THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Opinion No. 2015-UP-001518 (S.C. Ct. App. filed August 19, 2015)

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 the ....Petitioner,

Of Whom Donald J. McWhirter is the ....Respondent.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 the Appellant,

and Donald J. McWhirter is the Respondent.

Appellate Case No. 2013-001518

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2015-UP-428
Submitted April 1, 2015 – Filed August 19, 2015

AFFIRMED

James Calhoun Pruitt, Jr., of Pruitt & Pruitt, of Anderson, for Appellant.

Peter Demos Protopapas, of Rikard & Protopapas, LLC, of Columbia; and John Christopher Pracht, V, of Thomason & Pracht, LLP, of Anderson, for Respondent.

PER CURIAM: Lyman Warehouse, LLC (Lyman Warehouse), appeals the trial court's ruling that Donald J. McWhirter is entitled to $100,000 held in escrow by Lyman Warehouse's former counsel, Harold P. Threlkeld. Lyman Warehouse argues the trial court erred in ruling (1) McWhirter has standing to assert a claim to the money, (2) Lyman Warehouse released its claim to the money, (3) Lyman Warehouse would be unjustly enriched if it received the money, and (4) the contract required Lyman Warehouse to prove damages. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether McWhirter has standing to assert a claim to the money: *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) ("To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." (citations and internal quotation marks omitted)); Rule 22(a), SCRCP ("Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."); *First Union Nat'l Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 499, 469 S.E.2d 613, 616 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) ("[T]he primary purpose of interpleader is to enable a neutral stakeholder, usually an insurance company or a bank, to shield itself from liability for paying over the stake to the wrong party. This is done by forcing all the claimants to litigate their claims in a single action brought by the stakeholder. . . . There need not be actual competing claims against the stakeholder for him to be entitled to interpleader, as long as there is the potential for multiple claims." (citations and internal quotation marks omitted)).

2. As to whether Lyman Warehouse released its claim to the money: *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("A release is a contract and contract principles of law should be used to determine what the parties intended."); *id.* ("The parties' intention must, in the first instance, be derived from the language of the contract."); *id.* at 498, 649 S.E.2d at 502 ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered."); *id.*

at 499-500, 649 S.E.2d at 502 ("[A]ny ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." (quoting *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981))).

3. As to whether Lyman Warehouse would be unjustly enriched if it received the money: *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011) ("In actions at equity, this court can find facts in accordance with its view of the preponderance of the evidence." (internal quotation marks omitted)); *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010) (holding a party asserting a claim of unjust enrichment must prove (1) it conferred a benefit upon the defendant, (2) the defendant realized the benefit, and (3) the defendant retained the benefit under conditions that make it unjust for him to do so).

4. As to whether the contract required Lyman Warehouse to prove damages: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues if a prior issue is dispositive).

AFFIRMED.[1]

FEW, C.J., and HUFF and WILLIAMS, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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SC Court of Appeals

Circuit Court CA No: 2012-CP-04-00041
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 the ....Appellant,

Of Whom Donald J. McWhirter is the ....Respondent,

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Lyman Warehouse, LLC files the following petition for rehearing regarding this Court's decision in *Harold P. Threlkeld d/b/a Harold P. Threlkeld, Attorney at Law v. Lyman Warehouse, LLC, Lyman Pacific, LLC, Mills Demolition, LLC, Susan C. Stanley, Peter M. Stanley, and Donald J. McWhirter*, Opinion No. 2015-UP-428 (S.C. Ct. App. filed August 19, 2015). Appellant contends that in affirming the decision below, the Court overlooked or misapprehended the following points:

I. Appellant Never Released Its Claim to the Escrowed Funds.

Lyman Warehouse, LLC, entered into a release concerning a related contract, specifically a release related to a subsequent contract that was also breached (R. p. 280). However, that agreement by its specific terms related only to the Contract and Circumstances as defined by that agreement, each of which were specifically defined by reference to the subsequent contract rather than the contract relevant to the case at bar. While the Court is certainly correct that a release is a contract controlled by contract principles of law, the plain language of the release here suggests that it has no bearing on the instant dispute. Furthermore, the release cited by both parties and referenced by the Court neither mentioned nor included the April 7th contract pursuant to which the disputed funds were deposited. Indeed, by the time of the release cited by the parties and the Court, there was no need to address ownership to the escrowed funds as Lyman Pacific, the party that breached the April 7th contract, had already released any claim it may have had to the funds. (R. p. 278, R. p. 288). Appellant contends that the Court overlooked or misapprehended this point to the extent it relied on authorities suggesting

that interpretation of the release was necessary or relevant to the questions before the Court.

In support of its decision, the Court cited *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). That reliance was misplaced. In *Ecclesiates*, the original parties settled their claims prior to trial leaving only a third-party Complaint in dispute. At the conclusion of the third-party Plaintiff (EPM)'s case, the third-party Defendant (Outparcel) moved for a directed verdict and specifically cited the release between the other parties. *Id.* The trial court granted the motion, and this court reversed, concluding that the release at issue contained no language releasing the entire world and related only to the parties to the release, as interpreted according to principles of contract law. *Id.* So too here. Lyman Warehouse entered into a release with other parties relative to breach of a separate contract. Appellant respectfully suggest that the release does not control ownership of the funds at issue here, which are instead governed by reference to the only contract related to those funds.

Finally, Respondent does not have standing to assert the terms of the release or rely on that agreement to advance his claims. Respondent was not a party to the release and cannot seek to enlarge the scope of that agreement to include an additional contract. *See Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App. 2003); *See also Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct.App. 1994) (concluding that a third person not in privity of contract with the contracting parties may not enforce the provisions of a contract unless entered for the benefit of the third person).

II. Appellant Proved Its Damages Despite No Contractual Obligation to Prove Damages

This case concerns an earnest money deposit for a purchase contract covering certain commercial real estate. The contract at issue, like most real estate contracts, allocated ownership of the escrowed funds in the event of breach. (R. p. 274). In this case, the funds went to the Seller as liquidated damages in the event of breach. That fact, together with relevant language from the only contract relevant to this dispute, should end the Court's inquiry with the funds awarded to the Appellant Seller. However, at trial and on appeal, Respondent maintained that Appellant failed to prove damages and thus the funds belonged to Respondent. Appellant has been consistent: proof of damages is irrelevant under the contract, and even if such proof is somehow required the record certainly reflects substantial proof of damages. *See* Appellant's Reply Brief at 3-5.

In this case, the Court declined to address the issue, having determined that dispositive resolution of other issues rendered further analysis unnecessary. Respectfully, contractual allocation of damages and substantial evidence of record relative to damages permeate the remaining issues before the Court. Specifically if, as Appellant contends, the release is inapplicable, then the dispositive issue is unjust enrichment. Contractual allocation of damages, and proof required under that written agreement, are necessarily intertwined with unjust enrichment. Appellant respectfully requests that the Court address the merits of this issue, both independently as a possible alternative ground for the trial court's decision and as it relates to unjust enrichment.

III. The Language of the Contract and Proof of Damages are Fatal to Respondent's Unjust Enrichment Claim

The disputed funds at issue in this case originated as earnest money for a commercial real estate contract. The parties to that agreement specified, in writing, who should receive the funds in the event of breach. (R. p. 276). Appellant provided proof of damages directly caused by the Buyer's breach. This Court was correct that a party asserting a claim of unjust enrichment must prove three elements of that claim. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010) (requiring proof of (1) conference of a benefit on the defendant, (2) the defendant realized the benefit, (3) the defendant retained the benefit under conditions that make it unjust for him to do so). In applying that standard to this case, Appellant contends that the Court overlooked or misapprehended several points.

First, Appellant's proven damages demonstrate that receipt of the escrowed funds would not result in retention of a benefit. To the contrary, retained possession of contractually allocated liquidated damages in this case would merely serve to reduce Appellant's proven actual damages. Here the Respondent conferred a benefit to "seal the deal" just as any other buyer would necessarily pay an earnest money deposit to secure a contract. The Respondent, despite his failure to safeguard his interests and subsequent failure to secure a role in the Buyer LLC, obtained the benefit of that bargain. Specifically, the parties formed a binding agreement, subsequent breach notwithstanding.

Second, Appellant's retention of the benefit is equitable. As a preliminary matter, Appellant reiterates that a standard real estate contract, inclusive of an earnest money deposit and liquidated damages clause, controls ownership of the funds. (R. p. 276). However, in analyzing the merits of Respondent's unjust enrichment claim he failed to

prove any inequity that would follow enforcement of the contract as written. In this case, Appellant was far worse off as a result of the breach of contract after performance of a less favorable agreement. *See* Appellant's Reply Brief at 3-5. Furthermore, to affirm as to unjust enrichment this Court would necessarily be required to hold that earnest money liquidated damages are inequitable. Simply put, that cannot be the law in this State. In light of the underlying contract, the inapplicability of the release cited, and the failure of any additional proof suggesting inequity, there is no inequity in retention of the disputed funds and Appellant is entitled to enforce the contract at issue.

Finally here, Respondent has an adequate remedy at law. This Court failed to address the availability of legal remedies. See *Barret v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (1984) (equitable remedies unavailable where there is an adequate remedy at law). The Appellant respectfully requests that the Court address why Respondent is entitled to any equitable relief given the demonstrated availability of complete and adequate legal remedies.

CONCLUSION

The language of an inapplicable release cannot support the conclusion that an earnest money deposit allocated by contract to the non-breaching party unjustly enriches that party. Rather, the release as intended and the underlying contract as written dictate that Appellant is entitled to the disputed funds. Furthermore, the record reflects that Appellant proved its damages resulting from breach despite having no contractual obligation to do so. For these reasons, Appellant requests that the Court grant this Petition, withdraw its opinion, rehear the matter, and issue a new opinion reversing the circuit court's find that Appellant would be unjustly enriched through receipt of the

disputed funds. Appellant further requests that the Court address the remaining issue raised, specifically Appellant's contention that proof of damages is unnecessary or, in the alternative, that Appellant provided sufficient proof of damages.

Respectfully Submitted,

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August 31, 2015.

The South Carolina Court of Appeals

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 the Appellant,

and Donald J. McWhirter is the Respondent.

Appellate Case No. 2013-001518

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few, C.J.

Thomas E. Huff, J.

H. Bruce Williams, J.

Columbia, South Carolina

FILED

October 23, 2015

cc:
James Calhoun Pruitt, Jr., Esquire
Peter Demos Protopapas, Esquire
John Christopher Pracht, V, Esquire

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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 the ....Appellant,

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. ("CONSIDER-ATION: $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 Litigation[1]

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.

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[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, lines15-17) (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 Lymon[2] 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).

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[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).

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[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]

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[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 Lymon 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, lines9-11). There are no other members, nor has there ever been any other members. (R. p. 329, lines12-17).[6] (Mr. Stanley's deposition, Court's

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[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, "Lymon 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, lines14-25; 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

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[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.* *I'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]

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[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 in 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 Geothe 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;

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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

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[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

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[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,

> <u>VIII. COMPLETE RELEASE OF ALL CLAIMS *AGAINST LYMAN PACIFIC, MILLS, PETER AND SUSAN* BY BENNETT AND LYMAN WAREHOUSE</u>

(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*.

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[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

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[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]

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[18]The 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 Lymon 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 Lymon 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,

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July 7, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

R. Lawton McIntosh, Circuit Court Judge

Circuit Court Civil Action No: 2012-CP-04-00041
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 the .... Appellant,

Of Whom Donald J. McWhirter is the .... Respondent.

BRIEF OF RESPONDENT

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June 30, 2014

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ISSUES ON APPEAL

1. Is Appellant entitled to Respondent Don McWhirter's One Hundred Thousand ($100,000.00) Dollars even though Appellant released all claims to it?

2. Did the Circuit Court err in holding that Appellant failed to prove its damages?

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's judgment after a bench trial on March 6, 2013. On January 4, 2012, Thelkeld brought this interpleader action to determine the parties' respective rights to $100,000.00.[1] Lyman Warehouse, LLC answered the complaint asserting it was entitled to the monies. **ROA 17 .** Donald McWhirter ("McWhirter") through his Amended Answer and Cross Claim asserted he was entitled to the monies. **ROA 20 .** Lyman Pacific, Susan Stanley, Peter Stanley, and Mills Demolition asserted they had an interest in the monies. **ROA 27, 29 .** The matter proceeded to a bench trial and the Trial Court ordered that McWhirter's money be returned to McWhirter.

STATEMENT OF THE FACTS

This controversy involves the proposed purchase of 22 +/- acres of land in Lyman, South Carolina ("the Property"). **ROA 271 DLW Exhibit 1.** Initially, Peter Stanley (and his company Lyman Pacific LLC), Don McWhirter, and Elliott Edwards sought to purchase the Property from Lyman Warehouse for demolition and reclamation of steel. **ROA 141—142 Tr. 74 ll 9-17; 75 ll 10-17.**

On April 7, 2011, Pacific and Lyman Warehouse entered into a contract. Defendant Lyman Warehouse **ROA 271 DLW Exhibit 1.** The contract was signed at

[1] Plaintiff Threlkeld is an attorney who represented Lyman Warehouse and its manager Richard Bennett for a long time. **ROA 71 . Tr. 4 ll 8-15.**

a meeting at Stax's Restaurant in Greenville, SC. See **ROA _142_ Tr. 75 ll 19-22.** Present at the meeting were Peter Stanley, Richard Bennett, Elliott Edwards and Don McWhirter. **ROA _142_ Tr. 75 ll 19-22.**

The closing date on the contract was May 7, 2011. The contract set forth a purchase price of $1.3 million with $100,000.00 placed in trust. McWhirter individually wrote a check for $100,000.00 to satisfy the earnest money provision of the contract. **ROA _277_ DLW Exhibit 2.** Paragraph 15 of the contract states in pertinent part:

> REMEDIES FOR BREACH: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentioned in paragraph four (4) then seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

On May 3, 2011, Stanley, on behalf of Pacific, requested that Bennett and Warehouse move the closing seven days from May 7, 2011 to May 14, 2011. Bennett refused. **ROA _279_ DLW 4.**

On May 4, 2011, unbeknownst to McWhirter, Stanley and Bennett entered into a second contract for the sale of the Property and set the closing for May 14, 2011. The contract was between Mills Demolition, LLC (another Stanley company) and Lyman Warehouse. The sales price is the same as the Lyman Pacific contract and a deposit of earnest money in the amount of $50,000.00 was placed into the account of Harold Threlkeld. **ROA _292_ DLW 9.**[2]

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[2] On the closing day of May 7, 2011, Stanley sent a self serving letter to Appellant Lyman Warehouse that McWhirter's escrowed money should be turned over to Lyman Warehouse. **ROA _288_ DLW 6.**

The contract did not close on May 7, 2011. A dispute arose as to who was entitled to the One Hundred Thousand ($100,000.00) Dollars. See **ROA 289—291 DLW 7 and 8.** Threlkeld exchanged correspondence with representatives of Lyman Pacific and McWhirter outlining the dispute. See **ROA 289—291 DLW 7 and 8.** Threlkeld also had conversations with individuals about claims being made to the $100,000.00. **See ROA 93—94, TR. 26 ll 3-9; TR. 27 13-19.**

On May 27, 2011, an Agreement for Rescission of Contract and Full and Final Release ("Release") was reached between Lyman Warehouse, Mills Demolition, Lyman Pacific, Bennett, and the Stanleys. See **ROA 280 DLW Exhibit 5.** The Release was drafted by the counsel for Lyman Warehouse on behalf of his client with the knowledge that McWhirter had a claim to the money in escrow. See **ROA 289 DLW Exhibit 7; ROA 105—106 Tr. 38-39 ll 22-7.** The Release states in pertinent part that Lyman Warehouse:

> [F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but 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 fraud, civil conspiracy, interference with contractual relations . . .
>
> 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.

See ROA __280__ **DLW Exhibit 5** at p. 5-6 **emphasis** added. Lyman Warehouse received $27,500.00 in exchange for the release.

On June 3, 2011, Lyman Warehouse sold the rights to demolish the property for $1,475,000.00 to Hook Construction. See **ROA** __305__ **DM Exhibit 12.**

The main question before this Court is who is entitled to the $100,000.00 sitting in Attorney Threlkeld's trust account. The evidence at trial was clear, Lyman Warehouse released its rights to Don McWhirter's $100,000.00. Furthermore, the evidence at trial was clear, Lyman Warehouse did not suffer any damages by selling the Property for $1,475,000.00; which is greater than the Lyman Warehouse and Lyman Pacific contract of $1,300,000.00.

ARGUMENT: APPELLANT DOES NOT HAVE A LEGAL OR EQUITABLE INTEREST IN RESPONDENT MCWHIRTER'S MONEY

The Trial Court got it right; (a) Appellant has no right to Respondent's monies because Appellant released its claims to Respondent's monies; (b) Assuming *arguendo* that Appellant did not release its claim to the $100,000, Appellant failed to provide any competent evidence that it incurred any damages that would justify receipt of $100,000; (c) Appellant would be unjustly enriched if it received the $100,000; and (d) Respondent has standing to claim his $100,000.

A. Appellant released its rights to the $100,000.00

On April 7, 2011, Respondent tendered $100,000.00 to be placed into the escrow account of Mr. Threlkeld. By law, the $100,000 in Mr. Threlkeld's escrow account does not belong to Mr. Threlkeld. See Rule 1.15, RPC, SCACR Rule 407 and __Moore v.__

Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007). See **ROA 114 Tr. 47 ll 3-10**. At no time did the money leave Mr. Threlkeld's escrow account.[3]

Appellant has only one legal ground to claim the $100,000: Appellant's contractual rights under the April 7, 2011 agreement. See **ROA 114 TR. 47 ll. 11-14.** The April 7, 2011 agreement called for a May 7, 2011 closing date and no closing occurred.

On May 27, 2011, Lyman Warehouse, Lyman Pacific, Mills Demolition, Richard Bennett, Peter Stanley, and Susan Stanley (the Parties) entered into full and final Release. See **ROA 280 DLW Exhibit 5**. The release states in pertinent part:

> [F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but 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 fraud, civil conspiracy, interference with contractual relations . . .
>
> 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.

See ROA 280 DLW Exhibit 5 at p. 5-6 **emphasis** added. In addition to addressing the May 4, 2011 contract, the release affects any claim for damages arising out of any other

[3] A trial judge's findings of fact for issues of law tried without a jury are not disturbed unless found to be without evidence which reasonably supports a judge's findings. Chapman v. Allstate Ins. Co. 263 S.C. 656, 211 S.E.2d 876 (1975).

transaction or relationship between or among the parties. This language is inclusive of the April 7, 2011 contract.

In South Carolina, when the terms of a Release are clear and unambiguous, they are enforced by their terms. Bowers v. Dept. of Transp., 360 S.C. 149, 156, 600 S.E.2d 543, 546 (Ct. App. 2004) ("In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties."). Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950); The Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 425 (D.S.C.1995). S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22-23 (Ct. App. 2005) (A release is a contract, and the scope of a release is gathered by its terms). Here, the release itself reveals the parties' intent: "It being the specific intent of the releasing Parties ..."

Lyman Warehouse released all claims to the earnest money in exchange for $27,500. **See ROA 280 DLW Exhibit 5** pp. 4-6. Furthermore, to the extent that Lyman Warehouse sought McWhirter's $100,000, Lyman Warehouse failed to include any reference to the $100,000 in the release. Lyman Warehouse, Lyman Pacific, Mills Demolition, Peter and Susan Stanley all released their claims to McWhirter's $100,000. **ROA 212—213 Tr. 145 ll2 – p 146 ll1; ROA 280 DLW Exhibit 5.** The only party that did not release its claims to the $100,000 is Don McWhirter **ROA 214 Tr. 147 ll 6-10.**[4]

[4] Appellant contends that Appellant did not release McWhirter from the $100,000. See Appellant Brief at pages 26-27. Appellant misapprehends the Trial Court's Order. The Trial Court held that when Lyman Warehouse released Lyman Pacific for breach of the April 7, 2011 contract, Lyman Warehouse released any rights to the disputed $100,000.

B. Lyman Warehouse failed to prove damages

Even if the Release did not end this matter, McWhirter would still be entitled to the interpleaded funds as Lyman Warehouse has failed to prove any damages from the default of the April 7, 2011 contract. Generally, the construction of a contract is a question of law for the court. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997). If the language employed by the agreement is plain and unambiguous, the contract should be enforced by its terms. First-Citizens Bank Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct.App.1984).

The April 7, 2011 contract provides the following remedy for Lyman Warehouse if Pacific does not close:

> Remedies For Breach: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentions in paragraph four (4) then Seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

By its plain terms, the April 7, 2011 contract requires Lyman Warehouse to prove its damages from the Seller's default for up to the amount of monies paid prior to the default. The monies paid prior to default are the $100,000.

At trial, Lyman Warehouse failed to present competent evidence of any damages from Lyman Pacific's default. Lyman Warehouse did not enter any checks or costs that it incurred as a result of its contract with Lyman Pacific. Rather, the only evidence presented was that Lyman Warehouse entered into two other contracts that financially benefitted Lyman Warehouse, a May 4, 2011 contract with Mills Demolition and a June 6, 2011 contract with Hooks. The May 4, 2011 Mills contract has the identical damages

clause as the Lyman Pacific contract. Compare **ROA _274_ DLW Exhibit 1 paragraph (15)** to **ROA _295_ DLW Exhibit 9 paragraph (14).** The Mills contract called for $50,000 in earnest money compared to the $100,000 in earnest money in the Lyman Pacific contract. Lyman Warehouse settled its claims against Mills and Lyman Pacific for $27,500. **ROA _283_ DLW Exhibit 5 at paragraph 5.2.**

The June 6, 2011 contract closed for more money than the April 7, 2011 contract. See **ROA _306_ DM Exhibit 12 at paragraph 2.** As a result, Lyman Warehouse has failed to prove any damages from the default.

C. Appellant would be unjustly enriched if it received the $100,000

Unjust enrichment (quantum meruit) requires a showing that a benefit was conferred upon the defendant by the plaintiff, realization of the benefit by the defendant, and retention by the defendant of the benefit under circumstances that make it unjust for the defendant to retain the benefit. JASDIP Properties SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct. App. 2011).

As a result of the release and its improved financial position from the May 4, 2011 Mills contract and June 3, 2011 Hook contract, Lyman Warehouse has no legal or equitable claim to the monies. It would be unjustly enriched if were to obtain the $100,000. As a result, the money should be returned to its rightrful owner, Respondent McWhirter.

D. Appellant's Argument on Standing is without Merit

Finally, Appellant's argument that Respondent did not have standing based on the contract is incorrect and confuses two different legal theories, contract law and equitable law. The Trial Court was correct when it found that Respondent had standing

to assert a claim to Respondent's money because (1) this is an interpleader action; (2) standing is satisfied by Respondent's claim to the monies held in escrow; and (3) Respondent satisfies the elements of unjust enrichment.

This action began as an interpleader action. The historical and still primary purpose of a SCRCP Rule 22 interpleader is to enable a neutral stakeholder, in this case Mr. Thelkeld, to shield himself from liability for paying over the stake to the wrong party; this is done by forcing all the claimants to litigate their claims in a single action brought by the stakeholder. First Union Nat. Bank of South Carolina v. FCVS Communications 321 S.C. 496, 469 S.E.2d 613 (Ct. App. 1996), rehearing denied, certiorari granted, reversed in part 328 S.C. 290, 494 S.E.2d 429. Mr. Threlkeld believed that Respondent might assert a claim to the monies in his possession. Mr. Threlkeld named Respondent to the suit based on this fear. **ROA 114. Tr. 47 ll 19-24.** McWhirter was rightfully brought into the interpleader action.

Once in the action, Respondent had standing to assert his claims to the stake. To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Respondent had a personal stake in the monies involved in the action because it was Respondent's personal check that was

deposited in Mr. Threlkeld's trust account that made up the stake. Hence, Respondent has a substantial interest in the action.

Finally, Respondent has standing to bring a claim of unjust enrichment. The essential elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value. Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). Here there is ample evidence that Appellant would be unjustly enriched by Respondent's monies.

CONCLUSION

The Trial Court heard the witnesses, reviewed the evidence and got it right. Respondent McWhirter is entitled to his money. The Trial Court judgment, respectfully should be affirmed.

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b)

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC 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 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 the .... Appellant,

Of Whom Donald J. McWhirter is the .... Respondent,

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

APPELLANT IS THE ONLY PARTY WITH A VALID CLAIM TO THE ESCROWED FUNDS, THE ONLY REMAINING PARTY WITH STANDING TO ENFORCE THE TERMS OF THE CONTRACT, AND THE ONLY PARTY FINANCIALLY DAMAGED THROUGH NO FAULT OF ITS OWN.

This case concerns entitlement to funds placed in escrow under the terms of a breached contract with a specified remedy. The crux of Respondent's argument lies in repetitious assertions that this case somehow involves competing claims to "McWhirter's Money." That characterization is legally and factually erroneous. Rather, and for the reasons that follow, ownership of the escrowed funds is governed by the contract that initially called for the funds to be placed in escrow.

First, the Appellant is the only remaining party with standing to claim the escrowed funds and the Respondent fails to appreciate the nature of the standing issues in this case. Second, and despite the fact that Appellant was not required to prove damages under the terms of the contract, there is ample evidence of damages flowing from the Buyer's breach of contract. Next, the Appellant never released its claim to the escrowed funds, is contractually entitled to the escrowed funds, and all other parties to the contract have released any claims thereto. Finally, in light of the terms of the contract and ample proof of damages, the Respondent's unjust enrichment claim is fatally flawed. Accordingly, the decision below should be reversed to the extent that Court determined Respondent was entitled to the disputed funds.

A. Appellant Remains the Only Party with Standing to Assert a Claim to Escrowed Funds Notwithstanding Respondent's Misapprehension of the Standing Issues in this Case

Respondent McWhirter was not a party to the underlying contract in this case. (R. pp. 271-276). Similarly, he was not a party to a release that followed breach of two

separate contracts. (R. pp. 280-287).[1] In order to recover the escrowed monies under **ANY** theory, Respondent is necessarily seeking to enforce the terms of one or both contracts.[2] As he was not a party to either contract, he lacks standing to seek enforce either and is thus unable to establish entitlement to the escrowed funds. *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E.2d 858, 861 (2003) ("an individual who is not a party to a contract lacks privity to enforce it.")

First, the Trial Court correctly concluded that Respondent was not a party to the May 7 contract. (R. pp. 6-7). The Court below also concluded that Appellant's entitlement to the escrowed funds was a question of its rights under the contract. (R. p. 8). However, the Court below then failed to apply that same logic to recovery by the Respondent. In this, the Court erred. To wit, any entitlement to the escrowed funds was contract based. The funds were placed in escrow under the terms of a contract and necessarily belonged to one of the contracting parties.[3] Accordingly, Respondent lacks standing to assert his claim as he was not a party to the contract.

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[1] As detailed below, the release involved parties to two separate contracts. However, by its terms, the release covered only the "Contract" and "Circumstances" of the second contract. (R. p. 280).

[2] As covered in greater detail below, Respondent relies on enforcement of one or both contracts under each of his theories of recovery. Respondent argues that there was no proof of damages following breach as he erroneously suggests should have been required under the contract. Respondent was not a party to the contract and lacks standing to enforce its terms. Similarly, Respondent erroneously argues that Appellant released any claim to the escrowed funds by virtue of the executed release. Again, Respondent was not a party to the Release Agreement and lacks standing to seek enforcement. Finally, in attempting to prove unjust enrichment, Respondent is again forced to argue either a) lack of damages makes retention unjust or b) previous payments under the terms of a separate release make receipt of additional funds unjust.

[3] The Trial Court's reliance on *Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct.App. 2007) is correct to the extent that case clarifies obligations regarding funds held in attorney trust accounts. It is undisputed that Plaintiff, Mr. Threlkeld, did not own the funds at issue here. In *Moore*, Defendant Attorney Weinberg improperly dispersed funds despite a proper assignment of the right to those funds. *Id.* In this case, there was no assignment to rights under the contract. Furthermore, the Trial Court correctly concluded that Respondent was not a third-party beneficiary under the contract. (R. p. 6-7). Accordingly, *Moore* is inapplicable to the present facts beyond the undisputed conclusion that the escrowed funds did not belong to Plaintiff and is of no assistance in bolstering the unsupported conclusion that followed: that Respondent's claim to the funds could be other than contract based. *Moore*, 373 S.C. at 225.

Next, Respondent lacks standing to complain regarding the asserted lack of proof as to damages. *Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App. 2003).[4] As discussed in further detail below, there is no contractual language requiring proof of damages in order for the Appellant to claim the escrowed funds. However, as he was not a party to the contract, Respondent cannot now assert entitlement to the disputed funds for want of proof he is ill-positioned to demand.

Finally here, absent standing to demand proof of damages or enforce the terms of an inapplicable release, Respondent cannot prove unjust enrichment. As discussed more fully below, in arguing that Appellant would be unjustly enriched by receipt of the escrowed funds, Respondent reiterates arguments regarding contract damages and the effect of the release. Respondent cites several authorities for the proposition that he has standing to prove his claim to the stake here, but none that support the contention that an unjust enrichment claim serves to enlarge his authority to rely on contracts to which he is not a party to prove his claim.[5]

B. Appellant Provided Ample Evidence of Damages Despite Having No Contractual Obligation to Prove Damages

There is substantial evidence in the record relative to Appellant's Damages. Furthermore, the uncontradicted testimony of the contracting parties reflects their understanding that the escrowed funds would be forfeited to the Seller in the event of

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[4] *See also Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct.App.1994) (stating a third person not in privity of contract with the contracting parties generally may not enforce the provisions of a contract unless it is entered into for the benefit of the third person)

[5] *See, e.g., Charleston County School Dist. v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567 (1999) (standing requires that party asserting claim be real party in interest); *Sea Pines Association for Protection Wildlife, Inc. v. SC Dept. of Natural Resources*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (requiring "real, material, or substantial interest" in the subject matter of the action). Neither cited case, both relied on by Respondent, stands for the proposition that general standing to assert a claim alters the otherwise applicable limitation on non-parties to seek enforcement of the terms of a contract. Respondent fails to explain how, once in the action and assuming he has standing, he may proceed to enforcing contractual terms absent privity.

breach as liquidated damages. (R. p. 190, lines 2-24); (R. p. 374, lines 8-22; p. 376, lines 3-11). Finally, Respondent lacks standing to demand proof of damages under the contract.

Under the terms of the April 7, 2011 contract, the parties agreed to limit damages to "receipt of all monies paid by purchaser." (R. p. 274). That language suggests a specific remedy rather than a general cap subject to subsequent proof, as urged by the Respondent. Indeed, forfeit of the escrowed funds as liquidated damages is the only reading of the key language that makes sense. Specifically, by limiting the remedy in the event of breach to "receipt" of monies paid through default, the parties could only have intended to direct release of the escrowed funds to Seller following breach.[6] Furthermore, both parties to the contract testified as to their understanding that the deposit would be forfeited as liquidated damages in the event of breach.[7] Accordingly, the Court below erred in holding that Appellant was required to prove damages.

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[6] The full text of the key paragraph provides

> "(15) REMEDIES FOR BREACH: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentioned in paragraph four (4) then Seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default" (R. p. 274)

Respondent's reference to the clarification sentence is unavailing. First, the clarification does not alter the preceding language specifying the appropriate remedy: i.e. receipt of funds paid. Next, the clarifying language itself suggests that the only remedy shall be "all" monies paid. Required receipt of <u>all</u> monies paid leaves no room for doubt concerning proof of damages up to that amount. Finally, Respondent's urged interpretation reads language into the contract that quite simply is not there. The parties did not agree that the Seller would be entitled to damages up to a specified amount, nor did they employ language requiring any particularized proof after breach in order to make the receipt of damages language operable. Rather, the parties specified that all monies paid up thru breach would be forfeited to the seller.

[7] *See* R. p. 190, lines 2-24, (Bennett testimony explaining that deposit would be sole remedy without required proof of damages). *See also* R. p. 374, lines 8-22; p. 376, lines 3-11 (Stanley deposition answering that deposit would be liquidated damages as in all of his previous real estate contracts calling for earnest money). *See also* <u>Black's Law Dictionary</u> 584 (9th ed.2009) (defining earnest money as " [a] deposit paid (often in escrow) by a prospective buyer (especially of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults.")

Even assuming, *arguendo*, that the Appellant was required to prove damages, there is substantial evidence of damages in the record. There were two subsequent contracts related to the sale of portions of the same property as the contract at issue here. The first, between Appellant Lyman Warehouse and Mills Demolition dated May 4, 2011 failed to close. The second, between Appellant Lyman Warehouse and Hooks Construction dated June 6, 2011, closed on terms less favorable to the Appellant. While the specified purchase price in the June 6th contract was higher than the price in the April 7th contract, Appellant was only able to sell the valuable portions of the property and was forced to retain the environmental liability associated with the ground itself and ongoing financial responsibility for taxes and other expenses incident to continued ownership. Based on the record, the question is not whether Mr. Bennett and Appellant suffered any damages, but the amount by which his actual damages exceeded the available damages under the terms of the contract.[8]

Finally, for the reasons previously stated, Respondent lacks standing to demand proof of damages under the contract. He was not a party to the contract and cannot now assert his view as to proper interpretation or required proof of damages following breach.[9]

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[8] By way of illustration, assume that the parties had contracted for the sale of a business. Further assume that the contract called for the purchase of the entire business, including all assets and liabilities. If, following breach of our hypothetical contract, the Seller then contracted to sell the assets of the business while retaining all liabilities, one could hardly argue a better deal had been struck even where the subsequent contract had slightly higher consideration. Yet that is precisely the situation here. With breach of the April 7th contract near certain, Appellant entered a back-up contract. With breach of the first back-up contract similarly imminent, Appellant then struck another deal under different terms. Under the terms of the contract that ultimately closed, the June 6th contract with Hook Construction, Appellant sold the valuable portions of the property while retaining substantial liabilities akin to having entered into an asset purchase agreement rather than a straightforward sale of the property as originally envisioned.

[9] *Gilbert*, 356 S.C. at 30.

C. **Appellant Never Released its Claim to the Escrowed Funds While the Only Other Party to the Controlling Contract Released its Claim**

Following breach of two separate contracts, and in anticipation of possible litigation, the parties to both contracts entered into an "Agreement for Rescission of Contract and Full and Final Release". (R. pp. 280-287). The Court below erroneously found that said release relates to the escrowed funds at issue here. That conclusion is unsupported by either the language of the release or the conduct of the parties preceding that agreement. Furthermore, Respondent again lacks standing avail himself of the contractual benefits of an agreement to which he is not a party.

The parties to two separate contracts entered into the release at issue. However, the language of the release limited its operation to the parties to the release and to the May 4, 2011 Contract between Lyman Warehouse and Mills Demolition. (R. p. 280) ("Contract" defined as May 4, 2011 Agreement; "Circumstances" referencing background of the May 4, 2011 contract with no mention of the April 7th contract). The terms of the release divided the escrowed funds deposited under the May 4 contract between the parties to that contract. Simply put, the release cannot be read to effectuate release of any claim to the funds at issue here given the dearth of language to that effect.[10]

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[10] The Court below erroneously interpreted language in the release to apply to claims beyond the scope of the May 4th contract. (R. pp. 8-9). That interpretation is flawed for three reasons. First, the definitions and limitations recited earlier in the release carry over to the language quoted in the Order below and indeed the cited language refers back to "Claims." *See* R. p. 8-9 (quoting DLW Exhibit 5 (R. p. 284-285)). The capitalization is highly relevant to proper interpretation. As noted at the heading of section I of the release, capitalized terms shall have the definition ascribed. (R. p. 280). The particularized definition of "Claims" relates back to the definitions of both "Circumstances" and "Contract" both of which are intentionally limited to the May 4th contract. Accordingly, the general language of the release is still limited to "Claims" as used in the release and limited by the other definitions pertaining to said release. Second, by its very terms the release only related to "Claims" against the parties released. By that time, Appellant had no need to make a claim against any of the parties to the release in order to receive the escrowed funds from the April 7th contract for the reasons discussed above. Finally, the Court below erred in relying on *Bowers v. Dept. of Transp.* 360 S.C. 149, 156, 600 S.E.2d 543, 546 (Ct.App. 2004). While correct that "[i]n

Furthermore, there was no need to address the funds at issue here under the terms of the release. The Buyer in the April 7th contract, Lyman Pacific, had already released any claim to the funds at issue in this case through letters dated April 30th and May 7th. (R. p. 278; R. p. 288). As a result, when the release was negotiated and signed there was no need to address the escrowed funds from the April 7th contract as by that time Appellant was the only remaining party to that agreement with a claim to the funds.

Finally, as previously addressed, Respondent lacks standing to seek enforcement of the terms of the release. Respondent was not a party to the release and cannot properly seek to enforce its terms, or more accurately stated seek to enlarge its scope.[11]

The interpretation adopted below and now urged by Respondent assumes that the parties to the release gathered for the august purpose of conferring Respondent's right to claim contractually allocated funds when he failed to protect his own interests. Such an interpretation of the release, and the underlying facts, is at odds with the literal language of the release and common sense.

D. Appellant's Contractual Right to Escrowed Funds and Evidence of Substantial Damages are Fatal to Respondent's Unjust Enrichment Claim

In light of the ample proof of damages and Appellant's contractual right to the escrowed funds, Respondent's unjust enrichment claim fails as a matter of law. First, Respondent would have the Court erroneously conclude that retention of liquidated

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construing [a] release, the court must seek to ascertain and give effect to the intention of the parties," the Trial Judge failed to note and apply a subsequent distinguishment of *Bowers* on facts directly applicable here. *Id.* In *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 649 S.E.2d 494 (Ct.App. 2007), that Court noted that in construing the release at issue in that case, there was no language releasing the entire world only the parties to the release. The distinction applies with equal force to the facts of this case. Appellant never released any claim to the escrowed funds despite the possibility of a claim from Respondent, nor was Respondent released. Applying *Ecclesiastes* to the facts of this case, it is clear that the parties to the release did not intend to release anyone not a party to the release. *Id.*

[11] *Gilbert*, 356 S.C. at 30

damages in a manner customary to real estate contracts is somehow unjust. Second, any claim to unjust enrichment requires evaluation of the substantial damages suffered by the Appellant. Next, Respondent is not entitled to equitable relief given the availability of an adequate remedy at law. Finally, Respondent lacks the standing required to prove his unjust enrichment claim.

First, as discussed above, the escrowed funds here were intended as standard liquidated damages originating as earnest money to secure a real estate contract. (R. p. 276, lines 3-11). The purpose of placing the funds in escrow, as is standard in real estate transactions, was to "seal to deal." Unfortunately for the Respondent, he agreed to provide the earnest money for a contract without solidifying his role in the Buyer LLC. However, Respondent's failure to act with the prudence suggested by the circumstances does not operate to transform liquidated damages into unjust enrichment.

Next, unjust enrichment would necessarily require that receipt of the escrowed funds by the Appellant would be inequitable. *Ellis v. Smith Grading & Paving, Inc.* 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct.App. 1988) (explaining that unjust enrichment requires, *inter alia*, retention of a benefit under inequitable conditions). In light of the previous discussion of substantial damages suffered by the Appellant, how can it now be inequitable to retain contractually entitled damages? Here, the question suggests the answer. It cannot be inequitable to receive contractually limited damages where proven damages exceed the amount proposed for receipt.[12]

[12] Indeed, no matter the outcome of this case Appellant will not be "enriched." Damages following breach left Appellant far worse-off than he would have been had the contracting parties performed as required, and resolution of this case will ultimately only determine whether Appellant is closer to being as well off as he would have been in the absence of breach. Accordingly, arguments that the Appellant would be unjustly enriched are untenable as either way Appellant will not be enriched, let alone in a manner that would be inequitable.

Respondent's unjust enrichment claimed is also flawed in that he has an adequate remedy at law. *Barret v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (1984) (equitable remedies unavailable where there is an adequate remedy at law). Here Respondent could pursue claims against Lyman Pacific, Peter Stanley, and perhaps others. Failure to pursue legal remedies does not afford Respondent the ability to seek equitable remedies.

Finally, Respondent does not have standing to pursue his unjust enrichment claim. In order to prove that Appellant would be unjustly enriched, Respondent is necessarily relying on enforcement of contracts to which he is not a party. While he may be unhappy with the terms of those agreements, he cannot argue for his preferred interpretation given his lack of standing to do so. Respondent's contentions regarding standing to pursue equitable versus legal remedies are unavailing and against the weight of authority.[13] Assuming Respondent's standing to lay claim to the escrowed funds, he still lacks standing to enforce contractual obligations to which he is not a party. His inability to do so prevents proper proof that receipt of the escrowed funds would be unjust and is fatal to his claim.

CONCLUSION

The Appellant is contractually entitled to the escrowed funds at issue in this case. Respondent now claims he is owed $100,000 lost in hasty efforts to help consummate what could have been a lucrative deal. However, Respondent's poor planning ought not invite judicial intervention to correct his error. To the extent Respondent is entitled to any relief, he should direct his claims towards the appropriate parties. The Order below

[13] *See, e.g., Shasta Beverages v. South Carolina Tax Commission*, 280 S.C. 48, 55, 310 S.E.2d 655, 659 (1983) (doubting, in dicta, third-party ability to invoke unjust enrichment), *citing United States Rubber Products v. Town of Batesburg*, 183 S.C. 49, 55, 190 S.E. 120, 123-24 (1937); 66 Am.Jur.2d. Restitution and Implied Contracts, §4.

should be REVERSED in so far as the Trial Court determined Respondent was entitled to any of the escrowed funds.

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