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IN THE SUPREME COURT OF FLORIDA

TITUSVILLE ASSOCIATES, LTD., a Florida limited partnersihp, by and through Michael J. Levitt, its general partner; and MICHAEL J. LEVITT, individually and as general partner,

Petitioners/Defendants,

vs.

BARNETT BANKS TRUST COMPANY, N.A., a national banking association, as Trustee,

Respondent/Plaintiff.

CASE NO. 76,427

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT (CASE NO. 89-830)

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent/plaintiff, Barnett Banks Trust Company, N.A. ("Barnett"), filed this action, seeking a judgment declaring the rights of the parties in a dispute arising from a mortgage loan made by Barnett, as trustee, to petitioner/defendant, Titusville Associates, Ltd. ("Titusville"), a Florida limited partnership, from the proceeds of an offering of industrial revenue bonds by Brevard County, Florida, for the purpose of constructing and operating an adult congregate living facility in Titusville. Petitioner/defendant, Michael J. Levitt ("Levitt"), was the sole general partner of Titusville, which was the developer of the project. Barnett, as trustee for the holders of the revenue bonds, held the mortgage and other rights as lender of the bond proceeds, including a so-called operating deficit letter of credit in the amount of $511,000 and a guarantee of operating deficits executed by Levitt. The dispute centered on whether Barnett could collect both the $750,000 amout of the guarantee and the $511,000 letter of credit or whether funds obtained from the letter of credit would count against and act to pay or satisfy the guarantee. In paragraph nineteen of its first amended complaint (R.80),[1] Barnett alleged that by reason of the

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1 As used in this brief, "R." refers to the record on appeal, "Aug. T." to the transcript of the trial proceedings on August 29, 1988, "Dec. T." to the transcript of the trial proceedings on December 8, 1988, "PX." to plaintiff's exhibits, "DX." to defendants' exhibits and "A." to the appendix to petitioners' brief.

conflict between the positions taken by it and Titusville and Levitt, Barnett was "in great doubt as to whether the trustee is entitled to draw on the letter of credit for the benefit of the Bondholders." (R.79).

In the trial court, Barnett contended that the subject operating deficit guarantee and letter of credit were separate, cumulative obligations and that Barnett was entitled to collect the full amount of the $750,000 operating deficit guarantee and still draw on the letter of credit up to its full amount of $511,000, for a total recovery from petitioners of $1,261,000.

Petitioners, Titusville and Levitt, counterclaimed, also seeking a declaratory judgment of the rights of the parties. Petitioners contended that the letter of credit was merely security for the operating deficit guarantee, did not constitute a separate, additional obligation, that defendants' total exposure for operating deficits was fixed at no greater than $750,000, and that any draws on the letter of credit to cover operating deficits would count against and act to satisfy the obligations under the operating deficit guarantee. (R. 286).

A nonjury trial was set for August 29, 1988. On August 9, 1988, Barnett filed and served a motion for summary judgment on defendants. No notice of hearing was served with the motion. On August 19, 1988, ten days before the date set for trial, Barnett served a notice setting the hearing for the morning of trial. At the hearing, Titusville and Levitt objected and argued that Barnett failed to serve the notice twenty days before the date

fixed for the hearing, as required under Rule 1.510(c), Florida Rules of Civil Procedure. The trial court below sustained Titusville's objection and did not entertain Barnett's motion for summary judgment, following the holding in Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984).[2]

After a trial of two full days of testimony and documentary evidence presented by both parties, the trial court entered a final declaratory judgment, concluding that:

> [T]he greater weight of the evidence did not support Barnett's claims but instead, the greater weight of the evidence supports the counterclaim of defendants Titusville and Levitt.
>
> (R.286, A.1)

Barnett then appealed to the First District Court of Appeal. Barnett argued that (i) the trial court erred in refusing to hear its motion for summary judgment, (ii) it was entitled to judgment as a matter of law, and (iii) the evidence presented at trial did not support the declaratory judgment in favor of Titusville and Levitt. The First District reversed on the first two issues and found it unnecessary to address the third. Barnett Banks Trust

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2 At the time of the hearing, transcripts of the following depositions taken during discovery were on file: Michael J. Levitt, taken on June 29, 1988, Kenneth Price, Jr., taken on July 8, 1988, Paul T. Chan, Esq., taken on July 8, 1988, of Mary W. Sullivan, Esq., taken on August 10, 1988, Kenneth L. Becker, taken on August 11, 1988, and Don Clark, Jr., Esq., taken on August 17, 1988. The deposition transcripts illustrate widely divergent constructions of the guarantee terms at issue.

Co. v. Titusville Associates, Ltd., 560 So.2d 1337, 1338 (Fla. 1st DCA 1990).

On May 18, 1990, defendants moved for a rehearing and requested that the First District certify this case as one in conflict with the Fourth District's opinion in Wakefield. On July 6, 1990, the First District denied defendants' motion for rehearing and request to certify. 560 So.2d at 1341. On August 3, 1990, defendants filed their notice to invoke the discretionary jurisdiction of this Court based upon a direct and express conflict between the decision of the First District in the present case and that of the Fourth District in Wakefield. On November 21, 1990, this Court issued an order accepting jurisdiction, pursuant to Article V, Section 3(b)(3), Florida Constitution.

STATEMENT OF THE FACTS

The Titusville bond offering was essentially two separate transactions. (Dec.T.140). One of the transactions constituted the sale of bonds from the issuer, Brevard County, to the underwriter, Smith Barney, who sold the bonds to the public. (DX.6). At the same time, the money received from the sale of the bonds to Smith Barney was placed in trust (DX.4), and Barnett, as trustee for the bondholders, made a loan of these proceeds to Titusville. (PX.3, DX.4). The loan was secured by a typical mortgage (DX.2, DX.3) and assignment of rents (DX.5) and was for the purpose of constructing and operating an adult congregate living facility. The note, mortgage, assignment of rents and other rights of the lender were then pledged to Barnett as security or collateral for the repayment of the interest and principal due on the bonds. (DX.4, PX.3). The bonds themselves, however, were not general obligations of Brevard County and were instead revenue bonds payable only out of proceeds received from payments on the note or from the mortgaged property or other security for the mortgage indebtedness. Moreover, the note and mortgage were expressly agreed to be nonrecourse with no personal liability on the part of either Titusville or its general partner, Levitt (DX.2., DX.3). Because the loan of bond proceeds from Barnett to petitioners was nonrecourse, the only personal liability assumed by Levitt or Titusville was set forth in two guarantees, both contained in one document, entitled "Guarantee

of Completion." (PX.2). The first guarantee, not at issue in this case, required Levitt to pay whatever was necessary to complete construction of the project, an adult congregate living facility in Titusville. This guarantee was in an unlimited dollar amount. The other obligation assumed by Levitt and Titusville was an operating deficit guarantee (the "Operating Deficit Guarantee" or the "Guarantee"), contained in paragraph 4 of the "Guarantee of Completion." (PX.2, A. 2). This Operating Deficit Guarantee required payment by Levitt or Titusville of operating deficits incurred after the issuance of the first certificate of occupancy for the project for a period of three years, but expressly limited the obligation to $750,000. (PX.2).

The Guarantee of Completion (PX.2, A. 2) shows on its face, particularly in the recitals or preamble, that the guarantee was part of a combined bond offering and mortgage loan transaction consisting of a number of documents executed as of the same date, December 27, 1985. These other documents referenced in the Guarantee of Completion include the Financing Agreement (PX.3), the Mortgage and Security Agreement (DX. 3), and the Trust Indenture (DX. 4). Other documents making up the transaction include an Assignment of Rents (DX. 5), a bond purchase agreement (DX. 6) and the bond disclosure documents, consisting of the Preliminary Official Statement (the "POS") (PX.5) and the Official Statement (the "OS") (PX.4).

Petitioners, Titusville and Levitt, also procured as part of the same transaction a $511,000 Letter of Credit issued by the

Continental Bank of Philadelphia and payable to Barnett, as trustee for the bondholders (the "Letter of Credit"). (PX.1). The Letter of Credit contains a reference on its face to operating deficits (PX.1) and Section 2.4 of the Financing Agreement identifies the Letter of Credit as the "Operating Deficit Letter of Credit" (PX.3, at p. 8).

The Operating Deficit Guarantee was negotiated between Mr. Kenneth Price, the representative of Titusville and Levitt, and Mr. Kenneth Becker, on behalf of the underwriter, Smith Barney, Harris Upham & Co., Inc. ("Smith Barney"). Their final negotiations on the Operating Deficit Guarantee were actually conducted in private, with no one else present. (Dec. T. 48, 53). Their preliminary negotiations were conducted largely on the telephone, in conversations just between the two men. (Dec. T. 40).

During the fall of 1985, Levitt's representatives supplied financial information on the proposed project to Smith Barney. (Dec. T. 39). This information was compiled into the Estimated Sources and Uses of Funds chart which was published at page 8 of the OS (PX.4). The parties added up the estimated sources of funds on the one hand and the estimated uses on the other. (Dec. T. 30-35). The two necessarily had to balance and the amount necessary to make them balance was the additional equity which Smith Barney would require of the developer, either in the form of cash, or alternatively, a Letter of Credit. (Dec. T. 31-33, 40-41). In the fall of 1985, and as late as December 17,

the date of the POS (PX.5), the amount of the Letter of Credit required was $400,000. (PX.5, at p. 8; Dec. T. 34).[3]

The Letter of Credit was obtained by Levitt and Titusville to insure the bondholders of an owner's equity sufficient to meet the owner's existing obligations. Becker testified that a cash deposit would have been acceptable to Smith Barney in lieu of the Letter of Credit. (Aug. T. 114, 119-20).

At the time of closing, the principal costs for which the underwriter sought additional security were (i) completion of construction, and (ii) debt service during the 18-month rent-up period commencing six months after construction was begun. (PX.4, at p. 9). The parties' testimony was all in agreement that payment of debt service was equivalent to paying an operating deficit. (Aug. T. 238, 259).

On Thursday, December 19, 1985, as the date for the closing approached, Price sent to Becker and Mary Sullivan, the bond counsel, a letter transmitting a schedule detailing the projected costs for the Titusville project (DX. 7), consisting of the same items shown as estimated uses in the chart at page 8 of the OS

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3 As shown in footnote 2 on page 8 of the OS (PX.4, A. 4), a part of the required owner's equity was the subordination of $750,000 of the owner's overhead and profit, which is reflected in the estimated uses as a substantial part of the $795,000 cost item for owner legal, audit, overhead and profit. The $750,000 amount of the overhead and profit to be subordinated was agreed to well in advance of the closing and has no relationship to the amount of the Operating Deficit Guarantee finally agreed to at the closing in Titusville on December 27, 1985. (Aug. T. 118).

(PX.4, A. 4). Given the cost projections as of that date, the amount necessary to balance the estimated sources and the estimated uses was $511,000. Therefore, Price's December 19 letter stated that the amount of the required letter of credit would be $511,000. (DX. 7). Price assumed the matter was resolved and the next day, Friday, December 20, ordered the Letter of Credit from the Continental Bank of Philadelphia in the amount of $511,000. (Dec. T. 41-42; PX.1, A. 6). On the following Monday and Tuesday, Price worked on the closing of another, unrelated transaction. Wednesday was Christmas, and on Thursday morning the parties departed early for Titusville (Dec. T. 41-42). Accordingly, Price did not recall having any other substantive discussion with Becker after December 19 and prior to the closing. (Dec. T. 45). On the other hand, as stated by Barnett, Becker testified that on December 19, the date of Price's letter, Becker obtained Price's agreement almost to double the amount of the Letter of Credit, from $511,000 to $1,000,000, notwithstanding that the amount of the Letter of Credit had been projected at $400,000 as late as December 15. (PX.5, at p. 8). In his testimony, Price denied any agreement to provide a letter of credit in excess of $511,000. (Dec. T. 46).

At closing, Becker apparently realized that because of the potential for construction cost overruns, the Letter of Credit did not provide as much coverage for operating deficits as he would have liked. (Dec. T. 48-49). As an alternative, therefore, Becker and Price discussed a proposed express written

guarantee of operating deficits to be executed by Levitt. (Dec. T. 48-49). Becker then apparently asked for a $1,000,000 guarantee, with Price holding out for substantially less. (Dec. T. 49). Eventually a compromise was reached and the two men agreed to a written operating deficit guarantee of $750,000, which represented Levitt's total exposure of personal liability in this project over and above the personal obligation he had already assumed to complete construction. (Dec. T. 49).

Once Price and Becker finally agreed on the Operating Deficit Guarantee, the language for the guarantee had to be drafted on the spot at closing. With the extreme time constraints, the parties decided to insert the guarantee as a new paragraph 4 in the Guarantee of Completion, which had been negotiated and agreed to prior to closing. Petitioners' counsel, Paul Chan, wrote a first draft of the Operating Deficit Guarantee, but everyone there had a hand in selecting the language. (PX.10). Becker testified that Mary Sullivan drafted the language of the guarantee and he recalls looking at it and saying, "That's o.k. with me." (Aug. T. 115-16). Donald Clark, Smith Barney's counsel, testified that the language of the Operating Deficit Guarantee was a "joint effort" by all counsel. (Aug. T. 174). Paul Chan testified that in the second draft Ken Becker requested the insertion of the language, "exclusive of any amounts that may be available for operating deficits from Bond Proceeds." (DX. 11, Dec. T. 150, 152).

With assistance from the other parties, Smith Barney had prepared the POS (PX.5) prior to the closing. This was a preliminary version of the document to be sent to potential purchasers of the bonds to disclose facts material to the transaction. At the closing, Smith Barney's legal counsel, Clark, maintained a copy of the POS on which there were numerous handwritten changes that were to be incorporated before the final OS was printed. (PX.9).

Because the Operating Deficit Guarantee had been agreed to only at closing, additional language describing it had to be incorporated into the OS. The marked-up copy of the POS which Clark took away with him from closing (PX.9) shows that no such language had been written. Clark instead took with him to prepare the OS only a photocopied page of the handwritten draft of the Operating Deficit Guarantee language. (PX.9, between pp. 24-25, A. 5). Moreover, the chart at page 23 of the OS (PX.4), on which Barnett relied heavily at trial, is not written out in Clark's marked-up copy. The only references to the chart were mere handwritten numbers with no descriptions on the reverse side of the photocopied page of the Operating Deficit Guarantee language. (PX.9, between pp. 24-25, A. 5). In addition, Price gave a signature page to Clark for the final OS prior to all changes being made, in reliance on Clark's accurately stating terms of the transaction. (Dec. T. 64). Finally, both Price and Chan testified that they did not receive a red-lined or revised version of the OS after the closing and before the final document was printed. (Dec. T. 62, 63, 66-68, 170).

Pursuant to his obligations under the completion guarantee, Levitt insured that Titusville completed construction of the Brevard County facility. Moreover, pursuant to his obligations under the Operating Deficit Guarantee, Levitt caused Titusville to contribute amounts in excess of $750,000 to fund operating deficits of the project incurred after the first certificate of occupancy had been issued. The project did not enjoy the occupancy that was anticipated and was unable to carry the debt service. Barnett obtained title to the mortgaged property through a foreclosure action. Although the loan was nonrecourse, Levitt fully performed the two obligations he assumed in the Guarantee of Completion, completing construction of the project and contributing $750,000 to operating deficits.

SUMMARY OF ARGUMENT

The District Court below erred in holding that the trial court should have considered Barnett's motion for summary judgment. Barnett's motion was untimely since the only notice of hearing on the motion was served less than twenty days before the date fixed for the hearing, which was the date the case was set for trial. The Court should approve the decision of the Fourth District in Wakefield and quash the contrary decision of the First District below because the Wakefield rule applying the twenty-day service requirement not only to a motion for summary judgment but also to a notice of hearing on the motion is more consistent with the language of and policy behind Rule 1.510(c).

Any error by the trial court in not considering Barnett's motion for summary judgment was thoroughly harmless because the record reflected substantial issues of fact to be resolved, thereby precluding entry of a summary declaratory judgment.

The discussion in the District Court's opinion regarding the independence of the Letter of Credit from the underlying transaction misses the point of what was at issue between the parties and decided by the trial court. The declaratory judgment did not address, nor have Titusville and Levitt contested, the liability of the issuing bank if Barnett had presented timely drafts under the Letter of Credit. Instead, the judgment below determined that if Barnett did recover funds from the Letter of Credit and applied those funds to the same operating deficits

covered in the Operating Deficit Guarantee, such funds would count against and act to discharge Titusville's and Levitt's obligations under the Guarantee. Accordingly, the declaratory judgment below is in no way inconsistent with the law governing letters of credit on which the District Court relied.

The trial court properly resorted to extrinsic evidence in construing how draws under the Letter of Credit would affect Titusville's and Levitt's liability under the Operating Deficit Guarantee. The language of the Guarantee itself supported the position asserted by Titusville and Levitt and thus either compelled a judgment against Barnett or was at the very least susceptible of more than one meaning and thus ambiguous. Therefore, issues of fact existed which would have precluded the trial court from entering a summary judgment.

Finally, the declaratory judgment below is presumed correct and may be reversed only if there is no theory under which the judgment can be sustained. On appeal, all conflicts in the evidence, and all reasonable inferences therefrom, must be resolved in favor of upholding the judgment in favor of Titusville and Levitt. Viewed in this perspective, the record contains ample support for the trial court's judgment. For these reasons, the District Court's decision below should thus be quashed and the declaratory judgment reinstated.

ARGUMENT ON APPEAL

POINT ONE

THE TRIAL COURT PROPERLY REFUSED TO CONSIDER BARNETT'S MOTION FOR SUMMARY JUDGMENT BECAUSE BARNETT'S NOTICE OF HEARING ON THE MOTION WAS UNTIMELY

The first day of trial was scheduled to begin on August 29, 1988. Exactly twenty days before the trial and approximately one year after the case had been filed, on August 9, 1988, Barnett served a motion for summary judgment. No notice of hearing was served. Then, ten days before the trial was to begin, on August 19, 1988, Barnett served a notice scheduling the motion for summary judgment for hearing on August 29, 1988, before the start of the trial. Prior to the beginning of trial, Barnett attempted to argue its motion. However, upon petitioners' objection, the trial court in reliance on Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984), refused to consider Barnett's motion since Barnett had not timely complied with the notice provisions of Rule 1.510(c), Florida Rules of Civil Procedure. (Aug. T. 5, 6, 9, 10). As stated in Norton v. Gibson, 532 So.2d 1325 (Fla. 1st DCA 1988):

> It is well established that it is reversible error to grant summary judgment pursuant to a motion which has not been served in accordance with the 20-day requirement of Rule 1.510(c).
>
> Id. at 1326.

In the court below, the First District declined to follow Wakefield and held that the twenty-day service requirement of Rule 1.510 applied only to a motion for summary judgment and not the notice of hearing on the motion. The First District held that the service of a notice of hearing was governed by Rule 1.090, Florida Rules of Civil Procedure, which requires only that the notice be served a reasonable time before the hearing, and that under the circumstances, ten days was sufficient. In so holding, the First District attempted to distinguish Wakefield as being unclear on whether the motion for summary judgment in that case was itself untimely. The First District, however, also expressly concluded "that the Wakefield court erroneously interpreted rule 1.510(c)." For a number of reasons, this Court should follow the rule announced in Wakefield and quash the holding by the First District below.

In Wakefield, a summary final judgment had been entered at a hearing held only eight days after service of the notice of the hearing. In reversing the summary judgment, the court held:

> In this appeal from a summary final judgment we reverse because only eight days transpired between the date of the Notice and the date of the hearing whereas the rules clearly require 20 days notice. Fla.R.Civ.P. 1.510(c).
>
> 443 So.2d at 465.

Wakefield thus construed Rule 1.510(c) to require that the notice of hearing, not just the motion, be served at least twenty days prior to a hearing.

Moreover, Wakefield is not the only district court decision to so hold. In Fernandez v. Moreno, 176 So.2d 587 (Fla. 3d DCA 1965), a motion for summary judgment was filed by the plaintiff over five months before trial. Although two separate notices of hearing on the motion were served, no hearing was ever held. On the day of trial, at the plaintiff's request, the court granted the motion for summary judgment. Id. at 588. The district court reversed, holding:

> We are of the opinion that the trial court erred in entering a summary judgment without notice to the defendant that the same would be heard. Although the motion had been filed for many months, it had not been served, in accordance with Rule 1.36, Florida Rules of Civil Procedure, 30 F.S.A., "at least ten days before the time fixed for the hearing"; and the defendant was deprived of his opportunity to serve opposing affidavits prior to the day of the hearing.
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> Id. at 589.[4]

In its opinion below, the First District Court attempted to distinguish Fernandez by stating that it did not address the time requirement for service of a notice of hearing. However, in Fernandez, the motion, even though filed over five months earlier, was held untimely because it had not been served "at least ten days before the time 'fixed for the hearing.'"

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4 This case was decided when the Florida Rules of Civil Procedure required written notice of the hearing to be served 10 days, rather than the current 20 days, before the hearing.

Fernandez, just as Wakefield, clearly construed the rule to require not only service of the motion, but also service of notice of the hearing date, within the required time period. Without service of a notice of hearing, the time for a hearing could not be "fixed,"[5] and thus the twenty-day notice period should not begin to run. See also Greer v. Workman, 203 So.2d 665 (Fla. 4th DCA 1967), and John K. Brennan Company v. Central Bank & Trust Company, 164 So.2d 525, 530 (Fla. 2d DCA 1964) (The rule "requires that a summary judgment be entered against a party only after an opportunity to be heard on ten days written notice of the application for the judgment." (Emphasis added)).

The Eleventh Circuit Court of Appeals has interpreted Rule 56(c), Federal Rules of Civil Procedure, in a manner consistent with Wakefield.[6] In Moore v. State of Florida, 703 F.2d 516 (11th Cir. 1983), a case arising out of the Middle District of Florida, the court reversed a summary judgment on the ground that it violated the ten-day notice requirement of the rule. The motion was served in November 1980, and granted by the court on February 5, 1981. Except for requiring notice of ten rather than

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5 According to the unabridged second edition of Webster's New Twentieth Century Dictionary, "fixed" means ". . . established; settled; set . . .". According to Black's Law Dictionary, "fixed" means ". . . determined; settled; make permanent . . .".

6 Florida courts have held that federal decisions construing similar rules of procedure are "highly persuasive in ascertaining the intent and operation effect of various provisions of the rules." Wilson v. Clark, 414 So.2d 526, 531 (Fla. 1st DCA 1982).

twenty days, the operative language of Rule 56(c) is the same as that of Rule 1.510(c), and provides:

> The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing.

In reversing the summary judgment, the Eleventh Circuit clearly held that the notice of hearing on the motion, as well as the motion itself, was subject to the ten days' limit in the rule. As stated by the court:

> The Rule thus mandates a hearing on the summary judgment motion, and at least 10 days' notice of that hearing.
>
> Id. at 519.

Similarly, in Milburn v. United States, 734 F.2d 762 (11th Cir. 1984), a case arising out of the Southern District of Florida, the court reversed a summary judgment for failure to give ten days' notice of the hearing. Defendant's motion for summary judgment was served on December 30, 1982, and the plaintiff served a written response. On March 22, 1983, the trial court granted the defendant's motion. The Eleventh Circuit acknowledged that Rule 56(c) did not require an oral hearing, but held that an adverse party was entitled to notice that the matter will be taken under advisement and that such notice was subject to the ten-day limit of Rule 56(c). As stated by the court:

> As above indicated, this court has established a "bright-line" test requiring 10-day advance notice that the court will take a motion for summary judgment under advisement as of a certain date. That requirement guarantees that the non-moving party will have an opportunity to marshall its resources and focus its attention on rebutting the motion for summary judgment with every factual legal argument available.
>
> Id. at 766.[7]

The Eleventh Circuit thus once again applied the ten-day notice limit in Rule 56(c), not just to the service of the motion for summary judgment, but also to service of the notice of hearing on the motion, with the hearing in that case being the date on which the court would take the motion under advisement. See also Donaldson v. Clark, 819 F.2d 1551, 1555 (11th Cir. 1987) (en banc) (ten-day notice required of date court will consider motion).

Beyond the clear support in the case law, there are several additional reasons why this Court should reject the decision of the First District below and approve Wakefield's bright line rule requiring twenty days notice of a summary judgment hearing. First, the Wakefield holding is supported by the language of Rule 1.510(c) itself. The rule's requirement that a motion be served

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7 Just as the decisions of Florida appellate courts, the Eleventh Circuit decisions require strict compliance with the requirement of ten-days' notice of a summary judgment hearing. See, e.g., Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) ("we have held repeatedly that this requirement of notice will be deemed strictissimi juris and applies to all parties litigation." (Emphasis original)

"at least twenty days before the time fixed for the hearing" clearly contemplates that an adverse party shall receive twenty days advance notice of the date on which a motion will be called up for hearing. The rule appears to contemplate the service of a notice fixing the hearing date at the time the motion is served. If the notice of hearing is not served with the motion, however, the apparent meaning and intent of Rule 1.510(c) would require that the notice of hearing also be served at least twenty days before the hearing.

Second, the bright-line rule of Wakefield (and the Eleventh Circuit) provides more certainty and uniformity to summary judgment proceedings, thereby avoiding substantial litigation over what constitutes reasonable notice. On the other hand, under the holding of the First District below, the question of reasonable notice under Rule 1.090(d) would be a question of fact, creating further uncertainty for the parties, increased demands on the trial courts and additional issues to raise on appeal. Is ten days' notice presumptively reasonable? Is five days' notice reasonable? Is three days' notice reasonable? These and other questions will have to be regularly litigated if this Court affirms the First District's decision.

Third, the First District's interpretation of Rule 1.510(c) has the potential to encourage surprise and gamesmanship. Under the First District's holding, for example, a party could contact the court on December 1, 1990, and obtain a hearing date for a motion for summary judgment on December 20, 1990, serve the

motion that same day, and then wait ten or so days before serving its notice of hearing, all for the purpose of limiting the opposing party's ability to prepare for the hearing and thus gain an advantage. Such practice should not be encouraged or condoned, particularly when the result could be the deprivation of a party's right to trial. Indeed, in this action Barnett knew that its motion for summary judgment could not be heard before the day of trial since the motion was served exactly twenty days before the trial date. Yet, Barnett waited ten days to notify defendants that it would seek to have the motion heard on the first day of the scheduled trial. Titusville and Levitt, under these circumstances, could and did reasonably believe that, given the time restraints and Barnett's failure to serve a notice of hearing with the motion, the motion would not be heard. In short, Barnett could and should have served the notice of hearing at the same time that it served its motion.

Lastly, considering that a summary judgment "is necessarily in derogation of the constitutionally protected right to trial," Holl v. Talcott, 191 So.2d 40, 48 (Fla. 1966), any doubt as to the meaning or interpretation of the notice requirements of Rule 1.510(c) should be resolved in favor of providing greater notice. Requiring twenty days' advance notice of a summary judgment hearing would provide a constant and uniform rule for trial courts to follow and help ensure that opposing parties have adequate time to conduct necessary discovery and obtain and file opposing affidavits.

It is not enough for an opposing party to receive service of a motion for summary judgment outside the twenty-day limit. What is important to that party is advance notice of the date on which the motion will be heard or taken under advisement by the trial court. Affidavits in opposition to the motion can be submitted up to the day before the hearing. It is therefore the notice of the hearing date, not just the fact that a motion for summary judgment has been served, that is critical to the protection of a party's due process rights. Accordingly, for this and the other reasons stated, Wakefield's holding requiring twenty days' notice of a hearing is more consistent with the language and policy behind Rule 1.510(c) than is the holding of the First District below. This Court should therefore quash the decision below and approve Wakefield.

POINT TWO

ANY ERROR IN REFUSING TO HEAR BARNETT'S MOTION WAS HARMLESS BECAUSE BARNETT WAS NOT ENTITLED TO A SUMMARY JUDGMENT

A. THE DISTRICT COURT MISAPPLIED THE LAW GOVERNING LETTERS OF CREDIT; THE DECLARATORY JUDGMENT ENTERED BELOW DOES NOT IN ANY WAY IMPAIR THE THE INDEPENDENCE OF THE LETTER OF CREDIT FROM THE UNDERLYING TRANSACTION

Titusville and Levitt do not take issue with the law regarding the independence of letters of credit on which Barnett and the District Court relied below. Likewise, petitioners agree that in considering whether documents comply with the terms of a Letter of Credit, a court must insist on literal compliance and may only consider the language on the face of the documents themselves. However, the District Court's opinion misses the point of what was the dispute between the parties and decided by the trial court below.

The Letter of Credit is a so-called clean letter of credit. All that is required for Barnett to draw on it is the submission of a draft prior to the expiration date. Titusville and Levitt have never contested whether, if Barnett timely presented a draft to Continental Bank, that issuing bank would be required to pay under the Letter of Credit. Absent exceptional circumstances, Continental Bank's obligation under the Letter of Credit would exist regardless of what transpired in the underlying transactions.

However, this is not the issue presented to and decided by the trial court. Simply stated, the issue was whether "funds obtained by Barnett by draws on the Letter of Credit would count against and act to satisfy or discharge the obligations under the $750,000 Operating Deficit Guarantee." (R. 287). Barnett argued that funds from the Letter of Credit could not count against the Guarantee. Titusville and Levitt argued, and the trial court agreed, that such funds from the Letter of Credit would count against the Operating Deficit Guarantee, in light of the language of the Guarantee and the fact that petitioners would be required to reimburse Continental Bank for the amount of any such draws. Titusville and Levitt never argued at trial, and the trial court did not rule, that Continental Bank would not be liable to Barnett if Barnett had timely presented drafts under the Letter of Credit. But petitioners did argue, and what the trial court in effect ruled, was that although the Letter of Credit was a source of payment for the obligation of the Operating Deficit Guarantee, it did not create an additional, cumulative obligation to fund operating deficits separate and apart from the Guarantee.

The undisputed evidence showed that the Letter of Credit was a substitute for a cash deposit by the petitioners. (Aug. T. 114, 119-20). However, if Titusville or Levitt had posted a $511,000 cash deposit in lieu of the Letter of Credit and Barnett applied funds from this deposit to pay operating deficits, even Barnett would have difficulty in arguing that the funds should not apply against the $750,000 guarantee obligation. The same

should be true for funds obtained from draws on the Letter of Credit.

Thus, if Titusville or Levitt had advanced directly from their own funds $750,000 for operating deficits and Barnett nevertheless drew on the Letter of Credit for unpaid debt service or other operating deficits, Barnett would have recovered more for the bondholders than they were entitled to receive.[8] Accordingly, Barnett, as trustee, would be required to reimburse petitioners. It was to avoid just such a result and resolve Barnett's own "great doubt" (R. 5) about the relationship between the Letter of Credit and the $750,000 Guarantee, that Barnett filed the declaratory judgment action below.

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8 This is the issue addressed at paragraph 4 of the declaratory judgment where the trial court held, "Accordingly, if defendants have satisfied the obligations under the Operating Deficit Guarantee, Barnett has no right to draw on the Letter of Credit." (R. 287). The issuing bank, Continental Bank, was not a party and the trial court's judgment does not purport to determine the bank's liability under the Letter of Credit for any future draws by Barnett. Nevertheless, given the court's ruling, if the guarantee obligations had been discharged, but Barnett nevertheless sought to draw on the Letter of Credit, supplemental relief barring Barnett from doing so could be appropriate. Such action, however, would have no impact on the liability of the issuing bank for any draws and therefore would not contravene the law that letters of credit are independent of the transactions underlying them.

B. THE TRIAL COURT PROPERLY CONSIDERED EXTRINSIC EVIDENCE BECAUSE THE LANGUAGE OF THE OPERATING DEFICIT GUARANTEE, AS APPLIED TO POTENTIAL DRAWS BY BARNETT UNDER THE LETTER OF CREDIT, EITHER COMPELLED A JUDGMENT FOR PETITIONERS OR WAS AT LEAST AMBIGUOUS

The District Court erred in holding that the trial court should not have considered evidence extrinsic to the Letter of Credit and Operating Deficit Guarantee. It is not clear from the record that the trial court necessarily relied upon such extrinsic evidence. However, if the trial court did so, such action was proper and could not constitute reversible error for the reason that the language of the Guarantee, as applied to draws by Barnett on the Letter of Credit, supports the position asserted by Titusville and Levitt and thus either compelled a judgment in their favor or was at the very least ambiguous.

A word or phrase used in a contract is considered ambiguous if such word or phrase is "of uncertain meaning, and may be fairly understood in more ways than one." Friedman v. Virginia Metal Products Corp., 56 So.2d 515, 517 (Fla. 1952). In State Farm Fire & Casualty Co. v. DeLondono, 511 So.2d 604 (Fla. 3d DCA 1987), an exclusion in a homeowner's policy for property "regularly rented" was held ambiguous as applied to a house leased on a one-time basis while the homeowner was on a business trip. In so holding, the court stated:

> Although the construction of a contract is ordinarily a matter of law, where the terms of a written instrument are disputed and are reasonably susceptible to more than one construction, an issue of fact is presented.

> Quayside Associates, Ltd. v. Harbour Club Villas Condominium Assoc., 419 So.2d 678 (Fla. 3d DCA 1982). The instant policy did not define "regularly rented"; the parties disagreed as to what the term meant; and the trial court was of the view, correctly, that the term was reasonably susceptible to more than one meaning. It was, thus, proper to submit the question to the jury to be decided as an issue of fact. Hoffman v. Terry, 397 So.2d 1184 (Fla. 3d DCA 1981).
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> 511 So.2d at 605.

Indeed, the courts hold parol evidence freely admissible to aid in the construction of ambiguous contract terms:

> In the construction of contracts the intention of the parties is to govern. Such intention is ordinarily deduced from the language employed when the same is without ambiguity; however, if the language does create an ambiguity, then parol evidence is properly admissible, not for the purpose of changing or varying the terms of the written instrument, but to elucidate, explain or clarify the intention of the parties.
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> Royal American Realty, Inc. v. Bank of Palm Beach and Trust Company, 215 So.2d 336, 338 (Fla. 4th DCA 1968).

See also Hoffman v. Terry, 397 So.2d 1184 (3d DCA 1981) (contract interpretation question of fact properly submitted to jury because "susceptible to more than one construction").

At the trial below, the parties presented widely divergent constructions of the Operating Deficit Guarantee provisions at issue. The language of the Guarantee, literally and straightforwardly applied, can easily be read to provide that

funds obtained by Barnett from the Letter of Credit and applied to Operating Deficits count against the $750,000 Guarantee. Thus, even if Titusville's and Levitt's construction were not the only correct one, it was without question a reasonable construction, well supported by the terms of the Operating Deficit Guarantee. Therefore, at the time Barnett sought to present its motion for summary judgment, issues of fact existed which would have precluded the trial court from granting the motion and instead required the consideration of parol evidence.[9] Any error by the trial court in not hearing Barnett's motion was therefore harmless.

In support of its decision below, the District Court emphasized that the Letter of Credit was a partnership contribution toward the equity of the project, whereas the Operating Deficit Guarantee was a personal, and not a partnership, obligation. 560 So.2d at 1340, 1341. The court further noted that paragraph 2.4 of the Financing Agreement required Titusville to deliver the Letter of Credit. Id. at 1340. The Letter of Credit did not refer to any other documents and provided that it could not be modified by reference to any other document. Id. The District Court further noted that the Guarantee of Completion stated that it contained the complete

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9 See Snyder v. Cheezem Development Corp., 373 So.2d 719, 720 (Fla. 2d DCA 1979). ("If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.")

agreement of the parties and did not refer to the Letter of Credit, nor did it specify a set-off by the Letter of Credit. Id. It was essentially these factors on which the District Court relied to hold that the material documents were unambiguous and the trial court could not consider parol evidence in resolving the claims of the parties.

The District Court's reasoning, however, fails to consider a number of issues. First, the Guarantee of Completion (PX.2, A. 2), which contained the Operating Deficit Guarantee, itself refers to the Financing Agreement, Trust Indenture and other loan documents and even refers to the Financing Agreement for the definition of specific terms. (PX.2, A. 2). The Operating Deficit Guarantee requires Levitt to "cause borrower [Titusville] to pay all Project operating deficits," (PX.2) while the Letter of Credit has on its face a reference to "Operating Deficit." (PX.1, A. 6). At Section 2.4 of the Financing Agreement (PX.3) a reference is made to the "Operating Deficit Letter of Credit," but the term is not defined and nothing is said anywhere in the Financing Agreement or other documents about the purposes for or circumstances in which the parties intended for Barnett to draw on the Letter of Credit. Thus, looking at the transaction as a whole, there is an apparent, if less than clear, connection between the Letter of Credit and Operating Deficit Guarantee. Under these circumstances, the trial court properly considered extrinsic evidence.

Moreover, the District Court failed to consider that the Operating Deficit Guarantee expressly provides that payments by Titusville, as well as those by Levitt, would apply against the $750,000 liability. The undertaking by Levitt in the Operating Deficit Guarantee was "to cause Borrower [Titusville] to pay all project operating deficits . . . ." (PX.2, A.2). The partnership, Titusville, was newly formed for the transaction, was owned entirely by Levitt and his spouse, and Levitt was the sole general partner. The payments by Titusville would thus be controlled or caused to be made by Levitt. Moreover, the Guarantee itself provides that it "shall not require Guarantor (or Borrower) to advance more than $750,000 under the Guarantee." (PX.2, A. 2). "Borrower" was defined as Titusville, and thus payments by the partnership clearly count against the $750,000 obligation. Therefore, the question whether the Operating Deficit Guarantee is only a personal obligation, or also represents a partnership obligation, does not determine whether the $750,000 Operating Deficit Guarantee obligation would be paid or reduced from funds Barnett obtained from the Letter of Credit that Levitt caused Titusville to provide.

Furthermore, the Letter of Credit was an obligation only of the issuing bank, not of either Titusville or Levitt. It was, as the District Court correctly stated, a contribution by Titusville to its equity in the project, and considered by the parties as the equivalent of a cash deposit. The Letter of Credit was a source or means of payment of or security for Titusville's or

Levitt's obligations. It did not, as the District Court erroneously concluded, represent an additional, cumulative obligation in itself.

The District Court also relied heavily on the alleged lack of any set-off language in the Operating Deficit Guarantee. Citing to E. A. Turner Constr. Co. v. Demetree Bldrs., Inc., 141 So.2d 312 (Fla. 1st DCA 1962),[10] the District court concluded that if "Titusville and Levitt intended to reduce their financial exposure on operating deficits, they should have included set-off or reduction language in the guarantee." 560 So.2d at 1340. The District Court, however, failed to consider that although the Guarantee does not expressly refer to a set-off or the Letter of Credit, the Guarantee is far from silent on the subject. The last phrase of the Guarantee provides that the $750,000 obligation was, "exclusive of any amounts that may be available

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10 Turner Constr. Co., 141 So.2d 312, is distinguishable and not controlling in this appeal. In that decision, the contract at issue was found to be "a complete statement of the whole contract," 141 So.2d at 314, and the court found that the parol evidence offered would have varied the written contract. Id. In this case, although the Guarantee of Completion provides that it "represents the entire agreement between Issuer and Guarantor," the guarantee also expressly refers to other contemporaneous documents and clearly shows that it was only a part of one single, larger transaction. Moreover, the extrinsic evidence offered by Titusville and Levitt did not vary or contradict any written agreements, but rather illustrated how the loan documents related to each other. Moreover, the evidence was consistent with a, if not the only, reasonable construction of the Guarantee's terms. See Saco Development, Inc. v. Joseph Bucheck Construction Corp., 373 So.2d 419, 421 (Fla. 1st DCA 1979), and Warner v. Caldwell, 354 So.2d 91, 96 (Fla. 3d DCA 1977).

for operating deficits from Bond Proceeds," [PX. 2, p.4]. By including this provision, Barnett and the underwriter, Smith Barney, understandably sought to prevent Titusville and Levitt from claiming that they satisfied the $750,000 Operating Deficit Guarantee by spending amounts advanced under the loan of Bond Proceeds. But by including this exclusion, and limiting it only to Bond Proceeds, the parties demonstrated an intent that funds used for operating deficits and caused to be paid by Titusville or Levitt from any source other than Bond Proceeds would count against their $750,000 obligation. The District Court in effect construed the last phrase of the Operating Deficit Guarantee to read, "exclusive of any amounts that may be available for operating deficits from Bond Proceeds or the Letter of Credit." Such a construction, however, is beyond the clear language and meaning of the Operating Deficit Guarantee. At paragraph eight of the Official Statement (PX.4, A.4), the estimated sources of funds included not only Bond Proceeds, but also owner's equity, which consisted in part of the $511,000 Letter of Credit. If Kenneth Becker, the underwriter's representative who suggested the phrase "exclusive of any amounts . . ." intended also to exclude amounts drawn under the Letter of Credit, this should have occurred to, and been suggested by, him at the same time he inserted language excluding Bond Proceeds.

Additional disputes over, or apparent ambiguities in, the language of the Operating Deficit Guarantee were created by Barnett's construction of the Guarantee's terms as applied to

draws on the Letter of Credit. Barnett argued to the courts below that the phrase "under this Guarantee" in the Operating Deficit Guarantee implies that the $750,000 limit on Titusville's and Levitt's obligation relates only to that Guarantee and does not limit any separate obligation purportedly represented by the Letter of Credit. However, the Operating Deficit Guarantee language itself, read in context, does not support Barnett's position. The Operating Deficit Guarantee was inserted as a new paragraph four in the Guarantee of Completion," which had been prepared prior to the closing. (Dec. T. 145-50; PX.10, DX. 11). Accordingly, the Guarantee of Completion, as finally executed, actually contains two separate guarantees, the unlimited guarantee to complete construction and the Operating Deficit Guarantee limited to $750,000. (PX 2). The phrase "under this Guarantee" was thus inserted to clarify that the $750,000 limit applied only to the Operating Deficit Guarantee in paragraph Four and not to the unlimited construction guarantee. (Aug. T. 281-2; Dec. T. 158). Barnett's argument distorts the language of the Operating Deficit Guarantee by seeking to have it read out of the context in which it was drafted.

Moreover, although the phrase "cause to pay" is not defined in the Operating Deficit Guarantee, it was undisputed that Levitt, acting for Titusville, was responsible for obtaining the Letter of Credit (Dec. T. 42-45; DX. 8, 9, 10) and was personally liable for reimbursing the issuing bank for any draws made against it. (Dec. T. 42-45; DX. 8, 9, 10). Accordingly, the

evidence below was uncontroverted that if Barnett obtains funds from drawing on the Letter of Credit, Titusville or Levitt will have caused those funds to have been paid within the meaning of the Operating Deficit Guarantee. Finally, it was undisputed that construction of the project financed by the bond offering was complete (Dec. T. 74) and that any draws by Barnett on the Letter of Credit would therefore be used to apply to debt service, which was agreed by all parties to constitute an "operating deficit," as that term was used in the Operating Deficit Guarantee.[11]

In summary, any funds obtained by Barnett through draws on the Letter of Credit would constitute funds which Titusville or Levitt caused to pay, such funds would necessarily be used for the same operating deficits covered by the Guarantee, and any such funds would not constitute Bond Proceeds. Accordingly, under the language of the Operating Deficit Guarantee itself, such funds would apply against the $750,000 obligation of the Guarantee. If Barnett were allowed to recover against Titusville or Levitt up to the full amount of $750,000 Guarantee, and at the same time allowed to retain funds drawn on the Letter of Credit, Titusville or Levitt and would have been required wrongfully to advance more than the $750,000 for the specified operating deficits, contrary to the language of the Operating Deficit Guarantee.

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11 In any event, the parol evidence rule would not bar the consideration of evidence relevant to the petitioners' performance of their obligations, such as the evidence regarding petitioners' obtaining, and being liable for reimbursement of amounts drawn under, the Letter of Credit and then completing construction of the project.

Nothing in the decision of the District Court demonstrates why or how the testimony offered by Titusville and Levitt below, which must be accepted as true for the purposes of this appeal, necessarily varies or contradicts the language of the Operating Deficit Guarantee. Perhaps the Guarantee should have specifically addressed how draws against the Letter of Credit would affect the obligations under the Guarantee. Had the Guarantee done so, perhaps there would have been no ambiguity in the documents and thus no need for this declaratory judgment action. However, the Operating Deficit Guarantee was negotiated at the eleventh hour, written out in hand at the closing and simply did not expressly address the issue. It is for this very reason that resort to extrinsic evidence was necessary to consider the context in which the Operating Deficit Guarantee and Letter of Credit were written. Indeed, Barnett went to great lengths in pre-trial discovery and at trial to develop and present extrinsic evidence concerning the intention of the parties. However, if the Guarantee does not clearly support the position advanced by Titusville and Levitt, the language of the Guarantee, as applied to draws under the Letter of Credit, is at least susceptible of being read the way Titusville's representatives testified it was intended to be read. Therefore, the interpretation of the agreements was an issue of fact for the trial court to decide. The District Court improperly substituted its judgment for that of the trial court. This Court should therefore quash the decision of the District Court below and reinstate the trial court's final declaratory judgment.

POINT THREE

THE DECLARATORY JUDGMENT BELOW WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE AFFIRMED

A. IN THE INTEREST OF JUDICIAL ECONOMY, THIS COURT SHOULD REVIEW THE SUFFICIENCY OF THE EVIDENCE AT TRIAL TO SUPPORT THE DECLARATORY JUDGMENT AND NOT REMAND THE ISSUE TO THE DISTRICT COURT.

This Court has held in several decisions that, once it acquires jurisdiction over a case by reason of conflict with another decision, the Court "will proceed to consider the entire cause on the merits," Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977), and review is not limited to the issues raised in the petition for certiorari. See D'Agostino v. State, 310 So.2d 12 (Fla. 1975); Brown v. State, 206 So.2d 377 (Fla. 1968); and Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961).

The District Court expressly stated that it did not address the issue whether competent, substantial evidence supported the decision of the trial court. 560 So.2d at 1338. However, this Court should address the issue and not remand it to the District Court for at least two reasons. First, the issue is closely related to one of the two issues the District Court did address. Second, a decision by this Court on all issues will bring this litigation to an end with the most efficient use of judicial resources.

B. THE TRIAL COURT'S DECLARATORY JUDGMENT IS PRESUMED CORRECT AND THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE TRIAL COURT

In Tibbs vs. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 US 31, 102 S.Ct. 2211, 72 L. Ed. 2d 652 (1982), this Court set forth the appropriate standard of review on appeal:

> As a general proposition, an appellate court shall not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom had been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.
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> 397 So.2d at 1123.

Indeed, it is well settled that a "judgment rendered in a non-jury trial is presumed correct and the trial judge's findings have the quality of jury verdict." Mitchell v. Morse Operations, Inc., 276 So.2d 248, 249 (Fla. 3d DCA 1973). As stated in Herzog v. Herzog 346 So.2d 56, 57 (Fla. 1977):

> Even if the appellate court disagrees with the trial court and would have reached a different conclusion had it been in the shoes of the trial court, barring a lack of substantial evidentiary support for the findings of the trial court, the judgment should be affirmed.

There were sharp conflicts in the evidence concerning the meaning of the agreements at issue, the negotiations which preceded the agreements and the intention of the parties. However, it was for the trial court to hear the evidence, weigh the credibility of the witnesses and resolve disputed issues of fact. Neither this Court nor the District Court can retry the case or reweigh the conflicting evidence on appeal. All such conflicts must be resolved against Barnett and cannot constitute grounds for reversal of the judgment below.

C. THE DECLARATORY JUDGMENT IS WELL SUPPORTED BY THE EVIDENCE.

1. BARNETT ITSELF INTRODUCED SUBSTANTIAL PAROL EVIDENCE AT TRIAL AND THUS WAIVED ANY OBJECTIONS BASED ON THE PAROL EVIDENCE RULE

Barnett waived any objections to parol evidence by itself offering parol evidence and by failing to object at trial to the parol evidence offered by Titusville and Levitt. In Ross v. Florida Sun Life Insurance Company, 124 So.2d 892 (Fla. 2d DCA 1960), the trial court in a non-jury trial admitted evidence of an alleged prior oral agreement which purportedly varied the terms of the contract at issue. The appellant failed to object to the oral testimony at trial. On appeal, the appellant urged that, since the parol evidence rule is a rule of substantative law and not evidence, there could be no waiver by failing to object at trial. After an extensive survey of the law, the court disagreed and concluded "that the appellant, by failing to make

timely objection in the lower court, has waived his right to raise this objection on appeal." 124 So.2d at 898.

Similarly, at the trial in this action, Barnett relied extensively on parol evidence. It its opening statement, Barnett stated, "The evidence is going to show that this is basically a factual case." (Aug. T.15).

At trial, Barnett offered in its case-in-chief, testimony concerning the intent of the parties' from the depositions of the underwriter, Kenneth Becker, Becker's attorney, Donald Clark, and bond counsel, Mary Sullivan. Becker's testimony related to discussions he had with Price concerning Price's alleged initial agreement to provide a $1,000,000 letter of credit and the heated negotiations at the closing which led to the drafting of the $750,000 Operating Deficit Guarantee. (Aug. T.90-91, 94-97). Barnett thus introduced parol evidence concerning the negotiations between the parties concerning the Guarantee and Letter of Credit, the deal struck by the parties as a compromise at the closing, and the relationship between the Operating Deficit Guarantee and Letter of Credit. By introducing that evidence, Barnett cannot complain on appeal that the trial court should not have considered parol evidence.

2. THE TESTIMONY OF KENNETH PRICE SUPPORTS THE JUDGMENT.

The testimony of Kenneth Price, Titusville's representative, was more reasonable and credible than the testimony of Kenneth Bicker, the witness on which petitioners primarily relied. The trial court heard the testimony of the two men, received extensive oral and written argument from the parties concerning the weight to be afforded each man's testimony, and resolved the conflicts in favor of Titusville and Levitt. The trial court's findings, therefore, should not be disturbed on appeal, and Price's testimony must be accepted as true.

A key area of conflict between the testimony of Price and Becker revolved around their negotiations over the telephone prior to the closing. In the courts below, Barnett relied heavily on Becker's testimony that on December 19, Price agreed to increase the amount of the Letter of Credit from $511,000 to $1,000,000. In his testimony, however, Price denied any agreement to supply a $1,000,000 Letter of Credit. (Dec. T. 46). He instead testified how the amount of the Letter of Credit was determined and that based on the estimated sources and uses of funds as of December 19, the amount of the letter of credit was to be $511,000. (Dec. T. 40-41). Price then confirmed this in a letter dated the same day to Becker and bond counsel (Dec. T. 38, DX. 7) and did not discuss the matter again with Becker until they were present at the closing. (Dec. T. 40-41, 45). The trial court apparently accepted Price's testimony on these facts as more credible and persuasive than Becker's.

Additionally, Price's testimony regarding the negotiations at the closing was more credible and reasonable than Becker's. In the negotiations, Price testified that he repeatedly emphasized to Becker that the amount of the Operating Deficit Guarantee would represent Levitt's total exposure for operating deficits. (Dec. T. 50, 73). Becker, being very familiar with Levitt and Levitt's finances (Aug. T. 109, 113), knew that if there were any draws on the Letter of Credit, the amount of those draws would be paid by Levitt. Thus, the potential for draws on the Letter of Credit to pay for operating deficits affected Levitt's total monetary exposure, which was, from Price's point of view, the only important issue. Becker, therefore, had every reason to know that when Price repeatedly stated that Levitt's exposure for operating deficits would not exceed $750,000, Price also intended to include in that amount any funds obtained from the Letter of Credit which were used to pay the very same operating deficits that were the subject of the Guarantee. It was not credible for Becker to claim he obtained a personal commitment of both the $511,000 Letter of Credit and the $750,000 guarantee, for a total of $1,261,000 in a compromise with Price at the closing, when, as Becker acknowledges, Price was objecting to posting a $1,000,000 Letter of Credit.

For all these reasons, and as found by the trial court, Price's testimony regarding the negotiations at the closing was more persuasive and credible than Becker's and provides ample support for the judgment below.

3. THE BOND DISCLOSURE DOCUMENTS, WHEN REVIEWED IN CONTEXT, DO NOT SUPPORT BARNETT'S POSITION.

In the courts below, Barnett relied heavily on language from pages 23 and 24 of the Official Statement (the "OS") (PX.4). However, even bond counsel, Mary Sullivan, distinguished between the documents which actually constitute the parties' agreement and the bond disclosure documents such as the OS. Ms. Sullivan testified that the OS "was something that describes the issue, describes the bond issue, but really doesn't establish the way the issue works." (Aug. T. 243). She also testified that the OS "is not the legal document that drive[s] the deal" (Aug. T. 243), and that "the rights of the parties would be determined by the transaction documents and not what the official statement says about them." (Aug. T. 276). Moreover, the OS contains an express disclaimer that its summaries of the transaction documents are not "comprehensive or definitive" and are "qualified in their entirety" by reference to those documents (PX.4, p. 2). Accordingly, the parties' rights are actually determined by the operative agreements themselves, for example, the Guarantee of Completion (PX.2, A. 2), mortgage (DX. 3), Financing Agreement (PX.3) and Trust Indenture (DX. 4), and not by the disclosure documents such as the POS or OS.

Barnett nevertheless argued at trial that in the last paragraph of page 23 of the OS (PX.4), the reference that "Michael J. Levitt has <u>further</u> agreed," coming just after the

paragraph describing the Letter of Credit, indicates that the Operating Deficit Guarantee was to be in addition to and cumulative of the Letter of Credit. However, this argument is misleading and uses the term "further agreed" out of context. In reviewing the mark-up of the POS maintained by the underwriter's counsel, Donald Clark (PX.9, A. 5), it is clear that the language in the final OS is derived from the photocopied page of the draft Operating Deficit Guarantee which was inserted between pages 24 and 25 of Donald Clark's marked-up draft of the POS. (PX.9, A. 5). That page demonstrates that the "further agreed" language relates to Levitt further agreeing to provide the Operating Deficit Guarantee in addition to the guarantee to complete construction which was set forth in the immediately preceding paragraphs of the Guarantee of Completion. Thus, the "further agreed" language in the last paragraph of page 23 of the OS in no way refers the Letter of Credit.

The only information in the entire POS or OS arguably inconsistent with Titusville's and Levitt's position at trial is the chart at the top of page 24 of the OS. (PX.4). Kenneth Price and Paul Chan, petitioners' attorney, both testified that they were not provided a copy of the printed version of the proposed changes in the POS before the OS was printed. (Dec. T. 62,63, 66-68,170). Barnett did not introduce at trial a copy of the OS bearing a signature by Price or Levitt. Nor did Barnett introduce any document evidencing circulation of the draft of the OS after closing, although Barnett saw fit to offer in evidence a

letter from Paul Chan circulating after closing the agreed-upon changes in the Guarantee of Completion (PX.10, A. 3). Accordingly, the only notice to Price or Chan of the language of the Operating Deficit Guarantee to be inserted in the OS was provided by the photocopied page which was apparently inserted at some point by Donald Clark between pages 24 and 25 of his mark-up of the POS. (PX.9, A. 5).

The front side of this page is simply a photocopy of the actual draft of the Operating Deficit Guarantee language. On the reverse side of the page are handwritten notes and a series of numbers. Neither Price nor Chan remembered being shown the numbers or other material on the back side of this page. (Dec. T. 62,168). Moreover, Price testified that not all pages of Clark's marked-up POS were fastened together when Price signed the signature page. (Dec. T. 64). Furthermore, the references at the top of page 24 of the OS to the $290,579 as being available from the Letter of Credit and the $750,000 as being available from Levitt's guarantee were not in the handwritten sheet purportedly shown to Price and Chan at closing. (PX.9). Indeed, there is nothing in the handwritten sheet to indicate to what the $290 or $750 figures related. (PX.9, Dec. T.62). It is easy to understand how Price or Chan would not have comprehended the significance which Barnett later attributed to the chart even if it were specifically shown to them, which under the circumstances is highly doubtful.

Considering all of these factors and the extreme time constraints and other circumstances at the closing, the trial court was certainly justified in affording little probative value to the chart at the top of page 24 of the OS in ascertaining the intention or understanding of the parties.

CONCLUSION

For the reasons stated, this court should quash the decision of the District Court below and reinstate the final declaratory judgment entered by the trial court.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by mail to Christine R. Milton, Esq., Post Office Box 4099, Jacksonville, Florida 32201, this 9th day of January, 1991.

Attorney