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**Dec 19 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

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Appellate Case No.: 2022-000470  
Case No. 2021-CP-10-04342

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Levi Grantham, LLC, .....Appellant,

v.

Kathy Wright Mitchell, .....Respondent.

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**INITIAL REPLY BRIEF OF APPELLANT**

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## ARGUMENTS

- I. Respondent's application of principles of contractual interpretation reveal that the purchase agreement is ambiguous, thereby making summary judgment improper.

In her response, Respondent contends repeatedly that the parties' purchase agreement should be construed against Levi Grantham, as the drafter of the agreement. However, this argument only confirms that whether time was of the essence was ambiguous, thereby making summary judgment improper.

As stated in Levi Grantham's initial brief, "[s]ummary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 448 (Ct. App. 2020). If the language of the contract creates an ambiguity, "a court will construe any doubt and ambiguities in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). However, when a contract is unambiguous, a court has no need to construe a contract against the drafter or apply other principles of contract construction. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 574, 772 S.E.2d 882, 893 fn. 2 (Ct. App. 2015) (refusing to address argument that ambiguous contract should have been construed against drafter because the contract was unambiguous); *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (stating that if a contract's "language is plain, unambiguous, and capable

of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect").

Here, Respondent argues that the purchase agreement was unambiguous. Yet she cannot deny the presence of the contingencies provision that allowed Levi Grantham to toll the agreement while it sought government approvals. So, to avoid the application of the tolling provision, Respondent claims that it, along with other parts of the agreement, should be construed against Levi Grantham.

Respondent's argument, though, implicitly shows that summary judgment was issued in error. If the purchase agreement is unambiguous, then the Court should not apply canons of contractual construction to determine its meaning. And if the Court can only determine whether time was of the essence of the contract by applying the principle of *contra proferentem*, then the purchase agreement is ambiguous in this regard. Thus, by relying on the principles of contractual construction to support her reading of the purchase agreement, Respondent actually proves that the purchase agreement is ambiguous. Summary judgment was, therefore, improper.

II. Respondent's attempt to convert a question of fact into a question of law is unconvincing and based on clearly distinguishable caselaw.

In defense of the circuit court's grant of summary judgment, Respondent argues that whether a particular act is performed within a reasonable amount of time is a question of law when the facts are undisputed and susceptible to only one reasonable inference. Respondent relies on *Crawford v. Southern Ry. Co.*, 101 S.C. 522, 86 S.E. 19 (1915), to support this argument. Yet a close examination of that case shows that it has little – if any – applicability to the facts of this case.

*Crawford* involved whether the plaintiff timely provided notice to a railroad company of claims related to livestock that became sick and later died after being in the care of the railroad company. The bill of lading for the shipment of the livestock included a stipulation that the shipper provide notice of any claims within five days of the livestock being removed from the railcars. *Id.* at 524, 86 S.E. at 19. The livestock died more than five days after they were removed, and the owner sued the railroad company for their death. *Id.* In defense, the railroad company moved for directed verdict on the claims because the plaintiff had failed to provide notice within five days of the livestock being removed from the railcars as required by the stipulation. *Id.* at 525, 86 S.E. at 20.

On appeal, the South Carolina Supreme Court ruled that the five-day notice requirement was “unreasonable and void” under the particular circumstances of the case because it was “impossible” for the shipper to determine the nature and extent of his damages when the livestock did not die within the notice period. *Id.* at 526, 86 S.E. at 20. However, the court was careful to cabin its ruling and explain that it was based on the particular facts of that case. *Id.* According to the court, its ruling could not be understood “as holding that the question whether a thing has been done within a reasonable time is, under all circumstances, a question of law.” *Id.* at 527, 86 S.E. 20. Thus, even though the court ruled that the stipulation was void, it nevertheless remanded the case for a new trial to determine whether the plaintiff substantially complied with the requirement to provide notice. *Id.*

Contrasting the unique facts of *Crawford* with those involved in this case shows that *Crawford* provides no meaningful guidance to the issues presented here. *Crawford* addressed whether a stipulation requiring notice of a claim within a very short time was valid when the particular circumstances giving rise to the claim demonstrated that it was impossible to provide the required notice. In contrast, this case involves whether a prospective purchaser of real estate failed to close on the purchase within a reasonable time when closing contingencies largely outside of the parties' control had not been satisfied. Because Levi Grantham presented evidence showing that it has reasonably been seeking the necessary government approvals upon which the closing was expressly conditioned, there is a question of fact about the reasonableness of its actions that precludes summary judgment.

III. Respondent's argument based on her purported lack of knowledge and understanding regarding real estate development show that further discovery is needed and that summary judgment was prematurely granted.

Finally, Respondent argues that the Court should not consider facts unknown to her in construing the meaning of the contingency provision and whether it superseded the "time is of the essence" clauses. According to Respondent, Levi Grantham is a sophisticated real estate developer that has failed to proffer evidence that she understood the potential duration of the contingency period. Not only does this argument reinforce the ambiguity of the purchase agreement by requesting that the Court consider factors outside the four corners of the contract, it also demonstrates why summary judgment was prematurely granted before the parties completed discovery.

Specifically, Respondent argues that the record lacks evidence about whether she understood that making the closing contingent upon Levi Grantham's obtaining government approvals for its intended development could delay the closing. While this assertion is true, it is only true because the parties have not engaged in discovery on this issue. Therefore, it is necessary that the Court reverse summary judgment so that the parties can engage in discovery and determine what Respondent's understandings and intent were at the time she agreed that Levi Grantham could toll the agreement until all closing conditions were satisfied.

### CONCLUSION

Based on the foregoing discussion and analysis, Levi Grantham respectfully renews its request that the Court reverse the circuit court's order granting Respondent summary judgment.

Respectfully submitted,

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Charleston, South Carolina

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**PROOF OF SERVICE**

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This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the *Initial Reply Brief of Appellant* via electronic mail only, addressed as follows:

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**VIA EMAIL ONLY**

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**Re: Levi Grantham, LLC v. Kathy Wright Mitchell**  
**Civil Action No.: 2021-CP-10-04342**  
**Appellate Case No.: 2022-000470**  
**MVA File No.: 048042.000001**

Dear Ms. Kitchings,

With regard to the above-referenced matter, please accept the following for filing in the above matter:

1. Initial Reply Brief of Appellant Levi Grantham, LLC; and
2. Proof of Service.

By copy of this letter, I am serving Respondent's attorney with a copy of the Initial Reply Brief of Appellant.

Thank you for your assistance with this matter. If you should you have any questions, please feel free to contact me.

Sincerely,

MOORE & VAN ALLEN PLLC



E. Brandon Gaskins

EBG/lp

Enclosure: As Stated.

cc: Donald J. Budman, Esquire (*via e-mail only*)

Charlotte, NC  
Charleston, SC