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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY

SC SUPREME COURT

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 LawPlaintiff,

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 thePetitioner,

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

J. Calhoun Pruitt, Jr.
PRUITT & PRUITT
101 North Murray Avenue
Anderson, South Carolina 29625
Attorneys for Appellant

Peter D. Protopapas
RIKARD & PROTOPAPAS, LLC
Email: pdp@rplegalgroup.com
1329 Blanding Street
Post Office Box 5640 (29250)
Columbia, South Carolina 29201
Telephone: 803.978.6111
Facsimile: 803.978.6112
Attorneys for Respondent, McWhirter

J. Christopher Pracht
THOMASON & PRACHT
P.O. Box 4025
Anderson, South Carolina 29622
Telephone: 864-226-7222
Attorneys for the Respondent, McWhirter

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December 21, 2015

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COUNTER STATEMENT OF THE CASE

This appeal does not contain any issue worthy of *certiorari*. There is: (1) no novel question of law; (2) no dissent in the decision of the Court of Appeals which was issued *per curiam*; (3) no conflict with any prior decisions of the Supreme Court (4) no constitutional issues involved; and (5) no federal question involved. Rather, this matter is routine, was decided correctly by the Trial Court and properly affirmed *per curiam* by the Court of Appeals. The facts are routine and straightforward.

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 Petitioner Lyman Warehouse for demolition and reclamation of steel. **ROA 141—142 Tr. 74 II 9-17; 75 II 10-17**.

On April 7, 2011, Pacific and Petitioner Lyman Warehouse entered into a contract. **ROA 271 DLW Exhibit 1**. The contract was signed at a meeting at Stax's Restaurant in Greenville, SC. See **ROA 142 Tr. 75 II 19-22**. Present at the meeting were Peter Stanley, Richard Bennett the owner of Petitioner Lyman Warehouse, Elliott Edwards and Don McWhirter. **ROA 142 Tr. 75 II 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 Petitioner Lyman Warehouse move the closing seven days from May 7, 2011 to May 14, 2011. Bennett on behalf of Petitioner Lyman Warehouse 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 Petitioner Lyman Warehouse. The sales price was 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.**

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 Respondent 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 II 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 Petitioner 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 II 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 Trial Court and the Court of Appeals properly found that McWhirter 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

I. CONSTRUCTION OF THE RELEASE IS NOT APPROPRIATE FOR CERTIORARI

There is nothing about the construction of the Release drafted by Petitioner Lyman Pacific which requires this Court to issue a Certiorari. The facts are clear:

April 7, 2011 Pacific and Lyman Warehouse entered into a contract. **ROA 271 DLW Exhibit 1.**

May 25, 2011 Petitioner Lyman Warehouse: “[F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims . . .” **ROA 280 DLW Exhibit 5** at p. 5-6.

Lyman Warehouse received \$27,500.00 in exchange for the release. Lyman Warehouse released any claims it had against Pacific including for breach of the April 7, 2011 contract.

II. UNJUST ENRICHMENT APPLIES

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 that it has no legal or equitable right to claim.

III. THE RELEASE IS DISPOSITIVE OF THE PETITIONER'S ARGUMENT CONCERNING THE CONTRACT AND PROOF OF DAMAGES ARGUMENT

Even if the Release did not end this matter, McWhirter would still be entitled to the interpleaded funds as Petitioner Lyman Warehouse 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 Env'tl., 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 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.

By its plain terms, the April 7, 2011 contract requires Petitioner 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, Petitioner 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.

CONCLUSION

Respectfully, the Court should decline to grant *certiorari* as the requirements have not been met. Additionally, the correct result has been reached, Respondent McWhirter is entitled to his money back.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC



Peter D. Protopapas, SCB #68304

Email: pdp@rplegalgroup.com

1329 Blanding Street

Post Office Box 5640 (29250)

Columbia, South Carolina 29201

Telephone: 803.978.6111

Facsimile: 803.978.6112

Attorneys for Respondents

December ¹⁸~~21~~, 2015

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Appellate Case No: 2013-001518

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

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Lyman Warehouse, LLC, Lyman Pacific, LLC, Mills Demolition,
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Of Whom Lyman Warehouse, LLC is theAppellant,

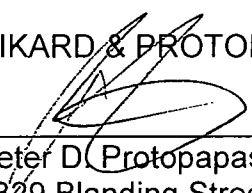
Of Whom Donald J. McWhirter is the..... Respondent.

PROOF OF SERVICE

I certify that a true and correct copy of Respondent's Return to Petition for Writ of
Certiorari has been served upon all parties involved on the ¹⁸21st day of December 2015,
by mailing same by regular US Mail to:

J. Calhoun Pruitt, Jr., 101 N Murray Avenue, Anderson, SC 29625
Fax: 864-224-8711; calhoun@pruittandpruitt.com; Attorney for
Defendant/Respondent, Lyman Warehouse

RIKARD & PROTOPAPAS, LLC


Peter D. Protopapas
1329 Blanding Street (29201)
P.O. Box 5640
Columbia, SC 29250
PH: 803-978-6111
FAX: 803-978-6112
EMAIL: pdp@rplegalgroup.com