

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

NOV 20 2015

SC Court of Appeals

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

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

v.

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

Of Whom Lyman Warehouse, LLC is thePetitioner,

Of Whom Donald J. McWhirter is theRespondent,

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion on August 19, 2015 (App.p. 1).
Petitioner filed for rehearing on September 2, 2015. (App.p. 4). The Court of Appeals
denied rehearing on October 23, 2015. (App.p. 11).

QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider whether the Court of Appeals erred when it affirmed the trial court's application of a release to funds neither governed nor mentioned by that release agreement?
2. Should this Court grant certiorari to consider whether the Court of Appeals erred when it affirmed the trial court's determination that Petitioner would be unjustly enriched through receipt of liquidated damages in a lesser amount than actual damages?
3. Should this Court grant certiorari to consider whether the Court of Appeals erred in affirming the trial court's construction of a contract to require proof of damages where the contractual language clearly provided for sum certain liquidated damages?

STATEMENT OF THE CASE

This is an appeal from a bench trial verdict in an interpleader action. The
disputed funds originated as an earnest money deposit to secure a contract to purchase
commercial real estate. The trial judge ruled that the contractually allocated funds
belonged to a non-party to that agreement. The Court of Appeals affirmed.

Lyman Warehouse, LLC – the petitioner – initially entered into a contract to sell
commercial real estate situated in Lyman, South Carolina to Lyman Pacific, LLC. (R.pp.
13-16). Pursuant to the terms of that agreement, Lyman Pacific was required to pay
\$100,000 as an earnest money deposit. (*Id.*). Donald McWhirter – the respondent –
provided the deposit on behalf of Lyman Pacific in hopes of later becoming a member of

that company. (R. pp. 143:20 – 146:24). McWhirter never became a member of Lyman Pacific, the parties were unable to secure an investor on agreeable terms, and the transaction failed to close when the buyer LLC did not produce the remainder of the purchase price by the closing date. (R. pp. 159-161).

Lyman Warehouse eventually sold the property to a third party on less favorable terms than its original contract with Lyman Pacific. (R. pp. 237-240). Prior to the eventual sale of the property, however, Lyman Warehouse entered into a back-up contract with Mills Demolition, LLC in the event the Lyman Pacific deal failed to close. (R. p. 337:3; R. p. 201:15-20; R. p. 207:9-11). When Lyman Pacific failed to close on its contract, and Mills Demolition was also unable to close, the owners of all three LLC's gathered to execute a mutual release. (R. p. 8-9). The release operated to extinguish potential claims between the parties related to the "Contract" and "Circumstances," all defined by reference to the back-up contract with Mills Demolition. (R. p. 280). Furthermore, and prior to execution of the release, Lyman Pacific had already released any claim it may have had to the earnest money from its earlier contract with Lyman Warehouse. (R. p. 278, R. p. 288).

The only real estate contract actually relevant to this case is the original contract between Lyman Warehouse and Lyman Pacific. Under the terms of that agreement, if the purchaser defaulted then the earnest money would be forfeited to the seller. The applicable contract language provided:

"(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)

The language is unambiguous: the Purchaser's failure to pay when due would result in "receipt of all monies paid." (*Id.*). The parties do not dispute that Lyman Pacific failed to close on the contract.

Lyman Warehouse also offered substantial proof of damages, despite the absence of such a requirement in the liquidated damages provision in the contract. The original contract between Lyman Warehouse and Lyman Pacific was at a total price of \$1,300,000. (R.p. 272). The contract between Lyman Warehouse and Hook Construction, the contract that ultimately closed, was at a total price of \$1,475,000. (R. p. 305). The latter contract was at an ostensibly higher price, but a terrible bargain for Petitioner. The contract with Hook Construction only pertained to rights to recover steel after demolishing structures at the property, with the seller paying property taxes and retaining environmental liability. (*Id.*) Furthermore, Richard Bennett – the sole member of Lyman Warehouse – testified that he and his company would have been far better off had Lyman Pacific not breached the original contract. (R.pp. 237-240). When the deal ultimately closed, Petitioner faced ongoing financial obligations for the property, substantial liability, and the continuing ownership of the ground itself. (*Id.*). What he sought to avoid under the terms of the first agreement he was compelled to accept after two different buyers failed to meet their contractual obligations.

At trial, McWhirter asserted four theories regarding his alleged entitlement to the escrowed funds. The trial court correctly determined that McWhirter could not recover

as a third-party beneficiary to the contract, had failed to prove civil conspiracy, and did not present competent evidence regarding any breaches of fiduciary duty. (R.pp. 4-6). However, the trial court then held that Lyman Warehouse would be unjustly enriched by receipt of the funds, citing the mutual released it signed. (R.pp. 7-8). The trial court also asserted that Lyman Warehouse failed to prove damages, based purely on comparing the higher purchase price of the latter contract but not its inapposite terms. (R.pp. 8-9).

The Court of Appeals affirmed in an unpublished, per curiam opinion, and without oral argument pursuant to Rule 215, SCACR. That Court determined that Respondent had standing in this interpleader action, and that determination is not challenged in this Petition. (App.p. 2) However, the Court of Appeals reasoned that Lyman Warehouse released its claim to the money by reference to basic principles of contractual interpretation. (App.p. 2-3). While Petitioner agrees as to the applicable law, the Court of Appeals failed to construe or even reference the language of the contract here. Similarly, the Court of Appeals referenced the elements of unjust enrichment without corresponding reference to anything in the record to support application of the law to these facts. (App.p.3). Finally, the Court of Appeals declined to address whether the contract required Lyman Warehouse to prove damages. (App.p. 3).

While the Court of Appeals may certainly issue brief, unpublished opinions under the applicable rules, Petitioner respectfully contends that the court below failed to address multiple aspects of the trial court's order that were fully briefed. This Court should grant certiorari, review the decision of the Court of Appeals, and ultimately determine that liquidated damages are not tantamount to unjust enrichment, in particular where – as here – the record supports Petitioner's consistent view that it did suffer actual damages.

ARGUMENT

This case concerns entitlement to funds placed in escrow under the terms of a breached contract with a specified remedy. At trial and on appeal the crux of Respondent's argument revolved around repetitious assertions that this case somehow involves competing claims to "McWhirter's Money." That characterization is legally and factually erroneous. Ownership of the escrowed funds is governed by the contract that initially called for the funds to be placed in escrow.

The Petitioner was the only remaining party with standing to claim the escrowed funds. Furthermore, and despite the fact that Lyman Warehouse was not required to prove damages under the terms of the contract, there was ample proof of damages flowing from Lyman Pacific's breach of contract. Contrary to the trial court's ruling and the opinion of the Court of Appeals, the petitioner never released its claim to the escrowed funds, was contractually entitled to the escrowed funds, and all other parties to the contract released any claim they may have otherwise held. Finally, both the trial court and the Court of Appeals reasoned that the Petitioner would be unjustly enriched through receipt of its contractually allocated liquidated damages. Respectfully, that conclusion ignores both the nature of liquidated damages and the evidence adduced at trial relative to Petitioner's actual damages. Accordingly, this Court should grant certiorari, reverse the Court of Appeals, and remand the case to the trial court for entry of judgment in favor of the Petitioner.

A. The Controlling Contractual Language of the Release Applied to Funds Deposited Pursuant to a Separate Breached Contract between Different Parties.

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 both the trial court and the Court of Appeals were 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 both courts below neither mentioned nor included the April 7th contract. (R. p. 284-285). The April 7th contract governs the funds here. Indeed, by the time of the release cited by the parties and the lower courts, there was no need to address ownership of the escrowed funds as Lyman Pacific, the party that breached the April 7th contract, had already released its potential claim to the funds. (R. p. 278, R. p. 288). Petitioner respectfully submits that the Court of Appeals erred on this point to the extent it relied on authorities suggesting that interpretation of the release was necessary or relevant to the questions before that Court or the trial court.

In support of the decision below, both the Court of Appeals and the trial court relied on *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). That reliance was misplaced. In *Ecclesiastes*, 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 the court of appeals correctly 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. Petitioner respectfully submits 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.

This Court has similarly explained that basic principles of contract construction dictate enforcement by the plain language of agreements as indicative of intent. *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178, 184 (2013) (citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App.2004)). This Court has also previously cited *Ecclesiastes* for the proposition that an unambiguous contract should be interpreted by the parties' intentions as expressed in plain language. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178, 184 (2013) (citing *Ecclesiastes* 374 S.C. at 497–98, 649 S.E.2d at 501–02). As this Court also explained in *Progressive*, “Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” 747 S.E.2d at 184 (citing *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)).

Respectfully, the clarity this Court has consistently exhibited regarding enforcement of contractual intent is notably contrast to the Court of Appeals application of the law here. The trial court's reasoning and the Court of Appeals summary affirmance necessarily assume that the parties to the release intended to confer a

gratuitous benefit on the Respondent despite clear language in the underlying contract allocating liquidated damages. That conclusion is not supported by the record, is not apparent from the language of the release as applied by both courts below, and requires a counterintuitive look into the unexpressed intentions of the contracting parties.

Finally, the Respondent never had standing to assert the terms of the release or rely on that agreement to advance his claims. Respondent's standing to assert a claim to the stake here does not create the ability to enlarge the scope of an agreement he has no standing to challenge. *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).

B. Unjust Enrichment Cannot Lie Where the Disputed Funds were Intended by the Contracting Parties as Liquidated Damages and the Actual Damages Sustained Exceed the Liquidated Damages Available

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 would receive the funds in the event of breach. (R. p. 276). The Court of Appeals correctly explained 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) conferment 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). However, the Court of Appeals

failed to apply that standard to this case or explain how its view of the evidence comported with applicable law.

First, Petitioner'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 Petitioner'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. (R. p. 142-143). The Respondent, despite his failure to safeguard his interests or secure a role in the Buyer LLC, obtained the benefit of that bargain. Specifically, the parties formed a binding agreement, subsequent breach notwithstanding.

Second, Petitioner's contractual entitlement to damages is consistent with equitable considerations. As a preliminary matter, it bears repeating that a standard real estate contract, inclusive of an earnest money deposit and a liquidated damages clause, controls ownership of the funds. (R. p. 276). However, in asserting unjust enrichment McWhirter failed to prove any inequity that would follow enforcement of the contract as written. In this case, petitioner Lyman Warehouse was far worse off as a result of the breach of contract after performance of a less favorable agreement. Petitioner addressed this point at some length in its briefs to the Court of Appeals. (App.pp. 73-75). The Court of Appeals did not directly address this argument. Furthermore, to affirm the finding of unjust enrichment the Court of Appeals necessarily held that earnest money liquidated damages are inequitable. Simply put, that cannot be the law in this State. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010) (*holding*, inter alia, that retention of a conferred benefit must be unjust). In light

of the underlying contract, the inapplicability of the release cited, and the failure of any additional proof of inequity, retention of the disputed funds was appropriate and Lyman Warehouse is entitled to enforce the contract at issue.

Finally here, Respondent has an adequate remedy at law. The trial court and the Court of Appeals failed to address the availability of legal remedies. See *Barret v. Miller*, 283 S.C. 262, 321 S.E.2d (1984) (equitable remedies unavailable where there is an adequate remedy at law). The Petitioner respectfully submits that McWhirter could not and cannot demonstrate why is entitled to any equitable relief in the face of complete and adequate legal remedies.

C. Appellant Proved Its Damages Despite Having No Contractual Obligation to Prove Damages

This case concerns earnest money deposited under the terms of a purchase contract for 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 applicable to this dispute, should have ended the trial courts and the Court of Appeals inquiries with the funds awarded to the Petitioner as seller. However, at trial and on appeal, Respondent maintained that Lyman Warehouse failed to prove damages and thus the funds belonged to him. Petitioner 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. (App.pp. 73-75).

The Court of Appeals declined to address the issue, having determined that dispositive resolution of other issues rendered further analysis unnecessary. (App.p. 3). Respectfully, contractual allocation of damages, together with substantial evidence of actual damages, permeated the remaining issues before the courts below. Specifically if, as Petitioner 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. In failing to address this issue, the Court of Appeals erred. In evaluating unjust enrichment without reference to damages, the Court of Appeals failed to explain how retention of liquidated damages – in an amount below proven, actual damages – was unjust. This Court should grant certiorari and reverse the Court of Appeals.

* * *

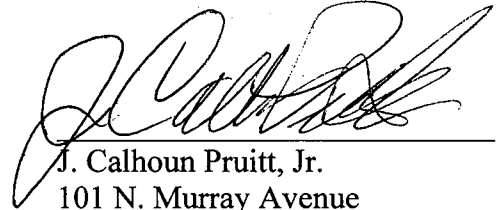
The language of an inapplicable release cannot support the conclusion that an earnest money deposit allocated by contract to the non-breaching party unjustly enriches that party. Rather, the release as intended and the underlying contract as written dictate that Petitioner is entitled to the disputed funds. Furthermore, the record reflects that Lyman Warehouse sustained substantial damages, despite having no contractual obligation to prove damages. Respectfully, the Court of Appeals failed to address how unjust enrichment applies on these facts. Furthermore, the Court of Appeals compounded that error in failing to address additional proof of actual damages

CONCLUSION

The Court should grant a writ of certiorari, review the decision of the Court of Appeals, and ultimately determine that the Court of Appeals erred in affirming that

Petitioner would be unjustly enriched based on standard provisions of a real estate contract with ample proof of actual damages..

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November 17, 2014.

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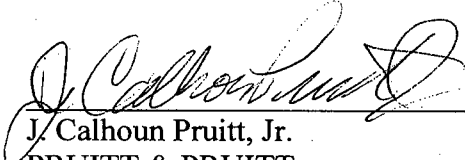
Of Whom Donald J. McWhirter is theRespondent,

PROOF OF SERVICE

I certify that I have served the **Petition for Writ of Certiorari** on the attorneys for
Respondent, Donald J. McWhirter, by depositing copies of it in the United States Mail,
postage prepaid, on November _____, addressed as follows:

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