STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1521

MGD PARTNERS, LLC

VERSUS

5-Z INVESTMENTS, INC.

Judgment Rendered: JUN 0 2 2014

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2009-0003832

Honorable Robert H. Morrison, III, Judge Presiding

* * * * *

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McDonald, J. dissents for the reasons assigned by Judge Kuhn.

* * * * *

Kuhn, J dissents & assigns reason

BEFORE: WHIPPLE, C.J., PARRO, KUHN, GUIDRY, PETTIGREW, McDONALD, McCLENDON, WELCH, HIGGINBOTHAM, CRAIN, THERIOT AND DRAKE, JJ.

Pettigrew J. dissents & joins in reasons with Kuhn, J.
McClendon, J. concurs
Crain, J. concurs
Theriot, J. dissents with reasons assigned by J. Kuhn.
Guidry, J. dissents for reasons assigned by Kuhn, J.

HIGGINBOTHAM, J.

This suit arises out of a redhibition action filed by appellants, MGD Partners, LLC (MGD), and a suit for a deficiency judgment filed by appellee, 5-Z Investments, Inc. (5-Z). In the redhibition action, appellant, MGD appeals the trial court's judgment, which sustained appellee's peremptory exception raising the objection of prescription. In the action for the deficiency judgment, appellants, Carson Davis and John Mills,[1] appeal from the trial court's judgment granting appellee's motion for partial summary judgment. For the following reasons, we reverse the trial court's judgment sustaining the exception of prescription under La. Civ. Code art. 2534, and the trial court's judgment granting partial summary judgment in favor of 5-Z, and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

On March 17, 2006, MGD purchased approximately 324 acres of land in Tangipahoa Parish (the property) from 5-Z. The property consisted of three primary parcels: an 80-acre parcel that has been partially developed since the date of the sale with roads, in addition to curb and gutter infrastructure in preparation for a residential development (parcel 1); a second 80-acre parcel that has been developed since the date of the sale by construction of a wastewater treatment facility (parcel 2); and a 160-acre parcel that has remained undeveloped (parcel 3). MGD purchased parcel 1 outright. Parcel 2 and parcel 3 were financed by two separate notes given to 5-Z on March 17, 2006. Promissory note 1, for parcel 2, was payable in the amount of $860,741.60 and due 18 months from March 17, 2006 (note 1). Promissory note 2, for parcel 3, was payable in the amount of $1,721,483.20 and due 36 months from March 17, 2006 (note 2).

MGD purchased the property with the intention of creating a residential development. In furtherance of its plan, on parcel 1 of the property, it developed

[1] Carson Davis and John Mills are members of MGD.

roads, as well as curb and gutter infrastructure. However, on March 9, 2009, after reviewing a public notice and related documents from the Army Corps of Engineers, MGD learned that the entirety of the property is located within the boundaries of the former Hammond Bombing and Gunnery Range. On April 23, 2009, MGD received a letter from Maurice Jordan, the Tangipahoa Parish Engineer, indicating that no further permits or approvals would be issued by the parish for development activities on MGD's property until the risk of contamination had been fully investigated and remedied.

Thereafter, on October 28, 2009, MGD filed a suit for rescission of the sale, claiming that the property's prior use as a bombing range constituted a redhibitory defect in the property and had it known of the defect, it would not have purchased the property. According to the petition, MGD purchased the property "under the mistaken belief that it was suitable for residential development purposes." MGD also asserted that 5-Z knew of the defect and failed to disclose it to MGD. In MGD's prayer for relief, it requested that the sale of parcel 3 be rescinded, and that it receive a refund of the sale price plus interest. MGD further requested a reduction in the purchase price of parcel 1 and parcel 2 to reflect the decreased value of these parcels as a result of the redhibitory defect.

In response to the allegations raised in MGD's petition, on January 7, 2010, 5-Z filed a peremptory exception raising the objection of prescription, asserting that it did not know of the redhibitory defect at the time of the sale, that MGD's suit was not filed within a year of the sale, and therefore, according to La. Civ. Code art. 2534(A)(2), MGD's redhibition claim was prescribed. On March 29, 2010, at a hearing, the trial court determined that La. Civ. Code art. 2534(A)(2) governed the prescriptive period in this case, which is a period of one year. The hearing on 5-Z's prescription exception was continued without prejudice so that it could be re-urged in the future, pending the completion of additional discovery.

On March 31, 2010, 5-Z filed a reconventional demand against MGD and a third party demand against Carson G. Davis and John Mills, as members of MGD. In 5-Z's petition, it asserted that Davis and Mills are "joint, several, and solidary obligors" on a promissory note in the amount of $1,721,483.20 payable to 5-Z, executed on March 17, 2006. 5-Z requested a deficiency judgment against Davis and Mills for the full amount due under the note, subject to credit for the sum realized at the sheriff's sale and amounts previously paid. According to 5-Z, the note was past due and owing, because sums owed on the note were not paid by the maturity date stipulated in the note. The property was previously sold on January 6, 2010, for $613,334.00 at a sheriff's sale in a separate matter entitled "5-Z Investments, Inc. v. MGD Partners, LLC," and numbered 2009-0002936.

On October 25, 2010, 5-Z filed a motion for partial summary judgment on its third party and reconventional demands, contending that the "pleadings, affidavits and exhibits on file show that there is no genuine issue as to material fact," and that it was entitled to a deficiency judgment as a matter of law. On December 10, 2010, the trial court signed a judgment granting 5-Z's motion for partial summary judgment and entered judgment in favor of 5-Z and against Carson Davis and John Mills, as follows:[2]

> [A]s joint, several and solidary obligors for the sum of $1,721,483.20, plus interest at the rate of 3.5% from March 17, 2006, until paid, together with all costs in these proceedings and in proceedings entitled "5-Z Investments, Inc. v MGD Partners, LLC" ... and stipulated attorney's fees in the amount of 25%, less credits of $100,000.00 paid on or about November 11, 2006 and $601,067.32 paid on or about January 6, 2010.

This judgment was certified as final by the trial court on May 1, 2012. Davis and Mills had filed a motion for new trial on December 14, 2010, which was denied by the trial court. Davis and Mills also applied for supervisory writs from this court

[2] On May 2, 2012, 5-Z filed a motion to dismiss its reconventional demand against MGD, reserving its rights against Davis and Mills.

seeking review of the December 10, 2010 judgment. This court subsequently denied the writ application on June 20, 2011, declining to exercise its supervisory jurisdiction and determining that MGD would have an adequate remedy by review on appeal.[3]

On December 22, 2011, 5-Z filed a motion to reset its exception of prescription. The matter was heard on February 22, 2012, after which the trial court signed a judgment on March 2, 2012, sustaining 5-Z's exception of prescription and dismissing MGD's claims against 5-Z with prejudice. MGD filed a motion for new trial contending that the judgment was contrary to the law and evidence, and that it had discovered new evidence since trial. MGD's motion for new trial was denied on May 1, 2012.

It is from the December 10, 2010 judgment granting partial summary judgment in favor of 5-Z that Davis and Mills appeal. MGD appeals the March 2, 2012 judgment sustaining 5-Z's peremptory exception raising the objection of prescription.

DISCUSSION

I. Prescription

MGD contends that the trial court erred in granting 5-Z's peremptory exception raising the objection of prescription, because the trial court: (1) wrongly classified the property as residential; (2) erroneously determined that 5-Z was not aware of the defect of the property at the time of the sale; and (3) failed to apply the doctrine of *contra non valentem*.

Louisiana Civil Code article 2534 sets forth the prescriptive period for filing a claim against a seller in redhibition and states, in part:

> A. (1) The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from

[3] **MGD Partners, LLC v. 5-Z Investments, Inc.**, 2011 CW 0731 (La. App. 1st Cir. 6/20/11)(unpublished).

> the day delivery of such thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first.
>
> (2) However, when the defect is of residential or commercial immovable property, an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer.
>
> B. The action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer.

The trial court determined that 5-Z's exception of prescription is governed by paragraph A(2) of Article 2534, because "it was undisputed that the property was purchased and developed for residential purposes," and therefore, the applicable prescriptive period is one year from the date of delivery of the property. MGD contends that the characterization of the property as residential was in error. According to MGD, at the time of the sale the property was vacant and undeveloped. MGD asserts that in order to classify the property at issue and determine the applicable prescriptive period, the court must look at the condition of the property at the time of the sale, and not its intended use. Thus, MGD contends that paragraph A(1) of Article 2534 governs the prescription exception with an applicable prescriptive period of four years from the date of delivery of the property or one year from the day the defect was discovered by MGD.

Louisiana Civil Code article 2534(A)(2) provides, "when *the defect is of residential or commercial immovable property,* an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer." (Emphasis added.) The language of this provision does not specifically address if such a classification is based on the intended use of the property, or if it is determined by the state of the property at the time of the sale.

This court previously addressed this issue in **Ndanyi v. White**, 07-0682 (La. App. 1 Cir. 1/30/08)(unpublished), 976 So.2d 356 (table). In **Ndanyi,** this court determined that because a suit in redhibition is based on the intended use of the property, in interpreting the language of the prescriptive article on redhibition, the trial court should classify the property based upon its intended use.

This issue was submitted to the Court *en banc*. For the following reasons, we find that the prescriptive period for the redhibition claims is determined by the actual character of the property, as of the date of the sale, and based upon objective evidence, not upon the intended use of the property by the buyer. Accordingly, we overrule **Ndanyi v. White**.

Statutes providing for prescriptive periods are to be strictly construed in favor of maintaining a cause of action. **David v. Our Lady of the Lake Hosp., Inc.**, 02-2675 (La. 7/2/03), 849 So.2d 38, 47. On appeal, MGD contends that logic and the desire to avoid absurd consequences and extreme uncertainty dictate that this reasoning must prevail.

MGD sets forth that it purchased this property "under the mistaken belief that the property was suitable for residential development purposes" and that 5-Z knew of and failed to disclose the defect (i.e., that the property is actually part of a former bombing and gunnery site wholly unable to be used as a residential development without remediation, if at all). Further, MGD only learned of this defect after preliminary efforts in development of the land.

Louisiana Civil Code article 2520 provides in part, as follows:

> The seller warrants the buyer against redhibitory defects, or vices, in **the thing** sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price. (Emphasis added.)

There are three factors which must be present to give rise to a redhibition action, those being first, a sale; second, a defect; and third, the defect must be of such a nature as to render the object purchased so inconvenient or imperfect it gives rise to a presumption the buyer would not have bought it, had he known of that defect. **Cimmaron Homeowners Ass'n v. Cimmaron, Inc.**, 533 So.2d 1018, 1020 (La. App. 1st Cir. 1988), writ denied, 537 So.2d 1167 (La. 1989); **Napoli v. Gully**, 509 So.2d 798, 799 (La. App. 1st Cir.), writ denied, 512 So.2d 1182 (La. 1987). The party's intended use of "the thing" is not referenced in the article or the jurisprudence.

The plain language of La. Civ. Code art. 2520 refers to the thing sold. The "thing sold" has a definite character at the time of sale, which cannot be altered by the buyer's intent. When the property herein was purchased, it was neither "residential" nor "commercial." Instead, it was **unimproved, unzoned, undeveloped raw pasture and woodland.** Regardless of the use or uses MGD may have ultimately intended, the property it purchased from 5-Z undisputedly was not residential or commercial. Thus, MGD's intent is irrelevant. Like MGD, 5-Z should be bound by the character of the property at the time of the purchase regardless of MGD's subjective intent. Any other result would lead to absurd consequences such that if the party changes its intent, the prescriptive period would change. There must be objective criteria on which to base the prescriptive period, i.e., the classification of the property as it existed at the time of the sale. Accordingly, when reviewing a matter for prescriptive purposes, the court must look at the character of the thing sold at the time of the sale, irrespective of its intended use.

Thus, given the nature of the property at the time of its purchase herein, the four-year prescriptive period and/or discovery rule of La. Civ. Code art. 2534(A)(1) should apply and not the one-year prescriptive period found in La. Civ. Code art. 2534(A)(2), which, by its terms, pertains to residential or commercial immovable property.

Louisiana Civil Code article 2534(A)(1) provides that an action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes in four years from the day delivery of such thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first. MGD purchased the property from 5-Z on March 17, 2006. According to the record, MGD discovered the alleged defect in the property around March 9, 2009, and there was insufficient evidence to prove that MGD knew of the defect prior to that date. On October 28, 2009, within four years of the sale and prior to one year from discovering the alleged defect in the property, MGD filed a suit for rescission of the sale. Therefore, MGD's suit for redhibition has not prescribed, and the judgment of the trial court sustaining 5-Z's peremptory exception raising the objection of prescription is reversed.[4]

II. Summary Judgment

5-Z filed a motion for partial summary judgment on its third party demand against Davis and Mills as joint, several, and solidary obligors of promissory note 2. In its motion, 5-Z contended that there is no genuine issue as to material fact, and it is entitled to a deficiency judgment as a matter of law. In favor of its motion for summary judgment, 5-Z attached the following: (1) note 2, which provided Davis and Mills "jointly, severally and in solido, promise to pay to the order of [5-Z]... the sum of ONE MILLION SEVEN HUNDRED TWENTY ONE

[4] We have concluded that La. Civ. Code art. 2534(A)(1) applies herein; therefore, we need not address whether the doctrine of *contra non valentem* applies or whether 5-Z was aware of the alleged defect at the time of the sale.

THOUSAND FOUR HUNDRED EIGHTY THREE AND 20/100 ($1,721,483.20)... Due and payable Thirty Six (36) months from [March 17, 2006];" (2) the credit deed, which provided the real estate that secured the mortgage; (3) the affidavit of Mr. Clarence Zahn, in which Mr. Zahn stated that $100,000.00 had been paid towards the balance of the note, that the property was sold at sheriff's sale, and that after credit for those amounts, there still remained an outstanding balance on the note; and (4) the sheriff's sale after appraisal, showing the amount for which the property sold.

Davis and Mills contend that there are "significant issues of material fact that are genuinely in dispute," and therefore, the trial court erred in granting summary judgment in favor of 5-Z and rendering a deficiency judgment against them. Davis and Mills argue that if, in the main demand, the contract of sale is cancelled, then the obligations of the surety are likewise extinguished as provided under La. Civ. Code arts. 3058 and 3059. Specifically, Davis and Mills contend that should MGD be successful in its redhibition claim against 5-Z then the entire debt of 5-Z, would be discharged, and Davis and Mills would also enjoy the benefits of this discharge.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Johnson v. Evan Hall Sugar Co-op., Inc.**, 01-2956 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Thomas v. Fina Oil and Chemical Co.**, 02-0338 (La. App. 1 Cir. 2/14/03), 845 So.2d 498, 501-02. On a motion for summary

judgment, the initial burden of proof is on the mover. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. Code Civ. P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. **Id.**, 845 So.2d at 502.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 02-1072 (La. 4/9/03), 842 So.2d 373, 377. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038 (La. App. 1st Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

The general law applicable for determining the validity of a deficiency judgment action is set forth in **First Guaranty Bank, Hammond, Louisiana v. Baton Rouge Petroleum Center, Inc.**, 529 So.2d 834, 841-42 (La. 1987) (on rehearing), as follows:

> When the property has been sold under the executory proceedings after appraisal and in accordance with statutory provisions governing appraisal, the creditor may obtain a personal judgment against the mortgagor for any deficiency remaining after the application of the net proceeds of sale to the secured debt. La. [Code Civ.] P. art. 2771.
>
> * * * * *
>
> To obtain a deficiency judgment, the creditor first must affirmatively plead and prove the existence of the obligation giving rise to the debt, La. [Civ. Code.] art. 1831, and the grounds of non-performance entitling him to maintain his judicial action. La. [Civ.

Code] art. 1994. Further, he must aver and establish by evidence that the property was sold under the executory proceeding after appraisal in accordance with the provisions of article 2723 of the Code of Civil Procedure...and that the proceeds received were insufficient to satisfy the balance of the performance then due. La. [Code Civ.] P. art. 2771; La. R.S. 13:4106; 4107.

* * * * *

The debtor, on the other hand, may assert both negative and affirmative defenses against the deficiency judgment action. He may defend by demonstrating the creditor's failure to prove one of the aforementioned elements of his case or by rebutting the existence of such an element. Additionally, the debtor may assert that an obligation is null, or that it has been modified or extinguished, but in such a case the debtor must prove the facts or acts giving rise to the nullity, modification, or extinction. La. [Civ. Code] art. 1831; La. [Code Civ.] P. art. 1005. [Case citations and footnotes omitted.]

After review of the evidence submitted by 5-Z in favor of summary judgment, 5-Z established that the property was sold under the executory proceeding after appraisal in accordance with the provisions of Article 2723 of the Code of Civil Procedure, and that the proceeds received were insufficient to satisfy the balance of the performance then due. However, Davis and Mills contend that should MGD be successful in its redhibition claim against 5-Z, then the entire debt of 5-Z would be discharged and Davis and Mills would also enjoy the benefits of this discharge.

The deficiency judgment proceeding is subject to all of the ordinary defenses available to a debtor, including the defense that the obligation has been modified or extinguished. Louisiana Civil Code article 3059 provides that "[t]he extinction of the principal obligation extinguishes the suretyship." In a deficiency judgment proceeding, the surety may interpose all nonpersonal defenses available to the principal debtor. See **Simmons v. Clark**, 64 So.2d 520, 523 (La. App. 1st Cir. 1953).

Davis and Mills signed the note as members of MGD, who received the property, but also in their individual capacities. In a deficiency judgment

proceeding, as a debtor on the note, Davis and Mills may assert that the obligation is null or that it has been modified or extinguished. MGD requested that the sale of certain property be rescinded, and the price of certain property be reduced because of a redhibitory defect. This court has determined that MGD's claim in redhibition has not prescribed, and thus, is still pending before the trial court. In this procedural posture, summary judgment on the deficiency action is not appropriate at this time. Although the evidence submitted by Davis and Mills is not sufficient to prove MGD's claim in redhibition, it is sufficient to raise a genuine issue of material fact. See **Jackson v. Slidell Nissan**, 96-1017 (La. App. 1st Cir. 5/9/97), 693 So.2d 1257, 1264.

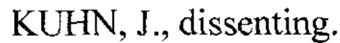
Finding that a genuine issue of material fact exists, the trial court's judgment granting partial summary judgment in favor of 5-Z is reversed, and the matter is remanded for further proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the trial court sustaining 5-Z's peremptory exception raising the objection of prescription and the trial court's judgment granting partial summary judgment in favor of 5-Z are reversed. This matter is remanded to the trail court for further proceedings. All costs of the appeal are assessed to appellee, 5-Z Investments, Inc.

REVERSED AND REMANDED.

MGD PARTNERS, LLC	**FIRST CIRCUIT**
VERSUS	**COURT OF APPEAL**
	STATE OF LOUISIANA
5-Z INVESTMENTS, INC.	**NO. 2012 CA 1521**



KUHN, J., dissenting.

I disagree with the majority's reversals of the trial court's actions of: (1) sustaining a peremptory exception of prescription filed by 5-Z Investments, Inc. (5-Z) and dismissing the redhibition claim filed by MGD Partners, LLC (MGD); and (2) granting summary judgment in favor of 5-Z in a deficiency judgment action against MGD sureties finding that because MGD might prevail on its redhibition claim, genuine issues of material fact preclude judgment.

In its petition averring entitlement to relief as a result of a redhibitory defect, MGD alleged that at the time of the purchase from 5-Z, it intended to use the property for residential development. And at the trial of the peremptory exception raising the objection of prescription, MGD urged that when the property was sold, it was for the purpose of residential development. Indeed, the entire basis of the redhibition claim according to MGD's petition is that the property it acquired was not suited for its intended purpose, i.e., residential development. But at the hearing on the motion for new trial and now on appeal, MGD maintains, and the majority apparently agrees, that the determination of whether the defect is of residential or commercial property for purposes of prescription under La. C.C. art. 2534 should be based on simply viewing the property at the time of delivery, thereby creating as a new legal precept an "objective observation" of alleged defective property.

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice. La. C.C. art. 2520. In a suit for redhibition, the plaintiff must prove: (1) the seller sold the thing to him and it is either absolutely useless for its intended purpose or its use is so inconvenient or imperfect that had he known of the defect, he would never have purchased it; (2) the thing contained a non-apparent, or latent, defect at the time of sale; and (3) the seller was given an opportunity to repair the defect. ***Walton Constr. Co., L.L.C. v. G.M. Horne & Co., Inc.***, 2007-0145 (La. App. 1st Cir. 2/20/08), 984 So.2d 827, 834. In conjunction with proof that the thing contained a non-apparent (latent) defect at the time of sale, Louisiana courts recognize sellers are bound by an implied warranty that the thing sold is reasonably fit for the buyer's intended use. See ***Walton Constr. Co., L.L.C.***, 984 So.2d at 834 n.8 (citing ***Young v. Ford Motor Co., Inc.***, 595 So.2d 1123, 1126 (La. 1992)); see also La. C.C. art. 2475; accord La. C.C. art. 1967 (defining "cause" as "the reason why a party obligates himself" and providing that "[a] party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying").

The majority's conclusion that since residential development of the property had not occurred as of the date of the sale, the proper basis for classifying the property, apparently as a matter of law, is an "objective observation" of the characteristics of the property at the time of the sale, turns a blind eye to the requirements necessary to support a claim for redhibition. It is well settled that the defectiveness of the thing sold is a factual determination to be made by the trier of fact, whose factual conclusions are not to be disturbed on appeal absent manifest

error. See ***Arceneaux v. Domingue***, 365 So.2d 1330, 1333-34 (La. 1978). In order to reach the conclusion that a thing sold is "useless" or its "use" is inconvenient or imperfect under an application of the provisions of La. C.C. art. 2520, the trier of fact must necessarily determine the thing's intended use, which is a factual finding subject to the manifest error/clearly wrong standard of review. The majority has simply ignored this well established standard of appellate review of a lower court's judgment and judicially created new law in the process.

It is noteworthy that the majority does not expressly state that it is reversing the trial court for having committed a legal error, though having failed to review the evidence in the record to ascertain the basis for its "objective observation" of the characteristics of the property, it certainly has not undertaken a manifest error/clearly wrong review. The majority's failure to articulate under which standard of review it has rendered its disposition undermines the importance of the Louisiana Rules of Court and the obligation the rules impose on practitioners. See La. Uniform Rules – Courts of Appeal, Rule 2-12.4A(9)(b) (requiring the appellant's brief to contain a concise statement of the appropriate standard of review for each assignment of error and issue for review). In such instances, the nature of this court is no longer that of a Court of Appeal but becomes that of a legislature or creator of the law.

Based on the allegations of its petition, MGD seeks recovery for a redhibitory defect as a result of the seller's breach of its obligation to ensure that the thing sold is fit for its intended use. See La. C.C. art. 2475 ("The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use"). Thus, the factfinder's determination of whether the property is residential or commercial in accordance

with the intended use is consistent with the object of the lawsuit. To rule as the majority has done creates an incongruent situation where to prove his claim for redhibition a plaintiff must demonstrate the intended use of the property without being subjected to the legally imposed time limitations for that intended use. The majority has looked at "the thing," ostensibly "objectively," and found it to be "unimproved, unzoned, undeveloped raw pasture and woodland." But without knowing of the intended use of the undeveloped property, where is the defect? The majority has expressly defined the defect as "that the property is actually part of a former bombing and gunnery site wholly unable to be used as a *residential development* without remediation, if at all." (Emphasis added.)

The very basis for any entitlement to the relief MGD seeks is the incompatibility of the undeveloped land with MGD's intent to use that land as a residential development. It is properly the role of the legislature to determine the length of prescriptive periods and not that of judicially active courts, even if judges do not agree with the clearly written law.

A trial court's determination of whether the property is residential or commercial based on the intended use of the immovable property at the time of delivery, read *in pari materia* with La. C.C. arts. 2475 and 2520 for purposes of an application of La. C.C. art. 2534, is proper and consistent with the object of MGD's lawsuit. Accord La. C.C. art. 1967. Specifically, La. C.C. art. 2520 defines a redhibitory defect as one that "renders [a] thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." The jurisprudence has included as elements of a plaintiff's claim for redhibitory relief proof that the seller sold the thing to him and it is either absolutely *useless* for its intended purpose; or its *use* so inconvenient/imperfect it may be presumed he would not have purchased the thing

had he known of the defect. And the jurisprudence has recognized the concomitant obligation of the seller to warrant that the thing containing that non-apparent defect is reasonably fit for the buyer's intended *use*. See ***Walton Constr. Co., L.L.C.***, 984 So.2d at 834.

Moreover, assuming *arguendo* that the determination of whether the property is residential or commercial for purposes of applying La. C.C. art. 2534 is one that should be based on the characteristics of the immovable at the time of the sale rather than its intended use in confecting that sale, the evidence actually admitted at the hearing of the exception of prescription should not be disregarded under the guise of an "objective observation" of the thing that is subject of the redhibition claim. The evidence admitted at the hearing about the characteristics of the immovable property prior to the sale without regard to the buyer's intended use actually supports a finding that the defect was of commercial immovable property.

Clarence Zahn, one of the five Zahn brothers, stated that for many years (somewhere between 25 and 40), the property had been used as a dairy farm. He and his brothers acquired it from the dairy farmers for the purpose of growing timber as an investment. Thus, the only evidence showing the characteristics of the property at the time of the sale was that it was commercial. As such, under La. C.C. art. 2534A(2), the redhibitory claim of the defect of commercial property prescribed one year from the day of delivery of the property. And although it may be suggested that looking at evidence of the use the seller made of the property in classifying it for purposes of application of the correct prescriptive period is inequitable because it overlooks the buyer's intended future use, the majority has concluded that the thing's classification is an objective one for which the buyer's intended use is "irrelevant."

Finally on this point, one may inquire how a person can look at an immovable and determine whether it is or is not residential or commercial merely by objectively observing it. A person can certainly choose to purchase what appears to a casual observer "unimproved, unzoned, undeveloped raw pasture and woodland" with a full intent of "flipping it" and taking advantage of tax consequences for the acquisition inasmuch as the owner deems the immovable property commercial in purpose. Likewise, woodland can readily yield timber and easily be considered a commercial enterprise by the owner. According to the majority's reasoning, the owners' decisions to treat each acquisition as commercial are incorrect as a matter of law. Similarly, a buyer may choose to purchase a house that is in dilapidated condition with the intent of demolishing it and using it for unimproved farm land. When it is discovered that it was part of a former bombing range (or burial site or medical waste disposal), is the purchaser relegated to the one-year prescriptive period of La. C.C. art. 2534A(2) because, at the time of the sale, an "objective observation" convinced the observer that it was a house and, therefore, residential?

Addressing the merits of this appeal, in support of the peremptory exception raising the objection of prescription, evidence *was* introduced. When evidence is so introduced, the trial court's findings of fact are subject to the manifest error-clearly wrong standard of review. ***Carter v. Haygood***, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267. Under this standard, if the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. ***Stobart v. State, through Dep't of Transp. and Dev.***, 617 So.2d 880, 882-83 (La. 1993).

At the hearing on the exception of prescription, Carson Davis, a member of MGD and the real estate agent under contract with 5-Z who sold the property for 5-Z to MGD, testified. Among other things, Davis stated that after Hurricane Katrina, he was looking for a tract of land for residential purposes and called Zahn, who Davis believed was a representative of 5-Z, to see if the tract 5-Z owned on Highway 445 was available for sale. According to Davis, after the sale, but prior to his discovery that the property had been within the parameters of the Hammond Bombing and Gunnery Range and the discontinuance of the issuance of building permits by the parish, MGD had been working to put in the infrastructure. Davis stated that MGD had pre-sold fifty lots at $2,500,000.00. This testimony constitutes a reasonable factual basis to support the trial court's determination that the property had been purchased for the intended use of developing it for residential purposes and, therefore, that the defect was of residential immovable property.[1]

Additionally, a reasonable factual basis exists to support the trial court's finding that 5-Z was unaware of the defect at the time of the sale and, therefore, was in good faith. Davis testified that at a meeting in Baton Rouge with the U.S. Army Corps of Engineers regarding the property 5-Z sold to MGD, Zahn had stated, "[E]verybody knew it was in the bombing range." George Sullivan, who also attended the meeting, testified that he overheard Zahn make a similar statement, but he could not verify if Zahn was referring to the property MGD purchased from 5-Z.

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[1]Appeals are taken from judgments, not the written reasons for judgment. See ***Davis v. Farm Fresh Food Supplier***, 2002-1401 (La. App. 1st Cir. 3/28/03), 844 So.2d 352, 353-54. Thus, to the extent that the trial court's finding that the property was purchased and developed for residential purposes is no longer an undisputed fact, mindful that the trial court's judgment simply sustains the exception of prescription, the evidence should be reviewed to determine whether any implicit findings support the trial court's conclusion.

According to Zahn's testimony, the meeting in Baton Rouge involved the entirety of the property located in the former Hammond Bombing and Gunnery Range, not just the property 5-Z sold to MGD. Zahn denied having made any statement suggesting that the property 5-Z sold to MGD was located in the former bombing range. He stated that at the time of the sale neither he nor, to the best of his knowledge, the members of 5-Z knew the property 5-Z sold to MGD was in the bombing range. Therefore, although there was conflicting testimony on this point, the trial court's choice to credit that of Zahn over that of Davis was reasonable. See ***Stobart***, 617 So.2d at 882-83.[2]

MGD's contention that under the doctrine of *contra non valentum*, prescription did not begin to run until it discovered the defect in the property is also without merit. Although the doctrine of *contra non valentem* is a jurisprudential rule under which prescription may be suspended, see ***Carter***, 892 So.2d at 1268, the date of discovery plays no part at all in determining the prescriptive period against such a seller. ***Wimberly v. Blue***, 2008-1535 (La. App. 3d Cir. 5/6/09), 11 So.3d 560, 563. To apply the discovery rule of *contra non valentem* to the sale of residential or commercial immovable property when that situation is the only one for which the legislature did not specifically provide for its application would render subparagraph (2) of La. C.C. art. 2534(A) redundant. Had the legislature intended the discovery rule to apply to this situation, it would have provided that the prescriptive period run from the date of discovery. ***Wimberly***, 11 So.3d at 564; see also ***Bunch v. Town of St. Francisville***, 446 So.2d

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[2]MGD filed a motion for a new trial, suggesting it had discovered new evidence about 5-Z's knowledge at the time of the sale and, on appeal, challenges the overruling of its motion. The new evidence consisted of Deputy Thomas R. Davidson's testimony that he was also at the meeting in Baton Rouge and had overheard the statement made by Zahn. As the trial court noted, the new evidence did not show "the extent [that] this problem was known at the time of the sale." Thus, because the testimony contains no new evidence that would change the result of this case, the trial court did not abuse its discretion in overruling the motion, particularly given the cumulative nature of the new evidence. See ***Thomas v. Comfort Center of Monroe, LA, Inc.***, 2010-0494 (La. App. 1st Cir. 10/29/10), 48 So.3d 1228, 1240.

1357, 1360 (La. App. 1st Cir. 1984) (it will not be presumed that the lawmaker inserted idle, meaningless, or superfluous language in the law or that it intended for any part or provision of the law to be meaningless, redundant, or useless).

Thus, applying the provisions of La. C.C. art. 2534A(2) under the appropriate standard of review, which is the manifest error/clearly wrong standard, MGD's action for redhibition against 5-Z, a seller who did not know of the existence of the defect, prescribed in one year from March 2006, when delivery of the property was made to MGD. MGD's lawsuit, filed on October 28, 2009, well over a year after delivery, was untimely. The trial court correctly sustained the objection of prescription and dismissed MGD's lawsuit against 5-Z. Accordingly, finding a reasonable factual basis to support the trial court's conclusion that the claim was untimely asserted, the trial court correctly sustained the exception of prescription and dismissed MGD's redhibition claim.

The trial court also correctly granted summary judgment in favor of 5-Z on its deficiency judgment action against Davis who, along with John Mills, another MGD member, signed the promissory note as a surety for MGD's obligation. In reversing the trial court, the majority determined that because MGD's redhibition claim was not prescribed, summary judgment on the deficiency judgment action was inappropriate, reasoning that Davis and Mills could assert any defenses available to the debtor, including extinction of the claim as a result of any recovery on MGD's redhibition claim.

The record established that 5-Z affirmatively pled and proved the existence of the obligation giving rise to the debt and the grounds of non-performance entitling it to maintain its judicial action. Further, 5-Z established by evidence that the property was sold under the executory proceeding, after appraisal, in accordance with the provisions of C.C.P. art. 2723 (providing for appraisal of the

property unless it is waived), and that the proceeds received were insufficient to satisfy the balance of the performance then due. Davis and Mills did not rebut the existence of any of the elements necessary for 5-Z to obtain a deficiency judgment. Simply stated, none of the defects Mills and Davis allege are in the chain of authentic evidence supporting the executory process are "fundamental" so as to preclude a deficiency judgment.

The assertion by Davis and Mills that 5-Z is prohibited from use of the Louisiana Deficiency Judgment Act because 5-Z failed to include them as necessary parties in the executory process and failed to provide adequate notice to them is likewise without merit. In the promissory note executed by 5-Z and MGD, Mills and Davis appear as guarantors on the note. The Deficiency Judgment Act was not designed to protect accommodation parties who have no interest in the mortgaged property. See ***Chrysler Credit Corporation v. Breaux***, 293 So.2d 261, 266 (La. App. 1st Cir.), writ denied, 294 So.2d 548 (La. 1974). Sureties are not entitled either to notice of the foreclosure sale or the right to appoint an appraiser. See ***Cameron Brown South, Inc. v. East Glen Oaks, Inc.***, 341 So.2d 450, 458-59 (La. App. 1st Cir. 1976).

Therefore, because 5-Z proved entitlement to summary judgment in its deficiency judgment action, and there are no outstanding issues of material fact, since I believe MGD's redhibtion claim is prescribed, I would affirm the trial court's judgment on this basis as well. Lastly, I would remand the matter to the trial court to hold an evidentiary hearing for a determination of a reasonable amount of attorney's fees.

For all these reasons, I dissent.