THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Opinion No. 4909 (S.C. Ct. App. filed Nov. 9, 2011)

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

v.

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

RESPONDENT/PETITIONER'S RETURN TO PETITIONER/RESPONDENT'S PETITION FOR A WRIT OF CERTIORARI

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Subject to its arguments in its Certiorari Petition, in which it contends it was entitled to judgment as a matter of law because there was no contract between the parties by agreement or promissory estoppel, NARP submits this Return to Richardson's Certiorari Petition.

I. Richardson's Certiorari Petition rests upon a complete misrepresentation of the evidence regarding the "Charleston Agreement" and a false reading of the jury's verdict form.

Richardson's Certiorari Petition rests upon the assertion that it is "undisputed" that the parties agreed in Charleston that Richardson could purchase 7.5% of NARP's stock for cash in an amount equivalent to 7.5% of the proceeds from his sale of RMI's assets to a third party. (Richardson Cert. Pet. at 5; see also *id.* at 1, 2, 3, 5, 7, 8, 10, 11, 15). This is a complete misrepresentation of the evidence in the record. Castellani specifically and repeatedly testified that he never agreed to this in Charleston or at any other time, and that he never agreed to accept a cash payment from Richardson for any NARP stock. (R. 139-141, 164-165, 188-189, 276-279, 284-285, 662-663).[1]

Armed with his complete misrepresentation of the Record, Richardson argues that the jury found there was a "$415,988" contract when it answered "yes" to the following interrogatory: "Can both parties perform under the 2000 Agreement as amended in Charleston?" (R. 2, ¶ 3; see Richardson Cert. Pet. at 1, 7-8, 11, 14, 15). The jury, however, never found that there was a contract to purchase NARP's stock for $415,988. (See R. 2-5). Rather, it specifically found a contract to purchase 7.5% of NARP's stock for $2,936,300. (R. 5, ¶ 8).

[1] Castellani offered Richardson several alternatives to acquire the stock, but these alternatives involved donations to a charity of Castellani's choosing, and the donation was to be based on the fair market value of 7.5% of NARP's stock at the time of the donation. (R. 160-163; 168-171; 176-177). Richardson rejected all of these alternatives. (R. 172-174; 351-352; 387-388).

II. Richardson's "promissory estoppel" explanation of the contract price found by the jury is not properly before this Court as a ground for certiorari, and it is manifestly without merit.

The Court of Appeals held that the trial court had ordered specific performance of the $2,936,300 contract found by the jury. Richardson contends this was error, because the $2,936,300 price related solely to his claim for promissory estoppel. This certiorari ground is not properly before this Court.

Rule 242(d)(2), SCACR expressly provides: "Only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (All emphasis added). Although Richardson made his current "promissory estoppel" argument in his petition for rehearing (Appx. 46-47), he never raised it "in the Court of Appeals." (See Richardson's App. Br., Resp. Br., and Reply Br., *passim*).[2] Thus, his "promissory estoppel" explanation of the contract price found by the jury is not a proper ground for certiorari.[3]

In any event, Richardson's "promissory estoppel" explanation is manifestly without merit. Nothing in the Verdict Form or the trial court's instructions to the jury on filling out the Verdict Form indicates the "price" question was limited to Richardson's claim for promissory estoppel. (See R. 2-5; 845-848). Moreover, as the Court of Appeals correctly held, the trial court made it clear that the jury would be required to answer all questions in this case, including whether a contract existed and the terms of that contract, including the price. (Appx. 13-14).[4]

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[2] NARP made this argument in its Return to Richardson's rehearing petition (Appx. at 50), and the Court of Appeals denied Richardson's petition. (Appx. at 55-56). Richardson replied only that he was "free to offer a rationale for that number [$2,936,300] in light of NARP's repeated instance [sic] that it is the price Richardson must pay for the shares of NARP stock." (Appx. at 53-54). This is true, but Richardson was required to first do so "in the Court of Appeals." Having failed to do so, he cannot raise this issue as a ground for certiorari per force the requirements of Rule 242(d)(2), SCACR, nor could he raise for the first time in his rehearing petition.

[3] Richardson also never raised this issue in the trial court.

[4] As noted later, Richardson does not challenge this ruling by the Court of Appeals and, therefore, it is the law of this case. See Arg. III, *infra*.

The trial court drafted the Verdict Form and, if it or the parties had intended the "price" question to be limited to promissory estoppel, the Verdict Form or the trial court's instructions would have said so or would have directed the jury to not answer the "price" question if the jury found that a contract existed. Neither the Verdict Form nor the trial court's instructions did so. (R. 2-5; 845-848). Thus, Richardson's argument has no merit.

III. The Court of Appeals properly held that the trial court granted judgment on a contract with a price of $2,936,300, and Richardson's contrary arguments are not preserved for appeal.

The real question presented by Richardson's appeal and his certiorari petition is the meaning of the trial court's judgment. If the trial court ordered specific performance of a contract to purchase 7.5% of NARP's stock for $2,936,300, then Richardson's appeal and certiorari petition must be denied, because he has never argued any error by the trial court.

Richardson argues the Court of Appeals misconstrued the trial court's judgment, and that the trial court ordered specific performance of the contract advocated by him at trial, to-wit: a bilateral contract whereby Richardson and Castellani had agreed that Richardson could purchase 7.5% of NARP's stock for 7.5% of the net proceeds received by Richardson in the sale of his company's assets. This argument hinges on the following analysis: (1) the parties originally agreed to exchange a 25% stock interest in NARP and Richardson's company (RMI) under the 2000 Agreement; (2) the parties later met in Charleston and orally modified the 2000 Agreement to reduce the percentage from 25% to 7.5%, and they further orally modified the 2000 Agreement to provide that, rather than exchange the stock, NARP would accept 7.5% of the after-tax proceeds from the sale of RMI's assets as payment for 7.5% of NARP's stock; and (3) this is the contract found by the jury and enforced by the trial court.

It is undisputed that the parties reduced the stock-swap percentage to 7.5% at the Charleston meeting, and it is undisputed the parties never swapped the stock. As demonstrated above, however, there was conflicting evidence on whether the parties entered a contract for Richardson to purchase the stock for 7.5% of the after-tax proceeds from the sale of RMI's assets. Here, Richardson ignores the conflicting evidence and misrepresents the Record as being "undisputed" on this point. More importantly, nothing in the judgment or attached verdict form resolves this evidentiary conflict as advocated by Richardson. No question in the Verdict Form presents this question except Question 8, which asks what price Richardson must pay for the stock and which the jury answered with a price of $2,936,300.00, not the $415,988.00 argued by Richardson.

As shown below, Richardson's argument is not preserved for appeal and is manifestly without merit.

A. The Trial Court's Judgment

The trial judge entered judgment by affixing the Verdict Form to a Form 4 Judgment and writing thereon: "Judgment for the Defendant [Richardson] under specific performance doctrine." (R. 1-5). Neither the Judgment nor the Verdict Form mentions the $415,988 price advocated by Richardson. Thus, under Richardson's theory, the trial judge intended the following enforcement procedure for his judgment:

1. ignore the jury's expressly stated contract price for the stock;

2. order the trial transcript;

3. review the disputed testimony by Richardson and Castellani on whether they agreed at the Charleston Meeting to a contract to purchase 7.5% of NARP's stock for 7.5% of the net proceeds from the sale of RMI's assets;

4. resolve that dispute in Richardson's favor; and

5. then further review the trial transcript to find that "net proceeds" price, *i.e.*, the $415,988 price advocated by Richardson.

Nothing in judgment hints at any such intent by the trial judge. To the contrary, the judgment plainly grants specific performance of the attached special verdict form, which plainly states a $2,936,300.00 contract price for the stock. It is inconceivable the trial judge intended to order specific performance of a disputed contract without setting forth the price in the judgment, which is what Richardson argues to avoid the plainly stated price of $2,936,300.00. Accordingly, certiorari should be denied. Moreover, as shown later, the record conclusively demonstrates, and the Court of Appeals properly found in an unchallenged ruling, that the trial judge intended that the jury would decide all questions in this case, including the price for the stock, and that the trial judge ordered specific performance of the $2,936,300.00 contract found by the jury.

B. Richardson's arguments ignores controlling South Carolina law on the meaning of judgments, and any argument to the contrary is not preserved for appeal.

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

The first step in determining the meaning of a judgment is to read the judgment without consideration of anything else. The only reasonable reading of the judgment here, indeed the only conceivable reading of the judgment, is that the court ordered specific performance of a contract with a purchase price of $2,936,300.00, the price found by the jury.

Richardson's contrary arguments rest upon an impermissible bootstrap. He goes outside the judgment to attempt to create an ambiguity, and this attempt rests upon disputed evidence. Any ambiguity, however, must first appear on the face of the judgment itself. Then, and only then, can there be any resort to anything outside the four corners of the judgment. There is no such ambiguity and, therefore, there can be no resort to anything outside the face of the judgment.

Moreover, assuming there is any ambiguity within the four-corners of the judgment, resolution of the ambiguity depends on the trial judge's intent, not the competing evidence submitted by the parties at trial. Richardson never addresses this controlling inquiry, thereby precluding his contrary arguments.

Richardson contends the contract price is $415,988, but he necessarily goes outside the four corners of the judgment to get this price. Richardson, however, has never argued that the appealed order is ambiguous. Rather, he has always claimed that the appealed order is unambiguous. Thus, Richardson has specifically disavowed the necessary predicate for his argument that the price is $415,988 – an ambiguous order. *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Thus, Richardson's attempt to go outside the four corners of the judgment to show its meaning is manifestly without merit and, therefore, certiorari should be denied.

Assuming Richardson's argument could be viewed as asserting the appealed judgment is ambiguous and therefore permits his argument on price, this argument is not preserved for appeal. It is axiomatic that an appellant cannot argue the meaning of an ambiguous or unclear judgment unless he first raised the issue in the trial court by post-trial motion. See, *e.g.*, *Revis v. Barrett*, 467 S.E.2d 460, 462-463 (S.C. App. 1996) (absent motion to clarify discrepancy in order, issue cannot be addressed on appeal); *Nellums v. Cousins*, 403 S.E.2d 681, 681-682 (S.C. App. 1991) (if order unclear, must move to clarify or issue is not preserved for appeal). Richardson never made any such motion in the trial court. Thus, he cannot make any such argument on appeal and, therefore, certiorari should be denied.

C. The Court of Appeals properly interpreted the trial court's judgment.

In reviewing the appealed judgment, the Court of Appeals held as follows: (1) the parties and the trial court treated the case as one at law rather than equity, even though it was an action for specific performance; (2) the parties and the trial court submitted the factual issues to the jury; and (3) the trial court did not view the jury as an advisory jury and intended that the jury would decided all factual issues, including the price for the stock. (Appx. at 12-14). Richardson does not challenge these rulings and, therefore, they are the law of this case. Moreover, the record amply demonstrates the trial judge intended that the jury would decide all issues in this case, including the contract price, and he submitted the Verdict Form to the jury for this purpose.

In his preliminary charge to the jury, the trial judge told the jury that this was a contract case with "competing claims" between the parties and that the jury was "called upon to sift through that and *come up with a verdict*" in the case. (R. 58) (emphasis added). He thereafter admonished the parties to discuss settlement because "[o]nce a *jury resolution* comes about in this particular case, somebody's going to be happy [and] somebody's going to be sad." (R. 78)

(emphasis added). The judge immediately followed this comment to the parties with further preliminary instructions to the jury that it would render the verdict in this case. (R. 79-83, *passim*).

After the end of the evidence on the first day of trial, the judge told the parties that if the jury found the parties did not enter the Termination Agreement, then they would be back under the 2000 Agreement. (R. 192). The jury, however, found that the parties did enter the Termination Agreement. (R. 2, Ques. 4). Thus, the judge could not have intended to put the parties back under the 2000 Agreement as argued by Richardson on appeal. Any doubt about this is resolved against Richardson under the conclusive evidence of the judge's intent in the subsequent trial proceedings.

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

The trial judge's jury charge also conclusively demonstrates his intent that the jury would decide all questions in this case. First, he charged the jury that it would decide the facts of the case and then apply the law to those facts. (R. 822). He then charged the jury that it was to decide whether any contract between the parties was ambiguous and was also to decide the terms of any contract between the parties. (R. 828-829; 831-833; 844-845). Finally, the judge

instructed the jury it would decide the question of specific performance of any contract found by the jury:

> Another area you'll have to look at is the area of specific performance. Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. In order to have specific performance, you have to find there was clear evidence of a valid agreement.

(R. 844). The judge then concluded his charge: "All right, ladies and gentlemen, I told you the law that you have to apply to the facts of this case." (R. 844-845).

During its deliberations, the jury sent a question to the trial judge. Question 8 on the verdict form asked whether Richardson was entitled to receive 7.5% of NARP's stock and, if so, what Richardson should pay for the stock. (R. 5, Ques. 8). The jury asked that if it found Richardson was entitled to receive NARP's stock, was Richardson "required to purchase [the] stock at current market value." (R. 922) (emphasis in original). The trial court advised the jury that it "must assign some value for the stock if you answer yes." (Id.). Here again, the trial judge made it clear that the jury would decide all questions in this case, including the contract price to be paid by Richardson, just as he had done earlier in the trial. (See R. 582-583).

The jury returned its verdict at 3:05 p.m. on August 29, 2008, finding a contract to purchase NARP's stock for $2,936,300.00. (R. 859; 5, Ques. 8). The parties made several post-verdict motions. In denying these motions, the trial judge repeatedly held that there was sufficient evidence to support the jury's verdict, including the purchase price of $2,936,300.00. The trial judge also held there was nothing inconsistent about any of the jury's answers to any of the questions in the verdict form. (R. 864-868). Thereafter, and on the same day as the jury's verdict, the trial judge entered judgment by simply attaching the Verdict Form to a Form Judgment and wrote thereon: "Judgment for the Defendant [Richardson] under specific

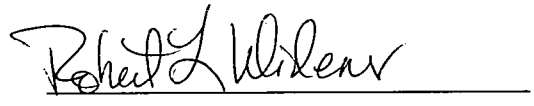
performance doctrine." (R. 1-5). This Form Judgment, with the attached Verdict Form, was then entered as the judgment of the court.

The fundamental question in this case was whether there was a contract to purchase 7.5% of NARP's stock and, if so, at what price. The Verdict Form unambiguously found there was a contract, and the price was $2,936,300.00. Assuming any ambiguity in the judgment (and there is none), the record conclusively demonstrates the trial judge intended to enter a judgment of specific performance on this contract and this price as found by the jury. Richardson never argues any error by the trial court and, therefore, certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Richardson's Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondent/Petitioner's Return to Petitioner/Respondent's Petition for a Writ of Certiorari by depositing a copy in the United States Mail, postage prepaid, on April 9, 2012 addressed to the attorneys of record, as follows:

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