IN THE SUPREME COURT OF FLORIDA

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

Petitioners/Defendants,

Case No. 76,427

vs.

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

Respondent/Plaintiff.

RESPONDENT'S REPLY BRIEF

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DESIGNATION OF THE PARTIES AND REFERENCE TO THE RECORD

The Respondent, Barnett Banks Trust Company, N.A., as Trustee, will be referred to as "Trustee."

The Petitioners, Titusville Associates, Ltd. and Michael J. Levitt, will be referred to as "Partnership" and "Levitt," respectively or Petitioners.

The designation "R _____" refers to the designation of documents in the record on appeal, as assigned by the clerk of the lower tribunal. The designations, "Aug. T. _____" and "Dec. T. _____", refer, respectively, to the transcript of proceedings on August 29, 1988 and December 8, 1988.

The designation's "PX._____" and "DX._____", refer, respectively, to the Trustee's exhibits and Petitioners' exhibits referenced in the transcript.

STATEMENT OF THE CASE AND FACTS

Because the Statement of the Case and Facts supplied by the Petitioners is misleading and contains numerous arguments under the guise of "facts," the Respondent, Barnett Banks Trust Company, N.A. (the "Trustee"), pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, submits its own statement.

The declaratory judgment action below arises from an offering of certain industrial development revenue bonds (the "Bonds") issued in connection with the financing, construction and operation of a senior citizen retirement facility located in Titusville, Brevard County, Florida (the "Titusville Project" or the "Project").

In broad summary, in a public offering of bonds issued in transactions such as this, a public entity issues the bonds, sells the bonds to an underwriter, and then loans to a develper the proceeds from the sale of the bonds to finance the developer's construction of a project. The bonds are sold by the underwriter to the public (the "Bondholders") and the public entity assigns to a trustee the issuer's rights on behalf of the Bondholders to enforce the Bond transaction documents. In the instant transaction, the public entity issuing the Bonds was Brevard County (the "Issuer"), the underwriter who initially purchased the Bonds and sold them to the Bondholders was Smith Barney, Harris Upham & Co. ("Smith Barney"), the developer who was loaned the proceeds of the sale of the Bonds to build the Project was Titusville Associates, Ltd (the "Partnership"), the individual who was the

General Partner of the Partnership, and an individual guarantor, was Michael J. Levitt ("Levitt"), and the trustee who was assigned the Issuer's right under the Bond document transaction was Barnett Banks Trust Company, N.A. (the "Trustee"). The Bond issue was in the original principal amount of $7,250,000 and it closed on December 27, 1985.

The developer loan was evidenced by a promissory note, which was secured, in part, by a non-recourse mortgage given by the Partnership on the Titusville Project. The Partnership also provided an irrevocable Letter of Credit (the "Letter of Credit") (PX. 1) in the amount of $511,000.00 from Continental Bank, Philadelphia, Pennsylvania (the "Letter of Credit Bank") naming the Trustee as beneficiary, and originally set to expire on July 1, 1988. As additional security for the Bondholders, Levitt, individually, executed and delivered to Brevard County as the Issuer a Guarantee of Completion (the "Guarantee") in which, inter alia, Levitt guaranteed the completion of the Project as well as prompt payment of all operating deficits of the Project up to $750,000.00 for a period of three years beginning in approximately January 1987. (PX. 2) Only that portion of the Guarantee which concerns the payment of operating deficits is involved in this appeal, hence all references to the Guarantee relate only to that operating deficits guarantee unless otherwise indicated.[1]

[1] The guarantee at issue, the operating deficits Guarantee, is contained in paragraph 4 of the Document entitled Guarantee of Completion, appended to this brief at Tab F. The letter of Credit is appended at Tab E.

Once the transaction became unprofitable to the Partnership, it defaulted under its obligations and the Trustee instituted foreclosure proceedings. Because the Trustee was concerned with the Partnership's threat to seek "supplemental relief" (presumably in a foreign jurisdiction) (see Petitioner's Brief p. 26, n.8) if the Trustee drew on the Letter of Credit, the Trustee filed the action in circuit court seeking a determination that it was entitled to collect, for the benefit of Bondholders, the full amount of the $750,000.00 Guarantee from Levitt and draw on the $511,000.00 Letter of Credit provided by the Partnership. The Trustee's position is that the Guarantee and the Letter of Credit by their clear and unambiguous terms provide two separate and independent sources of security for the Bondholders.

The Partnership and Levitt counterclaimed and asserted that the Trustee could collect no more than $750,000.00 on behalf of the Bondholders because the Letter of Credit issued by the Partnership was simply security for Levitt's personal obligation under the Guarantee; in short, that Levitt was entitled to an unwritten right of set-off under the Guaranty by the amount of the Partnership's Letter of Credit.

Twenty days before trial, the Trustee served its summary judgment motion on the ground that the language of the Letter of Credit and Guarantee was clear and unambiguous and clearly established that the Bondholders were entitled to recover both monies from the Partnership under the Letter of Credit and monies from Levitt under the Guarantee. On the date set for the hearing,

the trial court refused to consider the summary judgment motion on the basis of Petitioner's claim that Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984), mandated that a Notice Of Hearing on a Motion for Summary Judgment must be served twenty days before the hearing.

The trial court proceeded to receive two days worth of extrinsic evidence concerning the intent of the parties in providing the Letter of Credit and drafting and executing the Guaranty. On March 3, 1989, the trial court entered its order finding that, despite the language of those two documents, Levitt was entitled to offset the amount he guaranteed by the amount of the Letter of Credit provided by the Partnership and that once Levitt satisfied his $750,000.00 obligation under the Guarantee, the Partnership would have no further liability under the Letter of Credit.

The Trustee appealed, and the first district summarily reversed, holding that, first, the trial court erroneously construed Rule 1.510(c), Florida Rules of Civil Procedure, and should have considered the Trustee's Motion for Summary Judgment and, second, that this error required reversal, as the documents at issue were clear and unambiguous and the Trustee was entitled to a judgment as a matter of law. Barnett Banks Trust Company, N.A. v. Titusville Associates, Ltd., 560 So.2d 1337 (Fla. 1st DCA 1990).[2]

[2]This decision is appended to this brief at Tab A.

The petitioners petitioned this Court for review and on November 21, 1990, this Court accepted jurisdiction pursuant to Article V, section 3(b)(3), Florida Constitution, based on an apparent conflict between the decision of the district court in this case and that of the fourth district in Wakefield Nursery v. Hunter, supra.

SUMMARY OF ARGUMENT

This Court's jurisdiction under Article V, section 3(b)(3), Florida Constitution, exists in order to ensure uniformity in the decisional law announced by the various district courts. This court took jurisdiction over this case, entitled Barnett Banks Trust Company, N.A. v. Titusville Associates, Ltd., 560 So.2d 1337 (Fla. 1st DCA 1990), based upon an apparent conflict with that decision and the decision in Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984). It is this issue only which should be the focus of this court's attention, as it was solely the trial court's error below in refusing to hear Barnett's Motion for Summary Judgment, based upon Wakefield Nursery v. Hunter, supra, that formed the basis for the holding of the district court, namely that the documents at issue in this case, the Letter of Credit provided by the Partnership and the Guarantee executed by Levitt individually, were clear and unambiguous and entitled the Trustee to a judgment as a matter of law.

While this Court can, of course, review any issue it deems necessary once it has jurisdiction over a case, the sole issue worthy of this court's consideration in this case is whether the district court's holding concerning the requirements of Rule 1.510(c), Florida Rules of Civil Procedure, which holding was based upon the plain language of the rule and the almost unanimous case law construing the rule, is correct or whether the aberrant decision rendered in Wakefield Nursery v. Hunter, supra, which is based upon a misapplication of authority, is contrary to the plain

language of the rule and has never been relied upon by any other court, should now become the law in this state.

The Petitioners pay only brief lip service to this dispositive issue in its initial brief and implies that the Notice of Hearing was "unreasonable" in this case. The sole basis for the trial court's decision, and the district court's reversal thereof, was based upon the Petitioners' argument that the trial court did not have to consider the Trustee's Motion for Summary Judgment because the Notice of Hearing was not served along with the Motion for Summary Judgment.

The vast majority of the Petitioners' brief is a testament to why the parol evidence rule continues to have vitality in this and every other jurisdiction, as the testimony relied upon is based upon fading memories and the clear light of hindsight illuminating a deal gone sour. As this Court has repeatedly held, the making of a contract depends "not on the parties having meant the same thing but on their having said the same thing." Gendvier v. Bielecki, 97 So.2d 604, 608 (Fla. 1957).

The two documents at issue in this case, the Letter of Credit and the Guarantee, are clear and unambiguous, and the trial court was obligated under well-settled rules of contract construction to give those documents their clear effect. It was, therefore, reversible error for the trial court to have refused to exercise that obligation and to have held a trial on what the parties may have subjectively "intended" in entering into this transaction. This is the ultimate holding from the district court below and why

the trial court's failure to consider the Trustee's Motion for Summary Judgment was a predicate for the district court's reversal.

By resorting to arguments concerning the "context" in which these documents were executed, and the "larger transaction" at issue in this case, Petitioners ask nothing less than for this Court to both ignore the Petitioners use of parol evidence at trial in this case to modify and vary unambiguous documents, and to disregard the distinct and insular body of law concerning letters of credit and guarantees and rewrite a bargain which Petitioners, in retrospect, wish they had obtained.

The position is without a legal basis as the two documents at issue stand alone, and are, as a matter of law, independent of each other. The district court below correctly rectified the trial court's error, and rejected the argument.

This Court should take this opportunity to disapprove the erroneous interpretation of Rule 1.510(c) set forth in the decision of the fourth district in Wakefield Nursery v. Hunter, supra, and thereby eliminate the potential for legal gamesmanship it encourages, and approve the decision of the district court in this case, and all other district courts to address the issue.

ARGUMENT

I. THE DISTRICT COURT'S INTERPRETATION OF RULE 1.510(c) WAS CORRECT.

On August 9, 1988, the Trustee served its Motion for Summary Judgment by hand on counsel for the Petitioners (Aug. T. 7). Counsel for the Trustee had attempted well prior to serving the motion to coordinate with opposing counsel scheduling a hearing on this Motion. Because of vacation schedules and the lack of time available on the trial judge's calendar prior to the start of trial, counsel for the Trustee served opposing counsel by hand with a Notice of Hearing on August 19, 1988 indicating that the Motion would be heard by the trial court on August 29, 1988 before the start of the bench trial. (Aug. T. 5-10).[3]

When the Trustee announced it was ready to argue its Motion, counsel for Petitioners objected to the Motion even being considered, solely on the ground that the Notice of Hearing on the Motion was not served twenty days prior to the date of the hearing:

> THE COURT: Christine, you have the motion for summary judgment set for this morning?
>
> MRS. MILTON (Trustee's Counsel): Yes, sir. We had noticed it or we had filed it's previously, and I called Glenda several weeks ago to see if the motion could be heard prior to trial.
>
> And because of court calendars and vacations and so forth, we simply could not have it heard prior to this morning, so we would request that we have the right to present it this morning.

[3] The relevant pages of this transcript are appended to this Brief at Tab B.

THE COURT: All right.

MR. WALLACE (Petitioner's Counsel): Judge, we object to that being done because there was not sufficient time between the time when this motion was noticed for hearing and today's trial date.

The rules require that a notice of hearing be served twenty days ahead of time. That was not done here. The notice of hearing was served just about ten days before. So they have not complied with the rules.

If you were to grant a summary judgment, it would be reversible error and we would be back here in six months. There is a case I have that is on point. It's called Wakefield Nursery v. Hunter at 443 So. 2d 465. It's a Fourth D.C.A. case and it's real short.

"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 required twenty days notice", and it cites the rule and cites another case.

Judge, also, we just object --

THE COURT: Christine, I think we have a problem there, do we not, in the absence of agreement?

MR. PEREZ (Trustee's Counsel): Judge, let me respond to that. I think the rule specifically provides that the motion must be filed within twenty days of the hearing.

I can represent to the Court that I spoke with Mr. Wallace prior to filing this motion, at least twenty days before, and he got a copy by hand delivery of the motion itself within or before the twenty-day period actually began.

It is true that the notice was filed within the intervening time. But unlike this Fourth D.C.A. case, which you know is not binding on you, there was more than eight days. There was at least ten, maybe even

fifteen days before this hearing. He had ample opportunity --

THE COURT: The motion was filed August 10th.

MR. PEREZ: Yes, sir. And we're on August 29th, so he had nineteen days. Well, it was served, excuse me. And it's not filed. It's actually served on the party, and that is the way the rule reads.

THE COURT: It was hand delivered on the 9th of August, is that correct?

MR. WALLACE: That's right. I don't have a problem with that.

MR. PEREZ: Judge, let me read from the rule. It's Rule 1.510(c):

"The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing."

The rule contemplates the motion, not the notice, and it contemplates it to be served, not filed.

THE COURT: Does your case talk about notice or motion?

MR. WALLACE: The notice, Judge. I can understand Mr. Perez's argument. That is just not the way it's been construed by the Fourth D.C.A.

MR. PEREZ: Judge, I haven't seen that case.

THE COURT: "We reverse because --"

I quote: "We reverse because only eight days transpired between the date of the notice and the date of the hearing whereas the rule clearly required twenty days notice", citing 1.510(c).

MR. PEREZ: Well, that case might not specify, Judge, whether the motion for summary judgment accompanied the notice.

I think you know as well as everybody in this room that it's typical practice for attorneys to notice the summary judgment motion before even preparing the motion for summary judgment at times, and it could be that the motion wasn't even filed.

THE COURT: All they talk about is the notice in that case.

MR. WALLACE: Judge, that Greer case that is decided there, it was back when the rule was ten days. Well, maybe I am wrong. Maybe it's twenty days. But here in the Greer case, it had a motion for summary judgment. This is Greer -- I am sorry -- Greer versus Workman at 203 So. 2d 665. It's another Fourth D.C.A. case. It's the case relied upon in the other case I cited.

But there they had filed a motion for summary judgment a long time previously, had been set for hearing and never came up for hearing. It was laying there pending in the file, and then there was notice for the hearing but the notice didn't give the twenty-day period. And there the Court said that wasn't sufficient.

MR. PEREZ: (d) is the rule we're relying on, Judge. I am sorry, (c).

THE COURT: All right.

MR. PEREZ: I think, Judge, a fair reading of that case, twenty days notice would mean twenty days notice, that is, of the receipt of the motion for summary judgment, not the notice of hearing.

MR. WALLACE: Judge, that is just not --

THE COURT: That just doesn't appear to be a fair interpretation of the reading of that case. Whether the case is right or not, I am not going to argue with you. There is some question. But I don't think a fair reading of the case is clear that they are

requiring a twenty days notice before hearing. And it's strange that the rule doesn't speak to the notice requirement.

I think the rule probably contemplates the notice should be served simultaneously with the motion.

Based upon the Fourth D.C.A. case, having no other case interpreting the rule, I will have to go along with it. The motion will not be considered at this time.

(Aug. Tr. pgs. 5-10) (emphasis supplied).

It is clear from the above recited colloquy that there was no argument whatsoever by the Petitioners that the Notice of Hearing was "unreasonable" under the circumstances. In fact, it is quite clear that counsel for the Trustee had previously, i.e., before even serving the Motion for Summary Judgment, attempted to coordinate with counsel for the Petitioners and the court's schedule to see when prior to the scheduled trial date the Motion could be heard. Because that issue could not be resolved, the Trustee served its Motion for Summary Judgment twenty days prior to the date of hearing as required by rule 1.510(c), and the Notice of Hearing was served ten days after the motion was served. There is no question that the implication (Petitioner's Brief at 21), that the Notice was "unreasonable" under the circumstances, has simply been raised to obfuscate the sole legal basis for the Petitioners' argument, and the trial court's acceptance thereof, which the district court below correctly rejected.

The decision relied upon by the Petitioners, Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984), is the sole aberrant

decision in this state which holds that the unambiguous requirements of Rule 1.510 require that the Notice of Hearing must be served twenty days prior to a Motion for Summary Judgment being argued. Rule 1.510, entitled Summary Judgment, has several subparts, of which subsection (c) is entitled Motion and proceedings thereon, and provides in relevant part:

> The Motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. (emphasis supplied).

By its plain terms, the Rule requires only that the Motion for Summary Judgment be served at least twenty days before a hearing thereon. The reason for the rule is manifest: to allow opposing counsel, at a minimum, twenty days within which to prepare a response to the Motion for Summary Judgment.

The district courts in this state are in uniform agreement, with the sole aberrant exception of Wakefield Nursery v. Hunter, supra, that the clear requirements of Rule 1.510 are met when a Motion for Summary Judgment is served twenty days before a hearing thereon. For Example, in Norton v. Gibson, 532 So.2d 1325 (Fla. 1st DCA 1988), the first district held:

> It is well established that it reversible error to grant summary judgment pursuant to a Motion which has not been served in accordance with the twenty day time requirement of Rule 1.510(c).

Id. at 1326 (emphasis supplied).

See also Brock v. G.D. Searle and Co., 530 So.2d 428 (Fla. 1st DCA 1988) (error to grant summary judgment based on a Motion which failed to comply with the twenty day requirement of the Rule); Fruhmorgen v. Watson, 490 So.2d 1032 (Fla. 2d DCA 1986) (error to grant a party's oral motion for summary judgment made on the day a case is set for trial because the notice requirements of Rule 1.510(c) require that a Motion for Summary Judgment be served at least twenty days before the hearing); Gold v. ElCamino Mortgage Corp., 491 So.2d 322 (Fla. 3d DCA 1986) (appellees failed to serve the appellants with their Motion for Summary Judgment as required by Rule 1.510(c)).

There are, in fact, two notice requirements built into Rule 1.510(c). First, the Motion itself must be filed twenty days prior to a hearing thereon in order to prevent surprise to opposing counsel and to allow opposing counsel at least twenty days within which to prepare a response to the Motion for Summary Judgment. See Cook v. Navy Point, Inc., So.2d 532 (Fla. 1956). Second, Rule 1.510(c) requires that the Motion itself must state with particularity the grounds upon which it is based and the law to be argued in order to give opposing counsel notice of the specific basis for the Motion.

What is clear from the Petitioners' argument is that it attempts to confuse the requirements of Rule 1.510(c) which solely concern a Motion for Summary Judgment, with the provisions of Rule 1.090(d). Rule 1.090(d), entitled "[Time] For Motions," which clearly encompasses a Motion for Summary Judgment, requires

reasonable notice under the circumstances. For example, in Johnson v. Henck, 482 So.2d 588 (Fla. 1st DCA 1986), the court held that a motion seeking relief from a trial court order with a Notice of Hearing served only two days prior to the hearing did not constitute reasonable notice as required by the rule. Similarly, in Hayman v. Hayman, 522 So.2d 531 (Fla. 2d DCA 1988), the court found that the reasonableness requirement of Rule 1.090(d) was not met when one party received written notice on the morning of a hearing that an emergency hearing was scheduled.

The only impact rule 1.510(c) has on the provisions of Rule 1.090(d), is that twenty days after the Motion is served and prior to a hearing thereon is impliedly "reasonable under the circumstances," for a hearing on a Motion for Summary Judgment.

The Partnership has set up a specious argument here inviting the court to uphold the trial court's, and the Wakefield court's erroneous view of Rule 1.510 on the grounds that this alleged "bright line" test it advocates will eliminate any questions as to what is reasonable under the circumstances.[4] The trial court did not base its ruling on the fact that the notice was unreasonable, i.e., counsel for the Petitioners did not have time to adequately

[4] As stated, this argument was not advanced by the Petitioners in the trial court, and has nothing to do with the issue presented for this Court's consideration.

prepare to respond to the Motion, but ruled only that it did not even have to consider the Trustee's Motion.[5]

Because the sole basis for the trial court's decision was Wakefield Nursery v. Hunter, supra, an analysis of that decision is in order.

In that case, the fourth district reversed a summary judgment apparently because the notice was served only eight days before the hearing; it is unclear whether the Motion for Summary Judgment was also served at the same time. 443 So.2d at 465. Therefore, as a threshold matter, it is unclear whether the court reversed the grant of summary judgment on the ground that the Motion was not served at least twenty days prior to the hearing as required by the rule or whether, as the Petitioners advocate, the Wakefield court misinterpreted the rule and reversed because the Notice of Hearing only was not served twenty days prior to the hearing.

Further, Wakefield inaccurately cites to its prior decision in Greer v. Workman, 203 So.2d 665 (Fla. 4th D.C.A. 1967), for its erroneous interpretation of Rule 1.510(c).[6] At issue in Greer was

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[5] As is evidenced by the trial transcripts set forth supra at pages 10-14, it is clear that counsel for the Trustee informed Petitioners' counsel well in advance of serving the Motion for Summary Judgment that the Motion was forthcoming, and attempted to schedule a date for a hearing on that motion which was convenient to the court and opposing counsel. In light of this unrefuted fact established in this record, the Petitioners' claim here (Brief at page 21) that the clear requirements of Rule 1.510(c) and the interpretation of the rule given by the district court below and the other district courts cited above, encourages "surprise and gamesmanship," is quite ironic.

[6] A copy of Wakefield v. Hunter and Greer v. Workman are appended to this Brief at Tabs C and D, respectively.

a "non-noticed, unserved motion" for summary judgment. Id. at 668. The district court found error in the grant of summary judgment based upon an unserved motion and held that Rule 1.36(b), Rules of Civil Procedure [the precursor to present Rule 1.510(c)], required ten days written notice of the application for judgment.

Accordingly, it is clear from a mere reading of the decision in Greer that the infirmity in the grant of summary judgment in that case had nothing whatsoever to do with the length of time given in the Notice of Hearing. Rather, it was solely the failure to serve the motion within the time required by the rule that was condemned by the court in Greer. Therefore, the decision in Wakefield is not only antithetical to the plain language of Rule 1.510(c), it also erroneously and inaccurately cites Greer as authority for its aberrant holding.

It was because of this uncertainty in both the factual nature presented in Wakefield and its apparent conflict with the case relied upon, Greer, that the district court below held that Wakefield was "ambiguous." 560 So.2d at 1340.

The district court below further correctly held that, if the Petitioners' interpretation of Wakefield was correct, the Wakefield court erroneously interpreted Rule 1.510(c). 560 So.2d at 1340. As set forth above, the opinion of the district court below is entirely consistent with the plain language of the rule and the construction given the rule by all other district courts to discuss this issue.

The assertion made by Petitioners herein that Fernandez v. Marino, 176 So.2d 587 (Fla. 3d DCA 1965), and John K. Brennan Co. v. Central Bank & Trust Co., 164 So.2d 525 (Fla. 2d DCA 1964) are consistent with Wakefield is simply inaccurate as a mere reading of those decisions reveals.

In Fernandez v. Marino, supra, the court held that it was error to enter summary judgment without notice to the defendant that the same would be heard. The facts in that case clearly demonstrate that the motion itself was not served. The Court stated:

> Although the Motion had been filed for many months it had not been served. . . 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.

176 So.2d at 589. (emphasis supplied).

For this holding, which fully comports with the analysis employed by the district court below in this case and all other appellate decisions in this state save for Wakefield Nursery v. Hunter, the Court in Fernandez v. Marino, cited to John K. Brennan Co. v. Central Bank & Trust Co., supra, which similarly held that summary judgment may only be entered after the opposing party has an opportunity to be heard on ten days written notice "of the application for the judgment." 164 So.2d at 530. (emphasis supplied). In Brennan, the trial court had entered summary judgment without any notice of hearing at all.

Significantly, no other court before Wakefield ever interpreted rule 1.510(c), or its predecessor, as the court apparently did in Wakefield, and no other court, including the fourth district, has ever cited, much less relied upon Wakefield in the almost seven years since it was decided. The most widely used treatise on Florida Civil Procedure also recognizes that Rule 1.510(c) does not govern the service of a Notice of Hearing on a Motion for Summary Judgment. See Trawick, Florida Practice and Procedure, Section 25-6 (1988 Ed.)

The Federal decisions cited by the petitioners herein are also in accordance with the decision of the first district below and contrary to Wakefield Nursery v. Hunter. Rule 56(c), Federal Rules of Civil Procedure, which governs Summary Judgments, provides in pertinent part:

> The motion shall be served at least ten days before the time fixed for the hearing.

By its plain terms Rule 56(c), as does it state counterpart Rule 1.510(c), governs only the service of a Motion for Summary Judgment itself. This court may judicially notice the fact that unlike state courts, attorneys do not set hearings or call up motions to be heard by federal courts; whether to have a hearing at all is totally decided by the court. For example, in Milburn v. United States, 734 F.2d 762 (11th Cir. 1984), the court recognized that there must be at least ten days after a Motion for Summary Judgment is served before either the court schedules a hearing or before the court takes the Motion under advisement.

The other federal cases cited by the Petitioners are all consistent with this interpretation of Rule 56(c). For example, in Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985), the district court rejected a motion to dismiss for failure to state a claim, but found that because there was no issue of material fact, the defendants were entitled to summary judgment. The eleventh circuit reversed, finding that Rule 56(c) requires express notice ten days in advance that the Court will take a Motion for Summary Judgment under advisement. Id. at 824. Significantly, the eleventh circuit recognized the inherent notice requirements built into Rule 56(c), identical to those built into Rule 1.510(c)[7]: by filing a Motion for Summary Judgment, the adverse party must be given express notice of the summary judgment rules, his right to file affidavits and other materials in opposition to the Motion and the consequences in failing to respond. Id. at 824.

For this noncontroversial proposition, the eleventh circuit cited its prior decision in Moore v. State of Florida, 703 F.2d 516 (11th Cir. 1983), wherein the court held that the provisions of Rule 56(c) require that the party faced with summary judgment must have ten days notice that Court will take the motion under advisement.

In Milburn v. United States, 734 So.2d 762 (11th Cir. 1984), and again in Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987), the court held that it is error for the trial court to consider a

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[7]See supra at page 16.

Motion for Summary Judgment on less than ten days notice that the court will hold oral argument or will take the motion under advisement.

Contrary to Petitioners' assertions herein, the requirements of Federal Rule 56(c) and Florida Rule 1.510(c) are entirely consistent in their scope and effect: any hearing on a Motion for Summary Judgment may not be held any sooner than twenty days after service of that motion under the state rule, or ten days under the federal rule. This puts practitioners on notice when a Motion for Summary Judgment is served upon them that they have a distinct and set minimum period of time within which to garner their response in opposition.

The parade of horribles outlined by Petitioners (Brief at 20-22) is specious. The argument that the "bright line rule" set forth in Wakefield is not only consistent with the language of Rule 1.510(c) and would support more certainty and uniformity to summary judgment proceedings as well as discourage surprise and gamesmanship is nonsensical.

The claim that the Wakefield interpretation provides more uniformity and certainty to summary judgment proceedings, quite frankly, flies in the face of reality. As discussed above, a recipient of a Motion for Summary Judgment knows that, at a minimum, he or she will have twenty days within which to prepare to defeat the Motion for Summary Judgment. As a practical matter, this Court can take judicial notice of the fact that finding enough time on our circuit courts' busy calendars within which to schedule

a contested Motion for Summary Judgment usually results in a hearing date far in excess of twenty days from the time a Motion for Summary Judgment is served.

Contrary to Petitioner's arguments, questions of what constitutes reasonable notice will not have to be regularly litigated as a party receiving a Motion for Summary Judgment already has notice of a twenty day at a minimum requirement within which to be prepared to respond and argue in opposition to the Motion being granted.

In sum, it is clear that any party served with a Motion for Summary Judgment may argue to the court that the minimum of twenty days he or she had to prepare a response is unreasonable under the circumstances, pursuant to Rule 1.090(d). Further, as a practical matter, because Rule 1.510(c) contains a guarantee that no Motion for Summary Judgment will be heard until, at the minimum, twenty days after the Motion itself is served, a party, in the absence of truly extraordinary circumstances, will have ample opportunity within which to prepare a response. Accordingly, this Court should approve the decision of the first district on this point and disapprove the aberrant decision rendered in Wakefield.

In this case, the trial court's failure to even consider the Trustee's motion based upon the Petitioners' patently incorrect reading of Rule 1.510(c) had a material and seriously prejudicial impact in this case: instead of simply reviewing the two documents at issue, finding they were clear and unambiguous and giving effect to the parties' agreement as the Trustee's Motion requested, the

trial court proceeded to take two days of extrinsic testimony concerning the parties subjective "intent" in executing the Guarantee and delivering the Letter of Credit. Had the trial court considered the Trustee's Motion for Summary Judgment and applied the proper rules of contract construction, the Motion would have been granted as the Trustee was entitled to a judgment as a matter of law. This error by the trial court was properly corrected by the district court below and its analysis is discussed next.

II. THE DISTRICT COURT BELOW CORRECTLY HELD THAT THE TRUSTEE WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

The issue before the trial court was simply one of construction of the particular contractual language contained in the Letter of Credit and the Guarantee. As will be demonstrated, the language of the Letter of Credit and the Guarantee is unequivocal and unambiguous. As the district court recognized, 560 So. at 1340, because these documents were clear and unambiguous, it was error for the trial court to allow parol evidence to modify, vary or contradict these documents.

Petitioners' claim (Brief at 24) that they do not take issue with the law regarding the independence of letters of credit, cannot withstand scrutiny. The essence of Petitioners' argument is directly contrary to the law concerning both letters of credit and the law concerning a right of set off in a guarantee which contains a cap on the amount guaranteed.

The Letter of Credit provides in pertinent part:

> The request for payment under this letter of credit shall be final and conclusive for all purposes without verification by

> Continental Bank and shall not be subject to refutation, denial, or contest.
>
> This letter of credit set forth in full the terms of our undertaking and such undertaking shall not in any way be modified amended or amplified by reference to any document, instrument, or agreement referred to herein or which this letter of credit is referred to or to which this letter of credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement.

This language clearly and unequivocally states that the Letter of Credit stands alone without modification by or reference to any other document. It could be drawn upon by the Trustee at any time, without reference to any other document or agreement, which draw the issuing bank must honor.

The case law concerning letters of credit unanimously holds that a court may not "interpret" the terms of a letter of credit or refer to documents outside of the letter itself, even if the letter of credit is referred to in other documents. In Fidelity National Bank v. Dade County, 371 So.2d 545, 546 (Fla. 3d D.C.A. 1979), the district court reversed a trial court judgment which had ruled against the bank finding that two documents, construed together, satisfied the requirement that a certificate containing certain information must be presented to the bank before the letter of credit could be drawn. As the district court held:

> The efficacy of the letter of credit as a convenient useful instrument of commerce would be severely damaged were the courts to hold the issuer to any duty beyond the ministerial ones of laying the instruments next to one another and determining whether they precisely coincide.

In In re Air Conditioning, Inc. v. Wendell, 72 BR 657 (S.D. Fla. 1987), the lower court had construed a letter of credit by examining the substance of the underlying transaction and, as advocated by the petitioners herein, found the letter of credit was "part of a single contemporaneous transaction." As the court held:

> Even though a letter of credit may be 'contemporaneous' with other agreements between debtors and creditors, it still includes by its very nature and purpose an independent agreement between the customer and the bank which is to be treated separately from the agreement existing between the customer and the beneficiary.
>
> In fact, the usefulness of a letter of credit as a recognized instrument of commerce rests on the premise that timely payment under the letter of credit will be forthcoming so long as the beneficiary complies with the terms and conditions of the letter of credit, regardless of any dispute between the account party and beneficiary or issuing bank . . .
>
> The essence of a letter of credit is the promise by a bank, or other issuer, to pay money. The key to the uniqueness of a letter of credit and to its commercial vitality is that the promise by the issuer is independent of any underlying contracts. [citations omitted].

Accord, Pringle-Associates Mortgage Corp. v. Southern National Bank, 571 F.2d 871 (5th Cir. 1978) (trial court erred in construing conditions to exist in a letter of credit on the basis of the underlying agreements; a court should not resort to those underlying agreements in interpreting a letter of credit); Management Service Ltd. v. Club Sea, Inc., 512 So.2d 1025 (Fla. 3d DCA 1987); Braun v. Intercontinental Bank, 466 So.2d 1130 (Fla. 3d

DCA 1985); Fidelity National Bank of South Miami v. Dade County, 371 So.2d 545 (Fla. 3d DCA 1979).

The Letter of Credit involved in this case could not be a more clear, direct and straight forward direction to the Continental Bank to pay the Trustee on behalf of the Partnership the full face amount of the Letter of Credit on demand without reference to any other document or claimed agreement of "offset" by any party or entity. As demonstrated by the case law discussed above, the Letter of Credit stands alone, independently and in isolation from any other agreement, regardless of whether it is a part of one transaction, and cannot be "offset" by payments made under any other document, such as in this case the Guarantee executed by Levitt, individually.

The essence of the Petitioners' claim here, in order to avoid the clear transgression by the trial court of the insular body of case law surrounding Letters of Credit, is that all the trial court decided was whether funds obtained by the Trustee by draws on the Letter of Credit would count against or act to satisfy or discharge the obligations under the $750,000.00 Guarantee. Conceding as it must that the Trustee could have drawn on the Letter of Credit at any time, Petitioners' argument is simply legerdemain. It has claimed that Levitt fully paid all sums due under the Guarantee at issue, i.e., in excess of $750,000.00, and therefore, the Trustee could not draw on the Letter of Credit despite the clear language of the Letter of Credit itself. (See Petitioners' Brief at 26,

n.8). Petitioners' claim here that it does not disagree with the law concerning the Letter of Credit is, therefore, meritless.

The other aspect of Petitioner's claim is that Levitt's Guarantee must be offset by the amount of the Partnership's Letter of Credit; this claim is belied not only by the plain language of the Guarantee itself, but also by the case law.

As with any other contract, any alleged right of offset would, of course, have to be found in the language of the Guarantee itself. See, E.A. Turner v. Demetree Builders, 141 So.2d 312 (Fla. 1st DCA 1962). Conspicuously, and dispositively, there is no such language in this Guarantee. In pertinent part the Guarantee provides:

> WHEREAS, Michael J. Levitt ("Guarantor") the General Partner of Borrower has derived or expects to derive a substantial financial or other advantage from the Project; and
>
> WHEREAS, the Issuer has required as a precondition to the Loan that the Guarantor guarantee that the Project be completed substantially in accordance with the Plans and Specifications as defined in the Loan Agreement and provide funds for operating deficits for a certain period of time.
>
> NOW THEREFORE, for other good and valuable consideration, the receipt of which is hereby acknowledge, the undersigned, Michael J. Levitt, hereby covenants and agrees with the Issuer as follows:
>
> * * *
>
> 4. Guarantor further agrees to cause Borrower to pay all Project operating deficits, as determined by Borrowers' certified accountants, for a period of three (3) years beginning after the receipt of a certificate of occupancy for the first Project Unit. This guarantee of operating deficits

shall not require the Guarantor (or Borrower) to advance more than $750,000 under this Guarantee, exclusive of any amounts that may be available for operating deficits from Bond proceeds.

* * *

7. This document represents the entire agreement between Issuer and Guarantor and no modification thereof shall be effective unless in writing and signed by the Issuer and Guarantor.

* * *

9. Guarantor hereby acknowledges and agrees that Guarantor is fully liable under these guarantees notwithstanding the non-recourse nature of the Borrower's liability. [Emphasis supplied]

Accordingly, the Guarantee provides:

(i) that Levitt is the guarantor;

(ii) that Levitt expects to derive a financial advantage from the Titusville Project;

(iii) that Levitt guarantees the payment of all deficits for three years subsequent to issuance of a certificate of occupancy for the project's units;

(iv) that the guarantee of operating deficits require Levitt or the Partnership to advance no more than $750,000.00 under the Guarantee; implying they are required to advance funds for deficits from another source;

(v) that the guarantee of operating deficits is exclusive of amounts that may be available to operating deficits from Bond proceeds;

(vi) that Levitt agrees that he is fully liable under the Guarantee notwithstanding the Partial non-recourse obligation under the Bond documents; and

(vii) that the Guarantee contains the entire agreement between the parties.

The Guarantee does not say:

(i) that any amounts paid under the Letter of Credit will in any way reduce Levitt's obligations under the Guarantee;

(ii) that any amounts paid under the Guarantee will reduce the Partnership's obligations under the Letter of Credit; or

(iii) that the Letter of Credit is security for the Guarantee.

As is unequivocally clear in this language, the $750,000.00 guaranteed by Levitt, individually has no reference whatsoever to the Letter of Credit or to a right of offset of any other source. As the district court below correctly held:

> 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.

Cases rejecting claims by guarantors to a right of set-off not specified in the Guarantee itself are legion. For example, in Kim v. Peoples Federal Savings & Loan Association, 538 So.2d 867 (Fla. 1st DCA 1989), the district court recognized that an unconditional guaranty which merely contains a cap on the amount guaranteed does not allow the individual guarantor to off set his exposure under the guaranty with funds received from another source. Id. at 870-871. See also Goldome Savings Bank v. Bartholomew, 512 So.2d 975 (Fla. 2d DCA 1987); Woodruff v. Exchange National Bank of Tampa, 392 So.2d 285 (Fla. 2d DCA 1980).

In this case, Levitt is arguing that even though his personal Guarantee mandates that he is personally obligated to pay up to $750,000.00 of operating deficits, this amount must be offset by the amount of a Letter of Credit provided by the Partnership. Not only is this contrary to the plain language of each of those documents, it is also contrary to the case law cited above.

The ultimate issue which is presented in this case is whether the Letter of Credit and the Guarantee represented separate sources of security for the Bondholders. The trial court's obligation, under the principles of law set forth above concerning letters of credit and guarantees, and well-settled rules of contract construction mandated that the trial court simply read each of these documents. If they were clear and unambiguous, then the trial court should have received no extrinsic evidence concerning the subjective "intent" of the parties in this transaction.[8]

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[8]On page 26, n. 8, the Petitioners make a point which the Trustee feels obligated to expand upon. In furtherance of its strawman concerning the Issuing Bank being a non-party to this litigation and not having any liability should the Trustee draw on the Letter of Credit, Petitioners seek to have this court miss the entire point of this litigation. As Petitioners clearly imply, if the Guarantee obligations had been discharged but the Trustee sought to draw on the Letter of Credit, as was clearly its right to do as even Titusville concedes herein, "supplemental relief barring Barnett from doing so could be appropriate."

The significance of this statement should not be overlooked by this Court, as it was the position taken by the Petitioners to contest any draw on the Letter of Credit by the Trustee which precipitated this declaratory judgment action in the first instance. If, the Petitioners have necessarily conceded, the Trustee could draw on the Letter of Credit without any reference to the underlying transaction as the law clearly mandates, Petitioners' clear threat of having to bring "supplemental relief" prohibiting the Trustee from drawing on the Letter of Credit is a clear admission that its argument is totally contrary to the law concerning Letters of Credit. In other words, Petitioners attempt

Petitioners' argue that because the Letter of Credit was a substitute for a cash deposit, "even Barnett would have difficulty in arguing" that any application of these funds by Barnett would not apply against the $750,000.00 Guarantee obligation (Petitioners' Brief at 25). The Trustee has no difficulty whatsoever in advancing such a proposition, as the Trustee's ability to utilize both the Letter of Credit and the Guarantee as security for the Bondholders was exactly what was intended by the parties in having both sources as security and, most importantly, is what the documents clearly provide. The Trustee agrees with Petitioners that the right to utilize the letter of credit without "offset" against the $750,000.00 Guarantee should be the same whether the $511,000.00 had been a cash deposit (with the exception of Bond proceeds explicitly excluded by the Guantee) or a letter of credit. The Trustee's position is quite simple: both the Letter of Credit and the Guarantee operated as separate and distinct sources of security for the Bondholders and there was no right of offset intended, negotiated or placed within the documents. Petitioners' claim made in their Issue II (A) is, therefore, without a legal basis.

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to claim here that although it has no quarrel with the law concerning a letter of credit, nor of the Issuing Bank's liability therefore, it has admitted that once the Guarantee obligations had been fully discharged, the Trustee would then still be precluded from drawing on this clean Letter of Credit. It is clear, therefore, that Petitioners' claim that it has no quarrel with the letter of credit law cited above is, in fact, hollow.

As for Petitioners' Issue II (B), claiming that, at least, the documents are ambiguous, the Trustee responds by urging the Court to simply read the documents, as did the district court below. The thrust of Petitioners' point under this issue is that extrinsic, i.e., parol evidence, was properly received by the trial court in order to "understand the transaction as a whole."

The district court below quite properly saw through Petitioners' obfuscatory argument concerning both their feigned agreement with the law concerning letters of credit and Petitioners' claim that parol evidence was admissible to "look at the transaction as a whole." There was no issue presented in this case as to the fact that the Guarantee and the Letter of Credit were all part of the overall transaction, and there is no issue, contrary to Petitioners' spurious claim (Petitioner's Brief at 35, n. 11), that parol evidence was admissable to show performance of a party's contractual obligations.

Because the language of the Guarantee set forth above is clear and unambiguous, and the Letter of Credit, by its clear language and the law surrounding letters of credit in general, is also clear and unambiguous, the district court below properly held:

> Under these circumstances, parol evidence was inadmissible to modify, vary or contradict the unambiguous or unqualified terms of the guarantee. 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. Because the language of the Guarantee itself is entirely clear and unambiguous, what the petitioners here advocate is nothing less than an abrogation of the parol evidence rule so that the Trustee's right to draw on the Letter of Credit would act as a set-off of amounts due under the Guarantee. This is clearly an attempt to modify, vary and contradict the plain terms of those unambiguous documents. As such, the district court was imminently correct in holding that the trial court erred in resorting to extrinsic evidence on the issue of the subjective "intent" of the parties. Petitioners now seek to justify this clear violation of the parol evidence rule on the basis that the trial court was authorized to entertain extrinsic evidence in order to "understand the transaction as a whole."[9] This argument addresses a non-issue, namely whether the documents were part of one transaction, a conceded point.

A strawman which Petitioners set up in order to vary and contradict the clear terms of the Guarantee is to obfuscate the difference between the Partnership and the individual guarantor Levitt. By this argument the Petitioners seek to have this court fall into the same analytical trap to which the trial court succumbed. A party who has selected a certain legal entity, in this case a limited partnership which was formed in January 1985,

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[9] The Trustee is baffled by Petitioners' statement (Brief at 27) that it is not clear that the trial court relied upon extrinsic evidence. The transcripts of the trial court proceedings in this record reveal that the entire two days of testimony received by the trial court went solely to the issue of what the parties "intended" by utilizing the documents at issue.

almost a year prior to this transaction (Dec. T. 129), for a business transaction will be bound by that selection and may not simply jettison that entity once litigation transpires and the separate legal existence of the chosen entity is no longer convenient. See Unijax, Inc. v. Factory Insurance Association, 328 So.2d 448 (Fla. 1st DCA 1976) (corporations may not disregard their separate legal existence in order to claim coverage under an insurance policy).

The district court below properly saw through the Petitioners' argument, and stated:

> The operating deficit guarantee is a personal, and not a partnership obligation. The guarantee does not refer to the letter of credit; nor does it specify a set-off by the letter of credit. In fact, paragraph seven of the guarantee states that it represents the entire agreement between Brevard County and Levitt, and that no modification of the document is effective unless in writing and signed by the parties. Under these circumstances, parol evidence was inadmissable to vary or contradict the unambiguous and unqualified terms of the guarantee...
>
> [T]he letter of credit and the personal guarantee, while both addressing payment of the same operating deficit expenses, are not contracts of the same dignity. The letter of credit constitutes a contribution by the partnership toward the equity of the project. The guarantee is a personal obligation, providing the bondholders with security in the event the partnership was unable to meet the project's operating deficit expenses. The terms of neither document renders the other ambiguous, and both are consistent with the overall loan transaction.

560 So.2d at 1340-1341. (emphasis supplied)

What is dispositive here is that "the terms of neither document renders the other ambiguous, and both are consistent with the overall loan transaction," as the district court so recognized. 560 So.2d at 1341. Under the parol evidence rule the court is obligated, even if separate documents are a part of the same transaction, to look at the documents and see if there is an ambiguity.[10] If there is none, the court is obligated to construe the documents according to their plain meaning.

As Justice Ervin specifically noted in the denial of Titusville's Motion for Rehearing:

> This court properly construed those documents together, and in so doing, found that neither instrument renders the other ambiguous, and that both are consistent with the overall loan transaction. Under those circumstances, it was error for the trial court to consider additional parol evidence when it construed those instruments.

Id. at 1341. (emphasis supplied)

It is also critical to recognize the basis for the district court's holding that the Letter of Credit and the Guarantee "are not contracts of the same dignity." Id. at 1341. The Letter of Credit was provided by the Partnership to Brevard County. It was dated December 20, 1985 and by its terms was originally set to expire on July 1, 1988.

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[10]The Trustee has no argument with the dictionary definitions and the case law cited by Petitioners defining what is an ambiguity. There is none presented in this case. This court can read the Letter of Credit as well and the Guarantee and will reach the same conclusion as the district court; neither document renders the other ambiguous and both are consistent with the overall loan transaction.

The Guarantee, on the other hand, was provided by Levit to the Trustee and, by its terms, was to cover operating defecits incurred on the project for three years after the certificate of occupancy was issued, i.e., for three years beginning in January 1987.

Therefore, these two documents each involved different parties, were for different amounts and covered different periods of time, clearly "not contracts of the same dignity" as the district court correctly found. Id.[11]

In short, even when two documents are part of one transaction as the Letter of Credit and Guarantee are conceded to be, if the documents clearly set forth in unambiguous terms what the agreement of the parties is, it is error for the trial court to receive extrinsic evidence on what the parties subjectively "intended" those documents mean. As this court has previously held, the making of a contract depends "not on the parties having meant the same thing but on their having said the same thing." Gendvier v. Bielecki, 97 So.2d 604, 608 (Fla. 1957). The reason for this rule of law, and its continuing vitality is fully demonstrated by Issue III of the Petitioners' brief.

III. THE DISTRICT COURT CORRECTLY RECOGNIZED AND HELD THAT THE DECLARATORY JUDGMENT ENTERED BY THE TRIAL COURT WAS BASED UPON A MISAPPLICATION OF LAW.

In its Issue III, Petitioners' attempt, for obvious reasons, to claim that the trial court's declaratory judgment was supported

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[11]As a practical business matter, the difference between a clean Letter of Credit, which can be immediately converted to cash, and a personal Guarantee which inherently carries a distinct possibility of litigation and collection costs is manifest.

by "competent substantial evidence," and its findings of fact should, therefore, be affirmed. The fundamental flaw in Petitioners' position is quite simply that the trial court erred in receiving any extrinsic evidence on the parties subjective intent; the parol evidence rule should have barred such evidence, as the trial court was legally obligated to give those documents the effect their clear and unambiguous language called for.

In an attempt to create the impression that the trial court was authorized to make factual findings, which, therefore, should be deferred to by this court, the Petitioners seek nothing less than for this Court to ignore the parol evidence rule. It is clear that the district court below quite properly recognized that the determinative legal issue presented was whether or not the two documents at issue were ambiguous. If they were ambiguous, the parol evidence considered by the trial court was arguably proper. If, however, the documents were not ambiguous and were consistent with the transaction, then it was error for the trial court to do anything other than give the documents their clear meaning.

As the district court below properly held, the terms of neither document renders the other ambiguous and it was, therefore, error for the trial court to consider any "factual" evidence of intent.

The Petitioners' argument, therefore, concerning "judicial economy" and deferring to the trial court's findings, is unavailing, as it is based upon an erroneous legal proposition.

Finally, the Trustee must respond to the Petitioners' claim that somehow the Trustee "waived" its objection to the trial court's considering parol evidence in interpreting these unambiguous documents.

The Trustee moved for summary judgment on the ground that the documents meant exactly what they said: that the Letter of Credit and the Guarantee were, by their own clear terms, independent, separate sources of security for the Bondholders. The Letter of Credit explicitly states that no other document is to be used in reference to the Letter of Credit and that no resort to the underlying transaction was necessary or allowed when the letter was presented to the issuing bank. The Guarantee specifically refers to a maximum amount of $750,000.00 "under this guarantee," that it represented the complete agreement between the parties and that no modification of the Guarantee is effective unless in writing and signed by the parties.

Once the trial court refused to even consider the Trustee's Motion for Summary Judgment and proceeded to take parol evidence concerning the "intent" of the parties, the Trustee had no choice whatsoever but to present its evidence. Accordingly, the Trustee clearly preserved the argument by filing its Motion for Summary Judgment. What Petitioners suggest here is that the Trustee could have prudently refused to present any evidence once the trial court refused to consider the Trustee's Motion for Summary Judgment, truly a fatuous argument.

More importantly, the question of waiver is a non-issue. It is clear that the law requires a reviewing court when called upon to construe contracts to read the documents and give them their plain meaning. As the district court below properly recognized, this was the essence of the trial court's error, refusing to simply perform that judicial function. Accordingly, by filing its Motion for Summary Judgment which asked the Court to give effect to the Letter of Credit and the Guarantee, the Trustee squarely presented that issue to the trial court for its consideration. The trial court's legal error in failing to grant the Trustee's Motion for Summary Judgment could not possibly have been "waived" by the Trustee.

CONCLUSION

The plain language of Rule 1.510(c) governs only the service of a Motion for Summary Judgment, as the district court below correctly held.

All other district courts who have construed the rule are in accord with this interpretation, with the sole exception of Wakefield Nursery v. Hunter, supra. That decision is not only contrary to the plain language of the rule, but also erroneously misapplied the prior decision of Greer v. Workman, supra. Significantly, no court has ever cited or relied upon Wakefield Nursery v. Hunter, in the almost seven years since it was decided.

This Court should approve the decision of the district court below on this point and disapprove the aberrant decision of Wakefield Nursery v. Hunter.

Further, the holding of the district court below on the issue of whether the Letter of Credit and the Guarantee were clear and unambiguous is immenently correct and should be approved, as it was clear error for the trial court to have received parol evidence on the issue of the parties subjective intent when executing those documents, as the documents themselves establish, as a matter of law, the agreement of the parties.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Waddell A. Wallace III, Esquire, Smith & Hulsey, 1800 First Union National Bank Tower, 225 Water Street, Post Office Box 53315, Jacksonville, Florida 32201-3315, this 4th day of February, 1991.

Attorney

APPENDIX

A. Barnett Banks Trust Company, N. A. v. Titusville Associates, Ltd., 560 So.2d 1337 (Fla. 1st DCA 1990).

B. Transcript of August 29, 1988 Proceedings (Pages 5-10).

C. Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984).

D. Greer v. Workman, 203 So.2d 665 (Fla. 4th DCA 1967).

E. Letter of Credit, dated December 20, 1985.

F. Guarantee of Completion, dated December 27, 1985.

A P P E N D I X