IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00429

ASPIRED CUSTOM HOMES, LLC — PLAINTIFF/APPELLANT

V.

TODD MELTON AND TINA MELTON — DEFENDANTS/APPELLEES

ON APPEAL FROM THE CHANCERY COURT
OF LEE COUNTY, MISSISSIPPI

APPELLANT'S RESPONSE TO APPELLEES' BRIEF
ASPIRED CUSTOM HOMES, LLC

ORAL ARGUMENT REQUESTED

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I. Confession of Errors.

A cursory review of the "Brief of Appellees" reveals that the Meltons failed to respond to a number of issues raised by Aspired Homes in its appellate brief. Cf. "Brief of Appellant" to "Brief of Appellees." Specifically, the Meltons failed to offer any response whatsoever to the following issues raised in Aspired Homes' appellate brief:

- the Chancellor erred when he refused to order specific performance (see Aspired Homes' appellate brief at pp. 8-10);
- the Chancellor's interpretation of the contract was not reasonable (see Aspired Homes' appellate brief at pp. 10-13);
- the Chancellor's finding that nothing prevented Aspired Homes from securing appraisals before the July 9, 2009 closing date was manifestly wrong or clearly erroneous (see Aspired Homes' appellate brief at pp. 13-15);
- the Chancellor's finding that a basis for the Meltons' attempt to cancel the contract was that the house had not been completed as of July 4 was manifestly wrong or clearly erroneous (see Aspired Homes' appellate brief at p. 15);
- the Chancellor's finding that rectifying a drainage issue required considerable work was manifestly wrong or clearly erroneous (see Aspired Homes' appellate brief at pp. 15-16);
- the Chancellor's findings that Neelly's computer was not working properly and that the errors in his appraisal were cured were manifestly wrong or clearly erroneous (see Aspired Homes' appellate brief at pp. 16-17);
- the Chancellor's finding that the appraisals of Jimmy Langley and Mike Guyton have proven unreliable were manifestly wrong or clearly erroneous (see Aspired Homes' appellate brief at p. 17);
- the Chancellor's finding that Neelly's appraisal, which was fraught with error, was a sufficient basis for canceling the contract was manifestly wrong and clearly erroneous (see Aspired Homes' appellate brief at pp. 17-18); and
- the Chancellor's finding that the house was not 100% complete on July 9 was an additional reason for declaring the contract null and void was manifestly wrong and clearly erroneous (see Aspired Homes' appellate brief at pp. 18-20).

Legally, the Meltons' failure to respond to these errors raised by Aspired Homes constitutes a confession of these errors. See Tower Loan of Mississippi, Inc. v. Jones, 749 So. 2d 189, 191 (Miss. App. 1999) (citing Barber v. Barber, 608 So. 2d 1338, 1340 (Miss. 1992)); cf. S.S. v. S. H., 44 So. 3d 1054, 1056 (Miss. App. 2010) (failure to file appellate brief on issues is tantamount to confession of appellant's assignment of errors); Mississippi Dept. of Employment Sec. v. Shields, 42 So. 3d 1204, 1206 (Miss. App. 2010) (noting that appellate court is not obligated to look to record to form opinion against appellant where appellee failed to brief opposing position); Hayes v. Hayes, 994 So. 2d 246, 248 (Miss. App. 2009) (appellee's failure to brief his opposition to appellant's issues may be taken as confession of errors).

Hayes v. Hayes is instructive. There, appellant appealed a chancellor's ruling that she had waived any claim she held to her ex-husband's pension. Hayes v. Hayes, 994 So. 2d 246, 248 (Miss. App. 2009). Appellee, appellant's ex-husband, filed no appellate brief. Hayes, 994 So. 2d 246, 248. The Mississippi Court of Appeals concluded that appellee's failure to brief the issue left it with but two options: (1) to take appellee's failure to brief the issue as a confession of error and to reverse the chancellor's ruling or (2) to disregard appellee's failure and affirm. Hayes, 994 So. 2d at 248. Significantly, the Mississippi Court of Appeals noted that, where the "the case has been thoroughly briefed by appellant with a clear statement of the facts, and with apt and applicable citation of authorities, so that the brief makes out an apparent case of error," then the appropriate option is to take the appellee's failure as a confession of errors. Id.

Aspired Homes has assigned and thoroughly briefed a number of errors. It has provided this Court with a clear and concise statement of facts. It has supported its assignments of error with "apt and applicable" citation of authorities. And, its brief makes out an apparent case of error (in fact, of numerous errors).

The Meltons did file an appellate brief. However, as set forth above, they failed to respond at all to a number of very significant and substantial assignments of error. Accordingly, given that Aspired Homes' brief "makes out an apparent case of error," this Court should take the Meltons' failure to set out its opposition position to the above-referenced assignments of error as confessions of error and should reverse the Chancellor's judgment.

II. The Infamous Appraisal.

At the heart of this appeal is the appraisal the Meltons hired Ed Neelly to perform. The contract indeed required the home to appraise at or above the sales price. However, implicit in that requirement was the assumption that the determining appraisal would be fair, complete and accurate. It is outrageous that the Meltons argued first to the Chancellor and then to this Court that Neelly's haphazard effort to "appraise" the property was acceptable. In fact and contrary to that position, they conceded in their appellate brief that the purpose of an appraisal is to "inform the buyer of the true value of the property." See "Brief of Appellees" at p. 7. Yet, when it was pointed out to them that Mr. Neelly's appraisal was fraught with error, they refused to allow him to re-evaluate. Having obtained an unfair, incomplete, and inaccurate appraisal which grossly undervalued the property and gave them a colorable argument for backing out of the contract, the Meltons refused to allow themselves to be "informed of the true value of the property." They refused to consider the appraisals of Mike Guyton and of Jimmy Langley which were fair, complete, accurate and consistent. Moreover, they refused to allow their own appraiser, who admittedly made a number of mistakes, to re-evaluate the property in order to consider more accurate comparables and in order to correct his erroneous measurements, to include the value of the 552 square foot garage which he had failed to consider, to catch the error caused by the glitch in his software, to note the accurate contract price, and to consider all of the numerous changes

and additions Aspired was making to the property at the Meltons' request and as reflected in the document entitled "Buyer's Counter Offer # 1" which was appended to the back of the real estate contract.

III. "Good Faith and Fair Dealing" and "Clean Hands" Arguments.

Although the Meltons ignored most of Aspired Homes' assignments of error, they did contend that Aspired Homes' breach of the covenant of good faith and fair dealing argument and Aspired Homes' clean hands argument should be ignored on appeal. See Brief of Appellee at p. 12. They claim that these arguments were never raised below and therefore cannot be considered on appeal. See Brief of Appellee at p. 12.

The Meltons' claims are misplaced for two reasons. First, they fail to take into consideration the distinction recognized by the Mississippi Supreme Court between issues never raised below and raising different arguments to the same issues. See Brown v. Thompson, 927 So. 2d 733, 738 (Miss. 2006). As the Mississippi Supreme Court noted in Brown v. Thompson, the procedural bar which ordinarily prohibits issues from being raised for the first time on appeal applies only to issues never raised below. Brown, 927 So. 2d 733, 738. It does not apply to situations where new arguments are made to the same issues. Brown, 927 So. 2d at 738.

In this case, the breach of the covenant of good faith and fair dealing issue and the clean hands issue are not new issues never raised below. Rather, they are new arguments to the issues clearly raised and litigated below. They are just different arguments to the issues that the Meltons breached the contract in numerous ways including failing to obtain a reliable appraisal, failing to deliver Aspired Homes a written demand for repairs within ten days of the contract and refusing to give Aspired Homes an opportunity to cure.

Second, even if this Court were to determine that the breach of the covenant of good faith and fair dealing argument and the clean hands argument are new issues rather than just different arguments, they are still properly before this Court in light of the "plain error" doctrine. This doctrine reflects Mississippi policy "to administer the law fairly and justly." See Tower Loan of Mississippi, Inc. v. Jones, 749 So. 2d 189, 192 (Miss. App. 1999). It allows this Court to ignore the procedural bar that normally applies to issues not raised below and to retain the power to notice "plain error." See Tower Loan of Mississippi, 749 So. 2d 189, 192.

In this case, it would be unfair and unjust to ignore the Meltons' breach of the implied covenant of good faith and fair dealing. The covenant is such a fundamental part of Mississippi contract law that it is "written into" every contract as a matter of law. Entergy Mississippi, Inc. v. TCA Cable Partners, 22 So. 3d 284, 288 (Miss. App. 2009); Limbert v. Mississippi University for Women Alumnae Ass'n, Inc., 998 So. 2d 993, 998 (Miss. 2008). Likewise, it would be unfair and unjust to allow the Meltons' to seek and obtain relief from the equity court when it entered that court with dirty hands. The clean hands doctrine, like the implied covenant of good faith and fair dealing, is fundamental to Mississippi law. See, e.g., S.S., 44 So. 3d 1054, 1057 (noting that "he who comes into equity must come with clean hands"); Price v. Price, 5 So. 3d 1151, 1156-57 (Miss. App. 2009) (same); Kelley v. Day, 965 So. 2d 749, 757 (Miss. App. 2007).

IV. The Meltons' Misstatement of Facts.

Significantly, the Meltons represent to this Court that "it is undisputed" that they "did everything required under the terms of the Contract for Sale and Purchase of Real Estate." See "Brief of Appellee" at p. 6. However, that representation is a clear misstatement of the facts. Aspired Homes has disputed and continues to dispute that the Meltons did everything required under the contract. As set forth in Aspired Homes' "Brief of Appellant," the Meltons failed to

perform the contract in a number of ways. For instance, they failed to make application in appropriate form for a loan sufficient to close within seven calendar days as required by the contract. Indeed, by July 8, 2009 - the day before the scheduled July 9, 2009 closing, the Meltons still had not made application in proper form for a loan sufficient to close as required by the real estate contract. See Transcript, p. 28. Rather, all they had done was made informal inquiry about interest rates at several banks in their hometown. See, Transcript, p. 28. The Meltons failed to exert any effort whatsoever to make formal application for a sufficient loan as they were contractually required to do. See Transcript. P. 28.

Similarly, the Meltons failed with regard to their home inspection obligations. They did arrange for a home inspection. However, following that home inspection, they failed to make a written request for repairs to Aspired Homes within ten days. In fact, to date, they have failed to make such a written request. The Home Inspection Addendum to the contract clearly required the Meltons to make the written request for repairs. The language utilized in the contract was obligatory, not permissive

> 1. Buyer(s) shall, at its expense, arrange for a Home Inspection to be conducted and a written request for repairs delivered Seller(s) or Seller(s)' agent within 10 calendar days after effective date of the Contract. . .

See Appellants' R.E. 9 at Home Inspection Addendum, ¶ 1. The purpose of the obligatory statement is clear: to give the Aspired Homes the opportunity to cure. The Meltons failed to fulfill their contractual obligation and failed to give Aspired Homes the opportunity to cure.

Another misstatement of fact regards the Meltons' claim that the home did not pass inspection. See "Brief of Appellee" at p. 6. As set forth in Aspired Homes' appellate brief, there is neither proof nor suggestion that the home "did not pass" inspection. See "Brief of

Appellant," at p. 7. Indeed, the inspection report and the appraisal report themselves indicate the following:

- the structure was in good condition;
- only various minor repairs were recommended;
- the home was in excellent condition;
- no deficiencies were observed; and
- no repairs are required.

See Exhibit 7 at home inspection addendum; see also Appellee's Record Excerpts 6 and 7.

V. Contract Ambiguity.

In their brief, the Meltons contend that the contractual language at issue is clear and unambiguous. See "Brief of Appellee" at p. 9. Yet, they failed to even attempt response to Aspired Homes' detailed and lengthy argument setting forth the contract's susceptibility to two different interpretations and detailing the only reasonable interpretation. They failed to demonstrate how the Chancellor's interpretation of the contract gave every word and phrase meaning and effect as required by Mississippi law. They likewise failed to demonstrate that the Chancellor made every endeavor to give the contract a reasonable construction.

As set forth in Aspired Homes' original "Brief of Appellant," the Chancellor simply failed to give every word of the contract effect in his interpretation of the contract. In his interpretation, he completely ignored the mandate which required the Meltons to both arrange for a home inspection to be conducted and to provide a written request for repairs. And he misinterpreted the provisions in the Home Inspection Addendum which he viewed as allowing the Meltons to simply walk away from the contract. Under the only reasonable interpretation of the contract, the Meltons could not simply walk away from the contract. Rather, they were

required to deliver a written request for repairs and to allow Aspired Homes the opportunity to cure. See Brief of Appellant."

As demonstrated, the Meltons' suggested interpretation of the contract is unreasonable. It, in effect, turns the sales contract into an option contract. It, in effect, allows them to simply "change their minds" and walk away from their contractual obligation to purchase the home they contracted to purchase. However, the parties' clear intent was to enter into a sales contract, not an option agreement.

As noted by the United Stated District Court for the Southern District of Mississippi, applying Mississippi law, "[i]t is so clear than an option is entirely separate and distinct from a sale or a lease that, really, it is unnecessary to cite authorities." See, Whitworth College, Inc. v. City of Brookhaven, 161 F. Supp. 775, 782 (S. D. Miss. 1958). Nevertheless, there is ample authority that a clear distinction exists between a sales contract and an option agreement. See, e.g., Whitworth College, 161 F. Supp. 775, 782; see also Cole v. Haynes, 216 Miss. 485, 496, 62 So.2d 779, 780-81 (1953). A contract to purchase and sell real estate creates a mutual obligation on the one party to sell and on the other party to purchase. Whitworth, 161 F. Supp. at 782; Cole, 216 Miss. 485, 496, 62 So. 2d 779, 780-81. An option contract, however, imposes no binding obligation upon the person holding the option; "it creates no enforceable indebtedness on the part of the person to whom it is granted." Whitworth, 161 F. Supp. at 782.

Even a cursory review of the contract at issue reveals a mutual obligation on the part of Aspired Homes to sell and on the part of the Meltons to purchase. It imposes binding obligations upon both parties, Aspired Homes and the Meltons. And it creates enforceable indebtedness on the part of both parties. Clearly, the real estate contract was not intended to be a simple option, and the Meltons should be prohibited from treating it as such.

VI. Award of Attorney Fees.

The Meltons contend on appeal that the trial court was correct in awarding them attorneys' fees. See "Brief of Appellee" at p. 11. In reliance upon Marshall v. Lindsly, they argue that "if a court chooses to enforce the terms of a contract, then it must also enforce the clause addressing attorney's fees, and that not to do so would be contrary to the law." See "Brief of Appellee" at p. 11.

The Meltons' reliance, however, is misplaced. Importantly, in this case, the Chancellor did not enforce the terms of the contract which specified quite clearly that "specific performance is the essence of this contract." See Exhibit 7, p. 3, ¶ 16. Indeed, the Chancellor refused Aspired Homes' request for specific performance and, instead, declared the contract null and void. See Record, pp. 117-122 and 140-142. Since the Chancellor did not enforce the terms of the contract, it had no basis for enforcing the contract's clause addressing attorney's fees. See also Lagarde v. Lagarde, 33 So. 2d 1169, 1178 (Miss. App. 2009).

VII. "Option c".

Finally, the Meltons claim that, following the home inspection and appraisal, they simply chose "option c," canceled the contract, and demanded a return of their earnest money. See "Brief of Appellee" at p. 9. The Chancellor interpreted the home inspection addendum provisions of the contract to allow the Meltons to do so. However, the interpretation that the Meltons' could simply opt out of the sales contract without affording Aspired Homes the opportunity to cure indubitably violates the contract construction principles set forth in Aspired Homes' appellate brief. See "Brief of Appellant" at pp. 10-13. It fails to give effect to every word and phrase in the home inspection addendum as required by Mississippi law.

The Chancellor could have and should have reconciled the mandate that the Meltons both arrange for a home inspection and provide a written request for repairs delivered within ten days with sub-paragraphs (a), (b), and (c) of paragraph 3 of the addendum. If he had done so, as required by Mississippi law, he would have reached the only reasonable construction - that is, that:

- The Meltons were required to arrange for a home inspection to be conducted.
- If the home inspection revealed any "deficiencies," then the Meltons would have been required to deliver a written request for repairs to Aspired Homes within ten days. At the same time, they would have been required to provide Aspired a copy of the home inspection report.
- Upon receipt of the written request for repairs and the copy of the report, Aspired Homes would have had three days to consent in writing to correct deficiencies on the Melton's list in an amount not to exceed the dollar figure which should have been, but was not, filled in the blank on line 22 of the addendum (which simply means there would have been no upper limit as to the amount Aspired Homes would have had to expend in correcting any deficiencies).
- If Aspired Homes failed to consent to correct the deficiencies in an amount not to exceed the dollar figure which should have been failed in, then Aspired Homes would have been in breach, and the Meltons could have canceled the contract.
- Alternatively, if it were going to cost Aspired more than the predetermined expense limitation to correct the deficiencies, then Aspired Homes would not have been required to correct the deficiencies. However, Aspired Homes could have nevertheless chosen to correct the deficiencies, though not required to do so, and proceeded with the contract.
- On the other hand, if it were going to cost Aspired Homes more than the predetermined expense limitation to correct the deficiencies and Aspired Homes chose not to correct the deficiencies, then the Meltons could have themselves accepted responsibility for the deficiencies and proceeded with the contract.
- Finally, only if neither party was willing to assume responsibility for the deficiencies, then the Meltons could have exercised option 3(c) and canceled the contract.

This interpretation is the only interpretation of the home inspection addendum which gives every word and phrase effect and which results in a reasonable construction rather than an unreasonable construction. Clearly, the Meltons do not dispute this reasonable, interpretation of the home inspection addendum. If they did, they surely would have responded, objected to, taken issue with, or, at the least, commented upon the section of Aspired Homes' appellate brief criticizing and raising as error the Chancellor's unreasonable construction of the contract.

Even if the Meltons were correct in their interpretation of the contracts' Home Inspection Addendum, they still had no contractual right to cancel the contract. The contract clearly states that "[i]f deficiencies are revealed by the Home Inspection Report," then the "Buyer may . . .". See Appellant's R. E. 9 at Home Inspection, ¶ 3. A significant, in fact crucial, fact ignored by the Meltons and overlooked by the Chancellor, however, is that the Home Inspection Report revealed no deficiencies. It clearly stated "no deficiencies were observed" as well as "the structure was in good condition" and "the home was in excellent condition." See Exhibit 7 at Home Inspection Addendum; see also Appellee's Record Excerpts 6 and 7. Since "no deficiencies were observed" during the home inspection, the Meltons had no right to rely on their claim of a "failed inspection" as a basis for backing out of the real estate contract.

VIII. Conclusion.

As detailed herein and in Aspired Homes' "Brief of Appellant," the Chancellor committed a number of reversible errors in this case - errors that were unsupported by substantial evidence; errors that were manifestly wrong and contrary to Mississippi law; and errors, for the most part, which the Meltons confessed by failing to oppose them in their brief. For all the reasons set forth herein and in Aspired Homes' Brief of Appellant," Aspire Homes respectfully submits that the Chancellor's opinion and judgment in this matter should be reversed. Aspired

Homes respectfully requests this Court to reverse the Chancellor's opinion and judgment and to order the Meltons to specifically perform the contract and to pay Aspired Homes the damages it has sustained as a result of the Meltons' refusal to honor the contract. Additionally, since the Chancellor's opinion and judgment cannot stand, Aspired Homes requests this Court to reverse the Chancellor's award of attorney's fees as well.

Respectfully submitted,

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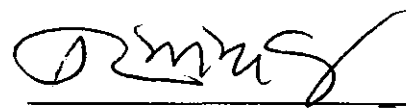

THOMAS M. McELROY, MSB [redacted]

CERTIFICATE OF SERVICE

This will certify that the undersigned attorney, Thomas M. McElroy, has this date caused true and correct copies of the above and foregoing Reply Brief of Appellant to be delivered to counsel of record and to the trial court judge by causing the same to be placed in the United States Mail, postage prepaid, addressed as follows:

Honorable John A. Hatcher, Jr.
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THIS, the 18th day of January, 2011.

THOMAS M. McELROY

CERTIFICATE OF FILING

This is to certify that I, Thomas M. McElroy, Attorney for Aspired Custom Homes, LLC, Plaintiff/Appellant in the above-styled and numbered cause, have this date served or caused to be served the original and three copies of the Reply Brief of Appellant and an electronic diskette containing same on January 18, 2011 to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

Respectfully submitted,

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