

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Circuit Court

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001518

Harold P. Threlkeld d/b/a Harold P.
Threlkeld, Attorney at Law.....Plaintiff,

v.

Lyman Warehouse, LLC, Lyman Pacific, LLC,
Mills Demolition, LLC, Susan C. Stanley,
Peter M. Stanley and Donald J. McWhirter..... Defendants,

Of whom Lyman Warehouse, LLC is theAppellant,

And

Of whom Donald J. McWhirter is the Respondent.

FINAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

- A. Did the lower court in holding that a release explicitly limited in terms to the parties to that contract nevertheless releases all claims against all other entities and individuals?
- B. Did the lower court err in holding that the Seller lost its entitlement to the escrowed funds via a failure to prove his damages, in any or all of the following:
- Did the lower court err
- (1) in holding that a third party who is not a beneficiary of a contract has standing to challenge the contract's terms;
 - (2) in reading a contractual provision regarding liquidated damages in a manner contrary to law;
 - (3) in holding the contract has a meaning exactly opposite to the understanding of each party at the time the contract was signed;
 - (4) in holding that a release releases claims that had already been released; and/or
 - (5) in holding that the evidence showed that the Seller had not suffered any damages?

OVERVIEW

Respondent William McWhirter, an experienced businessperson and company-owner, who holds a master's degree in business, provided a \$100,000 check to secure a contract on behalf of an LLC he hoped to join. The contract was to purchase and sell real estate. It provided that if the Buyer failed to close by the closing date, all money paid through that date would be damages to the Seller. He had no written agreement with the LLC as to his joining.

Nor did he have a written agreement with the LLC as to what would happen to his money if the contract to purchase real estate failed to close and the advance money was forfeit. He did not ask to be and was not mentioned in the contract. When the contract failed to close, the Seller became entitled to the money paid on the contract.

If he is entitled to recover under *quantum meruit* or the like, it is against the LLC which he had expected to join, and/or against the sole owner of that LLC individually. The dispute among the Buyers as to who was to do what, which Buyer failed to assemble the remainder of the purchase price, has no relevance to the Seller's contractual entitlement to the funds advanced.

STATEMENT OF THE CASE

This is an interpleader action. The case began with a Complaint filed January 5, 2012, by the escrow agent, Harold P. Threlkeld d/b/a Harold P. Threlkeld, Attorney at Law, against Lyman Warehouse LLC ("Warehouse"), Lyman Pacific, LLC ("Pacific"), Mills Demolition, LLC, Susan C. Stanley, Peter M. Stanley and Donald J. McWhirter, seeking a judicial order regarding to whom to deliver the \$100,000.00 held in escrow pursuant to an April 7, 2011 contract

between Warehouse and Pacific. (R. pp. 13-16). The contract was to purchase and sell real estate located at 14 Pacific Street in Lyman, SC.

Only Warehouse, Pacific, and Mr. McWhirter appeared. Pacific's counsel moved to be relieved on January 2, 2013, as directed by his client. Pacific did not participate in the litigation thereafter.

The matter was heard non-jury by Judge R. Lawton McIntosh on March 6, 2013. A post-trial brief was filed by Warehouse on March 29, 2013. Via Order dated May 7, 2013, Judge McIntosh directed that the escrowed funds be delivered to Mr. McWhirter. Warehouse filed a motion to reconsider dated May 23; McWhirter filed a memorandum in opposition to that motion dated June 11. The motion was denied via Form 4 order dated June 6th. Warehouse received written notice of entry of the order on June 11, and timely filed notice of appeal on July 9.

FACTS

The sole dispute in this case concerns who is entitled the money placed in escrow to secure a contract to sell and purchase

real estate that fell through when the Buyer was unable to close. Is it the Seller, as the Seller (Appellant) maintains? Or is it the person who put up the initial money for the contract, as Respondent McWhirter maintains?

A. The Contract

The contract at issue in this case is a contract to sell and purchase real estate. (R. pp. 271-276). It is entitled, "Agreement to Sell and Purchase Real Estate." (R. p. 271). Executed April 7, 2011, it called for a closing date of May 7 of that year, and stated that "time is of the essence." (R. p. 272).

The contract was to purchase and sell 22.86 acres of a 41.1 acre parcel, and an additional 9.31 acres out of the same parcel. The 22.86 acres contained a building; the 9.31 acres was "The Parking Lot Area." The properties were located at 14 Pacific Street in Lyman, SC. (R. p. 27).

It called for a purchase price of \$1.3 million, with \$100,000.00 to be paid up-front and the remainder at closing. ("CONSIDERATION: \$100,000.00 at the signing of this contract held in trust by

Attorney, Harold Threlkeld (864) 226-1305. \$1,200,000.00 at closing.”) (R. p. 272)

The contract contained not just one but two merger clauses.

Paragraph 12 of the contract provides,

(12) WHOLE AGREEMENT: This Agreement shall constitute the entire agreement between the parties and no prior verbal or written agreement shall survive the execution of this Agreement. In the event of an alteration of this Agreement, the alteration shall be in writing and shall be signed by all the parties or their agents in order for the same to be binding upon the parties.

(R. p. 273)

Paragraph 21 provides,

(21) ENTIRE AGREEMENT. This instrument (including any exhibits attached as a part hereof) constitutes the entire and final agreement among the parties and there are no agreements, understandings, warranties, or representations among the parties except as set forth in this Agreement.

(R. p. 274). On this, all agree. See R. p. 255, lines 4-7 (“THE COURT: -- do you agree there's a merger clause, actually two merger clauses, in exhibit 1 . . .? MR. PRACHT [Attorney for Respondent McWhirter]: Yes, Your Honor.”)

B. Parties to the Contract

The parties to the Contract are Lyman Warehouse, LLC (Seller) and Lyman Pacific, LLC (Buyer).

Despite the similarity in part of the names, there is no connection between Respondent Lyman Pacific, LLC and Appellant Lyman Warehouse, LLC, other than the attempt to buy and sell the property. “Lyman” is the name of a town, and is the name of the mill on the subject property. (R. p. 137, lines 1-24).

These entities are described in more depth below, under the heading, “Parties to the Litigation.”

C. Parties to the Litigation¹

1. Respondent William McWhirter

Respondent William McWhirter has a master’s degree in business. (R. p. 136, line 15) (Testimony of Mr. McWhirter). He makes his living as “a building contractor, residential and commercial. I do excavation, septic systems, and I also demolish buildings.” (R. p. 136, lines 18-22) (Testimony of Mr. McWhirter). He owns two companies, McWhirter Construction, Inc., and McWhirter and Crew.

¹ This section discusses only those parties who appeared in the litigation.

(R. p. 140, lines 21-22). In his telling, he made a \$100,000 contribution in the name of an LLC he hoped to join. No operating agreement for the LLC was ever signed. (R. p. 141, lines 21-23).

He testified that he traveled to South Carolina to sign a contract for the purchase of real estate, and “brought it [the money] to South Carolina with me in the form of a check.” (R. p. 143, lines 15-17) (Testimony of Mr. McWhirter).

He and his colleagues arranged a meeting with the Appellant Seller to provide the Seller with the money to “seal the deal.” “Q. And when you arrived at that meeting, what was your understanding of the purpose of that meeting? A. The purpose was to present Mr. Bennett [representing the Seller, Warehouse LLC] with a check to seal the deal.” (R. p. 142, line 23-page 143, line 1) (Testimony of Mr. McWhirter). “Q. When you gave your -- why did you give a hundred thousand dollars into this deal? A. I wanted to seal the deal with Mr. Bennett so that we could purchase the property and make a profit.” (R. p. 143, lines 20-23).

Later on the same day the contract was signed, the then-sole member of the LLC presented the proposed operating agreement to Mr. McWhirter. The agreement was not to his liking.

A. . . . We engaged Kelly Lowery to review the operating agreement for Lymon² Pacific which Mr. Stanley had drawn up and proposed that he wanted us to sign it that day.

Q. When you say that day, what day?

A. April 7th.

Q. Before or after the meeting [at which the Contract to Purchase Real Estate was signed]?

A. After the meeting

(R. p. 146, lines 18-24). See also R. p. 147, lines 2-4 (“I didn't feel comfortable signing it” (the operating agreement) largely because it provided the then-sole member “unilateral power to make decisions.”)

He raised his reservations about the proposed agreement to Mr. Stanley, the sole member of the Buyer LLC, but did not do so “in front of Mr. Bennett,” the owner of the Seller LLC. (“When we reviewed the operation document that Mr. Stanley presented us, it wasn't what we discussed. And we raised those reservations to him shortly after I had given Mr. Bennett a hundred thousand. We didn't do that in front of Mr. Bennett.”) (R. p. 161, lines 11-15).

He and his co-buyers considered “flipping” the property. (R. p. 166, lines 1-6) (testimony of Mr. McWhirter).

² Due to the frequency with which the transcript spells “Lyman” as “Lymon,” the convention of writing “[sic]” after the misspelled word will not be followed here.

He expected a windfall. “[M]y estimated profit was three point three million dollars.” (R. p. 154, lines 3-4).

Mr. McWhirter had been attempting to line up investors in the project even before the contract was signed. “[S]o as early as March 23rd, you were trying to secure investors in this project; is that right? A. Yes.” (R. p. 158, line 23-p. 159, line 1). The Buyers never came up with the remaining money to close the transaction. (R. p. 159, lines 2-6). The sole owner of the Buyer LLC, Mr. Stanley, did find a secure investor, but Mr. McWhirter was unhappy with the terms the investor proposed.³ (Mr. McWhirter blames Mr. Stanley for failing to come up with a satisfactory investor; Mr. Stanley blames Mr. McWhirter).

³ Mr. McWhirter testified,

A. By way of explanation, Mr. Stanley told Mr. Edwards and myself that he had a secure investor willing to put up the money. The problem at this point in time was that the -- we felt that it was exorbitant. He wanted sixteen percent on the money and sixty-five percent of our profit.

Q. So you weren't satisfied with the investor that Mr. Stanley presented?

A. Correct.

(R. p. 159, lines 6-14).

He does not think he should have done all his due diligence and lined up investors before paying \$100,000 on the contract. "Q. Isn't it true that you should have done all your due diligence and lined up your investors before you ever signed the April 7th contract? A. Well, I don't know that that's true." (R. p. 160, lines 2-5).⁴

He admits that the contract never mentions him, but believed that was okay, as the contract was "marked up" and he expected it would be "retyped."

Q. Okay. Well, the contract doesn't mention Mr. McWhirter anywhere, does it?

A. No. But as I stated in earlier testimony, it was my understanding that the -- this April 7 contract, as it was marked up -- it was all admitted that it wasn't very professional. I was under the assumption that it was going to be retyped.

R. p. 160, lines 19-25.⁵

⁴ His testimony continued, R. p. 160, lines 6-13,

Q. Well, now, you've got a master's degree in business, don't you?

A. Yes, sir.

Q. Okay. And let me see if I have this right. You've got a master's degree in business, and you put up a hundred thousand dollars to seal the April 7th contract?

A. Yes.

⁵ But he does think, "in hindsight," that it would have been prudent to have had a signed operating agreement with the LLC he hoped to join before putting up \$100,000.00 on its behalf. (R. p. 160, lines 3-6).

Nor is there any claim that he was unaware of the terms. He realized at the time the contract was signed that the contract provided only 30 days to close. "And you realized at that time, no matter what capacity you were there in, that you only had thirty days to close? A. That's correct." (R. p. 168, lines 22-25).

He admits that he expected Mr. Stanley, the owner of the Buyer LLC, to reimburse him for the hundred thousand dollars.

Q. Did Mr. Stanley and/or Mr. Edwards promise to pay you back their share of the money that you put up in behalf of Lyman Pacific?

A. Mr. Stanley wrote two letters stating that he would pay me -- and one phone call -- stating that he would reimburse me -- reimburse me the hundred thousand dollars.

Q. But of course, he hasn't done that?

(R. p. 171, lines 14-21).

2. Respondent Lyman Pacific, LLC (Buyer)

Respondent Lyman Pacific, LLC ("Pacific") is a single-member LLC owned and managed by Peter Stanley. (R. p. 329, lines 9-11).

There are no other members, nor has there ever been any other members. (R. p. 329, lines 12-17).⁶ (Mr. Stanley's deposition, Court's

⁶ Mr. Stanley is and has always been the sole member, sole owner, and sole manager of that LLC.

Exhibit 1, was designated by both parties and handed up to the bench. (R. p. 90, lines 20-24)). See also R. p. 266, line 22-p. 267, line 6 (Appellant's Counsel Mr. Pruitt referencing Mr. Stanley's deposition) (similar).

Respondent Pacific did not show up for the March 6, 2013 trial. It had previously requested its attorney withdraw as counsel. He successfully moved to withdraw on January 2, 2013. Mot. Withdraw and Ex. A thereto (Not in Record on Appeal).

-
- Q. FIRST OF ALL, TELL ME WHO IS LYMAN PACIFIC?
A. THAT'S A CORPORATION IN THE STATE OF SOUTH CAROLINA.
Q. IS IT A CORPORATION OR A LLC?
A. IT'S AN LLC.
Q. ALL RIGHT. AND WHO ARE THE -- WHO IS THE PRESENT OWNER OF THAT LLC?
A. I AM. I'M THE MANAGER.
Q. ARE THERE ANY OTHER MEMBERS OF THAT?
A. NO.
Q. SO ARE YOU THE SOLE MANAGER AND SOLE MEMBER?
A. CORRECT.
Q. HAVE YOU ALWAYS BEEN THAT?
A. YES.

(R. p. 329, lines 4-17), Deposition of Stanley (Court's Ex. 1).

3. Appellant Lyman Warehouse, LLC (Seller)

Appellant Lyman Warehouse, LLC, is represented in the appeal, as it was in the lower court and in the signing of the contract at issue in these proceedings, by principal member Richard Bennett. (R. p. 281), Agreement for rescission (Defs.' Ex.), p. 2.

It was Mr. Bennett's understanding, at the time the contract was signed, that Mr. McWhirter was a member of the Lyman Pacific LLC. (R. p. 186, lines 21-23). He thought that Pacific was trying to flip the property. (R. p. 187, line 9). (Mr. McWhirter admitted that the Buyers had discussed flipping the property. (R. p. 166, lines 1-6).

B. Underlying Facts

The contract at issue in this case called for a closing date of May 7, 2011. Pacific was unable to close. As the Court put it, "Lyman Pacific was not able to close by the transaction date." (R p. 260, lines 19-20). On that date, Pacific sent a letter to Warehouse releasing its claim to the \$100,000.00.

Approximately three weeks later, on May 27, 2011, Pacific and Warehouse signed a mutual release, whereby they released each other from all claims. (R. pp. 280-287).

In the interim, Mr. McWhirter had sent to the escrow agent a letter claiming to be entitled to funds, and directing the agent not to disburse the funds to Warehouse.

Warehouse ultimately closed a contract with a third party on less favorable terms. E.g., (R. p. 237, lines 14-25; p. 238, lines 5-21; p. 239, line 21-page 240, line 5; p. 240, lines 15-19). Although this contract involved a sales price \$175,000.00 greater than did the contract with Pacific, this contract sold only the building located on the property, not the land itself. *Id.*; *see also* R. p. 305 (Defs.' Ex (Hook contract), p. 1). Although one might generally expect land to have a positive net value, the land here was contaminated with PCBs and the like. Because the landowner is responsible under environmental laws for the clean-up, the property had a negative net value. Mr. Bennett, the owner of Warehouse, testified that he would have been much better off had the Pacific contract closed. Indeed, he had preferred all along that the Pacific contract close. He hoped it

would close until the closing date, and thereafter consistently wished it had closed.⁷

Additional facts relevant to particular arguments are provided in the discussions therein.

ARGUMENT

THE LOWER COURT ERRED IN DENYING WAREHOUSE'S CLAIM TO THE ESCROWED FUNDS IN FAVOR OF RESPONDENT MCWHIRTER, BECAUSE ANY VALID CLAIM MR. MCWHIRTER HAS IS AGAINST PACIFIC AND/OR MR. STANLEY; BECAUSE HIS THIRD-PARTY BENEFICIARY CLAIM FAILS FOR LACK OF STANDING AND ON THE MERITS; BECAUSE THE CONTRACT CALLS FOR THE ESCROWED FUNDS TO BE DELIVERED TO SELLER (WAREHOUSE) IF THE BUYER FAILS TO CLOSE, AND THE BUYER DID FAIL TO CLOSE; AND BECAUSE THE BUYER RELEASED ITS CLAIM TO THE ESCROWED FUNDS.

I. Preliminary Matter: McWhirter Lacks Standing to Pursue a Claim as a Third-Party Beneficiary. His Lack of Standing Is Fatal to that Claim.

The lower court properly ruled that Mr. McWhirter is not a third-party beneficiary of the contract. (R. pp. 6-7). However, the lower court failed to hold that, as Mr. McWhirter was neither a third-party

⁷ There were two later contracts to sell and purchase the building that never closed. Neither closed on the land. One did not close at all, and the other specifically excluded the land. These are discussed within the Argument section that relates to these contracts (Section II).

beneficiary of, nor a signatory to, nor even mentioned in the contract, that McWhirter lacked standing to challenge the contract's terms.

Scope of Review

The question is a question of law. Review is therefore *de novo*. *l'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000).

Argument

The lower court properly found that the burden of proof is on the one claiming standing; and that if McWhirter lacked standing, the case is over. The lower court erred in continuing its analysis after those findings.

The burden is on the party claiming standing. A failure of proof is fatal to any claim. The parties agree, as the lower court properly stated, that the burden is on the party claiming standing. "THE COURT: So hold on. So the burden of proof of standing of McWhirter is on McWhirter. I agree. And I'm not going to hear anything else on that because I don't need to. Okay?" (R. p. 84, lines 20-23). *See also* R. p. 85, lines 11-18 (counsel for McWhirter conceding that this is the law); R. p. 79, lines 18-19 (argument of counsel for Warehouse) (similar). *See also Powell v. Bank of Am.*,

379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (burden is on the party seeking to establish standing).

The court properly found, and the parties again agree, that if McWhirter's third-party beneficiary claim fails, either due to a lack of standing or on the merits, his contractual claims against Warehouse fail.

MR. PRUITT: And if he has no standing, then –

THE COURT: The case is over.

MR. PRUITT: --- that part of the case is over.

THE COURT: Do you agree with that?

MR. PROTOPAPAS: Your Honor, yes.

(R. p. 84, line 24-p. 85, line 4).

THE COURT: --- if Mr. McWhirter has no standing, is the case over?

MR. PROTOPAPAS: Yes, sir. And the only – the only thing that we could possibly still be here on is a declaratory judgment statute on an interpleader rule. The Court can assess the rights of all the parties either by saying you don't have a right by standing. That's how I'd ask the Court to rule.

(R. p. 85, lines 11-13).

The lower court properly found that as Mr. McWhirter was not a party to the contract, and as the contract did not mention Mr. McWhirter, and as the contract contained a merger clause, any claim by Mr. McWhirter based directly on the contract fails.

THE COURT: All right. Let me just say this. To the extent Mr. McWhirter has no standing to bring a breach of contract action, I do not find that this -- I find this is not a third-party contract either. *It is not anywhere close to one as far as I can see.*

(R. p. 268, lines 6-10) (emphasis added).⁸

⁸ The lower court did not err in finding that McWhirter was not a third-party beneficiary. McWhirter's claim is insufficient to establish standing as a third-party beneficiary. "Not every practical concern equates to the legal interest required for standing." *Powell v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008). South Carolina appellate courts have consistently held that a claim such as McWhirter's is insufficient to confer standing as a third party beneficiary. In *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 644 S.E.2d 699 (2007), the Supreme Court explained, "GEICO alleges that Cooper and Goethe commenced the family court action to bolster Cooper's position against GEICO in the pending litigation involving Cooper's rights under the Goethe policy." *Id.* at 136, 373 S.C. at 701. Although "GEICO may be affected by the outcome of the family court action," the argument that "a finding by the family court validating the existence of the common law marriage between Cooper and Goethe will . . . thereby impair[e] GEICO's ability to protect its economic interest in the payment of insurance benefits misses the mark." *Id.* at 138, 373 S.C. at 70. While a "Court should consider the practical implications of a decision denying or allowing intervention a party must have standing to intervene in an action" *Id.* at 138, 373 S.C. at 702. Therefore, "In this case, the family court had no need to ascertain or settle GEICO's rights before it determined the rights of Cooper and Goethe in their action to recognize their common law marriage." *Id.* at 137, 373 S.C. at 701.

In *Bob Hammond Construction Co. v. Banks Construction Co. and SC Department of Highways and Public Transportation*, 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994), the Court held that an interest in owning a building that was

The case against Warehouse is, or should be, over, with that determination.

II. The Lower Court Erred in Holding that Respondent McWhirter Is Entitled to the Contractual Funds.

One might feel sorry for Mr. McWhirter. He put up \$100,000.00 towards a Buy/Sell contract on behalf of an LLC; the deal fell through;

a subject of a contract did not transform a party into a third-party beneficiary. This was so even though the parties had intended that the third party was to acquire the building. This was so despite the contracting parties' knowledge of the third party's interest, and the third party having even attended regular progress meetings between the contracting parties. "Hammond argues that although it was not a party to the contract between the Highway Department and Banks, it had a sufficient relationship with the Highway Department to support an action against it." *Id.* at 424, 440 S.E.2d at 891. The Court continued,

Hammond contends that it had been a subcontractor for the Highway Department since the late 1970's and that in relation to its work on [the project the contract concerned], it had submitted all required documentation and *had been certified by the Highway Department as a subcontractor on the project.* Furthermore, Hammond alleges *it attended regular progress meetings between the Highway Department, Banks, and the subcontractors and that the Highway Department had specific knowledge of Hammond's contract with Banks.* Finally, Hammond contends its contract with Banks bound the parties to the identical rights and obligations that existed under Bank's contract with the Highway Department. Hammond claims these facts create a sufficient third party relationship between itself and the Highway Department to allow the breach of contract action.

Assuming for purposes of the summary judgment motion that all of Hammond's allegations are true, they do not transform Hammond into an intended beneficiary.

Id. at 424-25, 440 S.E.2d at 891-92 (emphasis added).

the LLC did not reimburse him.⁹ But that is no reason to penalize the seller. That is a matter for a cross-claim by Mr. McWhirter against the LLC. If he prefers, it could also be a matter for a cross-claim by Mr. McWhirter against Mr. Stanley.¹⁰ As he admits, it was Mr. Stanley whom he expected to reimburse him. (R. p. 171, lines 14-21).

A. The Lower Court Erred in Holding that Warehouse Had Released Its Claim to the Escrowed Funds from the April Contract.

Relying on *Bowers v. South Carolina Dept. of Trans.*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004), the lower court found that Warehouse had released its claim to the escrowed funds. (R. p. 8-10). This was error. As a result of this error, the lower court erroneously found that it would “unjustly enrich” Warehouse were Warehouse to receive those funds. (R. p. 8-10) (section entitled “4. Unjust Enrichment”).

The lower court’s holding is erroneous as a matter of law. The lower court’s underlying factual finding is clearly erroneous. Each of

⁹ On the other hand, Mr. McWhirter is an experienced businessperson, who holds an MBA, and yet failed to obtain a written agreement to join an LLC before signing a check from his own funds in support of an LLC he *hoped* to join.

¹⁰ See, e.g. *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192-92. 463 S.E.2d 641, 644 (Ct. App. 1995) (holding that, in a proper case, a plaintiff may pierce the corporate veil, and discussing the requirements to do so.)

these errors is an independent ground to reverse, as explained below.

1. *Background Facts*

After it became clear that a substantial probability existed that Pacific would fail to close, Warehouse entered into a “back up” contract to sell the property with Mills Demolition LLC (SC), which is an entity owned by Stanley’s wife. It did so on May 4, 2011. This contract explicitly provided that it would take effect only if the pre-existing contract between Warehouse and Pacific failed to close. May 4 contract, p. 1 (emphasis added) (“WHEREAS, the Seller has offered to sell the property described below *provided the existing contract the seller has expires*”). The parties to that contract, and the lower court, agreed that it was in fact a “back up” contract. “[I]t is merely a back-up contract.” (R. p. 7) “So this would’ve been a back-up contract.” (R. p. 337, line 3) (deposition of Mr. Stanley). See also R. p. 201, lines 15-20 (testimony of Mr. Bennett) (similar), R. p.

207, lines 9-11 (similar); (R. p. 62) (Post-Trial Brief of Lyman Warehouse, p.5 (similar)).¹¹

Three days later, Lyman Pacific, via Mr. Stanley,¹² released to Warehouse all its claims to the \$100,000.00 in the event Pacific failed to come up that day (May 7, the deadline for the April 7 contract to close) with the needed purchase funds for the April 7 contract.

As the Order recognizes, almost three weeks after that, on May 27, Warehouse, Mills Demolition, Pacific, and the three individuals who were each sole owner of one of those LLCs (Richard Bennett, Peter Stanley, and Susan Stanley) entered into a mutual release of all claims. (R. p. 8-9).

2. The Lower Court Erred as a Matter of Law in Relying on Bowers v. SC DOT. The Law Is Exactly Opposite.

The Order recognizes that “Lyman Warehouse's claim to the \$100,000 is contingent on Lyman Warehouse's contractual rights

¹¹ Although Mr. McWhirter's views of this May 4 contract are not relevant here, as background, Mr. McWhirter concedes that this was a “back-up” contract. “Well, I have been referring to the backup contracts by Mills.” (R. p. 169, lines 14-15) (Testimony of Mr. McWhirter).

¹² Mr. Stanley's actual and apparent authority to act on behalf of Pacific is discussed in footnote 6 of this document and the accompanying text, and in footnote 18.

under the April 7, 2011 agreement.” (R. p. 8). It then relies on *Bowers v. South Carolina Dept. of Trans.*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004) for its conclusion that

Lyman Warehouse released all claims to the earnest money in exchange for \$27,500. **See** Exhibit 5 pp. 4-6. As a result of the release, Lyman Warehouse would be unjustly enriched if were to obtain the \$100,000.

(R. p. 9-10) (emphasis in original).

The Order has the law backwards. *Bowers* is has been distinguished on grounds directly applicable here. As explained in *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007), *Bowers* concerned a mutual release that released not only claims against the parties to that release, but “was general and all encompassing in its scope. . . . [In that it] released the tort-feasor “and all other persons, firms or corporations liable, or who might be claimed to be liable.”” *Ecclesiastes*, 374 S.C. at 495, 649 S.E.2d at 500 (quoting *Bowers*, 360 S.C. at 154, 600 S.E.2d at 500).

The release by Warehouse at issue here contained no such all-encompassing release of claims against the rest of the world; it was limited to the parties to the release.

The full text of the section of that document (Section VII) by which Warehouse released its claims is reprinted here for the convenience of the reader. It is entitled,

VIII. COMPLETE RELEASE OF ALL CLAIMS
AGAINST LYMAN PACIFIC, MILLS, PETER
AND SUSAN BY BENNETT AND LYMAN
WAREHOUSE

(R. p. 284) (underscoring in original, italics added).

The accompanying text states, in full:

In exchange for the Consideration and the Covenants hereinbefore stated, the undersigned, Bennett and Lyman Warehouse together with his spouse, personal representatives, successors and heirs, attorneys and assigns, do(es) *hereby release and forever discharge Lyman Pacific, Mills, Peter and Susan* from all of the Claims, both past and present, including, but not limited to all claims, demands, actions, and causes of action, including without restricting the foregoing generality, any and all claims for damages, liquidated damages, exemplary damages, punitive damages, incidental, special, indirect or consequential damages, damages and all losses of money and economic opportunity and for mental anguish or emotional distress, damages for loss of reputation, damages for breach of contract, damages arising from tort, including intentional acts, fraud, constructive fraud, civil conspiracy, interference with contractual relations and/or prospective economic advantage, interference with corporate governance, breach of corporate or limited liability company duty, costs of every kind, including attorney's fees and breach of every fiduciary duty owed by any one or more of the parties herein released to the party herein released, including but

not limited to mismanagement, breach of each and every law governing management of corporate affairs, misappropriation of funds, improper maintenance of records; breach of any duty owed to the parties herein released imposed by any statutory law of the United States of America, any statutory common law of the State of South Carolina, any rule or regulation published or promulgated by any federal or state agency and any other statutory or common law of any other jurisdiction of the United States of America, whether known or unknown and whether asserted or not asserted.

It being the specific intent of the releasing Parties to fully *release the Parties herein* released of and from any Claims or right of the releasing Party to claim or to make any of the Claims against the Parties herein released for any losses or damages the releasing Party may have sustained or may hereafter sustain, known or unknown, arising out of the Circumstances or arising out of any other transaction or relationship between or among the releasing Party and the Parties herein released and all incidents and consequences thereof.

(R. p. 284-285) (emphasis added).

Thus, the operative section in the present release is entitled as a release by Warehouse “Against Lyman Pacific, Mills, Peter and Susan [Stanley];” its text states that the released parties are “Lyman Pacific, Mills, Peter and Susan,” and its text states again that the intent is to “release the *Parties* herein released.”

As explained in *Ecclesiastes*, 374 S.C. at 502, 649 S.E.2d at 504, quoting the release at issue in that case,

"This Mutual Release is . . . by and between JDL Holdings, LLC, Plaintiff and Danny Yopp d/b/a Ecclesiastes Productions Ministries." Palpably, the Settlement Agreement was exclusively between EPM and JDL.

The *Ecclesiastes* Court held, as a matter of law, that the release did not release any claimant or potential claimant who was not a party to the release.¹³ It therefore reversed the trial court without a need for oral argument. *Id.* at 488, 649 S.E.2d at 496. ("The trial judge granted Outparcel's motion based on a settlement agreement between EPM and JDL Holdings, LLC ('JDL') that he deemed to require Outparcel's release as well. We REVERSE.") See also *id.* n.1 (the contention to the opposite did not merit oral argument prior to reversal.)

It thereby distinguished *Bowers* on facts identical to the facts here. It held these facts, as a matter of law, do not equate to a release against anyone or any entity not a party to that release. It held that these facts require a result opposite from the result in *Bowers*.

¹³ More generally, see *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 556 S.E.2d 357 (2001) (applying the principle *expressio unius est exclusio alterius*). This principle would suffice to reverse even had *Ecclesiastes* never been decided.

So too here. There was no language in this document releasing the entire world. The release clearly states whom is being released.

The lower court erred, as a matter of law, in holding that Seller had released any party whom was not a party to the release..

3. The lower court's holding re: the release is erroneous for additional reasons.

First, the lower court failed to realize that by that point, *there was no longer any claim by Pacific against Warehouse for the escrowed money in the May 4 contract.* Pacific had already released that claim. It did so via its April 30 and May 7 letters. (R. p. 278; R. p. 288).

Second, the Court's factual finding makes no sense. In its clearly erroneous reading, the two parties to the April 7 contract,¹⁴ Seller and Buyer, each released the other from any claim it had to

¹⁴ As the Court properly found, the only two parties to the April 7 contract were Warehouse and Pacific. *E.g.*, R. p. 6 ("Here, the contract is clearly between two parties, Lyman Pacific, LLC and Lyman Warehouse LLC.")

\$100,000.00 sitting in escrow. Why would the parties do that?¹⁵ By that logic, the parties must have intended for the money to sit with the escrow agent in perpetuity.

Obviously, the funds contractually belong to one of the parties to the contract, either the Buyer or the Seller.¹⁶ The Seller failed to show up at trial to be heard on its claim. The funds thus default to the Seller.¹⁷

Third, the lower court again confused itself in reading the \$27,500.00 that was paid to Seller at the time of that release as payment on the April 7 contract. (R. p. 10). That was a compromise

¹⁵ It cannot be seriously maintained that they intended to benefit Mr. McWhirter by each renouncing its own claim to the escrowed money. This is especially so as the lower court found that Mr. Stanley/Lyman Pacific was not in the least concerned with the welfare of Mr. McWhirter. For example, the court stated its findings at the conclusion of the hearing: "But even so, the acts, his [Mr. Stanley's] acts, certainly appeared to be in his personal best interest and didn't appear to include any consideration of any fellow member or of Mr. McWhirter." (R. p. 265, lines 6-10).

¹⁶ If they had belonged to the Buyer, the Buyer could have used those funds to reimburse the non-member who put up the money. Because they belong to the Seller, the Buyer would need to reimburse the non-member out of its own funds, or the funds of its sole member, if any reimbursement were required.

¹⁷ Nor could McWhirter enforce the release, even had the document been intended to end Warehouse's claim to the escrowed funds. McWhirter was not a party to the release. Under South Carolina law, "an individual who is not a party to a contract lacks privity to enforce it." *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E. 2d 858, 861 (2003). Thus, Buyer's failure to show up for trial ends the dispute as to the escrowed funds: They belong to Seller.

of the outstanding claim for the failure of the Buyer to close on the May 4 contract. It represented approximately half the amount (\$50,000.00) that the Buyer was obligated, via that May 4 contract, to cause to be paid to the Seller in the event that second contract failed to close.

B. The Lower Court Multiply Erred in Denying Warehouse's Claim Based on a Supposed Lack of Proof of Damages.

The lower court's holding that Mr. McWhirter was entitled to the contractually-escrowed funds on grounds that the contract required Warehouse to prove its damages, and that Warehouse failed to do so, is erroneous in five separate aspects. Each, individually, is prejudicial error. (R. p. 9-11).

The lower court erred, first, as a matter of law, because Mr. McWhirter lacks standing to contest the terms of the April 7 contract between Warehouse and Pacific. This is discussed at some length in Part I above. That discussion is incorporated by reference and will not be repeated here.

The lower court erred, second, because the parties to that contract have each testified that they intended for those funds to be

liquidated damages, to be transferred in their entirety from escrow to the Seller if the Buyer failed to close.

Mr. Bennett testified,

- Q. And it [the \$100,000 check] was meant to hold the property, was it not?
- A. It was for the earnest money of this contract.
- Q. It was for the earnest money of that contract. Okay. The earnest money for that contract, sir, was not meant to be any sort of a liquidated damage, was it, sir?
- A. I thought we all agreed that if they defaulted that the hundred thousand dollars would be my full remedy, basically liquidated damages. I couldn't sue them for any more or any less and vice versa.
- Q. Look at paragraph fifteen.
- A. Yes, sir. Yes, sir?
- Q. Do you see the word liquidated damages in there?
- A. No, sir.
- Q. Do you see it's saying sole remedy?
- A. It says, the earnest money up to this date will be seller's sole remedy against the purchaser defaulting. Is that basically what you're saying?
- Q. Yeah. It says it's your sole remedy, right?
- A. The earnest money is my sole remedy.
- Q. So you would have to come and prove the amount of your damages up to one hundred thousand dollars if the closing doesn't occur?
- A. That's not what I understood.

(P. 190, lines 2-24).

Mr. Stanley similarly testified,

Q. OKAY. PARAGRAPH FIFTEEN (15) -- -

A. IN OTHER WORDS, *THAT WAS THE LIQUIDATED DAMAGES FOR IT.*

Q. SO -- AND YOU SEE IT AS A LIQUIDATED DAMAGES CLAUSE?

A. I'M -- WHAT I'M SAYING IS THAT IF WE DIDN'T CLOSE -- WHEN I SAY, "WE" -- IF LYMAN, *IF LYMAN PACIFIC DID NOT CLOSE, BENNETT KEEPS THE MONEY. THAT'S WHAT I'M SAYING.*

Q. UP TO THE AMOUNT OF HIS DAMAGES; RIGHT?

A. UP TO THE AMOUNT OF HIS DAMAGES -- I MEAN, THAT'S UP TO HIM WHAT HE THINKS HIS DAMAGES ARE. *I'M JUST SAYING THAT MY INTERPRETATION OF THAT IS WE PUT UP A HUNDRED THOUSAND DOLLARS (\$100,000) AND WE DON'T CLOSE, THEY GET THE MONEY.*

(R. p. 374, lines 8-22) (emphasis added).

Mr. Stanley continued,

A. I'M -- WHAT I'M SAYING IS MY INTER- -- MY INTERPRETATION OF, OF FIFTEEN (15) IS THAT -- I MEAN ALL THE DEALS THAT I'VE, I'VE BEEN -- *I'VE BEEN IN THE REAL ESTATE BUSINESS FOR A LONG TIME. I MEAN, I'VE HAD A LOT OF CONTRACTS. IF I PUT UP THE DEPOSIT AND I DON'T CLOSE, THE GUY KEEPS THE MONEY.*

Q. THAT'S THE WAY IT WORKS?

A. *IT'S ALWAYS WORKED FOR ME THAT WAY.*

(R. p. 376, lines 3-11) (emphasis added).

Thus the interpretation of the only two parties that signed the contract was that a failure of the Buyer to close would automatically result in the Seller being entitled to the funds in escrow, i.e., the \$100,000.00.

The lower erred, third, in failing to find that the letters of April 30 and of May 7 from Pacific to Warehouse released Pacific's claim to the \$100,000.00. (R. p. 278; R. p. 288) Indeed, by the May 7 letter, Pacific had explicitly agreed that the funds would belong to Warehouse if, as seemed almost certain as of the date and time of that letter, Pacific failed to close. Letter of May 7.¹⁸

¹⁸The lower court's reasoning, as stated at the conclusion of the hearing, was not included in the final Order. Appellant Warehouse addresses that reasoning here in an abundance of caution.

The lower court appeared concerned at the end of the hearing regarding Mr. Stanley's ability to bind Lyman Pacific, LLP. E.g., "Again, there's no indication that Mr. Stanley, although he anticipated he was going to be part of Lyman Pacific, had authority to act and bind that corporation." (R. p. 262, lines 15-16) (statement of the court). See also R. p. 265, lines 2-5 (similar). This is erroneous for two reasons.

First, and perhaps most importantly, regardless of whether Mr. Stanley had actual authority to act on behalf of Pacific, Mr. Stanley clearly had *apparent* authority to do so. See *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). The contract was signed in the presence of Mr. McWhirter and other

Footnote Continued

intended members of the LLC. It was signed by Mr. Stanley on behalf of Pacific. It is undisputed that Mr. McWhirter at least acquiesced in Mr. Stanley's signing on behalf of the LLC, and did so without protest. Mr. McWhirter admitted as much:

Q. Okay. Now, when you were at the meeting at Stax restaurant signing the April 7 contract, did you protest the authority of Mr. Stanley to execute it?

A. No, I did not.

(R. p. 171, lines 1-4). Cf. Deposition of Mr. Stanley, R. p. 333, lines 2-5 (stating that no one objected to his authority to sign on behalf of the LLC).

Moreover, Mr. Stanley had actual authority to bind the LLC. He is and has always been the sole member, sole owner, and sole manager of that LLC.

Q. FIRST OF ALL, TELL ME WHO IS LYMAN PACIFIC?

A. THAT'S A CORPORATION IN THE STATE OF SOUTH CAROLINA.

Q. IS IT A CORPORATION OR A LLC?

A. IT'S AN LLC.

Q. ALL RIGHT. AND WHO ARE THE -- WHO IS THE PRESENT OWNER OF THAT LLC?

A. I AM. I'M THE MANAGER.

Q. ARE THERE ANY OTHER MEMBERS OF THAT?

A. NO.

Q. SO ARE YOU THE SOLE MANAGER AND SOLE MEMBER?

A. CORRECT.

Q. HAVE YOU ALWAYS BEEN THAT?

A. YES.

(R. p. 329, lines 4-17). The court promised to read the entire deposition of Mr. Stanley (Court's Ex. 1) following the conclusion of the hearing. Moreover, the parties were allowed to specifically designate certain portions of that deposition for the Court's attention, and Warehouse specifically designated the quotation above, i.e., page 9, lines 4-17. (R. p. 415)

"THE COURT: Okay. Now, let me tell you. I just told you -- and I prefaced my remarks based on what I have not ruled, but what I anticipate that I very well may rule. *I am going to read everything, including the briefs, depositions.*" (R. p. 267, lines 71-11) (emphasis added).

The failure to so find was clearly erroneous.¹⁹

The lower court erred, fourth, in finding that Warehouse had failed to prove any damages. This fourth error is actually two separate errors. The operative language from the Order is,

At trial, Lyman Warehouse failed to present competent evidence of any damages from Lyman Pacific's default. Rather, evidence was presented that Lyman Warehouse entered into two other contracts, a May 4, 2011 contract and a June 6, 2011 contract. The June 6, 2011 contract closed for more money than the April 7, 2011 contract. See Defendant McWhirter Exhibits 2, 3, and 4. As a

Footnote continued

Operating agreement. He formed it. He was the sole owner. He never admitted them as members. So I think if you read that deposition, he undisputedly had the authority to enter into agreements relative to Lyman Pacific.

(R. p. 266, lines 22-p. 267, line 6).

Further, Warehouse's attorney had explained to the lower court, immediately prior to the court's remarks above,

MR. PRUITT: Your Honor, you haven't had a chance to read the deposition of Peter Stanley yet. But in that deposition, it clearly states that he is the sole owner of Lyman Pacific and that the other two never became members of it, largely because they never agreed on the

¹⁹ Indeed, Mr. McWhirter testified to similar effect. "Mr. Stanley signed a letter releasing my hundred thousand dollars on two separate occasions, on April 30th and on April 7th." (R. p. 149, lines 11-13).

result, Lyman Warehouse has failed to prove any damages from the default.

(R. p. 10).

First, Warehouse did present "competent evidence." Mr. Bennett testified at length about the expenses he incurred. E.g., R. p. 236, line 4-p. 237, line 4. This finding is clearly erroneous.

Second, the conclusion the lower court draws from the "evidence" on which it relies is clearly erroneous. The May 4, 2011 contract never closed. And the June 6 contract with the third-party buyer was less advantageous to Warehouse than the failed April 7 contract with Pacific would have been. The two contracts did not cover the same ground. The term "same ground" is meant literally, as illustrated by the following testimony of Mr. Bennett:

Q. All right. Now, would it have -- would it have suited you fine for Lyman Pacific to have closed on this deal?

A. Again, I absolutely promise y'all that would have been the best thing that could have happened to me that day is they brought me a check for one point three million dollars. And I hope they made a million. I hope they make a hundred million dollars. I just wanted to sell the property. Them numbers worked for me. And I just wanted to go. And now I'm still in a mess.

(R. p. 239, line 21-p. 240, line 5).

A. But I really wanted to sell the piece in whole.

Q. All right.

A. Because of some of the liabilities. And I needed the money.

(R. p. 240, lines 15-19).

A. Was anticipating selling the dirt. Then when Hook -- Hook said, we don't want the dirt. We just think it's too much liability. There might be contamination in the ground. All we want's the cherry. We want the steel. We don't want none of that stuff. We don't want no PCBs, which I've already been -- I'm in all kind of trouble right now. So all that stuff in the ground, they didn't want no liability. So they just specifically wanted the steel [i.e., to demolish the plant in order to recover its steel]. So what they did is they purchased just the steel. They made me sign an agreement. I think for three years I had to give them an easement on the property and pay the property taxes, and then they could just walk away. Whatever they left there was my problem.

Q. All right. Now, even though the contract with Hooks was a little more, why would the contract, the April 7th contract, been better?

A. Well, the main reason, A, it was a little bit more, but I had to agree to pay the property taxes for three years. That's part of it. But the main reason ---

Q. How much are the property taxes?

A. At the time they were about seventy thousand.

(R. p. 237, lines 4-25). Additionally, there were property taxes at

lower rate for two subsequent years. (R. p. 238, lines 1-5).

- A. But the main reason was the liability of having a hundred contractors on a piece of property that you own, and the liability of dealing with hazardous material that was onsite and spilling it on the ground or make a mistake. And my reality, I believe, came true. I think I have at least eight mechanics liens filed against it now, and I got in trouble with EPA. They're already in the process of -- I guess they're going to fine me. They said they are. But they -- I'm under EPA right now because they took PCBs out of the transformers and put them in some drums and didn't label them properly and store them properly. And since I own the land, I'm drug into it, which I have ---
- Q. All right. So you would have much rather sold the ground and left all those problems to Lymon Pacific?
- A. I'd much rather not be in any way attached to this, which at this point is a big nightmare.

(R. p. 238, lines 5-21).

The lower court erred in holding that a later contract for a slightly larger amount – selling a different and much more valuable slice of the property – negated any damages from the failure to close on the contract at issue here.

The lower court erred, fifth, because just as Mr. McWhirter has no standing to challenge the interpretation of the contract, that is, whether the monies paid prior to the failed closing date were liquidated damages or needed to be proven, so too did Mr. McWhirter

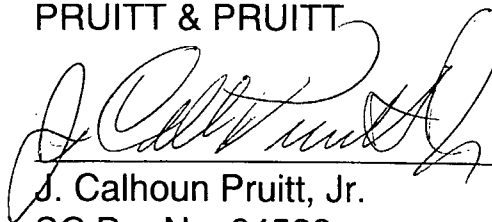
lack standing to challenge the sufficiency of the evidence provided by Mr. Bennett on behalf of the Seller.

CONCLUSION

To the extent, if any, that the Court concludes that Mr. McWhirter has a claim in equity, the Court may wish to remand with instructions to allow Mr. McWhirter to pursue the claim(s) against Lyman Pacific LLC and/or its sole owner, Mr. Stanley. Either way, the Order below should be REVERSED or REMANDED with instructions to void the award against Respondent Lyman Warehouse.

Respectfully Submitted,

PRUITT & PRUITT



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July 7, 2014

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
R. Lawton McIntosh, Circuit Court Judge

Circuit Court CA No: 2012-CP-04-00041
Appellate Case No: 2013-001518

Harold P. Threlkeld d/b/a Harold P. Threlkeld,
Attorney at LawPlaintiff,

v.

Lyman Warehouse, LLC, Lyman Pacific, LLC,
Mills Demolition, LLC, Susan C. Stanley, Peter
M. Stanley and Donald J. McWhirterDefendants,

Of Whom Lyman Warehouse, LLC is theAppellant,

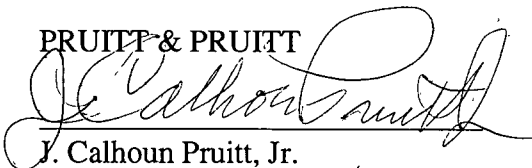
Of Whom Donald J. McWhirter is theRespondent,

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and Final Reply Brief of Appellant on the attorneys for Respondent, Donald J. McWhirter, by depositing a copy of it in the United States Mail, postage prepaid, on July 7, 2014, addressed as follows:

Peter D. Protopapas
Rikard & Protopapas
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July 7, 2014

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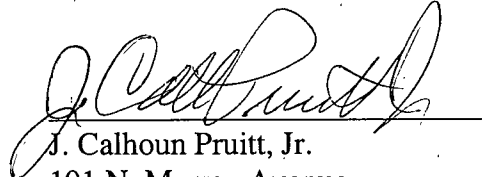
The undersigned hereby certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with the requirements of Rule 211(b), SCACR.

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JUL 08 2014

SC Court of Appeals


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July 7, 2014.