IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00134

**VILLAS OF WINDSONG, LTD;
AND ITS GENERAL PARTNER,
ARBOR PROPERTIES, INC.,
ARBOR PLACE, LLC AND
ARBOR PLACE II, LLC**

Defendant-Appellant

v.

**RGT/CHARLESTON PARTNERS, LTD.,
BY AND THROUGH ITS GENERAL
PARTNER FORD DEVELOPMENT CORPORATION**

Plaintiff-Appellee

**APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, SECOND JUDICIAL DISTRICT, MISSISSIPPI**

BRIEF OF THE PLAINTIFF-APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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BY AND THROUGH ITS GENERAL
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Plaintiff-Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

The Honorable John C. Gargiulo, Harrison County Circuit Court Judge

RGT/Charleston Partners, Ltd., by and through its General Partner, Ford Development Corporation, Plaintiff-Appellee

Rex Robertson, RGT Charleston Partners, Plaintiff-Appellee

Scott Delano, Agent for RGT/Charleston Partners, Plaintiff-Appellee

Villas of Windsong, Ltd., and its General Partner, Arbor Properties, Inc., Arbor Properties, LLC and Arbor Place II, LLC, Defendants-Appellants

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Other Interested Persons:

None

Respectfully submitted, this the 8th day of October, 2010.

RGT/CHARLESTON PARTNERS, LTD., BY AND THROUGH ITS GENERAL PARTNER, FORD DEVELOPMENT CORPORATION

BY: M Brant Pettus
ATTORNEY OF RECORD FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES

I. Whether the Plain Language of Paragraph 22 of the Agreement to Buy and Sell Was Properly Applied by the Circuit Court?

II. Whether Paragraph 22 of the Agreement to Buy and Sell Is a Collateral Agreement Excepted From the Application of the Merger Doctrine?

III. Whether the "Purchaser (or its assigns)" Obtained Approval for the Construction of Additional Units Under the Provisions of Paragraph 22 of the Agreement to Buy and Sell?

IV. Whether the Amount Expended by Defendants-Appellants to Construct the Additional 88 Units Has Any Effect on the Validity and Enforceability of Paragraph 22 of the Agreement?

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings and Disposition in the Court Below.

This is an appeal from a Final Judgment entered by the Circuit Court of Harrison County, Second Judicial District, Mississippi ("Circuit Court") following the briefing and arguments of the parties on a Motion for Summary Judgment filed by RGT/Charleston Partners, Ltd. ("RGT" or "Plaintiff").

On July 22, 2008, RGT filed its original Complaint against Villas of Windsong, Ltd. ("Windsong") and its General Partner, Arbor Properties, Inc. ("Arbor Properties"), for the breach of an Agreement to Buy and Sell ("Agreement"). (R. at 12-18.) More specifically, the Agreement requires Windsong, as the "Purchaser" of certain property,[1] or its assigns, to pay RGT $4,583.33 for each additional housing unit above 240 units approved for construction on the property if Windsong as the "Purchaser", or its assigns, obtains such approval. (R. at 2.) RGT's claim for breach of contract is based on the approval obtained by Windsong, or its assigns, to construct 88 additional units on the property for which RGT has not been paid pursuant to the terms of the parties' Agreement. (R. at 2-3.)

Windsong and Arbor Properties filed their Answer, asserting, among other things: (1) that RGT failed to join necessary and indispensable parties; and (2) the defense of impossibility due to the property involved having been transferred to Arbor Place, LLC ("Arbor Place") and Arbor Place II, LLC ("Arbor Place II"). (*See* R. at 20.) (Sixth, Seventh and Eighth Affirmative Defenses.) As a result of these allegations and defenses, RGT sought leave to file an Amended Complaint naming Arbor Place and Arbor Place II as additional Defendants, which was agreed to by counsel for Defendants and granted by the Court. (R. at 37-38 and 39-55.)

[1] The Agreement was initially entered between RGT (Seller) and Arbor Properties (Purchaser), but Arbor Properties assigned its rights and obligations under the Agreement to Windsong prior to the closing. (R. at 117.)

Following written discovery, RGT filed its Motion for Summary Judgment and Memorandum in Support regarding the Defendants' breach of Paragraph 22 of the Agreement (R. at 89-144). The subsequent briefing of the issues by the parties followed (R. at 155-308 and 311-18), and a hearing of RGT's Motion was held before the Circuit Court on November 19, 2009 (R. at 309-10).

On December 21, 2009, the Circuit Court entered a Judgment granting RGT's Motion for Summary Judgment and finding that the Agreement was breached by the Defendants when they failed to pay RGT the amount stipulated in Paragraph 22 following the Defendants' successful efforts to have the City of Biloxi approve the construction of 88 additional units on the property. (R. at 319-23; Appellee R.E. at 41-45.)

On January 14, 2010, Defendants' filed their Motion to Reconsider and/or Clarify Memorandum Opinion on Motion for Summary Judgment ("Motion to Reconsider") alleging that the Judgment was improper as to all of the Defendants and that RGT did not offer any rationale or evidentiary support for a finding that all Defendants were obligated under Paragraph 22 of the Agreement. (R. at 336-39.)

RGT filed a Response in Opposition to Defendants' Motion to Reconsider ("Response in Opposition") and also a Motion for Amended Judgment Awarding Pre-Judgment and Post-Judgment Interest. (R. at 343-421.) RGT's Response in Opposition pointed out that: (1) the Defendants never once raised the arguments presented in their Motion to Reconsider in their Response in Opposition to RGT's Motion for Summary Judgment; and (2) the Defendants actually referred to themselves collectively with regard to their liability under Paragraph 22 throughout their Opposition to RGT's Motion for Summary Judgment. (R. at 348, ¶ 15.)

On February 26, 2010, the Circuit Court entered a Final Judgment denying Defendants' Motion to Reconsider and granting RGT's Motion for Amended Judgment by awarding pre-judgment and post-judgment interest.

II. Relevant Facts.

A. *The Pertinent Provisions of the Agreement to Buy and Sell.*

On January 13, 2004, RGT (Seller) entered into the Agreement with Arbor Properties (Purchaser) for the sale of certain real property known as Lot 4 of Jam Lane Subdivision, constituting approximately 29.26 acres, located in Biloxi, Mississippi (the "Property") for the "Purchase Price" of $1.1 million. (R. at 102, ¶¶ 1-2; Appellee R.E. at 1, ¶¶ 1-2.) Subsequent to entering the Agreement but prior to closing, Arbor Properties assigned its rights and obligations under the Agreement to Windsong. (R. at 117-21, ¶ A; Appellee R.E. at 12-16, ¶ A.)

The Agreement expresses that it was RGT's (the Seller's) sole responsibility to obtain the necessary zoning approvals from the City of Biloxi for the construction of the initial 240 multi-family housing units on the Property. (R. at 103, ¶ 9; Appellee R.E. at 2, ¶ 9.) It was also RGT's (the Seller's) sole responsibility to obtain the necessary wetlands permits for the construction of the initial 240 multi-family housing units. (R. at 103, ¶ 8; Appellee R.E. at 2, ¶ 8.) In fact, the sale of the Property was contingent upon RGT (Seller), and RGT alone, satisfying both of these obligations prior to the transfer. (R. at 103, ¶¶ 8-9; Appellee R.E. at 2, ¶¶ 8-9.) The threshold number of 240 units was established for these obligations of RGT (Seller) due to Arbor Properties, and subsequently Windsong, representing that they intended to construct 240 multi-family housing units on the Property. (R. at 102, ¶ 4; Appellee R.E. at 1, ¶ 4.)

Paragraph 22 of the Agreement, however, expresses a very different circumstance by requiring Windsong (Purchaser), or its assigns, to pay RGT (Seller) if the Purchaser (or Purchaser's assigns) obtains approval for the construction of additional units on the Property

following the transfer. (R. at 104, ¶ 22; Appellee R.E. at 3, ¶ 22). Paragraph 22 of the Agreement provides as follows:

> At or prior to Closing, Seller and Purchaser shall enter into an agreement whereby if Purchaser (or Purchaser's assigns) obtains approval by the City to build more than 240 multi-family units on the Property, then, within thirty (30) days of obtaining said approval, Purchaser (or Purchaser's assigns) shall pay to Seller an amount equal to $4,583.33 times the number of said units in excess of 240.

(R. at 104, ¶ 22; Appellee R.E. at 3, ¶ 22.) This provision of the Agreement expressly provides the terms, obligations and understanding of the parties in the event additional units were approved for construction following the closing for the transfer of the Property. The obligation of Windsong (Purchaser), or its assigns, under Paragraph 22 of the Agreement is separate and collateral from RGT's (the Seller's) sole obligations to obtain approval for 240 units prior to the closing and is distinguishable from the provisions of the Agreement regarding title, possession and quantity of land being transferred. The obligation of Windsong (Purchaser), or its assigns, under Paragraph 22 of the Agreement is also an obligation separate and distinct from the payment of the "Purchase Price" for the Property. (R. at 102-104, ¶¶ 2 and 22; Appellee R.E. at 1-3, ¶¶ 2 and 22.)

On or about October 29, 2004, RGT conveyed the Property to Windsong. (R. at 127-28.) At the time of this transfer, 240 units had been approved for construction on the Property. (R. at 124-25; Appellee R.E. at 19-20.) (Defendants' Answer to Plaintiff's Interrogatory No. 7.)

B. *The Relationship Between the Defendants and Subsequent Transfers of the Property.*

Pursuant to discovery conducted in this case, the undisputed relationship between the Defendants is as follows:

> **INTERROGATORY NO. 3:** Identify and describe the owners/shareholders/members of each Defendant.
>
> **ANSWER TO INTERROGATORY NO. 3:** Arbor Properties, Inc. is owned by its shareholders, William G. Thames, Jr. and William G. Thames, Sr.

> Arbor Properties, Inc. is the general partner of Villas of Windsong, Ltd. Villas of Windsong, Ltd.'s limited partners are William G. Thames, Jr. and William G. Thames, Sr. Arbor Place, LLC's member and manager is Villas of Windsong, Ltd. Arbor Place II, LLC's member and manager is Villas of Windsong, Ltd.

(R. at 123; Appellee R.E. at 18.) (Defendants' Answer to Plaintiff's Interrogatory No. 3). The Affidavit of Mr. W. Gordon Thames, Jr. offered in opposition to RGT's Motion for Summary Judgment also makes the association between the Defendants clear.

> Villas of Windsong, LTD is an Alabama Limited Partnership. Arbor Properties, Inc. is an Alabama Corporation. Arbor Place, LLC is a Mississippi Limited Liability Company and Arbor Place II, LLC is a Mississippi Limited Liability Company. Arbor Properties, Inc. is the General Partner of Villas of Windsong, LTD. I am the President of Arbor Properties, Inc. Arbor Place, LLC and Arbor Place II, LLC are owned and managed by Villas of Windsong, LTD. Therefore, all four entities are under my direct supervision and control, and I am familiar with the day to day operations of all four such entities and have been since their inception. I am very familiar with the apartments built on Jam Lane in Biloxi, Mississippi.

(R. at 199-211, ¶ 2; Appellee R.E. at 28-40, ¶ 2.); *see also* Defendants' Responses to Plaintiff's Interrogatories No. 4-6 (R. at 123-24; Appellee R.E. at 18-19.)

On or about April 19, 2007, Windsong conveyed the Property to Defendant Arbor Place, LLC ("Arbor Place"). (R. at 129-31.) Thereafter, on or about June 25, 2008, Arbor Place conveyed a portion of the Property to Defendant Arbor Place II, LLC ("Arbor Place II") (R. at 132-34.)

C. *Subsequent Approval of Additional Units and Nonpayment.*

It is undisputed that on or about March 4, 2008, Arbor Place (wholly owned and managed by Windsong) received approval from the City of Biloxi, Mississippi for the construction of 88 units in addition to the 240 units previously approved for the Property. (R. at 139-44; Appellee R.E. at 22-27.) It is also undisputed that neither Windsong nor any of the other Defendants have made payment to RGT pursuant to Paragraph 22 of the Agreement (88 units x $4,583.33) despite the City of Biloxi's approval of the 88 additional units over two and one-half (2 ½) years ago.

SUMMARY OF THE ARGUMENT

The Circuit Court properly entered summary judgment in favor of RGT and against Defendants, and the Circuit Court's Judgment and Final Judgment at issue should be affirmed by this Honorable Court.

RGT (Seller) entered an Agreement with Arbor Properties (Purchaser), which was assigned to Windsong (Purchaser), for the transfer of certain Property. The Agreement required RGT (Seller) to obtain all the necessary approvals for the construction of 240 multi-family housing units on the Property prior to the transfer. Additionally, Paragraph 22 of the Agreement contains all the essential terms of a contract and contains an obligation whereby if Windsong (Purchaser), or its assigns, obtains approval for the construction of multi-family units in excess of 240 on the Property, Windsong, or its assigns, is obligated to pay RGT $4,583.33 per each additional unit. Paragraph 22 represents a collateral agreement between the parties that is distinguishable from the provisions of the Agreement regarding the "Purchase Price" or the title, possession and quantity of land being transferred. Therefore, Paragraph 22 is an enforceable obligation that was not extinguished by the merger doctrine.

Subsequent to the transfer of the Property, Windsong, by and through Arbor Place (which is wholly-owned and controlled by Windsong), obtained approval for the construction of 88 additional units on the Property. RGT made demand for payment pursuant to Paragraph 22, but Defendants have refused to satisfy their obligation to date. Based on the undisputed relationship of Defendants, the law imputes knowledge and notice to all Defendants of the obligation owed to RGT under Paragraph 22. Based on the undisputed relationship of Defendants, the law also establishes a principal-agent relationship between Windsong and Arbor Place. Therefore, the fact that the approval for the construction of the additional units was obtained in the name of Arbor Place is of no consequence. Windsong and its General Partner, Arbor Properties, are

legally liable for their breach of Paragraph 22 due to the failure to pay RGT the agreed-upon proceeds for the additional units.

The amount of funds expended by Defendants in obtaining approval for the additional units is also irrelevant. Neither Paragraph 22 nor any other provision in the Agreement make the obligation of Windsong to pay RGT the amount of $4,583.33 per additional unit approved for construction contingent on the funds expended to obtain the approval. Accordingly, the Circuit Court properly entered its Judgment and Final Judgment in favor of RGT and against Defendants for the amount of $403,333.04, plus court costs and pre-judgment and post-judgment interest. The Judgments should be affirmed by this Honorable Court.

ARGUMENT

I. Standard of Review.

On appeal, summary judgments and matters of contract interpretation are reviewed *de novo*. *See Gray & Assocs., Inc. v. State Bd. of Educ.*, 34 So. 3d 655, 656 (Miss. Ct. App. 2010); *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, 110 (Miss. 2005).

Summary judgment, where appropriate, is designed "to secure the just, speedy, and inexpensive determination of every action." Miss. R. Civ. P. 56. A court may properly grant a motion for summary judgment when, after viewing the facts in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c); *Gray & Assocs.*, 34 So. 3d at 656. Stated differently, summary judgment must be entered against a nonmoving party if that party fails to make a showing sufficient to establish the existence of a genuine issue of fact essential to that party's issue. *Id.*

II. The Circuit Court Applied the Plain, Unambiguous Language of Paragraph 22 of the Agreement to Find a Legal, Enforceable Obligation Owed to RGT.

The initial argument presented in the Brief of Appellants is that the Circuit Court failed to consider, or misinterpreted, certain clauses of Paragraph 22. (Appellants' Br. at 12.) Defendants assert that the only reasonable construction of Paragraph 22 is that "the parties determined to enter a second agreement for additional purchase price if by a fixed point in time – Closing – the number of units that could then be built on the property was more than 240 or for some reason remained unsettled." (Appellants' Br. at 13.) Defendants assert that the Circuit Court effectively wrote out the timing clause of "At or prior to Closing" at the beginning of Paragraph 22. (Appellants' Br. at 14.) Alternatively, Defendants assert that the interpretation of the "second agreement" contained in Paragraph 22 is ambiguous and requires extrinsic evidence of the parties' intent. (Appellants' Br. at 18-19.) Defendants' arguments, however, fail to apply the plain language of Paragraph 22, consider the provisions of the Agreement as a whole, or consider the applicable law.

A. *The Construction of Paragraph 22*

In Mississippi, courts interpret contracts based on an objective standard and "not by the subjective intent or belief of a party." *Palmere v. Curtis*, 789 So. 2d 126, 131 (Miss. Ct. App. 2001). A court's interpretation of a contract is first determined by a review of the four corners of the document. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, 111 (Miss. 2005). If the court finds some ambiguity, it will then proceed to use the canons of contract construction to determine the parties' intent. *Rogers-Usry*, 908 So. 2d at 111. Only after exhausting these two steps without a resolution will extrinsic evidence be allowed. *Id.* Even extrinsic evidence has limitations, and courts will not allow evidence of what the parties thought the agreement meant. *See Landry v. Moody Grishman Agency, Inc.*, 181 So. 2d 134, 139 (Miss. 1965).

It is without dispute that the parties agreed to the following provisions in Paragraph 22 of the Agreement:

> At or prior to Closing, Seller and Purchaser shall enter into an agreement whereby if Purchaser (or Purchaser's assigns) obtains approval by the City to build more than 240 multi-family units on the Property, then, within thirty (30) days of obtaining said approval, Purchaser (or Purchaser's assigns) shall pay to Seller an amount equal to $4,583.33 times the number of said units in excess of 240.

(R. at 104, ¶ 22; Appellee R.E. at 3, ¶ 22.) (emphasis added).

Paragraph 22 states the parties "shall" enter an agreement "[a]t or prior to Closing" "whereby if Purchaser (or Purchaser's assigns) obtains approval" for additional units, RGT will be paid the designated amount of $4,583.33 per additional unit "within thirty (30) days of obtaining said approval." The plain language of Paragraph 22 alone contemplates a post-closing obligation of Windsong, or its assigns, for two important reasons: (1) the provisions required the agreement to be entered no later than the closing ("At . . . Closing, [the parties] shall enter . . ."); and (2) the provisions provide for payment to RGT within thirty (30) days after Windsong, or its assigns, obtain approval for the construction of additional units.

The construction of the Agreement as a whole only clarifies that the express language of Paragraph 22 creates a post-closing obligation. Prior to the closing, only RGT (the Seller) was responsible for obtaining and required to obtain the necessary approvals (zoning and wetlands permitting) for the construction of 240 units on the Property. (R. at 103, ¶¶ 8-9; Appellee R.E. at 2, ¶¶ 8-9.) Paragraph 22, however, expresses the rights and obligations of the parties if Windsong (the Purchaser), or its assigns, obtains approval for the construction of additional units – a situation not required or contemplated prior to the closing.

While Defendants argue that the provisions of Paragraph 22 are ambiguous, Defendants do not offer any support for this position other than to argue that the timing clause of Paragraph 22 ("At or prior to Closing") could modify either the separate agreement clause (the parties

"shall enter an agreement") or the obligation clause ("Purchaser (or Purchaser's assigns) shall pay"). (Appellants' Br. at 14.) However, to argue that the timing clause modifies the obligation clause ignores the plain language and grammar used in Paragraph 22. Based on the applicable law, the Circuit Court properly interpreted the meaning of Paragraph 22 within the four corners of the Agreement.

With all of this in consideration, the provisions of Paragraph 22 clearly and objectively contemplate a continuing obligation of Windsong (the Purchaser), or its assigns, after the closing to pay RGT for additional units that are approved for construction. The Circuit Court properly made this finding and holding in its initial Judgment by stating: "The provisions of Paragraph 22 were not fulfilled or supplanted and, therefore, remain viable and enforceable." (R. at 323; Appellee R.E. at 45.) Defendants' appeal and arguments on these issues should be rejected, and the Judgment and Final Judgment of the Circuit Court should be affirmed.

B. *A Separate "Written" Agreement Was Not Required*

Defendants challenge the Circuit Court's finding that Paragraph 22 did not require a separate "written" agreement in order for the provisions of Paragraph 22 to be enforceable. (Appellants' Br. at 12.) It is undisputed that a separate "written" agreement re-memorializing the terms already expressed in Paragraph 22 was not entered by the parties. Such a second restating in writing, however, was not required by the Agreement or the applicable law.

Under Mississippi law, contracts are valid and enforceable upon the following requisites being met: (1) offer and acceptance (*i.e.*, mutual assent); (2) two or more contracting parties; (3) consideration; (4) sufficiently definite terms; (5) parties with legal capacity; and (6) no legal prohibition precluding contract formation. *See Rotenberry v. Hooker,* 864 So. 2d 266, 270 (Miss. 2003); *Stovall v. Hayes*, 984 So. 2d 1079, 1085 (Miss. Ct. App. 2008). The validity,

enforceability and construction of contracts are matters of law committed to the court rather than a jury. *Leach v. Tingle*, 586 So. 2d 799, 801 (Miss. 1991).

In circumstances where an agreement contemplates additional documents at or prior to a closing, this Honorable Court has stated:

> **The fact that the writing sued upon by its terms contemplates further documents and a closing in no way renders the writing sued upon unenforceable according to its terms.** *Busching v. Griffin*, 542 So. 2d 860, 863 (Miss. 1989); *Vicksburg Waterworks Co. v. J.M. Guffy Petroleum Co.*, 86 Miss. 60, 66, 38 So. 302, 304 (1905). **These principles apply to a contract to make a contract the same as they apply to any other contract or agreement**. *Etheridge v. Ramzy*, 276 So. 2d 451, 454-56 (Miss. 1973).
>
> We have recognized such contracts perform dual and arguably separate functions, 'precatory and obligatory,' *Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d at 583, the same as is a contract to devise or bequeath property. *Williams v. Mason*, 556 So. 2d 1045, 1049 (Miss. 1990); *Trotter v. Trotter*, 490 So. 2d 827, 830 (Miss. 1986). It is obligatory in two specific senses. The contract is the measure of the closing documents. A contract of sale gives parties the right to complain if another tenders a closing document not in compliance with the contract. *Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d at 583; *see also, Putt v. City of Corinth, supra.* Of course, the contract contemplates closing documents and, without doubt, those documents will supplant and subsume the contract in many respects. *Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d at 583. **Still, obligations of the contract of sale which at closing are neither supplanted nor fulfilled remain viable and enforceable**. *Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d at 583; *Knight v. McCain*, 531 So. 2d 590, 594-95 (Miss. 1988).

Tingle, 586 So. 2d at 802 (emphasis added). In the case of *Etheridge v. Ramzy*, this Honorable Court quoted with approval the following:

> A contract is not necessarily lacking in all effect merely because it expresses the idea that something is left to future agreement. However, unless an agreement to make a future contract is *definite* and *certain* upon *all* the subjects to be embraced, it is nugatory. **To be enforceable, a contract to enter into a future contract must specify *all* its *material* and *essential* terms and leave *none* to be agreed upon as the result of future negotiations.**

Etheridge v. Ramzy, 276 So. 2d 451, 453-54 (Miss. 1973) (italics in original) (emphasis added).

In the present case, Paragraph 22 of the Agreement does not require that there be a separate "written" agreement; it simply states that "[a]t or prior to Closing, Seller and Purchaser shall enter into an agreement . . . ." (emphasis added). By the act of purchasing and closing on the Property, Windsong (or its assigns) agreed to pay RGT $4,583.33 for each additional unit approved for construction.

Further, RGT and Windsong entered into the Agreement and explicitly expressed their intent regarding their rights and obligations in the event Windsong (the Purchaser) obtained approval from the City of Biloxi for the construction of additional units. The details of the parties' mutual assent in Paragraph 22 are sufficiently definite and clear – approval of additional units creates an obligation on the part of Defendant Windsong (or its assigns) to pay RGT $4,583.33 per additional unit. Paragraph 22 satisfied all of the requirements for a valid, enforceable contract as expressed in *Rotenberry*. Defendant Windsong (or its assigns) is not entitled to evade its obligation under the guise that a separate "written" agreement was required – which is not even the case. *See Busching v. Griffin*, 542 So. 2d 860, 863 (Miss. 1989) ("'A stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of . . . evading performance of any of the provisions of the contract.'"); *Etheridge*, 276 So. 2d at 453-54.

As a matter of law, Paragraph 22 is a valid agreement between the parties which did not require the entry of a separate written document to be enforceable as it contains all the essential terms of a contract. The Circuit Court's ruling on this point should be affirmed, and the Defendants' appeal and argument on this point should be rejected.

There is no genuine dispute as to the relevant obligation of Windsong (or its assigns) in Paragraph 22 of the Agreement and its subsequent failure to satisfy its obligation. RGT

respectfully requests this Honorable Court to affirm the Judgment and Final Judgment entered by the Circuit Court awarding RGT damages in the amount of $403,333.04, plus costs and pre-judgment and post-judgment interest.

III. The Obligation Contained in Paragraph 22 of the Agreement is a Collateral Agreement That is Not Barred by the Merger Doctrine.

Defendants argue that the obligation contained in Paragraph 22 of the Agreement was merged into the closing documents. (Appellants' Br. at 14-18.) More specifically, Defendants make a lengthy attempt to distinguish the *Knight* case and summarize the basis for the holding in *Knight* as follows: "The stipulation in *Knight* addressed a contingency that *could not* arise until after conveyance (the buyers' inability to obtain a building permit)." (Appellants' Br. at 16-17) (emphasis in original) (footnote omitted.) Defendants also argue that Paragraph 22 deals with the purchase price for the Property, a matter which one would expect to merge into the deed. (Appellants' Br. at 17.) The Agreement, however, evidences a situation very similar to Defendants' summation of *Knight* and shows that the obligation to pay under Paragraph 22 is separate and distinct from the "Purchase Price" of the Property.

This Honorable Court has adopted the majority rule that "collateral or independent agreements, which are to be performed subsequent to the conveyance, are not merged into the deed of conveyance." *Knight v. McCain*, 531 So. 2d 590, 595-96 (Miss. 1988). ("[T]his Court now holds that Mississippi adopts the majority view that certain preliminary stipulations, such as are independent and collateral and not such preliminary agreement as would be merged in the conveyance, survive the deed and confer independent causes of action.") Expressing that thirty-seven (37) other jurisdictions have adopted this position, the *Knight* court quoted with approval the following excerpts from cases decided in other jurisdictions:

> 'The rule of merger does not apply to those provisions of the antecedent contract which the parties do not intend to be incorporated in the deed or which are not necessarily performed by the delivery of the executed conveyance.' . . .

> 'The doctrine of merger cannot apply where the deed constitutes only part performance of the proceeding contract, and that the unperformed provisions of the contract do not merge into the deed.'

Knight, 531 So. 2d at 595.

In *Knight*, the plaintiffs entered into a purchase agreement for some property located in a subdivision. *Id.* at 592. In the purchase agreement, the parties agreed that the purchase price for the property would be refunded if a building permit for the property could not be obtained. *Id.* The plaintiffs were forced to bring suit regarding this provision in the purchase agreement, and the defendant argued that the refund provision in the purchase agreement was unenforceable since the purchase agreement merged into the deed. *Id.* at 594. The court found the refund provision to be an independent stipulation, separate and apart from provisions associated with title, possession or quantity of land. *Id.* at 596.

In the instant case, the Agreement expresses that it was RGT's (the Seller's) responsibility to obtain the necessary zoning approvals from the City of Biloxi for the construction of 240 units on the Property. (R. at 103, ¶ 9; Appellee R.E. at 2, ¶ 9.) It was also RGT's (the Seller's) responsibility to obtain the necessary wetlands permits for the construction of 240 units. (R. at 103, ¶ 8; Appellee R.E. at 2, ¶ 8.) In fact, the sale of the Property was contingent upon RGT, and not any of the Defendants (as Purchaser or an assign), satisfying both of these obligations prior to the transfer. (R. at 103, ¶¶ 8-9; Appellee R.E. at 2, ¶¶ 8-9.)

Paragraph 22, however, expresses a very different circumstance by requiring Windsong (the Purchaser), or its assigns, to pay RGT if Windsong (or its assigns) obtains approval for the construction of additional units on the Property following the transfer.[2] The obligation of

[2] Defendants argue that the Circuit Court improperly ruled that Defendants "were required" to obtain approval for the construction of additional units under Paragraph 22. (Appellants' Br. at 17.) While RGT agrees that Paragraph 22 does not contain an affirmative obligation for Windsong, or its assigns, to obtain approval for additional units, the point the Circuit Court was making was the contrast between the approval obligations prior to closing – which were RGT's – to the obligation of Windsong, or its assigns, under Paragraph 22 to pay RGT if

Windsong, or its assigns, under Paragraph 22 of the Agreement is separate and collateral from RGT's obligations to be performed prior to the closing and is certainly distinguishable from the provisions of the Agreement regarding title, possession and quantity of land being transferred.

Further, the parties specifically defined the "Purchase Price" in Paragraph 2 of the Agreement. (R. at 102, ¶ 2; Appellee R.E. at 1, ¶ 2.) The parties also provided that Windsong (the Purchaser) would obtain a title insurance policy for the Property in the amount of the "Purchase Price" within sixty (60) days of the Agreement being entered. (R. at 102, ¶ 6; Appellee R.E. at 1, ¶ 6.)[3] This obligation was not associated with the timing of the closing, which was to occur "on or before thirty (30) days after Seller has obtained both the Minimum Corps Approval and the Zoning Approval." (R. at 103, ¶ 10; Appellee R.E. at 2, ¶ 10.) The parties did not express any requirement in either Paragraphs 6 or 22 for an increase in the amount of title insurance (based on the "Purchase Price") if approval for additional units was obtained by Windsong, or its assigns, as expressed in Paragraph 22. Importantly, Paragraph 22 makes no reference to the "Purchase Price" at all or to the "Purchase Price" being affected or contingent on whether Windsong (the Purchaser) obtained approval for the construction of additional units prior to the closing – which it was not even seeking or required to do prior to closing.

In the instant case, as in *Knight* and as discussed above, the parties entered the Agreement which expressly contemplates an obligation on the part of Windsong (or its assigns) to pay for additional units approved to be constructed on the Property following the closing. The provisions and obligation of Paragraph 22 of the Agreement were intended to be a separate,

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Windsong, or its assigns, obtained approval for additional units. (R. at 322.) It is undisputed that approval to build 88 additional units was obtained by Arbor Place, which is wholly owned and managed by Windsong.

[3] Paragraph 6 of the Agreement provides for the Purchaser to obtain the title insurance within thirty (30) days of receiving the "Survey" and title information from the Seller, both of which were required to be provided by the Seller within thirty (30) days of the Effective Date (1/13/04). (R. at 102, ¶¶ [5] and 6; R.E. at 1, ¶¶ [5] and 6.)

collateral and independent obligation of Windsong (or its assigns) following the transfer of the Property.

As in the *Tingle* case, "obligations of the contract of sale which at closing are neither supplanted nor fulfilled remain viable and enforceable." The provisions of Paragraph 22 of the Agreement were not fulfilled at closing. Further, there is no evidence that the obligations of Paragraph 22 were supplanted at or prior to closing. Therefore, the express obligation of Windsong (or its assigns) to pay RGT for the additional units is viable and enforceable.

Defendants' argument regarding merger is without merit. As a matter of law, Windsong or its assigns are bound by and legally obligated pursuant to the plain language of Paragraph 22, and the Circuit Court's Judgment and Final Judgment regarding same should be affirmed.

IV. Windsong, Through Arbor Place, Obtained Approval from the City of Biloxi for the Construction of 88 Additional Units on the Property.

Defendants argue that since Windsong did not obtain approval for the additional units and the party that did obtain such approval, Arbor Place (wholly-owned and managed by Windsong), was not a party to, or assign of, the Agreement, neither party could be liable under Paragraph 22. (Appellants' Br. at 19.) Defendants argue that the Circuit Court's construction of Paragraph 22 impermissibly creates an encumbrance running with the land. (Appellants' Br. at 19.) Defendants' positions, however, ignore the notice imputed to Windsong, Arbor Properties and Arbor Place as a matter of law and the undisputed control of Windsong in obtaining the approval for the additional units.

In the present case, the following facts are undisputed:

1) The Agreement was initially entered by RGT and Arbor Properties (R. at 102, ¶ 1-2; Appellee R.E. at 1, ¶ 1-2);

2) Arbor Properties has two shareholders: William G. Thames, Sr. and William G. Thames, Jr. (R. at 123; Appellee R.E. at _18);

3) Arbor Properties is the General Partner of Windsong and the Limited Partners of Windsong are William G. Thames, Sr. and William G. Thames, Jr. (R. at 123; Appellee R.E. at 18);

4) Arbor Properties subsequently assigned its rights and obligations in the Agreement to Windsong (R. at 117, ¶ A; Appellee R.E. at 12, ¶ A);

5) Arbor Place is wholly owned, controlled and managed by Windsong (R. at 123; Appellee R.E. at 18);

6) Arbor Place received approval from the City of Biloxi for the construction of 88 additional units on the Property (R. at 139-144; Appellee R.E. at 22-27); and

7) Paragraph 22 of the Agreement requires Windsong, or its assigns, to pay RGT the amount of $4,583.33 for each additional unit approved for construction at the request of Windsong, or its assigns (R. at 104 ¶ 22; Appellee R.E. at 3, ¶ 22).

In this circumstance, the law establishes that Windsong, Arbor Properties and Arbor Place had actual and/or constructive knowledge of the obligations owed to RGT under Paragraph 22 of the Agreement. *See Doe v. Pontotoc County Sch. Dist.*, 957 So. 2d 410 (Miss. Ct. App. 2007).[4] "It has long been the rule that 'a corporation is bound by the knowledge acquired by, or notice given to, its officers or agents which is within the actual or apparent scope of their authority or employment and which is in reference to a matter to which their authority extends.'" *Womble v. Singing River Hosp.*, 618 So. 2d 1252, 1268 (Miss. 1993) (overruled on other grounds) (quoting *Parmes v. Ill. Cent. Gulf R.R.*, 440 So. 2d 261, 265 (Miss. 1983)). "[N]otice to the corporation is obtained through the knowledge or notice of its officers or agents." *First Nat. Bank v. C. W. Leeton & Bro.*, 95 So. 445, 447 (Miss. 1923); *In re Signal Intern., LLC*, 579

[4] "Actual notice is defined as 'notice expressly and actually given. . . .' while 'constructive notice' is defined as 'information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Doe*, 957 So. 2d at 410.

F.3d 478, 496 (5th Cir. 2009) ("A corporation is charged with the knowledge of any of its managing agents who have authority over the sphere of activities in question.").

> The general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation.

Am. Standard Credit, Inc. v. Nat'l Cement Co., 643 F.2d 248, 271 n. 16 (5th Cir. 1981). This rule applies where the ownership is the same through several related entities. *Ohio Millers' Mut. Ins. Co. v. Artesia State Bank*, 39 F.2d 400, 403 (5th Cir. 1930) (noting that where "a dominant individual" who owns substantially all of an entity, transfers property to numerous entities, and attempts to claim separate ownership of those entities, "the court will look through the form of the legal entities to the real owners and to the controlling power, and impute his knowledge to all his corporations."). Therefore, since Defendants all have the same ownership, and especially since Windsong owns and makes all decisions for Arbor Place, they all had knowledge of Paragraph 22 of the Agreement and must be bound by its terms.

Additionally, the undisputed facts of this case establish that a principal-agent relationship exists between Windsong and Arbor Place. A principal-agent relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *O.W.O. Investments, Inc. v. Stone Investments Co., Inc.*, 32 So. 3d 439, 447 (Miss. 2010). According to Mr. Thames' Affidavit, Arbor Place is "owned and managed by Villas of Windsong, LTD [and] all four entities are under [his] direct supervision and control." (R. at 199-211, ¶ 2; Appellee R.E. at 28-40, ¶ 2); *see also* Defendants' Responses to Plaintiff's Interrogatories No. 4-6 (R. at 123-24; Appellee R.E. at 18-19.)

As the sole member of Arbor Place, Windsong directs and controls all actions taken by Arbor Place, and, as a result, Arbor Place acts on behalf and at the will of Windsong. This was the very case when Arbor Place obtained approval from the City of Biloxi for the construction of 88 additional units on the Property. Since the decision to seek approval for the construction of the additional units could have never been made without the directive, consent and approval of Windsong, it follows that Windsong obtained such approval from the City, regardless of the fact that the building permit applications were filed in the name of its wholly-owned subsidiary.[5]

Even if a formal assignment did not occur between Windsong and Arbor Place as Defendants argue, Windsong, as the Purchaser, obtained approval for the construction of 88 additional units through Arbor Place. As a result, Windsong (as the Purchaser) is obligated to pay RGT the principal amount of $403,333.04 pursuant to Paragraph 22 of the Agreement and any analysis regarding encumbrances running with the land is completely unnecessary. Moreover, Arbor Properties, as the General Partner of Windsong, is liable for the obligations of Windsong to the same extent as Windsong. *See* Ala. Code § 10-9C-404(a) (2010) ("[G]eneral partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the claimant or provided by law.")

This Honorable Court has also recognized:

> [A]ccording to a number of cases, the notion of separate corporate existence of parent and subsidiary or affiliated corporations will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation. The fiction of separate corporate identity of two corporations will not be extended to permit one of the corporations to evade its just obligations or to promote fraud or illegality or injustice.

[5] This same circumstance, coupled with the notice imputed by law to Arbor Place of the obligation owed to RGT, is sufficient to establish a legal assignment of the obligation owed to RGT. *See* Rest. 2d. Contracts, Assignment and Delegation, §§ 318(1) and 327(1) (an obligation can be assigned as long as it is not against public policy and there is a manifestation of assent by the assignee to the assignment).

Beco, Inc. v. Am. Fid. Fire Ins. Co., 370 So. 2d 1343, 1346 (Miss. 1979) (emphasis added). Even if a principal-agent relationship did not exist between Windsong and Arbor Place (although it does exist based on the undisputed facts), our law will not allow a single center of decision-making and economic power to avoid its legal obligations under the guise of different corporate forms. While Windsong may have been the first entity to which the property was transferred and Arbor Place is the entity that obtained approval for the construction of the additional units, it is disingenuous to argue that the Circuit Court's Judgment should not apply to either of them because the "Purchaser" of the property is not the same as the entity that obtained approval for the construction of the additional units although the "Purchaser" controls and is the sole owner of the entity that received the subsequent approval for construction of the additional units.

Defendants should also be found to have waived the argument, and to be estopped from arguing, that the Circuit Court's Judgment is not applicable to all of them.[6]

Based on the foregoing undisputed facts and applicable law, the Circuit Court's Judgment and Final Judgment should be affirmed against Windsong, Arbor Properties and Arbor Place.

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[6] Defendants never once presented an argument or raised an objection in their Response to RGT's Motion for Summary Judgment about their separate liabilities under Paragraph 22. If fact, Defendants' Response referred to their collective liability in several statements. (R. at 348, ¶ 15.) It was not until Defendants' filed their Motion to Reconsider that this argument was raised (R. at 336-39.) Arguments first made in a Rule 60 Motion to Reconsider that could have been made prior to the trial court's decision are not proper grounds for reconsideration, and, carrying that premise to its logical conclusion, are thus not properly heard on appeal. *See Pruett v. Malone*, 767 So. 2d 983, 986 (Miss. 2000) (rejecting an appeal where the arguments in favor of the motion to reconsider could have been made prior to the decision). Defendants could have made their argument in their Response to RGT's Motion for Summary Judgment. However, they chose not to do so. Therefore, they waived that argument and it is not properly before this Honorable Court.

Second, Defendants should be judicially estopped from asserting that all Defendants are not liable. Defendants collectively referred to their liability in their Response to RGT's Motion for Summary Judgment. The Circuit Court was entitled to rely on those representations. As a result, Defendants are judicially estopped "from asserting a position, benefiting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *See Tupelo Redevelopment Agency v. Gray Corp., Inc.*., 972 So. 2d 495, 525 (Miss. 2007) (quoting *Richardson v. Cornes*, 903 So. 2d 51, 56 (Miss. 2005)). That is exactly what Defendants are attempting to do.

V. The Amount Expended by Defendants to Construct the Additional 88 Units Does Not Have Any Effect on the Validity and Enforceability of Paragraph 22 of the Agreement.

Defendants argue that the enforcement of Paragraph 22 would be unfair due to the amount of money expended to construct the additional 88 units on the Property. Paragraph 22, however, clearly expresses that it applies when Windsong (as the Purchaser), or its assigns, obtains the necessary approval. As discussed above, Windsong did obtain approval for the construction of 88 additional units. No contingency regarding the costs of obtaining the necessary approval or of construction is mentioned anywhere in Paragraph 22. Also, as discussed above, the language of Paragraph 22 does not confine its application to a pre-closing situation as Defendants would have this Court believe.

In actuality, this argument of Defendants lends more credence to the control of, and notice to, Windsong and Arbor Properties all along. Defendants argue that the necessary approvals for the additional units were obtained by Arbor Place. (Appellants' Br. at 23.) The parties invoiced and responsible for paying the costs associated with the approval for the additional units include Arbor Properties and Arbor Place II (R. at 157-58, 204, 275 and 277.)

The costs associated with constructing the additional units on the Property is simply irrelevant to the issue of whether Windsong and the other Defendants breached their obligation owed to RGT in Paragraph 22 and should not be considered by this Honorable Court.

CONCLUSION

The contractual provisions, undisputed facts and the applicable law of this case establish that: (1) RGT and Windsong entered the Agreement; (2) Paragraph 22 of the Agreement provides for Windsong (as the Purchaser), or its assigns, to pay RGT the amount of $4,583.33 for each additional unit above 240 that Windsong, or its assigns, obtains approval to construct on the Property; (3) Paragraph 22 does not require a separate written agreement to be enforceable since

it contains all the essential terms of a contract; (4) Paragraph 22 is a collateral agreement that is not barred by the merger doctrine; (5) Arbor Place is wholly-owned, controlled and managed by Windsong (whose General Partner is Arbor Properties); (6) Arbor Properties is jointly and severally liable for the liabilities of Windsong; (7) Windsong, through Arbor Place, obtained approval for the construction of 88 additional units on the Property; (8) Arbor Place had imputed knowledge and notice of the obligations owed to RGT under Paragraph 22 at all relevant times; and (9) RGT has not been paid the agreed-upon amount pursuant to the provisions of Paragraph 22 by any Defendant.

As a result, there is no genuine issue of material fact in this matter regarding Windsong's, Arbor Properties' and Arbor Place's obligation to pay RGT $403,333.04 for the additional units, plus pre-judgment and post-judgment interest. RGT is entitled to summary judgment as a matter of law and respectfully requests this Honorable Court to affirm the Judgment and Final Judgment entered by the Circuit Court.

Respectfully submitted on this the 8th of October, 2010.

RGT/CHARLESTON PARTNERS, LTD., BY AND THROUGH ITS GENERAL PARTNER, FORD DEVELOPMENT CORPORATION

BY: W Brant Potter

ATTORNEY OF RECORD FOR PLAINTIFF-APPELLEE

CERTIFICATE OF SERVICE

I, M. Brant Pettis, Esq., attorney for Plaintiff-Appellee, RGT/Charleston Partners through its General Partner, Ford Development Corporation, certify that I have this day filed via Federal Express, overnight delivery, an original and three (3) copies of this Response Brief of the Plaintiff-Appellee with the Mississippi Supreme Court Clerk and have served a copy of same by United States mail, with postage prepaid, on the following persons at the following:

The Honorable John C. Gargiulo
Harrison County Circuit Court Judge
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This the 8th day of October, 2010.

M. Brant Pettis