2d at 397. Finally, there is no evidence of any contract entered into after the Termination Agreement and, therefore, NARP is entitled to a directed verdict on Richardson’s contract claim.

II. NARP is entitled to a directed verdict on Richardson’s claim for promissory estoppel.

Promissory estoppel arises only upon proof of the following elements: (1) an unambiguous promise by the promisor, *i.e.*, NARP here; (2) reasonable reliance on the promise by the promisee, *i.e.*, Richardson here; (3) reliance by the promisee (Richardson) was expected by and foreseeable to the promisor (NARP); and (4) injury caused to the promisee (Richardson) by his reasonable reliance, *i.e.*, detrimental reliance. *Rushing v. McKinney*, 633 S.E.2d 917 (S.C. App. 2006). The only “promise” in the evidence is Richardson’s testimony that he “thought” Castellani had agreed to the \$415K contract in the July 2004 Charleston Meeting, which occurred before the parties entered into the Termination Agreement.

There could be no promissory estoppel prior to the execution of the Termination Agreement. Until that time, Richardson had a contractual right under the 2000 Agreement to demand 7.5% of NARP’s stock in exchange for RMI issuing 7.5% of its stock to Castellani. As shown earlier, the merger clause in the Termination Agreement captured and extinguished “*all* prior discussions and agreements, *both* oral and written, between the parties” that were related to or arose from the 2000 Agreement. (Appx. 912,

¶ 6) (emphasis added). Thus, any promissory estoppel had to arise after the Termination Agreement.

There is no evidence of any element of promissory estoppel after the Termination Agreement. There were discussions and negotiations after the Termination Agreement, but no promises or any other element of promissory estoppel. Accordingly, NARP is entitled to a directed verdict on Richardson's claim for promissory estoppel.

CONCLUSION

Richardson wanted the Termination Agreement. He asked for the Termination Agreement. He got the Termination Agreement. But now that it no longer suits him, and now that Castellani cannot assert any shareholder rights in the sale of RMI to DHS, Richardson wants out of the Termination Agreement. To that end, he has told a multitude of different stories on how and why he has a right to acquire NARP's stock under the secretly-signed October 4 option agreement or some variant of the 2000 Agreement, all of which the Termination Agreement expressly and repeatedly terminated, settled, and released. Preventing this type of chicanery is precisely why courts enforce contracts as written and according to their terms regardless of their wisdom or folly, apparent unreasonableness, or a party's failure to guard his rights carefully.

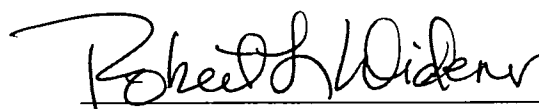
The Termination Agreement is not ambiguous. Nothing in it makes its provisions contingent upon any event, including but not limited to the execution of the "15 Dec" option agreement or any other agreement. The plain language of the Termination Agreement obliterates the 2000 Agreement and anything related to it, including the \$415K contract that Richardson now claims was reached in the Charleston Meeting before the parties entered the Termination Agreement. The courts cannot rewrite the

Termination Agreement to protect Richardson's latest chapter in his ever-changing story on how and why he has a right to acquire stock in NARP. That was his obligation as the party who drafted the Termination Agreement, signed it, and then requested the other party to also sign it.

There is no evidence of any contract or promissory estoppel arising after the Termination Agreement. Accordingly, NARP is entitled to a directed verdict on all of Richardson's claims.

For all of the foregoing reasons, the appealed judgment should be reversed and the case should be remanded for the entry of judgment in favor of NARP.

Respectfully Submitted,



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July 10, 2014
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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

v.


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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondent/Petitioner's Brief of Petitioner by depositing a copy in the United States Mail, postage prepaid, on July 10, 2014 addressed to the attorneys of record, as follows:

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