

THE STATE OF SOUTH CAROLINA
In The 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

RECEIVED

AUG 21 2014

S.C. Supreme Court

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

v.

P.J. Richardson, Petitioner/Respondent.

RESPONDENT'S BRIEF

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

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

Attorneys for P.J. Richardson

Table of Contents

Counter-Statement of Issues	1
I. Did the trial court properly deny NARP’s motion for directed verdict as to Richardson’s contractual claims because ample evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP’s stock and that right had not been terminated?	1
II. Did the trial court properly deny NARP’s directed verdict motion as to promissory estoppel because ample evidence existed that Richardson relied on NARP’s promise to sell Richardson 7.5% of NARP stock?.....	1
Counter-Statement of the Case	2
Standard of Review	11
Argument	12
I. The trial court properly denied NARP’s motion for directed verdict because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP’s stock and that right had not been terminated.	12
A. The document containing a “termination” provision and merger clause was not a stand-alone agreement, but was instead part of a three-part agreement which never materialized, leaving the parties subject to their 2000 Agreement as amended.	13
1. The document containing the termination provision was just one step in a potential three-part agreement.	14
2. The presence of a merger clause does not change the analysis	16
B. The trial court properly found the document containing the termination provision to be ambiguous and correctly articulated his reasoning.	18
1. The trial court articulated his reasoning as to why the document containing the termination provision was ambiguous	19
2. The document containing the termination provision is ambiguous on its face and requires the Court to look beyond the four-corners of the single document containing the provision	20
3. Any ambiguity cannot lawfully be construed against Richardson as both parties drafted portions of the overall three-part agreement (which was never consummated) with the aid of lawyers	22
II. The trial court properly denied NARP’s directed verdict motion as to promissory estoppel because evidence existed that Richardson relied on NARP’s promise to sell Richardson 7.5% of NARP stock	23
Conclusion	26

Table of Authorities

	Page(s)
Cases	
<i>Ashe v. Carolina & Nw. Ry. Co.</i> , 65 S.C. 134, 43 S.E. 393 (1903)	21
<i>Bardsley v. Gov't Employees Ins. Co.</i> , 405 S.C. 68, 747 S.E.2d 436 (2103)	19, 20
<i>Bishop Realty & Rentals, Inc. v. Perk, Inc.</i> , 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987).....	15
<i>Carey v. Snee Farm Cmty. Found.</i> , 388 S.C. 229, 694 S.E.2d 244 (Ct. App. 2010).....	19
<i>Columbia Hyundai, Inc. v. Carll Hyundai, Inc.</i> , 326 S.C. 78, 484 S.E.2d 468 (1997)	23
<i>Conway v. Charleston Lincoln Mercury Inc.</i> , 363 S.C. 301, 609 S.E.2d 838 (Ct. App. 2005).....	12
<i>Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund</i> , 371 S.C. 5, 636 S.E.2d 862 (2006)	12
<i>Dykema v. Carolina Emergency Physicians, P.C.</i> , 348 S.C. 549, 560 S.E.2d 894 (2002)	20
<i>Ellie, Inc. v. Miccichi</i> , 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).....	15
<i>F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.</i> , 350 S.C. 454, 567 S.E.2d 842 (2002)	11
<i>Fisher v. Stevens</i> , 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003).....	23
<i>Greenville v. Washington Am. League Baseball Club</i> , 205 S.C. 495, 32 S.E.2d 777 (1945)	21
<i>Housing Auth. of Columbia v. Cornerstone Hous., LLC</i> , 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003).....	15
<i>Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.</i> , 268 S.C. 80, 232 S.E.2d 20 (1977)	14

<i>Lingefelt v. Forest Hills Homes, Inc.</i> , 305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991).....	17
<i>NARP v. Richardson</i> , 396 S.C. 124, 720 S.E.2d 53 (2011)	10
<i>Powers Const. Co., Inc. v. Salem Carpets, Inc.</i> , 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984).....	24
<i>Quesinberry v. Rouppasong</i> , 331 S.C. 589, 503 S.E.2d 717 (1998)	11
<i>Sauner v. Public Serv. Auth.</i> , 354 S.C. 397, 581 S.E.2d 161 (2003)	12
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007)	23
<i>Sloan v. DOT</i> , 365 S.C. 299, 618 S.E.2d 876 (2005)	19
<i>Soil Remediation Co. v. Nu-Way Envtl., Inc.</i> , 325 S.C. 231, 482 S.E.2d 554 (1997)	18
<i>Steinke v. South Carolina Dep't of Labor, Licensing & Regulation</i> , 336 S.C. 373, 520 S.E.2d 142 (1999)	11
<i>Welch v. Epstein</i> , 342 S.C. at 300, 536 S.E.2d at 418-19	11, 18
<i>Wilson Group, Inc. v. Quorum Health Res., Inc.</i> , 880 F.Supp. 416 (D.C. S.C. 1995)	23
<i>Young v. Independent Publishing Co.</i> , 273 S.C. 107, 254 S.E.2d 681 (1979)	14
Other Authorities	
17A Am. Jur. 2d Contracts, § 377 (2004).....	22

Counter-Statement of Issues

- I. **Did the trial court properly deny NARP's motion for directed verdict as to Richardson's contractual claims because ample evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated?**

- II. **Did the trial court properly deny NARP's directed verdict motion as to promissory estoppel because ample evidence existed that Richardson relied on NARP's promise to sell Richardson 7.5% of NARP stock?**

Counter-Statement of the Case

NARP sued Richardson seeking to extinguish Richardson's rights in an agreement executed between Robert Castellani ("Castellani") and NARP, on one hand, and Richardson and Reeves Manufacturing, Inc. ("Reeves"), on the other. Richardson counterclaimed, for among other things, specific performance and promissory estoppel to have the parties' contract recognized and to enable him to acquire the 7.5% interest in NARP.

When Richardson and Bob Castellani, the owner of North American Rescue Products, Inc. ("NARP"), met, Richardson owned Reeves, an established company, which manufactured various health care and safety products for first responders, homeland security, and some military uses. (App. 130-131; *see generally* 294-653.) Reeves began providing infrastructure and support to NARP, which was by comparison a new company. This included assisting with the everyday operations of NARP. For example, Mr. Richardson's wife, Billie Richardson, kept the NARP books and monitored receivables and payables. (App. 132; 588-589.) Castellani used Reeves' plant in Maryland for storage and warehousing. (App. 157-158.) Reeves similarly provided other services to NARP, including supplies and selling various NARP products. (App. 313-315.) During this time frame, the companies also began cross-selling each other's products. (App. 315; 389.)

Due to the shared interests between the two companies and the importance of cross-selling their products between various customers, Castellani (for himself and NARP) and Richardson (for himself and Reeves) executed an agreement on January 1, 2000 ("2000 Agreement"). The 2000 Agreement formalized the ongoing business

relationship between the two companies, and allowed Castellani to offset some of his personal risk associated with his fledgling company. (App. 909.) Under the 2000 Agreement, NARP and Reeves agreed to pay each other commissions equal to 25% of the taxable income of their companies for cross-selling each other's respective products. (*Id.*) Further, Castellani and Richardson considered each other as entitled to a 25% ownership interest in the other's company under the 2000 Agreement. (App. 311; 360; 1013.) The parties performed under the 2000 Agreement for four years.

On July 29, 2004, Castellani and both Richardsons met in Charleston, South Carolina ("Charleston Meeting"). During this meeting, the parties agreed to modify the 2000 Agreement. They agreed to reduce the percentage of ownership each could obtain from the other's company from 25% to 7.5%. (App. 238-239.) The agreement was also modified because Richardson was about to sell Reeves to a third party. (App. 334-336.) Thus, the parties agreed that Richardson could acquire a 7.5% ownership interest in NARP in exchange for the cash equivalent (of 7.5% of Reeves stock) from proceeds from the pending sale of Reeves. (App. 381; 537; 600-602.) Both Castellani and Richardson acknowledged an agreement was reached in Charleston, South Carolina. (App. 238-239; 298-299; 311.) The parties' contract amendment was aimed at making the exchange of ownership shares easier in light of the sale of Reeves. (App. 376; 496-500.) Castellani 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. (App. 239.) Castellani stated that "[w]e agreed to this in Charleston." (App. 289.) Richardson also agreed that there was a "meeting of the minds in Charleston." (App. 521.)

Richardson remained ready, willing, and able to perform the contract as modified in Charleston in 2004. Richardson stated that “[m]y intention was to carry out and honor this agreement with Bob [Castellani] by paying out with the proceeds of the sale of Reeves.” (App. 328-329.) Richardson further stated that “I am bound now to honor that agreement.” (App. 522.) Richardson knew he only had to deliver a check to NARP for the proceeds from the sale of Reeves to comply with the amended agreement. (App. 524.) Richardson stated “that’s what it was, write him a check.” (App. 544.) Richardson admitted that “we’ve never hesitated or changed our position of what Bob [Castellani] is entitled to. He was entitled to 7½ percent of what we sold Reeves for” (App. 528.) Moreover, Richardson testified that the money from the sale of Reeves was in his account and he could “cut a check for that money to Bob [Castellani] today if he would take it”—that is, if Castellani would give Richardson the agreed-upon 7.5% interest in NARP. (App. 545; 526.)

NARP filed suit on May 17, 2007, seeking a declaration that Richardson was not entitled to purchase 7.5% of the stock of NARP. (App. 11.) NARP amended the complaint to assert a claim of breach of fiduciary duty against Richardson for actions he allegedly took as a former member of the NARP board. (App. 23.) Richardson answered and counterclaimed. (App. 39.) In his first counterclaim, Richardson alleged breach of contract and sought specific performance of one of two alternate agreements giving him a 7.5% ownership position in NARP, sought to estop NARP based on NARP’s promises upon which Richardson relied, or alternatively, sought money damages for NARP’s failure to honor the agreements. (App. 44-48 at ¶¶ 38-69.)

The matter was tried before a jury on August 25-29, 2008. At the close of the evidence, Richardson amended his pleadings to conform to the evidence presented at trial. (App. 655-663.) Counsel for Richardson presented the motion to amend stating, with respect to the contract claim: “the claim that we would like to pursue is that the 2000 agreement as modified orally in Charleston.” (App. 655-656.) The modification of the agreement in Charleston “changed the amount of the respected [sic] shares from 25 percent . . . to 7.5.” (App. 655-656.) Further, the modification of the contract “was done in the context of the pending sale of Reeves.” (*Id.*) In his motion, counsel went on to state:

And in that context, therefore, Mr. Castellani promised to give seven and a half percent of shares in his—of the shares of his company, however that would be styled, in return for 7.5 percent of the proceeds of the sale of Reeves.

(App. 656.) The trial court granted Richardson’s motion to amend stating “[i]n looking at the revised amended answer and counterclaim, I’m not sure it’s even necessary to grant the motion, it might very well be encompassed in that but I am granting the motion to amend the pleadings to conform to the proof.” (App. 663.) This amendment ruling was not challenged on appeal by NARP.

Richardson and NARP attempted to reach a subsequent agreement during late 2004 and on into early 2005. (App. 298.) Pursuant to the agreement as envisioned: (1) Richardson would receive an Option Agreement reflecting his 7.5% equity interest in NARP; (2) Richardson would make a charitable contribution to a charity identified by Castellani in an amount equal to 7.5% of the sale proceeds of Reeves, which was then negotiating the sale of its assets; and (3) the parties would execute a Termination, Release

and Settlement Agreement. (*See generally*, App. 856-907; 890-891; 894-897; 899-900; 904.)

One component of the three-part agreement was memorialized in a document identified as the “Agreement of Termination, Settlement and Release.” (App. 911-913.) This phase of the three-step agreement was designed to reiterate Richardson’s entitlement to 7.5% of the stock of NARP while ending all other rights under the parties’ 2000 Agreement as had previously been modified in their Charleston meeting. (App. 911-913.) In fact, the document containing the termination provision also contained two provisions protecting Richardson’s right to purchase 7.5% of NARP stock and demonstrated that the document was merely the first step in the ongoing attempt to reach the three-part agreement if it satisfied both Richardson and NARP. (App. 911-913.) The “Agreement of Termination, Settlement and Release” specifically referenced a future date of December 15, 2004, and the option agreement to then be executed as yet another step in this three-tiered agreement. (App. 912.) The termination provision and the reiteration of Richardson’s right to purchase 7.5% of NARP’s stock was intended to be joined with the last part of the agreement—payment by Richardson to a charitable organization of Castellani’s choosing in consideration for the NARP stock. (App. 283; 298.) These three steps, when combined, would have created the overarching three-part agreement between NARP and Richardson. (App. 298.) However, Richardson and his attorneys called the contribution to the charity into question, and this portion of the three-pronged agreement never materialized. (App. 392-393.) Accordingly, while the document containing the termination provision was signed by both parties, an overall agreement was never finally consummated by the parties because the document

represented only one part of the three-part agreement, or, as described at trial, the “three-legged stool.” (App. 381-382.) Hence, the parties were continuing to operate under and were bound by the 2000 Agreement as modified in Charleston during the negotiation phase and after the three-part agreement failed to materialize. The jury found that 2000 Agreement, as modified, was capable of enforcement or performance since portions of the three-pronged agreement never came to fruition and the termination provision did not end Richardson’s right to a 7.5% share in NARP. (App. 7.)

Castellani and NARP never fully performed under the Charleston agreement reached in 2000, and failed to tender to Richardson the requisite shares in exchange for the proceeds from the sale of Reeves (which proceeds amounted to \$415,988). (App. 150-153; 300-305; 381-382; 523; 1012.) Instead, as set forth above, NARP argued the Charleston agreement had been terminated.

Based on the background and on the evidence outlined above, directed verdict motions were denied and the matter was submitted to the jury on a special verdict form posing specific fact questions and requiring the jury to give categorical answers. (App. 7.) Neither party objected to the form of the special verdict.

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 further 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. (App. 8.) 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?

(App. 7.) 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?” (App. 8 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.” (App. 6.) The judgment did not state anything else.

In another portion of the jury verdict form that Richardson avers related to Richardson’s promissory estoppel claim, the trial court inquired of the jury as to what price Richardson should pay for the percentage share of NARP. The jury wrote \$2,936,000. (App. 7.)¹ Richardson’s position is that this dollar figure pertained to the

¹ There was competing evidence at trial introduced respecting the value of NARP shares at the time. (App. 576-577.) To the extent Richardson was going to be permitted to purchase NARP stock because of a promise permitting him to do so under a promissory estoppel claim, Richardson maintains the jury weighed the competing evidence on a purchase price and settled on \$2,936,000, a figure within the range of that evidence. It should be noted that post judgment, NARP has taken actions which, according to Richardson, have drastically reduced the value of NARP stock to near worthless stock. This action is the subject of subsequent litigation by Richardson against NARP and

cause of action for promissory estoppel that Richardson pled and that the trial court presented to the jury.² The trial court did not utilize any dollar number in entering the judgment in favor of Richardson for specific performance. (App. 6.) As noted, the parties' Charleston agreement provided a price term—the amount of the proceeds from the sale of Reeves.

Following trial, post-trial motions for judgment notwithstanding the verdict and to alter or amend the verdict were made immediately after the return of the verdict. (App. 848-854.) The trial court denied all such motions. (*Id.*) The trial court prepared the judgment that day and judgment was entered September 2, 2008. (App. 6.)

NARP moved to alter or amend the judgment on September 15, 2008. (App. 51.) Among other things, in its motion NARP claimed that the jury did not find that NARP had breached any contract and that Richardson failed to demonstrate that he was ready to pay for the 7.5% stake in NARP. (*Id.*) However, NARP withdrew its post-trial motion by notice filed September 23, 2008. (App. 54.) Thereafter, NARP served and filed its notice of appeal on October 3, 2008, which was received by Richardson on October 6, 2008. (App. 55.) Richardson did not challenge the trial court's ruling on his new trial *nisi* motion because the trial court ultimately entered judgment in his favor for the relief he requested—specific performance—on the only contract the jury found capable of performance.

NARP filed its notice of appeal and contemporaneously asserted, for the first time, an incorrect interpretation of the judgment rendered by the trial court. NARP sent

others. These matters are of public record.

² As an alternative claim, Richardson claimed that through promissory estoppel, he had the right to purchase NARP stock based on promises NARP made and relied upon.

to counsel for Richardson a purported tender of NARP stock on October 6, 2008, with a demand that Richardson tender \$2,936,300.00 as payment for such stock no later than October 10, 2008, at 4 p.m., supposedly as required by NARP's view of the trial court's judgment for specific performance.³ (App. 1053.) This demand was rejected by Richardson. Richardson then timely cross-appealed on October 13, 2008, to challenge NARP's mischaracterization of the trial court's judgment reflected in the NARP October 6 demand letter, in case for some reason the trial court or the court of appeals were to agree with NARP's counsel's mischaracterization. (App. 56.) NARP attempted to have the court of appeals remand the question regarding how much Richardson would pay to NARP for his 7.5% share in NARP but the court of appeals denied that request. (App. 58-61.) NARP did not seek certiorari on that issue from this Court. (App. 1416.)

The court of appeals heard NARP's appeal and Richardson's cross-appeal, denying NARP's motion to have the cross-appeal dismissed on grounds that Richardson was supposedly not an aggrieved party. (*See* App. 1275.)⁴ In its opinion, the court of appeals agreed with Richardson, the trial court, and the jury to the extent that it concluded an enforceable contract existed between the parties. *NARP v. Richardson*, 396 S.C. 124, 720 S.E.2d 53 (2011). Instead of enforcing the valid agreement it found to exist, however, the court of appeals concluded that the parties had not included a price term in their contract and that the dollar figure contained on the verdict form should be used for that purpose. *Id.* The court of appeals reached that decision despite the lack of

³ Although this letter was not presented to the trial court, it was part of the appellate record because it was attached as an exhibit to NARP's motion for limited remand (which was denied), dated November 19, 2008 and filed in the court of appeals. (App. 58; *see also* App. 61.)

⁴ NARP did not seek certiorari review of the court of appeals' denial of its motion to dismiss Richardson's appeal.

any amount on the face of the judgment and despite the clear contractual terms Richardson and NARP agreed to as recognized by the jury.

Both parties petitioned the court of appeals for rehearing. (App. 1227-1274.) The court of appeals denied both petitions. (App. 1213.) Both parties then filed petitions for writ of certiorari with this Court. This Court originally granted both parties' petitions for certiorari and summarily addressed the issues raised on certiorari in its March 26, 2014, Memorandum Opinion No. 20014-MO-009. Both parties petitioned this Court for rehearing on the Memorandum Opinion. By Order dated May 23, 2014, this Court granted the petitions for rehearing and ordered the parties to brief the issues on certiorari.

Standard of Review

When reviewing a ruling on a motion for directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 567 S.E.2d 842 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, the trial judge must submit the case to the jury. *Quesinberry v. Rouppasong*, 331 S.C. 589, 503 S.E.2d 717 (1998). This Court can reverse the trial court only when there is no evidence to support the trial court's decision to submit the case to the jury. *Steinke v. South Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). In "considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

Argument

I. The trial court properly denied NARP's motion for directed verdict on Richardson's contractual claims because evidence demonstrated that Richardson possessed a contractual right to purchase 7.5% of NARP's stock and that right had not been terminated.

NARP accuses Richardson of "chicanery" and of "secretly" signing documents, etc. NARP's accusations are unpersuasive, and demonstrate the weakness of its legal positions. A jury heard NARP's evidence and considered all of NARP's accusations, which Richardson steadfastly denied, and the jury determined that NARP has broken promises to Richardson and breached its contractual duties to him. Further, after the judgment in this matter, NARP took actions apparently rendering the NARP stock to which Richardson is entitled of little value.⁵

Moreover, NARP wishes this Court to ignore the proper standard of review. NARP argues it should have obtained a directed verdict based on the written document containing a "termination" provision which was but one step of a three-part agreement. NARP argues this point as if no other evidence was presented at trial beyond the "termination" provision. This is not accurate and ignores ample evidence that the parties' ongoing relationship continued to be governed by the 2000 Agreement⁶ as orally

⁵ Richardson has been forced to initiate separate litigation because of NARP's actions in this regard.

⁶ To the extent NARP continues to claim Delaware law applies, which it does not expressly state in its brief, NARP is wrong. The law is clear that contracts are governed by the State's law where the contract is formed. *Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006) ("[A] contract is controlled by the laws of the State in which it is made and is to be performed."); *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005) (applying Virginia law because the oral contract was allegedly made in Virginia). In South Carolina "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). The record before this Court contains clear

modified in Charleston. 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 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 should thus pay \$415,988 for his share of NARP under that contract.⁷

NARP's position also disregards the evidence that there was a *three-part* agreement, regarding which the termination provision was but *one part*, which three-part agreement failed to materialize. Richardson's above statement of the case and below analysis provide numerous record citations from trial evidencing the failure of the parties to finalize the three-part agreement. It would be manifest error to ignore the record evidence as NARP suggests. The trial court also correctly found the document containing the termination provision to be ambiguous and properly permitted the question of whether the termination agreement extinguished Richardson's right to a 7.5% interest in NARP to the jury.

- A. The document containing a "termination" provision and merger clause was not a stand-alone agreement, but was instead part of a three-part agreement which never materialized, leaving the parties subject to their 2000 Agreement as amended.**

The trial court denied NARP's directed verdict motions and rejected NARP's argument that a document containing a "termination" provision ended Richardson's right

evidence that a valid and enforceable agreement was created in Charleston, the jury found the Charleston agreement could be performed, and the trial court ordered it to be performed.

⁷ Richardson hereby incorporates by reference all of its arguments in its briefing as Petitioner with regard to the meaning and construction of the judgment of the trial court.

to purchase 7.5% of NARPs' stock. In denying the motions, the trial court stated "the testimony is conflicting" and NARP's argument was "a possible conclusion that the jury can come to. But there is more than one." (App. 671-672.) When addressing the termination document and its merger clause, the trial court stated that "the facts in this case, though they might support the argument you are making, again there is any number of variety of conclusions and arguments that could be supported by the evidence." (App. 675.) The trial court went on to state that NARP's position as to the termination agreement "is not the sole and exclusive argument that can be made based upon the facts in this case." (*Id.*) Based on the evidence, the trial court correctly denied NARP's motions for a directed verdict based on the termination agreement.

1. The document containing the termination provision was just one step in a potential three-part agreement.

In sending the case to the jury, the trial court rightly recognized that contracts can be made up of several documents. This is not a point that NARP can contest. *See Young v. Independent Publishing Co.*, 273 S.C. 107, 110, 254 S.E.2d 681, 683 (1979) (recognizing that multiple documents can make up a single contract). The trial court also recognized that competing evidence existed on whether the parties had completed the three-part transaction. The law is well-settled that when one or more documents make up a contract and not all of the portions of the multi-part agreement are executed or finalized, no meeting of the minds has occurred. *Young*, 273 S.C. at 111-113, 254 S.E.2d at 683-684. *See also Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977) ("[T]he instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even

though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial.”); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004) (“[T]wo contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole.”); *Housing Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct. App. 2003) (“Under South Carolina law, two contracts executed at different times but which relate to the same subject matter and are entered into by the same parties are to be construed as one contract and considered as a whole.”); *Bishop Realty & Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 184-85, 355 S.E.2d 298, 300 (Ct. App. 1987) (“Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties.”) (internal citations omitted).

Here, Richardson offered overwhelming evidence that the document containing the termination provision was merely one phase of a three-part agreement. (App. 1033; 1034; 1035; 1043; 306; 380; 477.) Consistent with this, Rod Manning, who was counsel for Richardson who was involved with the contract negotiations, offered testimony detailing the exact terms of the proposed three-part agreement. (*See generally*, App. 856-907; 890-891; 894-897; 899-900; 904.) Additional evidence was offered as to the attempt to create this three-part agreement, that the termination agreement was but one

part, and that the three-part agreement ultimately failed to materialize. (App. 1014; 1032; 1035; 1036; 1052; 387; 489-490; 503-506.)

In contrast, NARP offered testimony claiming that the document signed in November 2004 containing the termination provision was the end-all-be-all and that the document forever ended the parties' rights under the 2000 Agreement as modified. (App. 917.) Even NARP's evidence refuted this contention, however. (App. 911-913; 1034; 1035.) Bob Castellani of NARP conceded in his testimony that the "Termination Agreement" *alone* did *not* represent what was agreed upon between the parties. (App. 291.) Further, an e-mail from Castellani on May of 2005, months after the date of the termination provision document, referenced his "share" of the Reeves sale (App. 1043), again demonstrating that the parties had *not* terminated all rights to stock in each other's companies based on any termination provision document. The differing views of the parties as to the force and effect of the document containing the termination provision created a jury issue as to the parties' intent and as to whether the three-part contract was fully executed.

2. The presence of a merger clause does not change the analysis.

NARP points out that the document with the termination provision contains a merger clause stating, "[t]his 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." However, a merger clause cannot extinguish any prior agreements when the contractual relationship is never finalized.

Further, a merger provision does not negate a consistent parol agreement not intended to be merged by the parties. In *Lingefelt v. Forest Hills Homes, Inc.*, 305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991), the court of appeals interpreted a contract containing a similar merger clause, which stated, “[t]his agreement contains the entire understanding between us and no other representation, verbal or written, has been made which is not set forth herein.” *Id.* at 200, 406 S.E.2d at 396. The court held “the doctrine of merger is inapplicable to a consistent parol agreement that was not intended to be merged into the written agreement.” *Id.* at 201, 406 S.E.2d at 396. Thus, even assuming *arguendo* that the document containing the termination provision and merger clause to were binding (which was not the case), the existence of the merger clause still did not end the right of Richardson to the 7.5% interest in NARP. The document with the termination provision *twice* references an exception to its scope concerning Richardson’s right to purchase 7.5% of NARP stock from NARP and it forecasts the execution of an agreement reaffirming the rights of the earlier 2000 Agreement as modified. These references indicate an intent *not* to make the 7.5% agreement part of the document containing the termination provision. Hence, the parties’ actions of twice reaffirming the right to purchase for Richardson contradicts the new position. Further, Castellani’s own email of May of 2005, well after the date on the termination provision document, referenced his “share” of the Reeves sale which indisputably shows NARP and Castellani did not believe the “termination” document ended the parties’ rights to purchase the respective 7.5% interest shares in the others’ companies. (*See App.* 1043.)

In light of the evidence of the failure of the three-part agreement and of the parties’ reaffirmance of Richardson’s right to a 7.5% interest in NARP, the trial court

properly ruled that the parties' intentions regarding the contracts were matters for the jury. "Although as a general rule contracts are to be construed by the court, where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to jury." *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997) (internal citations omitted). Thus, jury questions existed regarding Richardson's right to purchase 7.5% of NARP stock and the effect, if any, of the subsequent attempts to enter into a three-part contract. Accordingly, the trial court properly denied NARP's motion for directed verdict. *See Welch v. Epstein*, 342 S.C. at 300, 536 S.E.2d at 418-19 ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below.") (internal citation omitted).

B. The trial court properly found the document containing the termination provision to be ambiguous and correctly articulated his reasoning.

At the close of the plaintiff's case, the trial court denied the plaintiff's first round of directed verdict motions and found that the termination document was ambiguous and not capable of being understood without further evidence. NARP, for the first time, now contends that the trial court did not properly articulate the reasons why it found the document containing the termination provision to be ambiguous. NARP also encourages this court to read any ambiguities in the November document against Richardson on a claim that Richardson's attorney drafted the "termination" agreement. (App. 306.) Finally, NARP ignores well-settled law that agreements can have multiple parts and until all are executed, the agreement is not final. NARP's arguments should be rejected.

1. The trial court articulated his reasoning as to why the document containing the termination provision was ambiguous.

For the first time, NARP contends that the trial court did not properly articulate its reasoning for concluding that the document containing the termination provision was ambiguous, citing this Court's opinion in *Bardsley v. Gov't Employees Ins. Co.*, 405 S.C. 68, 747 S.E.2d 436 (2103).⁸ The grounds offered for this issue are not preserved. This argument by NARP was not raised to the court of appeals and NARP did not petition this Court for certiorari with respect to this argument. *See Sloan v. DOT*, 365 S.C. 299, 618 S.E.2d 876 (2005) (noting an issue was unpreserved where a party failed to seek rehearing and/or certiorari on it). Should the Court consider it, the following demonstrates why the analysis in *Bardsley* does not apply.

First, in *Bardsley*, this Court addressed an insurance contract, which must be strictly construed against the insurer. *Id.* at 76, 747 S.E.2d at 440. Such a setting is vastly different from the one before the court now involving sophisticated parties, who hired lawyers to negotiate on their behalf, and where both sides participated in the drafting of the proposed three-part agreement. *See* Section I.B.3., *infra*.

Second, *Bardsley* involved a case where the trial court granted summary judgment. A trial court must articulate its reasoning in an order granting summary judgment. *See, e.g., Carey v. Snee Farm Cmty. Found.*, 388 S.C. 229, 694 S.E.2d 244 (Ct. App. 2010) (remanding where the trial court's summary judgment order failed to articulate the reasoning of the court). Hence, *Bardsley* merely reiterates this well-known proposition in the summary judgment context. In this matter, the trial court found the document containing the termination provision to be capable of more than one

⁸ The *Bardsley* decision has never been cited in this matter before.

construction and submitted the question of its effect on the parties' relationship to the jury.

Third, if this Court determines *Bardsley* is somehow applicable, the trial court properly stated "the terms of [of the Termination Agreement] were absolutely ambiguous. Read as a whole, it borders on being completely un-understandable." (App. 428.) The trial court articulated his basis on NARP's position stating "y'all might be certain you entered that you entered into that November 8, 2004 termination agreement but I don't think the evidence shows that." (App. 428.) The trial court was correct in making this finding given the evidence discussed above herein.

Thus, the trial judge properly submitted the issue to the jury. If NARP believed the jury's special verdict conclusion with respect to the termination provision document was inconsistent with other parts of its verdict, it was incumbent upon NARP to make a motion for new trial based on such inconsistency before the jury departed. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554-55, 560 S.E.2d 894, 896 (2002) (holding a party waived its right to object to an inconsistent verdict by failing to raise the objection prior to the jury being discharged). It did not do so, and in fact has never raised inconsistency of verdict as an issue in this matter.

2. The document containing the termination provision is ambiguous on its face and requires the Court to look beyond the four-corners of the single document containing the provision.

Viewing the evidence as a whole (and not in isolation as NARP would have this Court do), the document containing the termination provision does not represent the complete agreement the parties were negotiating. Hence, the termination provision did not become effective because the overall three-part agreement of which it was a part

never became effective. Due to the varying positions taken regarding the document with the termination provision, the trial court also properly submitted the determination of whether the termination provision ended Richardson's right to buy NARP stock to the jury as well as the additional terms under the three-part agreement. The trial court also properly allowed and considered parol evidence related to Richardson's right to purchase 7.5% of NARP stock under the 2000 Agreement as amended.

“When the written evidence of the contract does not contain all the terms of the transaction between the parties, parol evidence (not contradicting or varying the writing) is admissible for the purpose of showing a contemporaneous independent agreement entered into between the parties.” *Ashe v. Carolina & Nw. Ry. Co.*, 65 S.C. 134, 138, 43 S.E. 393, 394 (1903); *see also Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 507-08, 32 S.E.2d 777, 782 (1945) (holding the trial court properly reviewed the contract language, relationship of the parties, and surrounding circumstances when determining the parties' intent as the contract omitted necessary provisions).

Here, the trial court properly allowed consideration of testimony regarding the request by Castellani to have Richardson pay the proceeds of the sale of Reeves into a charity for tax purposes—the final step of the three part agreement. During the Atlanta meeting, Castellani requested as part of the parties' arrangement that Richardson pay Dobson Ministries (a charity) for the 7.5% NARP stock. (App. 1049; 477-478.) This request would have constituted the three-part agreement so discussed at trial: the option agreement to be entered into on December 2004, the document containing the termination provision, and the payment to a charity. (App. 485-486.) Therefore, because the document with the termination provision is not a whole and complete agreement between

the parties, parol evidence was necessary to determine exactly what governed the rights of the parties.

The November 2004 “termination” document specifically referenced a *future* date of December 15, 2004 for an option agreement to be executed as another step in this three-tiered agreement stating:

It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated 15 Dec, 2004 pursuant to which NARP and RAC have granted RJP an option to purchase 7.5% of the capital stock of NARP⁹.

(App. 911-913.) The future date reference expressly demonstrates that the document with the termination provision did not represent the entire [proposed] agreement of the parties, and that there was ambiguity that could only be explained by other evidence. The matter was thus properly submitted to the jury for the special interrogatories.

3. Any ambiguity cannot lawfully be construed against Richardson as both parties drafted portions of the overall three-part agreement (which was never consummated) with the aid of lawyers.

NARP’s attorney, Curt Stodghill, worked on two segments of the three-part agreement—the reaffirmance of the right to purchase 7.5% of stock and the charitable donation. (App. 306.) These two portions of the agreement and the document containing the termination provision were intended to operate together. Accordingly, these ambiguities should not be read against Richardson. Further, this is not an adhesion

⁹ NARP’s proposed solution to this problem is to say this particular language in the “termination” agreement is meaningless. Such a proposed solution has no basis in the law, however. An interpretation of a contract which gives reasonable meaning to all contract provisions will be preferred to one which leaves a portion of the writing useless, meaningless or inexplicable. 17A Am. Jur. 2d Contracts, Section 377 (2004). Thus, the trial judge properly submitted the issue to the jury for its consideration.

contract setting. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) (“[A]n adhesion contract is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.”). Thus, the contract terms should not be construed against Richardson. *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F.Supp. 416, 426 n.10 (D.C. S.C. 1995) (stating that the rule of construction that construes ambiguities against a contract drafter is “not automatically applied when there is no evidence of adhesion or unequal bargaining power”). Instead, these ambiguities merely necessitated that the evidence be submitted to the jury to determine the parties’ intent. Both parties had lawyers representing them in the negotiations and both are sophisticated business entities which appropriately factored into submitting the issues to the jury. See, e.g., *Columbia Hyundai, Inc. v. Carll Hyundai, Inc.*, 326 S.C. 78, 82, 484 S.E.2d 468, 470 (1997) (finding negotiations through attorneys did not result in a final agreement but merely represented a process of trying to reach an agreement).

Importantly, since the termination provision is in the nature of a waiver or release, such documents are to be construed strictly *against* waiver. *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). Hence, the varying interpretations merely necessitated that the evidence be submitted to the jury to determine the parties’ intent. The trial court correctly did so.

II. The trial court properly denied NARP’s directed verdict motion as to promissory estoppel because evidence existed that Richardson relied on NARP’s promise to sell Richardson 7.5% of NARP stock.

NARP argues any promises or agreements between NARP and Richardson were extinguished by the document containing the termination provision and merger clause and, thus, Richardson’s right to rely on these promises was also extinguished. As shown

above, the termination provision did not terminate Richardson's right to acquire 7.5% of stock in NARP. Further, Richardson reasonably relied on NARP's promises regarding his ability to purchase 7.5% of NARP's stock. Accordingly, the evidence presented an issue for the jury, and the trial court properly denied NARP's directed verdict motion.

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

Richardson provided sufficient evidence to establish a promissory estoppel claim and to survive NARP's directed verdict motion. Viewed in a light favorable to Richardson and in support of a promissory estoppel claim, there was evidence that *after*¹⁰ the Termination Agreement, NARP's Castellani agreed to let Richardson acquire NARP stock. (App. 195; 1043; 207-212; 1045.) For example, in the context of discussing his "share" of the sale of Reeves, Castellani stated "nothing has changed in my mind about getting this done for you and Billie."¹¹ (App. 1043.) Richardson, in reliance on this promise, had sold Reeves Company and set aside the proceeds from the sale of Reeves so he could exchange them for a 7.5% share in NARP. (App. 526; 545.) Richardson sold Reeves Company and has set aside the proceeds of Reeves so he could use those proceeds to purchase the 7.5% share in NARP he was promised. (App. 311-312.)

¹⁰ NARP acts as if no such evidence exists.

¹¹ In context, what was to get "done" was the sale of 7.5% of NARP stock to Richardson.

At trial and now, Richardson has the funds (those from the sale of Reeves) ready to pay to NARP and Castellani if the shares are tendered. (App. 526; 545.) Richardson's actions were undertaken as a result of promises by Castellani on behalf of NARP. (App. 207-212; 297-300; 544-45; 600-601; 1043; 1045). Richardson had a reasonable expectation that NARP and Castellani would perform their part of the agreement and fulfill the promises made with respect to the 7.5% of NARP stock. (App. 470; 474; 486.)

Further, Richardson also presented the testimony of Ms. Billie Richardson on the existence of a promise. Ms. Richardson testified as follows on direct:

Counsel: Okay. And were any promises made at that meeting?

...

Ms. Richardson: As I said, you know, 7 -- our 7 1/2 for his 7 1/2. You'll always have your 7 1/2.

Counsel: What does that mean, you'll always have your 7 1/2?

...

Ms. Richardson: In -- after the sale of Reeves, there was some pretty, pretty dark moments for me. Bob [Castellani—of NARP] was very reassuring, very comforting. And he said to me, you'll always have your 7 1/2. Simple as that.

Counsel: That was skipping ahead a little bit. I want to go back to Charleston, just to the Charleston meeting. Were any promises made between P. J. and Bob that you saw?

...

Ms. Richardson: Just that, you know, you have 7 1/2 percent ownership of my company and I have 7 1/2 percent ownership in your company. I don't know how -- I mean, it was just that basic to me. That, you know, I promise you this and you promise me that.

(App. 600-601.)

As demonstrated by the evidence, Richardson reasonably relied on the promise to permit him to purchase part of NARP's stock, and Richardson's reliance was foreseeable and expected by NARP. Therefore, sufficient evidence was presented to establish every

element of a promissory estoppel claim warranting submission of the claim to the jury. NARP's arguments regarding promissory estoppel should thus be denied.¹²

Accordingly, evidence was presented to establish every element for a promissory estoppel claim making NARP's directed verdict motion against the promissory estoppel claim completely untenable. Thus, the trial court properly denied NARP's directed verdict motion and even if Richardson's contract claim were to fail, he is still entitled to a judgment based on the promissory estoppel claim.

Conclusion

Accordingly, this Court should affirm the trial court's denial of NARP's directed verdict motions and uphold the trial court's judgment ordering NARP to specifically perform under the 2000 Agreement as modified and specifically hold that Richardson is entitled to pay \$415,988 or his 7.5% interest in NARP as provided by the only contract the jury found capable of performance.

[Signature Page Attached]

¹² In addition, the argument NARP advances to this Court was not made to the trial court. At no time before the trial court did NARP argue Richardson had failed to present evidence on the elements of promissory estoppel. Instead, at the trial, and in the face of conflicting evidence, NARP argued the Termination Agreement *enabled* the sale of Reeves, and that this should have worked an "estoppel" against Richardson, justifying a directed verdict on promissory estoppel for NARP. (App. 671.) It is axiomatic that NARP may not present arguments on appeal for the first time in support of its arguments for directed verdict.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: A. Mattison Bogan

C. Mitchell Brown
William C. Wood, Jr.
A. Mattison Bogan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Rivers S. Stilwell
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Attorneys for P.J. Richardson

August 21, 2014
Columbia, South Carolina

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):

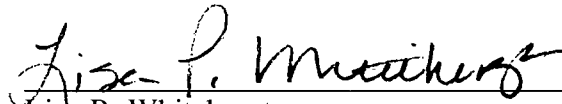
Pleadings:

Respondent's Brief

Counsel Served:

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

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



Lisa P. Whitehurst
Administrative Assistant

August 21, 2014