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** — **APPELLANTS**

V.

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

**APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT, HONORABLE JOHN C. GARGIULO, PRESIDING**

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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Appellants believe the Court would be aided by the opportunity to ask questions of counsel in person.

I. INTRODUCTION

The Circuit Court misread Paragraph 22 to require action by the Buyer after the sale, and allowed the Seller to receive payment of additional purchase price long after the sale closed. No matter how many times RGT inserts "following the transfer" into its description of Paragraph 22, or refers to the "initial 240" apartments as if everyone understood there would be more, the fact remains that the Circuit Court erred in entering summary judgment in favor of RGT.

In 2004, two parties entered into an unremarkable contract to buy and sell roughly 29 ¼ acres (including wetlands) in Harrison County. The agreed purchase price was $1.1 million; title was conveyed as directed to the Buyer's assignee. Four years and two subsequent transfers later, the Seller resurfaced, demanding additional purchase price and invoking a single provision from the parties' original Agreement to Buy and Sell as justification to essentially reopen a long-settled transaction.

Three undisputed facts illumine both the 2004 transaction and the present dispute: (1) the original sale was conditioned on the Buyer's ability to develop at least 240 apartments on the tract; (2) the wetlands permits obtained by RGT left approximately 20% of the land that could not be developed; and (3) zoning approvals obtained by RGT limited development to 10 units per acre. Because the required 240 units could be built, the sale closed with the Buyer paying $1.1 million, or $4,583.33 per unit that could then be built. These were not what RGT artfully describes in its papers as the "initial" 240 multi-use family housing units (*see, e.g.,* Appellee's Brief at p. 4); to close the deal, RGT had to secure approvals for as many apartments as the land

could then hold.[1] No phased or subsequent development was guaranteed or required in the contract nor did RGT present any evidence that additional development was contemplated when the sale closed.

RGT resurrected the 2004 agreement in 2008 years after it sold the property and got its $1 million. Successor owners of the property had secured new wetlands permits and reclaimed land that could not be developed under the 2004 permits secured by RGT. RGT learned that these owners had secured approvals to build additional apartments on that newly-reclaimed land. RGT did not expend any resources to secure the new permits that made additional land available for development. Nonetheless, RGT wants to be paid an amount equaling nearly half again the original purchase price, based solely on a tortured reading of one provision in the 2004 Agreement.

II. ONLY ONE READING OF PARAGRAPH 22 GIVES IT FULL EFFECT.

Paragraph 22 is clear: the parties determined to enter a second agreement supplementing the agreed purchase price on a *pro rata* basis if by a fixed point in time – Closing – the number of units that could then be built was more than 240 or for some reason remained unsettled. This is the only reading that gives full effect to the three operative clauses: (1) "At or prior to closing" (the timing clause); (2) "Seller and Purchaser shall enter into an agreement" (the second agreement clause); and (3) "whereby . . . Purchaser (or Purchaser's assigns) shall pay" (the obligation clause). Because no additional approvals were obtained and no separate agreement was reached by the time of Closing, the terms of Paragraph 22 ***on their face*** were never met. The Circuit Court erred, in not giving effect to all of Paragraph 22's clauses.[2] *See Warwick v. Gautier*

[1] "In fact, the sale of the Property was contingent upon RGT (Seller), and RGT alone, satisfying both of these obligations [zoning approvals and wetlands permits] prior to the transfer." Appellee's Brief at p. 4.

[2] Specifically, the Circuit Court failed to give any effect to the timing clause of Paragraph 22, "At or prior to Closing . . ."

Utility Dist., 738 So. 2d 212, 215 (Miss. 1999)(citation omitted)("When construing a contract, the court will read the contract as a whole, **so as to give effect to all of its clauses**")(emphasis added).

To a certain extent, RGT agrees. *See, e.g.,* Appellee's Brief at p. 9 (citing *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So.2d 107, 111 (Miss. 2005)("A court's interpretation of a contract is first determined by a review of the four corners of the document.") RGT acknowledges that Paragraph 22 was not a then-existing agreement, but instead it contemplated an agreement to be entered between the parties later. Appellee's Brief at 10 ("the provisions required the agreement to be entered no later than the closing.")[3] RGT's interpretation, however, reaches two conclusions that are not supported by the four corners of the contract.

First, RGT repeatedly reads into Paragraph 22 a post-transfer obligation on the part of the Buyer. *See* Appellee's Brief at pp. 4-5, 10, 15. For example, RGT claims that the "plain language of Paragraph 22" necessarily contemplates that Windsong, or its assigns, could incur additional obligations to RGT after the sale closed. That simply is not true. RGT relies on the timing clause – "at or prior to closing" – but that clause establishes only that any separate future agreement had to be reached before the transaction closed.[4] RGT next tries to bootstrap a post-closing obligation from the 30-day payment requirement. *Id.* RGT ignores the fact that the 30-

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[3] *See also, e.g., id.* at p. 15, FN2: "RGT agrees that Paragraph 22 does not contain an affirmative obligation for Windsong, or its assigns, to obtain approval for additional units . . ." Notably, RGT attempts to play other provisions off Paragraph 22 in an effort to establish that any approvals above 240 necessarily would occur post-closing. Given that the Agreement, including Paragraph 22, was signed before any units were approved such a proposition makes no sense. Although no evidence has been adduced as to the parties' specific intentions, it is far more likely that Paragraph 22 envisioned Buyer, prior to closing, securing approvals for a density greater than 10 units per acre, rather than Buyer years later shouldering the costs to clear unfit lands only to pay RGT for the privilege.

[4] On p. 18 of its brief, *e.g.,* RGT attempts to claim as an "undisputed fact" that "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." While it may be RGT's *conclusion*, it is not an undisputed *fact*. Paragraph 22 contemplates a second agreement, to be entered at or before closing. No such agreement was reached; RGT can supply no evidence to the contrary.

days comes into play only if the future agreement was reached by closing. RGT cannot prove a post-closing obligation because it cannot prove a separate agreement. The plain language of Paragraph 22 on which RGT relies so heavily contemplates one thing – a distinct agreement to be entered by the parties before closing. There is no evidence in the record that such an agreement was ever reached. Nothing in Paragraph 22 establishes that the Buyer could incur an additional financial obligation years after the sale.

Second, RGT appears to contend that the act of closing somehow operated as the separate agreement required by Paragraph 22. *See, e.g.,* Appellee's brief at p. 13 ("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.") Perhaps this explains RGT's – and the Circuit Court's – focus on cases disclaiming the necessity of separate writings to effectuate an agreement. *See, e.g.,* Appellee's brief at pp. 11-13. Respectfully, the presence or absence of a separate **writing** is not the question; the issue is whether a separate **agreement** was reached at or prior to closing. RGT offered no evidence in its Summary Judgment Motion from which the Circuit Court could find such an agreement, and RGT's proposition of "closing-as-separate-agreement" is directly rebutted by the legal doctrine of merger. Closing did not endorse the terms of Paragraph 22, it extinguished them.

RGT quotes extensively from *Leach v. Tingle* and *Etheridge v. Ramzy*, but studiously avoids putting the block quotes into context in either case. As Defendants pointed out in their principal brief, *Tingle* involved a suit for the specific performance of a provision in a real estate sales contract that the seller "would give Purchaser a guaranteed buy-back anytime after the first year and Purchaser will be given $3,300.00 with this buy-back by Seller." *Leach v. Tingle,* 586 So. 2d 799, 800 (Miss. 1990). When the buyers sued to enforce the provision, the Seller did not

argue that he never agreed to buy back the property, but only that the agreement was too vague to be susceptible to enforcement through specific performance.[5] *Id.* at 800-801.

Etheridge v. Ramzy, 276 So. 2d 451 (Miss. 1973) does not deal with a real estate contract, but actually is closer to the situation presented here. The parties there drafted a written "Buy and Sell Agreement – letter of intent" addressing options to purchase certain stock. *Id.* at 452. When the option period expired and the party with first rights had not exercised the option, the other party notified them of their intent now to purchase the stock and drafted a second written agreement setting forth the details of the stock transfer. *Id.* at 453. When the party with first rights refused to execute the transfer agreement, the other party sued for specific performance. *Id.* Although the Court recognized that parties can make an enforceable contract that binds them to prepare and execute a subsequent documentary agreement that had not occurred. *Id.* at 454. The "Buy and Sell Agreement" was "nothing more than a memorandum *expressing an intent to enter into a future contract as opposed to an enforceable option agreement.*" *Id.* (emphasis supplied). Specific performance was not available to enforce the agreement because there was no agreement that could be enforced.

Similarly, Paragraph 22 of this Agreement to Buy and Sell might well express an intent in January 2004 - before either party knew what would happen with the wetlands permits, zoning, and building approvals – to enter a future contract once those contingencies had been realized. RGT's dogged insistence that Paragraph 22 itself created obligations "following the transfer" demonstrates that the future agreement was never reached.

[5] In fact, the Seller tried to rely upon the terms of a written buy-back agreement he claimed to have sent to the Buyers but that they apparently never received. *Id.* at 800, FN 2.

III. PARAGRAPH 22 WAS MERGED INTO THE DEED AT CLOSING.

The merger doctrine holds that "[t]he acceptance of a deed tendered in the performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract." *Knight v. McCain,* 531 So. 2d 591, 595 (Miss. 1988)(citations omitted). The Circuit Court's finding of an exception to this doctrine turned on the faulty premise that Paragraph 22 created an obligation for the Buyer to take some action "following transfer." *See* December 21, 2009, Order, R.E. 10. [6]

RGT carries the argument even further, claiming that "[T]he provisions and obligation of Paragraph 22 of the Agreement were intended to be a separate, collateral and independent obligation of Windsong (or its assigns) following the transfer of the Property." Appellee's Brief at pp. 16-17. This logic is entirely circular and self-contradicting: RGT cannot simultaneously posit that Paragraph 22 is and is not a separate agreement; the very act of merger at closing cannot be its own exception. More significantly, such positions reflect RGT's ambiguous interpretations of Paragraph 22. Interpretation of an ambiguous contract is a question of fact, not law. *See, e.g., Lewis v. Progressive Gulf Ins. Co., Inc.,* 7 So.3d 955, 959 (Miss. App. 2009). Even if it were proper for the Circuit Court to make factual findings on a summary judgment motion – which it is not – this record contains no evidence from which factual determination could be made.

Most telling, however, is RGT's attempt to make the extra $400,000-plus payment it demands be something other than additional purchase price. Under "Relevant Facts," RGT baldly states the "obligation" under Paragraph 22 is distinct from the payment of the "Purchase

[6] As previously noted, RGT concedes that the Circuit Court erred in finding the Buyer was required to obtain approval for additional units. *See* Appellee's Brief, p. 15 FN2.

Price," but offers no explanation of what this additional money is, if not "purchase price."[7] Again at p. 16 of Appellee's Brief, RGT specifically disavows any relationship between Paragraph 22 and the purchase price. RGT's efforts implicitly acknowledge that the amount of money Windsong would pay for the property is a not an "independent and collateral" obligation term but rather an integral term that would be "set" by closing. *See, e.g., 527 Smith Street Brooklyn Corp. v. Bayside Fuel Oil Depot Corp.*, 262 A.D.2d 278, 279, 691 N.Y.S.2d 560 (N.Y.A.D. 2 Dept. 1999) ("[T]he purchase price is an integral part of the real estate transaction, and not a collateral undertaking.")

IV. THE RECORD IS INSUFFICIENT TO HOLD ANY DEPENDANT LIABLE.

These facts are not in dispute: RGT entered the Agreement with Arbor Properties, Inc. The Agreement was assigned once -- to Villas of Windsong, Ltd. ("Windsong"). RGT conveyed the property to Windsong in 2004. RGT's conveyance, a warranty deed, excepted only "recorded restrictive covenants, rights of way, and easements. . ., prior recorded reservations, conveyances and leases of oil, gas and minerals by previous owners"; it did not include any continuing obligation related to potential future construction on the land. Windsong conveyed the property to Arbor Place, LLC in 2007; Arbor Place, LLC secured the additional approvals for new construction on the property.

Appellee's brief teems with arguments regarding the parties; nearly half its pages are devoted to arguing that the Court can simply disregard the separateness of the property's successive owners and find them jointly and severally liable under RGT's reading of Paragraph 22. First, RGT attempts unsuccessfully to define Arbor Place, LLC as an "assignee" of Windsong. Appellee's Brief at p. 18. Next it expounds on "constructive notice," followed by

[7] This is especially puzzling given RGT's painstaking disclaimer that it had any responsibility with respect to the property after closing.

doctrines of principal/agent. *Id.* at 18-19. From there, RGT argues avoidance before rounding out its themes with waiver. *Id.* at 21. The only proof RGT relies on to argue that the four Defendants can be treated as one entity is an Affidavit of Gordon Thames, noting "all four entities are under my direct supervision and control . . ." R. at 200.[8] Respectfully, this "evidence" is legally insufficient to establish that these entities are really just alter-egos of each other or Gordon Thames or whatever RGT espouses.

The cases RGT trumpets provide only generalized legal principles. RGT's citations may define terms, but they utterly fail to establish them as binding in this case or even to demonstrate favorable holdings on similar facts. In *Doe v. Pontotoc County Sch. Dist.*, 957 So. 2d 410, 418 (Miss. App. 2007), the court found that a school district had neither actual nor constructive notice of a teacher's inappropriate behavior with a student; RGT appears to have cited this authority solely for the definition of the terms "actual" and "constructive" notice, as the claims there involve negligent hiring. *Womble v. Singing River Hosp.*, 618 So. 2d 1252, 1268 (Miss. 1993)(overruled on other grounds) decided issues of wrongful death and governmental immunity. RGT's quote was taken from an analysis of the statute of limitations against the treating physicians.

General propositions of notice to corporate officers and the knowledge of "dominant individuals" are cited in the pre-Depression Era cases of *First Nat. Bank v. C.W. Leeton Bro.*, 95 So. 445, 447 (Miss. 1923) and *Ohio Millers' Mut. Ins. Co. v. Artesia State Bank,* 39 F.2d 400, 403 (5th Cir. 1930). RGT's use of *O.W.O. Investments, Inc. v. Stone Investments Co., Inc.*, 32 So. 2d 439, 447 (Miss. 2010), is notable only for its generic definition of the principal-agent relationship; the case actually held that the lawyer-agent's actions did not bind the principal, and

[8] RGT separately invokes certain discovery responses submitted on behalf of the Defendants. *See* Appellee's Brief at p. 19, R. at 123-24.

upheld summary judgment for the defendant. And the AmJur quote taken by RGT from the Court's thirty-year old decision in *Beco, Inc. v. American Fidelity Fire Ins. Co.*, 370 So.2d 1343, 1349 (Miss. 1979) is immediately followed by a reference to the requisite evidence to establish a *prima facie* case, evidence not present here.

To the extent these cases have any application in this matter, at this juncture, it is to demonstrate the need for an evidentiary record before one entity can be held to be the agent of another, or notice to an individual to be binding on another legal entity. Even if RGT could establish that Windsong (or some other assignee of the Agreement, had there been one) assumed an obligation to pay RGT if Windsong (or that assignee) ever built more than 240 apartments, RGT has not presented evidence on which any court could find that any of these Defendants are liable for that obligation. Rather, by virtue of its warranty deed, RGT expressly disclaimed any payment obligations encumbering the land as to subsequent transferees.

V. CONCLUSION

RGT enjoyed the benefit of its bargain in 2004, when it conveyed a parcel of unimproved and partially unusable property and received substantial consideration in return. It should not now be allowed to parlay a condition that was never met, on terms that were extinguished in its conveyance, and that it warranted did not apply, to get paid again. A proper reading of Paragraph 22, that gives effect to all its provisions, forecloses additional payments to RGT. Defendants request that the Court reverse the Circuit Court's summary judgment and either render judgment in their favor or remand for discovery and trial.

Respectfully submitted,

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ARBOR PROPERTIES, INC.,
ARBOR PROPERTIES, LLC AND
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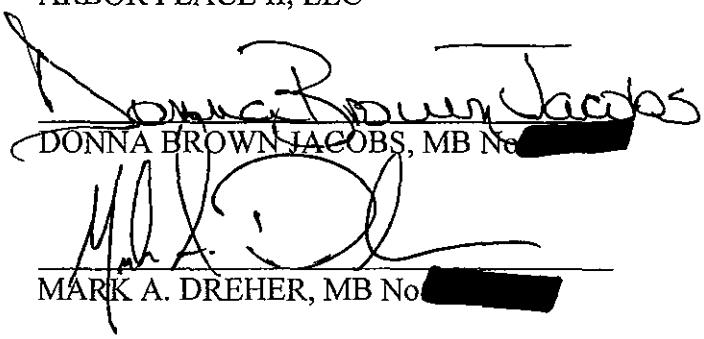

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CERTIFICATE OF SERVICE

I, Donna Brown Jacobs, do hereby certify that a true and correct copy of the above and foregoing Arbor Properties, Inc.'s Reply Brief was this day served by U. S. Mail, first class, postage pre-paid, upon the following:

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SO CERTIFIED, this the 24th day of November, 2010.

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