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**

BRIEF OF APPELLANTS

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ARBOR PROPERTIES, INC.,
ARBOR PROPERTIES, LLC AND
ARBOR PLACE II, LLC

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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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable John C. Gargiulo, Harrison County Circuit Judge

2. RGT/Charleston Partners, Ltd., by and through its General Partner Ford Development Corporation, Appellees

3. Rex Robertson, Charleston Partners, Ltd.

4. Scott Delano, agent for RGT/Charleston Partners, Ltd.

5. M. Brant Pettis, BALCH & BINGHAM, LLP, attorney for Appellees

6. Donna Brown Jacobs, Mark A. Dreher, and BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, attorney for Appellants

7. Virgil G. Gillespie, THE GILLESPIE LAW FIRM, attorney for Appellants

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

DONNA BROWN JACOBS

ONE OF THE ATTORNEYS FOR
APPELLANTS

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1. Whether the Agreement to Buy and Sell is subject to only one reasonable interpretation which requires judgment in favor of Defendants as a matter of law?

2. Whether all provisions in the Agreement to Buy and Sell, including Paragraph 22, merged into the deed and were extinguished at closing?

3. Whether, even if judgment for Defendants as a matter of law is not warranted, genuine issues of material fact preclude summary judgment in favor of Plaintiff?

STATEMENT OF THE CASE

Defendants Arbor Properties, Inc., Villas of Windsong, Ltd., Arbor Place, LLC, and Arbor Place II, LLC appeal from a summary judgment entered against them by the Circuit Court of Harrison County.

At issue is a single paragraph in a contract executed in 2004 between RGT/Charleston Partners, LTD., a Texas Limited Partnership, ("RGT") and Arbor Properties, Inc. RGT agreed to sell certain land in Harrison County to Arbor Properties. Arbor Properties assigned the Agreement to Buy and Sell to Villas of Windsong, which closed on the property in October 2004. RGT argues that the contested provision – Paragraph 22 – entitles it to an additional $403,333.04 purchase price four years after it sold the property because in 2008 the City of Biloxi issued building permits for more apartment units. The permits were issued to Arbor Place, to whom Windsong had deeded the property in 2007. Paragraph 22 provided:

> 22. ADDITIONAL MULTI-FAMILY UNITS. 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. 170, R.E. 19. RGT's Amended Complaint contains one substantive count: breach of contract. R. 42. Specifically, the Amended Complaint alleges that "[o]ne or more of the Defendants have materially breached the [January 2004] Agreement" and that "[p]ursuant to the Agreement, one or more of the Defendants were obligated to pay Plaintiff an amount equal to $4,583.33 times 88." R. 41-42 (¶¶ 15, 19). The Amended Complaint correctly alleges that Arbor Properties entered into the Agreement with RGT, and that Arbor Properties subsequently assigned the Agreement to Villas of Windsong. R. 40-41 (¶¶ 9, 11) The Amended Complaint also alleges, upon information and belief, that Villas of Windsong assigned its "obligation under Paragraph 22

of the Agreement" to Arbor Place and Arbor Place II. R. 41 (¶ 12) Windsong, Arbor Place, and Arbor Place II all denied in their Answers that Villas of Windsong assigned the Agreement to either of them. R. 66 (Answer of Defendant Villas of Windsong), R. 73 (Answer of Defendant Arbor Place II, LLC), R. 61 (Answer of Defendant Arbor Place LLC). RGT did not assert any basis for liability against Arbor Place or Arbor Place II other than as an assignee of the Agreement.

RGT moved for summary judgment against "Defendants," arguing that Paragraph 22 was a "separate, distinct and independent" provision that obligated Villas of Windsong "or its assigns" to pay additional purchase price even years after the sale closed. R. 89. The motion for summary judgment did not assert that either the January 2004 Agreement or the "separate, distinct, and independent" provision allegedly found in Paragraph 22 was assigned by Villas of Windsong to any other entity, and no evidence of any assignment was offered. The Memorandum simply recites that Arbor Place was a subsequent transferee of Villas, and Arbor Place II was a subsequent transferee of Arbor Place. R. 94. Defendants opposed the summary judgment motion, and submitted the Affidavit of Gordon Thames to support their response. R. 155-308. The Thames Affidavit contains the only explanation in the record as to why Paragraph 22 was included in the Agreement: because Arbor Properties had been led to believe that more than 240 units might be approved prior to closing. R. 201, R.E. 30 (¶ 7).

The Circuit Court granted summary judgment in favor of RGT and issued a written opinion on December 21, 2009. R. 319-323, R.E. 7-11. Under the Circuit Court's reading of Paragraph 22 "Defendants were *required* to obtain approval for the construction of additional units on the property following transfer." R. 322, R.E. 10. (emphasis added) The Court's principal finding on liability was that this "obligation" is "separate and collateral from the obligations of Plaintiff prior to closing on the property and is distinguishable from the provisions

of the contract regarding title, possession, and quantity of land being transferred." R. 322, R.E. 10. Thus, "[p]ayment under Paragraph 22 applies when Defendants obtain the necessary approval from the City of Biloxi to build additional units on the property." R. 323, R.E. 11.

The Circuit Court did not directly address the language at the beginning of Paragraph 22 – "At or prior to Closing, Seller and Purchaser shall enter into an agreement . . ." – noting only that "Paragraph 22 does not require a separate written agreement." R. 321, R.E. 9. The Circuit Court drew no distinctions between the Defendants who actually entered into a contract with RGT, (Arbor Properties and Windsong) and those that never entered any Agreement with RGT but took title to the property years later (Arbor Place LLC and Arbor Place II LLC). For example, under "Conclusions of Law" the Court erroneously stated it was "undisputed that Plaintiff and Defendants entered into a contract on January 13, 2004." R. 321, R.E. 9.

Each Defendant moved for clarification of the opinion, specifically requesting the Circuit Court to reconsider and/or clarify the opinion to the extent it treated the Defendants – two of which are Mississippi Limited Liability Companies – as if they were a single entity. R. 336-339. The motion was denied. R. 432-434, R.E. 14-16. A Final Judgment in the amount of $441,990.31, which included an award of pre-judgment interest, was entered February 26, 2010. R. 430-431, 447, R.E. 12-13. This appeal timely followed.

STATEMENT OF FACTS

In January 2004, RGT/Charleston Partners, LTD., a Texas Limited Partnership, ("RGT") agreed to sell 29.26 acres in Biloxi to Arbor Properties, Inc., a Florida Corporation ("Arbor Properties").[1] The purchase price was $1.1 million, and the Seller and Purchaser memorialized the deal in an Agreement To Buy And Sell. R. 168-178, R.E. 17-27. Arbor Properties intended to develop the usable tracts for multi-family housing, and the ability to develop at least 240 units was necessary to close the deal. R. 168-169, R.E. 17-18. (Agreement ¶¶ 4, 8, 9). In January 2004 the property was not zoned to allow multi-family housing, and much of the acreage was covered with wetlands and not suitable for development. R. 173-174, R.E. 22-23. In fact, the contemplated development would require appropriate zoning by the City of Biloxi *and* permission from the Corps of Engineers to fill part of the wetlands previously determined to fall within its jurisdiction. R. 169, R.E.18 (Agreement ¶¶ 8, 9). The Agreement obligated RGT, at its expense and effort, to submit plans to and obtain approval from the Corps of Engineers for the filling of enough wetlands to allow the development of "a minimum of" 240 units. R. 169, R.E 18. (Agreement ¶ 8). Similarly, the Agreement obligated RGT, at its expense and effort, to secure zoning by the City of Biloxi that would allow construction of "a minimum of" 240 units on the land if filled according to RGT's site plan. R. 169, R.E. 18. (Agreement ¶ 9). Arbor Properties had no obligation to buy the property unless RGT could deliver zoning that, when coupled with the necessary Corps approval, would allow the construction of "a minimum of" 240 units on the property.[2] R. 169, R.E. 18.

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[1] When the Agreement was signed, RGT did not own the property, but intended to purchase it prior to the anticipated closing of this Agreement. R.169, R.E. 18 (Agreement ¶7).

[2] Specifically, the Agreement provided:

> 8. WETLANDS: Seller has previously had the wetlands delineated for the Malpass Tracts (which includes the Property) and has received a jurisdictional determination thereof from the Mobile District Corps of Engineers (the "Corps") which is attached hereto as Exhibit "C". Within thirty

In January 2004 when the Agreement was executed, the parties did not know whether RGT could secure zoning and Corps approval to fill enough wetlands to accommodate a site plan allowing for more than 240 units on the property. The Agreement contained a single paragraph purporting to address the possibility of more than 240 units:

> 22. ADDITIONAL MULTI-FAMILY UNITS. 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. 170, R.E. 19. The Agreement did not contain any language providing that any term of the Agreement would survive the closing.

The Agreement gave RGT more than three months to apply for zoning, submit plans, and otherwise work with the City and the Corps of Engineers to obtain the necessary approvals. The Agreement provided that if RGT did not obtain both the zoning and the Corps approval by May 1, 2004, the Contract would terminate unless Seller and Purchaser both agreed to extend the time for closing. R. 169, R.E. 18. (Agreement ¶ 10). RGT obtained zoning from the City in a class (RM10) that would allow 240 units generally as depicted on Exhibit A to the Agreement, if the

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(30) days of the Effective Date, Seller, at Seller's expense, shall submit to the Corps a conceptual site plan for the Malpass Tracts (similar to the plan attached hereto as Exhibit "D") showing the various wetlands proposed to be filled by Seller thereon. At a minimum, said site plan shall reflect enough wetlands being filled on the Property so as to allow Purchaser to develop a minimum of 240 multi-family housing units thereon as generally depicted on the attached Exhibit "A" (the "Minimum Corps Approval"). Purchaser's obligation to close shall be contingent on Seller's receipt of the Minimum Corps Approval.

9. ZONING OF PROPERTY: Within thirty (30) days of the Effective Date, Seller, at Seller's expense, shall submit to the City of Biloxi (the "City") an application for the zoning of the Malpass Tracts which includes appropriate zoning so as to allow Purchaser to develop a minimum of 240 multi-family housing units on the Property. Purchaser's obligation to close shall be contingent upon Seller obtaining from the City the final approval of said zoning (the "Zoning Approval").

wetlands were filled as proposed. R. 179 (First Amendment, ¶ 1). RGT was not successful; however, in obtaining the Minimum Corps Approval by the May 1 deadline.

RGT requested an extension and Arbor Properties agreed to an extra three months. The parties executed a written First Amendment allowing RGT until August 1, 2004 to obtain the Minimum Corps Approval. R. 179. When August arrived RGT still had not secured the Minimum Corps Approval, and again requested an extension. Arbor Properties agreed, and the parties signed a Second Amendment extending the closing to August 27. R. 180. As that date approached and RGT did not have the Minimum Corps Approval, RGT requested another extension and the parties signed a Third Amendment to the Agreement, extending the closing date to September 10. R. 181. A Fourth Amendment was signed only two weeks later, giving RGT until September 17 to obtain the Minimum Corps Approval. R. 182. RGT finally obtained the Minimum Corps Approval in late September or early October.

Before closing, Arbor Properties assigned its rights and obligations under the Agreement to Villas of Windsong, Ltd.[3] R. 200, R.E. 29 (Thames Affidavit ¶ 3). Arbor Properties and Windsong were the only two Defendants who ever were a party to the Agreement. Windsong closed on the property in October 2004. *Id.* It is undisputed that no second agreement for additional purchase price was entered or even requested by RGT at closing. R. 201, R.E. 30 (Thames Affidavit ¶ 9). RGT's deed to Windsong 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. R. 184-185 (Warranty Deed). The 240 units were

[3] Arbor Properties is the General Partner of Villas of Windsong Ltd.

completed in June 2006. R. 200, R.E. 29 (Thames Affidavit ¶ 4). In 2007, Windsong conveyed the property to Arbor Place, LLC.[4] R. 187-189.

Almost a year after Windsong closed on the property, Hurricane Katrina struck leaving many residents on the Mississippi Gulf Coast without adequate affordable housing. An effort was made to determine whether any of the remaining wetlands in the tract could be mitigated and filled so that additional housing units could be constructed. R. 200, R.E. 29 (Thames Affidavit ¶ 5). Arbor Place employed an engineering group to develop a site plan, and in April 2007 Arbor Place submitted an application to the Corps of Engineers to fill 6.33 acres that originally were designated to be held as wetlands in perpetuity. R. 285-286. The Corps of Engineers in September 2007 granted Arbor Place a permit to fill 4.89 acres designated as wetlands in perpetuity and thus unusable at the time RGT sold the property "as is." R. 292-296. Arbor Place spent almost $700,000.00 securing the necessary approvals and then demucking and filling the wetlands to make the property suitable for construction. R. 200, R.E. 29 (Thames Affidavit ¶ 5). In April 2008 – almost four years after RGT sold the property – the City of Biloxi issued construction permits to Arbor Place for 88 units to be built on the newly reclaimed acreage. R. 139-144. In June 2008, Arbor Place conveyed part of the property to Arbor Place II, LLC.[5] R. 191-193.

When RGT learned that building permits had been issued to increase the number of units at the development it demanded that Windsong pay an additional $403,333.04, claiming that Paragraph 22 of the Agreement obligated Windsong to pay RGT more for the property than what it already paid at closing nearly four years earlier. Windsong refused the demand on the basis that any obligation under Paragraph 22 was extinguished when RGT deeded the property in 2004

[4] Arbor Place LLC is a Mississippi limited liability company. It is owned by Villas of Windsong Ltd.

[5] Arbor Place II LLC is a Mississippi limited liability company owned by Villas of Windsong Ltd.

and no second agreement had been entered "at or prior to closing" regarding any future approval of additional units. RGT sued Windsong and its general partner Arbor Properties. R. 12-18. RGT later amended its Complaint to add Arbor Place and Arbor Place II. R. 39-55.

SUMMARY OF THE ARGUMENT

The role of the trial court in any contract dispute is to enforce the parties' Agreement as written. The court should never rewrite a contract to make a different agreement. If the intent of the parties to the Agreement cannot be discerned from the language they chose, then the court must find the Agreement ambiguous. The interpretation of an ambiguous contract requires evidence of the parties' intent. Here, with no finding that Paragraph 22 is ambiguous, and no evidence of the parties' intent other than as expressed by the words they used and the Affidavit of Gordon Thames, the Circuit Court effectively wrote a new Paragraph 22, dropping some language and adding other. The only reasonable construction of Paragraph 22 as the parties wrote it requires judgment in favor of Defendants. Further, any obligation of Paragraph 22 to enter a second agreement did not survive closing in 2004. If the Circuit Court is correct that Paragraph 22 somehow is a stand alone agreement, then the summary judgment record is insufficient to support enforcement of that Agreement as a matter of law against any Defendant.

STANDARD OF REVIEW

To determine whether the Circuit Court erred in granting summary judgment in favor of RGT, this Court is doubly entitled to review the record afresh. First, review in a contract construction case is a question of law subject to a de novo standard. *See Dalton v. Cellular South, Inc.*, 20 So.3d 1227, 1231 (Miss. 2009) ("Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder. We, as an appellate court, employ the de novo standard of review for questions of law")(citations omitted).

Second, "[t]he standard for review of a summary judgment is likewise de novo . . . [and] [t]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Id.* at 1231-32 (citing *Kilhullen v. Kan. City S. Ry.*, 8 So. 3d 168, 174 (Miss.

2009)); *see also, Fletcher v. Lyles,* 999 So.2d 1271, 1276 (Miss. 2009). This means that the Court may consider all the evidence in the record, and must view that record in the light most favorable to Appellants. *See, e.g., Stonecipher v. Kornhaus,* 623 So. 2d 955, 960 (Miss. 1993) ("This Court employs a *de novo* standard of review in reviewing a [Circuit Court's] grant of a summary judgment motion. This entails reviewing all the evidentiary matters in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the [Appellants], and they are to be given the benefit of every reasonable doubt.")(citations omitted).

ARGUMENT

This appeal implicates long-established standards for construing written agreements. At issue is the meaning ascribed to three clauses in a single sentence – "Paragraph 22" – within the January 2004 Agreement between RGT and Arbor Properties, Inc. That sentence says:

> ADDITIONAL MULTI-FAMILY UNITS. 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.

The relevant clauses are:

(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).

The Circuit Court focused on the obligation language exclusively, either ignoring or misinterpreting the language preceding it. Not once in the opinion did the Circuit Court discuss the very clear term "at or prior to closing." As for the second agreement clause, the Circuit Court simply found that Paragraph 22 does not require a separate written agreement.[6] This finding begs the questions, because Paragraph 22 in plain words requires *an agreement* (whether written or oral) that did not then exist. Reversal is required because the Circuit Court's analysis is incorrect.

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[6] The Circuit Court cited *Busching v. Griffin*, 542 So. 2d 860 (Miss. 1989) to support the proposition that no "separate written agreement" was required here. *Busching* adds nothing to the inquiry here: what is the reasonable interpretation of this provision that specifies performance "at or prior to closing." Busching and Griffin had entered a written agreement – an option agreement giving Busching an option to purchase property from Griffin for $50,000. That agreement provided that if Busching exercised the option, "the terms of such sale will be provided in an agreement to be exercised between Griffin and Busching." *Busching*, 542 So. 2d at 861. After receiving testimony about the parties' intent, the Chancery Court found that the option agreement was just an agreement to agree and therefore not subject to specific performance. *Id.* at 863. This Court simply found that the option agreement was sufficiently definite to be enforced even though it provided that the terms of the sale would be agreed upon at the time the option was exercised. *Id.*

I. There is only one reading of the provision that gives effect to all three clauses.

"[I]t is a question of law for the court to determine whether a contract is ambiguous and, if not, enforce the contract as written. Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder. Appellate courts review questions of law de novo." *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 751-52 (Miss. 2003)(citations omitted). A ruling by this Court that adopts the only reasonable interpretation of Paragraph 22 requires that summary judgment be reversed and judgment rendered in favor of all Defendants.

"When construing a contract, the court will read the contract as a whole, so as to give effect to all of its clauses." *Warwick v. Gautier Utility Dist.*, 738 So. 2d 212, 215 (Miss. 1999)(citation omitted). The only reasonable construction that gives effect to *each* of these three clauses is this: 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. Because the number of units that could be built on the property given the zoning and Corps Approval undisputedly had been set at 240 by the time of Closing, no second agreement was ever reached and "Paragraph 22 never came into fruition." R. 201, R.E. 30 (Thames Affidavit ¶ 7). Nothing in Paragraph 22 suggests the parties intended to cover unanticipated future efforts to reclaim more of the property and increase the number of units that then could be built.

The Circuit Court effectively re-wrote Paragraph 22 to read this way:

> ADDITIONAL MULTI-FAMILY UNITS. ~~At or prior to Closing, Seller and Purchaser shall enter into an agreement whereby~~ [I]f Purchaser (or Purchaser's assigns) **[ever]** 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.

With all due respect, if the parties intended that to be their agreement, they would have said that, and would have had no reason to include a timing clause or a second agreement. The Circuit Court could neither ignore the words the parties used, nor substitute words they did not. *See, e.g., Warwick,* 738 So. 2d at 215 ("when interpreting a contract, the court's concern is ... what [the parties] said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy").

The inescapable problem for the Circuit Court is what to do with the timing clause at the beginning of Paragraph 22: "at or prior to Closing." It cannot simply be written out of the Agreement; it must be ascribed some meaning. Two possibilities arguably exist. The timing clause could modify the separate agreement clause, so that the second agreement had to be entered no later than closing. Alternatively, the timing clause could modify the obligation clause, so that the Purchaser had to pay at closing for any additional units then approved. Either way, if no additional units were approved or no second agreement entered by closing, there is no obligation to pay a greater price for the property.

The Circuit Court's reading not only ignores entirely the "at or prior to Closing" language in Paragraph 22, it actually advances a result *directly contrary* to any interpretation that *would* ascribe meaning to the clause. The only way that Paragraph 22 creates a post-Closing obligation to pay independent of any separate agreement is to find that "at or prior to closing" is meaningless.

II. Any agreement to enter into a "second agreement" merged into the conveyance at Closing and has been extinguished.

The Circuit Court's error in ignoring the timing clause carries over into its analysis of the merger doctrine. In Mississippi, "[p]revious negotiations or contracts are merged into a deed of conveyance" by virtue of the merger doctrine, which is firmly ingrained in this State's law. *Knight v. McCain,* 531 So. 2d 591, 595 (Miss. 1988)(citation omitted). "[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*, 531 So. 2d at 595 (quoting 77 AmJur.2d, Vendors & Purchases, § 291 p. 450 (1975)). In effect, the merger doctrine establishes – properly – that at closing, the deed acts as the "final word" on all outstanding negotiations attached to the conveyance of a parcel of land. *See, e.g., Holliman v. Charles L. Cherry & Associates, Inc.*, 569 So. 2d 1139, 1145 (Miss. 1990)("By numerous decisions of this Court the prior negotiations of parties become merged in the contract of conveyance when it is executed").

The Circuit Court relied upon *Knight* to say that Paragraph 22 is a "separate and collateral" obligation to be performed subsequent to the conveyance and thus did not merge into the deed at closing. That reading overtaxes both the *Knight* decision and the facts of this case.

Knight presented a unique and troubling set of facts that amplify its ruling. The McCains entered into a contract to purchase land on which to build a house. *Knight,* 531 So. 2d at 591-92. They negotiated with Johnson, whom they believed to be the owner of the land, and whom they trusted. *Id.* Johnson signed the contract indicating he was the "owner." *Id.* at 592. Johnson in fact was not the owner; he had deeded the land to his attorney Knight as collateral for a loan. *Id.* at 591. Johnson needed the money because he had been involved in litigation with Hinds County for failure to develop the subdivision in which the McCains purchased their lot, and by the time the McCains entered their contract was under a mandatory injunction. *Id.* The McCains heard rumors that the county would not issue building permits for the subdivision. *Id.* at 592. To address their concerns, Johnson amended the contract to include an obligation to refund all money they paid toward the property, with absolutely no time restriction, "[i]n the event county does not issue building permit." *Id.*

Johnson died before the sale closed, but the McCains indicated they wanted to go forward and buy the land. *Id.* They closed the sale with Knight, whom they believed to be the attorney

for Johnson's estate, and began paying semiannual payments to Knight pursuant to a note. *Id.* at 592-93. Just as they feared, the county refused to issue a permit so that they could build their house on the property. *Id.* at 593-94. At about the same time, the McCains discovered that Knight, not Johnson, had actually owned the property. *Id.* at 593. When they could not get their building permit, the McCains demanded that Knight refund all principal and interest payments they had made. Knight refused to refund the interest payments, and the McCains sued seeking a refund of all monies paid and cancellation of the deed and note.

Knight argued that the real estate contract had merged into the deed and the provision providing for a refund was no longer applicable. *Id.* at 594-95. The Chancery Court refused to apply the merger doctrine; cancelled the deed, note, and deed of trust; and entered judgment for plaintiffs for refund of the purchase price and other damages. *Id.* at 591.

On appeal, Knight continued to argue the merger doctrine had extinguished any obligation in the sales contract to refund "all monies." This Court followed other states and adopted an exception to the merger doctrine for collateral or independent agreements which are to be performed subsequent to the conveyance, finding that stipulations "not such as would be merged in the conveyance" might survive the deed. *Id.* at 596. The Court then analyzed whether the stipulation at issue – to refund all monies paid toward purchasing the property if no building permit could be obtained – was such a collateral and independent agreement. The Court was persuaded that the inability to get a building permit would eliminate any reason the McCains would want to buy the property "since the purpose of buying this property was for residence construction." *Id.* (emphasis added). The Court found that the McCains had secured an amendment to the contract, an "independent stipulation," to protect against that possibility. *Id.*

Against this backdrop, the facts here are drawn into sharp relief. The stipulation in *Knight* addressed a contingency that *could not* arise until after conveyance (the buyers' inability

to obtain a building permit).[7] Paragraph 22, on the other hand, deals with exactly the type of stipulation one would expect to be extinguished by the deed: the price the Purchaser will pay for the property. It was part of the original Agreement, entered before either party knew how many units would be approved for construction by closing. At closing, Seller and Purchaser knew how many units could be built – 240. Unlike the unrestricted stipulation in *Knight*, Paragraph 22 contains *both* a time restriction and a second agreement clause. Together they establish the conditions under which a "merger-surviving" collateral agreement might be created – if the parties enter a second agreement addressing additional approved units at or before closing. Those conditions were not met.

The Circuit Court misread the contract in finding that a collateral agreement arose under Paragraph 22. Although Paragraph 22 by its terms provides that no agreement for a bigger purchase price existed as of January 13, 2004, the Circuit Court not only found a present agreement but squeezed it into the *Knight* exception by creating a post conveyance obligation not expressed in the Agreement. The Circuit Court held that "under Paragraph 22, Defendants ***were required*** to obtain approval for the construction of additional units on the property ***following transfer***." R. 322, Opinion, p. 4. (emphasis added). The Circuit Court's construction – and wholesale rejection of the merger doctrine – is legal error. Paragraph 22 does not express either an affirmative requirement to secure building approval or any post-Closing time period as a condition of the agreement.

The Circuit Court's willingness to find an agreement to be performed subsequent to conveyance is particularly troubling given the unmistakable significance attached to "at or prior

[7] The Circuit Court also cited *Leach v. Tingle*, 586 So. 2d 799 (Miss. 1991) for the proposition that certain obligations of the contract might survive conveyance. Just like in *Knight*, the provision in *Leach*, that the seller would give the purchaser "a guaranteed buy-back anytime after the first year," could arise only after the property had been conveyed. *Leach*, 586 So. 2d at 800. After a "plenary" trial, the Chancery Court ordered specific performance, requiring the seller to repurchase the property. *Id.* This Court affirmed.

to Closing" in a real estate contract. Any agreement that sets closing as the deadline for its conditions expressly recognizes merger of all negotiations and conditions precedent into the deed of conveyance. *See Knox v. Bancorp South Bank,* 37 So.3d 1257, 1262 (Miss. App. 2010)(citing *Hoerner v. First Nat'l Bank of Jackson,* 254 So. 2d 754, 759 (Miss. 1972)("In reviewing negotiations culminating in a contract, it is assumed that previous negotiations are merged in the final document and that it expresses the intention of the parties"). That is, by its own terms Paragraph 22 embraced merger. Its conditions were to be satisfied by a date certain – Closing. They were not.

III. If Paragraph 22 is itself the contemplated "Second Agreement," the record is insufficient to enforce that Agreement against any Defendant as a matter of law.

The Circuit Court's decision is based on the unstated premise that Paragraph 22 is self-fulfilling: that is, that by including that paragraph the parties somehow automatically entered the second agreement that Paragraph 22 clearly requires. Respectfully, and for the reasons explained above, that construction asks more of Paragraph 22 than it is capable of delivering.

Even assuming the Circuit Court legitimately could wring from Paragraph 22 a separate, collateral agreement between RGT and Arbor Properties (or Windsong), reversal is still required. The myriad issues of material fact necessary to enforce that agreement against any Defendant preclude summary judgment in RGT's favor.

A. Any interpretation that Paragraph 22 contains a post-conveyance obligation to pay additional purchase price requires evidence of intent not found in this record.

A determination of whether a contract is ambiguous is an inherent and necessary "first step" in a proper contract analysis. *See, e.g., Rotenberry v. Hooker,* 864 So. 2d 266, 269 (Miss. 2003) ("Ambiguity analysis ... is by its very nature a necessary step in the examination of every contract"). If a contract is ambiguous, the interpretation of that ambiguity becomes a question of fact. *Lewis v. Progressive Gulf Ins. Co., Inc.,* 7 So. 3d 955, 959 (Miss. App. 2009)(citations

omitted). Summary judgment therefore is inappropriate where there is an ambiguous contract. *See, e.g., Pursue Energy Corp. v. Perkins,* 558 So. 2d 349, 354 (Miss. 1990) (collecting cases refuting summary judgment as an "inappropriate vehicle for final decision" of ambiguous contract provisions). Here, the Circuit Court made no express finding as to whether this collateral obligation was unambiguous and thus could be enforced without any parol evidence as to intent. The Circuit Court's construction – that Paragraph 22 is a second agreement obligating the Purchaser to pay more for the property some time in the future – at a minimum creates a conflict between the various clauses in Paragraph 22. "A conflict within the whole meets the very definition of ambiguity. *Dalton,* 20 So.3d at 1232. The interpretation of this "second agreement" requires evidence as to the parties' intent. The only evidence in this record as to the parties' intent is the Thames Affidavit, which states that no collateral obligation that would survive closing was intended by Arbor Properties when it entered into the Agreement. R. 201, R.E. 30. At a minimum, the summary judgment should be reversed, and this case remanded so that evidence of the parties' intent can be developed and considered by a fact finder.

B. The Circuit Court's construction impermissibly creates an encumbrance running with the land with no evidence the parties intended that result.

If the Circuit Court is correct that Paragraph 22 is a separate and collateral agreement, that Agreement was between RGT and Arbor Properties and then Windsong (Arbor Properties' only assign). Windsong did not obtain the 2008 building permits that allegedly triggered the obligation to pay a bigger purchase price – it did not even own the property anymore. Conversely, Arbor Place (which did own the property and obtained the building permits) was *never a party to the contract* containing Paragraph 22.[8] *See, e.g., Adams v. Greenpoint Credit,*

[8] The Amended Complaint alleged upon information and belief that the Agreement was assigned by Windsong to Arbor Place and Arbor Place II. All Defendants denied that allegation, and RGT offered no evidence to the contrary.

LLC, 943 So. 2d 703, 708 (Miss. 2006)(quoting *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 122 S.Ct. 754 (2002)("It goes without saying that a contract cannot bind a nonparty").

If the Circuit Court's interpretation of Paragraph 22 reaches so far as to make later transferees of the property liable for additional purchase price, to an entity they did not purchase from, the effect is to "encumber" the land.[9] Here again, though, the merger doctrine rears its head with the controlling deed.

RGT conveyed the parcel by virtue of a warranty deed purporting to "sell, convey and warrant" the land to Windsong (Arbor Properties' assignee). R.127. Pursuant to Miss. Code Ann. § 89-1-33:

> The word "warrant" without restrictive words in a conveyance shall have the effect of embracing all of the five covenants known to common law, to wit: seizing, power to sell, freedom from encumbrance [*sic*], quiet enjoyment and warranty of title.

The freedom from encumbrance is "a guarantee that the property is not subject to any rights or interests that would diminish the value of the land." *Century 21 Deep South Properties, Ltd. v. Corson,* 612 So. 2d 359, 371 (Miss. 1992). The covenant is "generally held to run with the land." *Howard v. Clanton,* 481 So. 2d 272, 275 (Miss. 1985). By virtue of its warranty deed to Windsong – which provided only for *recorded* "restrictive covenants, rights-of-way, and easements applicable to subject properties" (*see* R.127) – RGT expressly agreed as a matter of law that the warranties of Section 89-1-33 extended to the purchaser. If RGT did not intend those warranties to apply, it should have made its intentions clear through plain language in both the Agreement and the deed. Upholding the Circuit Court's decision effectively would nullify its warranty.

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[9] Encumbrances generally fall into three categories: (1) servitudes; (2) liens or charges on the land; and (3) present or future estates which may be carved out of the estate conveyed. *See Seymour v. Evans,* 608 So. 2d 1141, 1146 (Miss. 1992)(citing Powell on *Real Property,* ¶ 900[2]).

Further, before the Circuit Court can enforce Paragraph 22 as a covenant that runs with the land to successive owners, certain conditions must be shown to have been met. "[S]uch a covenant must satisfy three conditions: it must 'touch and concern' the land; the covenant must have been intended by the parties to bind successors; and there must be privity between the original parties and the successor, or at least notice to those successors." *Vulcan Materials Co. v. Miller,* 691 So. 2d 908, 913 (Miss. 1997) (citing *Mendrop v. Harrell,* 233 Miss. 679, 103 So.2d 418, 422-23 (1958); *Black's Law Dictionary* 365 (6th ed. 1991)). The Circuit Court made none of the necessary findings, nor could it on this record.

C. The record does not support a grant of summary judgment against all "Defendants."

Regardless of whether Paragraph 22 is or is not a separate contract, whether it merges into the deed or runs with the land, under *any* of these scenarios, the present record is insufficient to support judgment against all "Defendants." Yet that is precisely what the Circuit Court did. The Circuit Court's treatment of four legally distinct entities as one "unit" begins with the first sentence under Conclusion of Law. The Circuit Court found, with no explanation, "[i]t is undisputed that Plaintiff and Defendants entered into a contract on January 13, 2004." R.321, R.E. 9. A simple review of the Agreement show that is incorrect; only Defendant Arbor Properties entered into the January 2004 contract with RGT. That contract was assigned by Arbor Properties to only one entity, Defendant Villas of Windsong, which was the sole grantee in RGT's conveyance of the property.

The opinion includes reference to "the obligation of Defendants under Paragraph 22" and a finding that "Defendants were required to obtain approval for the construction of additional units on the property following transfer." These "facts" are not supported by the record. Defendant Arbor Place was neither a "purchaser" nor an "assign" to the January 2004 contract,

and did not receive title to the property from RGT. It is wholly unclear what role, if any, the Circuit Court ascribes to Arbor Place II, the fourth defendant.

RGT's motion for summary judgment lacked any rationale for holding all "Defendants" jointly obligated under Paragraph 22. Although not expressed in the opinion, the Circuit Court apparently held all "Defendants" liable on this "collateral obligation" because they have common ownership (a theory not alleged in the Amended Complaint). Common ownership alone is not sufficient to support liability. *See, e.g., Penn Nat. Gaming, Inc., v. Ratliff*, 954 So. 2d 427, 431-33 (Miss. 2007) (general rule that corporate entity will not be disregarded in contract claims unless complaining party can demonstrate frustration of expectations regarding the party to whom he looked for performance, flagrant disregard of corporate formalities, and fraud or other equivalent misfeasance; material elements of claim must be alleged in complaint); *see also* Miss. Code Ann. § 79-29-305 (member of limited liability company is not liable by reason of being member for debt, obligation, or liability of limited liability company, nor is member a proper party to proceeding against limited liability company by reason of being member). RGT offered no evidence that the Defendants are alter-egos or that they did not observe the separateness of the various entities. In the absence of such evidence, the summary judgment must be reversed.

IV. Simple mathematics demonstrates the inequitable windfall to RGT.

Finally, the Circuit Court cursorily dispensed with Appellants' arguments regarding the costs associated with obtaining approvals to fill additional wetlands and then mitigating and demucking to render them fit for development. However, these facts warrant a closer look in light of the bargained-for-value of the property when it was sold in 2004.

In 2004, RGT and Arbor Properties contracted for the sale of land to be used for a multi-unit housing development. Because much of the parcel had been delineated as wetlands, the deal

was conditioned, in part, on Corps of Engineers approval that a certain percentage of the land could be filled to allow construction. That approval was given before closing, but part of the land was to remain wetlands in perpetuity. Thus, when Windsong bought the property in 2004, at least part of it had essentially no value.

In 2008, Arbor Place developed a new site plan and obtained Corps permission to fill 4.89 acres previously designated as wetlands in perpetuity and thus unusable. The basic arithmetic suggests that when RGT conveyed the parcel to Windsong in 2004, there were roughly 24 acres of land fit for development.

The number of acres that could be developed in 2004 is significant in light of the following undisputed facts:

- The January 2004 contract required RGT to secure building and zoning approvals for 240 multi-family housing units (240 units/24 usable acres = 10 units/usable acre);
- The purchase price was 1.1 million dollars. ($1,100,000/24 usable acres = $45,833.33/usable acre);
- The per-unit value of the property was therefore $4,583.33. ($45,833.33/usable acre ÷ 10 units/usable acre = $45,833.33/10).

From these calculations alone, the parties' intentions as to purchase price are apparent. For this deal, the value of the land as evidenced by the purchase price was based roughly on the number of units that could be built if RGT obtained the zoning and Corps approval. RGT was responsible for meeting the minimum threshold of approvals for 240 units to close the sale (and obtain the $1.1 million price tag). Paragraph 22 provided a mechanism to value the property if more than 240 units were approved before closing. The benefit to RGT was that it would not ***undervalue*** the property in the event the capacity for development increased prior to the conveyance.

What this bargain did *not* anticipate, however, was ***overvaluing*** the property to RGT's benefit through a perpetual encumbrance running with the land. Fairness and common sense

dictate that while RGT could rely on Paragraph 22 to preserve its negotiated per-unit value *before* the deal closed (if, for example, zoning approvals had been obtained prior to the conveyance that allowed 15 units per acre rather than 10, thus impacting the then present value of the property), it cannot invoke Paragraph 22 as an inexhaustible source of income based on an indeterminate *future* value of the property *after* title was conveyed.

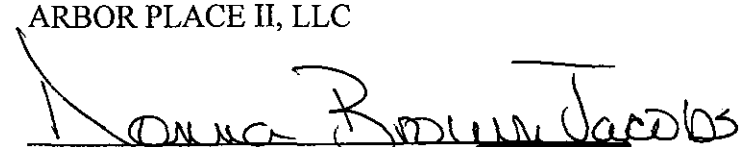
CONCLUSION

Given that contract construction is question of law to be taken up *de novo,* this Court may end the dispute here by finding that Paragraph 22 – on its own terms or by the operation of Mississippi's merger doctrine – could not and did not give rise to any post-Closing payment obligation against any of the Defendants. Defendants request that the Court reverse and render this appeal in Defendants' favor.

Alternatively, the Court should reverse the summary judgment and remand to allow the parties to develop an evidentiary record addressing the genuine issues of material fact including, but not limited to: (1) the construction of ambiguous contract provisions; (2) whether the parties to the Agreement breached the contract; (3) whether the parties to the Agreement intended to create a covenant running with the land as against subsequent owners; and (4) whether Defendants who were not parties to the Agreement have acted in some way to expose them to liability under the Agreement.

Respectfully submitted,

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



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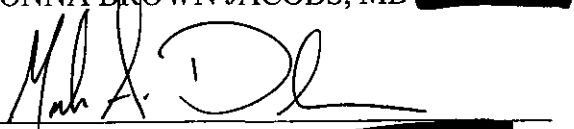

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CERTIFICATE OF SERVICE

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

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SO CERTIFIED, this the 7th day of September, 2010.

DONNA BROWN JACOBS

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