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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

GORDON G. COOPER, MASTER-IN-EQUITY

APPELLATE CASE NO. 2021-000762

Patricia Miller..... Respondent,

v.

David Meeks.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a real estate dispute. Respondent Patricia Miller (hereinafter referred to as "Seller") filed her Complaint on October 16, 2018 alleging causes of action against Appellant David Meeks (hereinafter referred to as "Purchaser") for trespass, nuisance, intentional interference with contract and ejectment. (ROA pp. 26-31).

On November 12, 2018, Purchaser filed an Answer and Counterclaim denying the material allegations contained in the Complaint and also counterclaiming for reformation of the deed and specific performance. (ROA pp. 32-38).

On December 12, 2018, Seller filed an "Answer to Counterclaim" denying the material allegations contained in the Counterclaim and setting forth several affirmative defenses. (ROA pp. 47-53).

Seller filed a Motion for Summary Judgment on May 13, 2019. (ROA pp. 279-280). On August 20, 2019, Purchaser also filed a Motion for Reference to the Master-in-Equity and for Partial Summary Judgment. (ROA pp. 281-282). Purchaser filed a Memorandum of Defendant in support of his motion on September 26, 2019. (ROA pp. 283-287).

The parties appeared before the Honorable Grace Gilchrist Knie on October 1, 2019 on the cross-motions for summary judgment. By "Order Regarding Plaintiff's Motion for Summary Judgment; Defendant's Motion for Partial Summary Judgment and Reference to the Master-in-Equity" filed November 6, 2019, the circuit court held as follows:

> That this is a real property boundary line dispute. By way of counterclaim, the Defendant seeks reformation of the deed to the property which is the subject of this action. Reformation of a deed is an equitable remedy. **It has been agreed that the plat of the survey upon which the disputed property was deeded is incorrect, and therefore the correct boundary lines must be determined by the Court.** (hereinafter "Circuit Court Order"). (ROA p. 21, para. 4)(emphasis added).

Neither party appealed the Circuit Court Order.

Based upon the foregoing, the circuit court referred this matter to the Master-in-Equity by Order of Reference filed December 13, 2019. (ROA p. 24). The Order of Reference provided that "any appeal from any order or judgment issued by the Master-in-Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules." (ROA p. 24).

On February 12, 2020, Purchaser filed a Motion for Summary Judgment with the Master-in-Equity. (ROA pp. 312-314).

The depositions of Patricia Miller, Frank Clyde Miller, Jr., George Benjamin Souther and David Richard Meeks were filed with the Court on December 2, 2020. (ROA pp. 54-251).

The parties appeared before the Master-in-Equity on April 26, 2021 on Purchaser's Motion for Summary Judgment. As noted in the Order of Master in Equity filed May 24, 2021:

> After arguments on the motion for summary judgment the parties voluntarily discussed the future of the case and the need for an in-person trial. After much discussion both parties consented to this Court issuing a ruling as to the entire matter of Reformation of the Deed based upon the parties' arguments and submissions in preparation for and at the hearing on the Defendant's motion for summary judgment. Both Plaintiff and Defendant agreed to submit the matter to the Court for a final ruling on the issue of the boundaries and ownership of the property at issue of the case. Both parties also stipulated that the evidence and submissions to the Court for the hearing on the Defendant's Motion for Summary Judgment would be admitted into the record for the court's review and ruling. (ROA p. 3).

As a result of his review of the record, the Master found that "(1) the Deed should not be reformed; and (2) that the property lines and ownership of the property are properly reflected in the Title to Real Estate dated July 15, 2010 filed in Deed Book 96-Q pg. 506, and the corresponding plat prepared by Souther Land Surveying dated June 30, 2010." (ROA p. 8).

Purchaser filed a Motion to Reconsider on June 2, 2021. (ROA pp. 363-370). The Master denied Purchaser's Motion by Order Denying Defendant's Motion to Reconsider filed June 22, 2021. (ROA pp. 12-13).

Purchaser then filed his Notice of Appeal.

STATEMENT OF THE FACTS

In or around April of 2006, Seller acquired a little more than ten acres of land in Spartanburg County, South Carolina from her husband Frank Clyde Miller. (ROA pp. 200, 208 - 209). This property was reflected as tax map number 1-48-00-016.00 (Id.). Unimproved land comprised approximately seven of these ten acres (ROA p. 271 – property referenced as tax map numbers 1-48-00-016.03, .06 and .04).

In or around 2007, Seller planned to convey 1.00 acre of her land to her son Frank Clyde Miller, Jr. (hereinafter referred to as "Son"). Son paid Ralph Smith to prepare a survey of this 1.00 acre parcel. (ROA pp. 148-149 (Son's depo. p. 16, l. 14 – p. 19, l. 18); p. 206). Seller never actually conveyed this 1.00 acre parcel to Son because it "flunked the perk test for the septic tank." (ROA p. 149 (Son's depo. p. 19, ll. 19-21)).

Because the 1.00 acre parcel failed the "perk test," Seller conveyed to Son the .97 acre lot which was directly west of the 1.00 acre lot. (ROA pp. 149-150 (Son's depo. p. 19, l. 23 – p. 22, l. 6)).

This .97 acre parcel was recorded in Plat Book 161 at Page 709 and is shown as tax map number 1-48-00-016.03. (ROA pp. 200 & 205). This was the only lot conveyed from Seller to Son. Son subsequently built a house on his .97 acre parcel.

In or around 2010, Seller decided to sell her land to pay some of her husband's bills. (ROA p. 92, ll. 16-24). Purchaser owned some adjacent land where he operated Hollywild Animal Park. (ROA p. 92, ll. 8-15). Hollywild Animal Park is located directly north of Hampton Road and Seller's land is located directly south of Hampton Road. (ROA p. 214 (Purchaser's depo. p. 14, ll. 12-25)). Purchaser wanted some land to "house his goats on the south side of Hampton Road." (ROA p. 214 (Purchaser's depo. p. 15, ll. 1-4)).

Although it is not clear who initiated the negotiations, Seller ultimately agreed to sell her land to Purchaser for $15,000.00. (ROA p. 94, ll. 18-19; p. 221 (Purchaser's depo. p. 44, ll. 19-24)). Seller was aware that Purchaser bought the land to keep his goats there. (ROA p. 111, l. 12 – p. 112, l. 6).

Purchaser asked Seller how much property she owned and was willing to sell and Seller responded that she had "at least 3 acres, maybe more." (ROA p. 221 (Purchaser's depo. p. 44, ll. 11-13)). Seller told Purchaser that she was selling all the land that she owned which "joins" Son's property. (ROA p. 222 (Purchaser's depo. p. 45, l. 2 – p. 46, l. 5); p. 223 (Purchaser's depo. P. 51, ll. 12-18)).

Purchaser prepared the "Agreement to Sell and Buy" dated May 22, 2010. (ROA p. 252). The Agreement to Sell and Buy described the property being sold as:

> **All that property that joins Frank C. Miller, Jr., Roy McGraw, joins Hampton Rd., continues to center of creek at lower end of Property. (ROA p. 252)**

Purchaser testified that he was purchasing all the land owned by Seller which was bordered by Hampton Road, the creek to the east, Roy McGraw's property to the south and which also "joined" Son's property. (ROA pp. 222-226 (Purchaser's depo. pp. 45 – 61); p. 235 (Purchaser's depo. pp. 95, l. 16 – p. 96, l. 15)). The property Purchaser intended to buy as described in the

Agreement to Sell and Buy is best depicted on Exhibit G to the Memorandum of Defendant filed September 26, 2019. (ROA p. 306-307).

After the parties signed the Agreement to Sell and Buy, Purchaser contacted Souther Land Surveying to prepare the survey for the property. (ROA p. 222 (Purchaser's depo. p. 46, ll. 6-10)). Souther Land Surveying opened a file for this job on May 26, 2010. (ROA p. 179 (Souther depo. p. 26, l. 5 – p. 27, l. 2); p. 200). Michelle White, an employee of Souther Land Surveying, completed the intake sheet for this job. (ROA p. 179 (Souther depo. p. 26, ll. 5-13)).

This intake sheet correctly noted that Son owned the property shown as tax map ending "016.3" but erroneously noted this was the 1.00 acre parcel shown in Plat Book 161 at Page 664. (ROA p. 200). The 1.00 acre parcel shown in Plat Book 161 at Page 664 was the parcel that Son originally wanted to own but never did because it failed the "perk test."

The survey prepared by Souther Land Surveying was completed on or by June 30, 2010 (hereinafter "Souther Survey"). (ROA pp. 290-291).

Perpetuating the mistake made by Michelle White, the Souther Survey indicated that the property conveyed to Purchaser was 4.47 acres with the western boundary being the 1.00 acre lot which was incorrectly noted on the survey as being owned by Son. (ROA pp. 290-291). Seller was still the owner of the property shown on the Souther Survey as belonging to "Frank Clyde Miller, Jr." The 1.00 acre lot was never conveyed to Son.

Ben Souther admitted that the Souther Survey contained an "error in the adjoining information, the information on the adjoining tax map off of our property. It should have been over onto this lot" which was the .97 acre lot actually owned by Son. (ROA p. 190 (Souther depo. p. 69, ll. 2-7)). Souther admitted this was a "mistake." (ROA p. 190 (Souther Deposition p. 69, l. 8)).

Attorney Josh Henderson conducted the closing on July 15, 2010. Seller signed the Title to Real Estate (hereinafter referred to as "Deed") which expressly referenced the Souther Plat and purported to convey the 4.47 acres shown on the Souther Plat. (ROA p. 200).

Shortly after the closing, Purchaser erected a fence on the eastern side of the .97 acre lot actually owned by Son extending from Hampton Road all the way down to the property owned by McGraw. (ROA pp. 149-158 (Son's depo. p. 20, l. 16-p. 21, l. 16; p. 27, ll. 6-21; p. 39, ll. 6-21; p. 158, ll. 12-22); pp. 317-318; p. 226 (Purchaser's depo. p. 62, ll. 1-4); p. 246 (Purchaser's depo. p. 140, ll. 13-23); p. 204; pp. 306-309; pp. 361-362). The fence was a large commercial fence open and obvious from the road. (ROA pp. 138 & 140). The location of the fence erected by Purchaser in 2010 is best depicted on Exhibit H to the Memorandum of Defendant filed September 26, 2019. (ROA p. 309).

Once the land was fenced in, Purchaser placed his goats on the property. When asked whether she had a problem when Purchaser fenced the property and put his goats on the fenced property, Seller testified "no, no, no, no, no." (ROA p. 104, ll. 14-21). She had no objection to Purchaser fencing in his property because he had "bought" that land. (ROA p. 105, ll. 7-9).

Purchaser confirmed that Seller never complained about the location of the fence that was constructed in 2010 even though Seller lived only 100 to 150 yards away. (ROA p. 248 (Purchaser's depo. p. 147, ll. 4-22)). Son also confirmed that Seller never suggested that the fence was in the wrong place even though Seller lived only "two doors up." (ROA pp. 153-154 (Son's depo. p. 36, l. 15 – p. 37, l. 19)).

Not only did Seller not object to the location of the fencing or the goats, she actually admitted that the goats were "beautiful." (ROA p. 114, ll. 8-17). Son testified that the goats were a "soothing presence." (ROA p. 153 (Son's depo. p. 34, ll. 12-21)).

Seller's daughter confirmed that Purchaser purchased all of the property up to Son's property which was the same property fenced in by Purchaser in 2010. The only disputed property in her mind was the property "behind" Son's property. (ROA p. 361).

Seller conceded that the property fenced in by Purchaser in 2010 was not in dispute. Seller's attorney acknowledged that Purchaser "fenced the property and added livestock" to the property he purchased in 2010. (ROA p. 319). Seller further agreed that the only property "at issue in this matter" was the "property **behind** Clyde Miller, Jr." (ROA p. 319)(emphasis added).

Although Seller and her daughter believed that the ownership of the land located directly "behind" (or south) of Son's property was in dispute, Son always believed that Purchaser was the owner of that property. (ROA pp. 154-156 (Son's depo. p. 38 l.11- p. 46 l. 9); p. 170 (Son's depo. p. 101, l. 13 – p. 103, l. 5)).

From the summer of 2010 until the summer of 2018, Purchaser kept his goats on the fenced-in property without incident. He also constructed a barn and made other improvements to the property. Nobody objected to the "big barn" being built or other improvements that were made to the property. (ROA p. 154 (Son's depo. p. 37, ll. 7-22)).

In or around May of 2018, Seller had discussions with another neighbor, Tillman Gibson, about selling "approximately 2.5 acres" to him. (ROA p. 108, ll. 6-17; p. 143). Although Seller and Gibson never fully executed a contract for the sale of this 2.5 acres, Gibson hired a surveyor to stake or flag the land he wanted to purchase from Seller. (ROA pp. 128-130 (Seller's depo. p. 42, l. 2 – p. 44, l. 12)).

Around the same time Seller was negotiating with Gibson, Purchaser was in negotiations with Son to buy the .97 acre lot owned by Son. (ROA pp. 155-156 (Son's depo. p. 44, l. 25 – p. 45, l. 12); p. 237 (Purchaser's depo. p. 103, ll. 12-16)). Son and Purchaser ultimately entered into

a Contract for Deed related to the .97 acre lot owned by Son. (ROA p. 227 (Purchaser's depo. p. 65, l. 5 – p. 67, l. 16)).

Now that he had Son's property under contract, Purchaser erected fencing around all the land he intended to purchase as evidenced by the Agreement to Buy and Sell. (ROA pp. 227-228 (Purchaser's depo. p. 65, l. 5 – p. 66, l. 15; p. 71, l. 25 – p. 72, l. 25); p. 158 (Son's depo. p. 55, ll. 3-11)). Purchaser started erecting the new fencing within a few weeks of noticing the survey flags that were placed in the ground by Gibson's surveyors. (ROA p. 159 (Son's depo. p. 57, ll. 1-7); p. 231 (Purchaser's depo. p. 78, ll. 12-25)).

The new fencing now ran across the southern border of the .97 acre lot before turning south and connecting to McGraw's property. (ROA p. 100, ll. 12-25; p. 305).

When Purchaser erected new fencing behind Son's property, Seller contacted her lawyer. Seller's lawyer sent Purchaser a letter in June of 2018 demanding immediate removal of the goats. (ROA p. 127, ll. 17-21). Subsequently, after retaining counsel, Purchaser realized that there was a mistake in the 2010 deed. (ROA p. 231, ll. 7-16).

Purchaser then contacted Souther and "expressed that he thought his line was further up the hill." (ROA p. 183 (Souther depo. p. 41, ll. 12-15)). Purchaser asked Souther to prepare an exhibit correcting the location of the lot which had previously been owned by Son but had now been purchased by Purchaser.[1] (ROA p. 210).

Souther testified that given the correction of the location of the .97 acre lot, the western property line pursuant to the Contract for Sale and Purchase should have been as highlighted on Exhibit No. 6 to his deposition. (ROA pp. 191-192 (Souther depo. p. 74, l. 2 – p. 77, l. 8); p. 204).

[1] Title of this property was ultimately placed in the name of Manzanares, LLC, a limited liability company owned by Purchaser and his wife. The "Exhibit Drawing for David R. Meeks" prepared by Souther on June 21, 2019 correctly identifies the location of the .97 acre lot formerly owned by Son but now owned by Purchaser through Manzanares, LLC. (ROA p. 210).

Souther further testified that the entire parcel to be sold pursuant to the Contract for Sale and Purchase is the highlighted portion shown on Exhibit No. 5 to his deposition. (ROA p. 192 (Souther depo. p. 77, ll. 9-19); p. 203).

STANDARD OF REVIEW

A boundary dispute is an action at law and the location of a disputed boundary line is a question of fact. Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995). In an appeal from an action in equity, tried by a judge alone, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n, Inc., 421 S.C. 538, 544, 808 S.E.2d 521, 524 (Ct. App. 2017); U.S. Bank Tr. Nat'l Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility[2] of the witnesses." Id. (quoting Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001)). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." Id. (quoting Pinckney, 344 S.C. at 387-88, 544 S.E.2d at 623). The appellate court can correct errors of law. Okatie River, L.L.C. v. Se. Site Prep. L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003).

[2] Because of the unique circumstances of this case, the Master did not actually have the benefit of live witnesses. Accordingly, the presumption that the Master was in a better position to assess credibility does not apply.

ARGUMENT

I. The Master-in-Equity erred in finding no mistake in the survey and resulting Deed when the law of the case already determined that the parties agreed that the survey referenced and incorporated into the Deed was incorrect.

The circuit court found as a matter of fact that Seller and Purchaser "agreed that the plat on the survey upon which the disputed property was deeded is incorrect, and therefore the correct boundary lines must be determined by the Court." (ROA p. 21). Neither party appealed the circuit court order. As such, the finding that both parties agreed that the Souther Survey was incorrect and that the Master must determine the correct boundary lines is the law of the case. See, e.g., Richland County v. Palmetto Cablevision, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, becomes the law of the case); Hotel and Motel Holdings, LLC v. BJC Enters., LLC, 414 S.C. 635, 659, 780 S.E.2d 263, 276 (Ct. App. 2015) (same).

Despite the law of the case, the Master found that the Souther Survey and the Deed were correct and refused to reform the Deed to correct the boundary lines. The Master exceeded the scope of the Order of Reference by ignoring the law of the case and making findings of fact and conclusions of law inconsistent with the law of the case.

II. The Master-in-Equity erred in applying and interpreting the doctrine of merger to defeat Purchaser's request for reformation of the Deed when the Seller did not argue merger, the facts established that the Deed was the result of mistake, and the failure to reform the Deed results in a windfall to Seller.

The Master-in-Equity refused to reform the Deed to correct the boundary lines and ownership of the properties in question based almost exclusively upon the doctrine of merger. The Master's application and interpretation of the doctrine of merger was controlled by error of law and not supported by the record.

First of all, Seller never argued the doctrine of merger. When Purchaser counterclaimed for reformation of the Deed, Seller did not include merger as an affirmative defense in her "Answer to Counterclaim." (ROA pp. 32-38). The failure to plead an affirmative defense is deemed a waiver of the right to assert it. See, e.g., Adams v. B & D, Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (ruling that an affirmative defense not pleaded in the answer or raised before the trial court will not be addressed on appeal).

Similarly, in her Motion for Summary Judgment, Seller did not assert the doctrine of merger to defeat Purchaser's request for reformation of the Deed. (ROA pp. 279-280).

In her brief in opposition to Defendant's Motion for Summary Judgment, Seller did not even mention the doctrine of merger. (ROA pp. 319-322).

At the hearing before the Master, Seller did not argue the doctrine of merger. (ROA pp. 54-84).

Given Seller's failure to raise the defense of merger, the Master erred in applying the doctrine of merger to defeat the Counterclaim of Purchaser requesting reformation of the Deed. Even if it was appropriate for the Master to consider the doctrine of merger, he erred in his interpretation of that doctrine.

Generally speaking, the doctrine of merger provides that the "execution, delivery, and acceptance of a deed varying the terms of an antecedent contract indicates an amendment of the original contract." Shoney's, Inc. v. Cooke, 291 S.C. 307, 311, 353 S.E.2d 300, 303 (Ct. App. 1986). The theory is that the parties to the transaction always have the "privilege…of changing their contract obligations by further agreements prior to performance." Id. at 310, 353 S.E.2d at 303.

The doctrine of merger is not automatic or absolute. There are numerous exceptions. See e.g., Hughes v. Greenville Country Club, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984) (contrary intent exception to the doctrine of merger); Shoney's, 291 S.C. at 313, 353 S.E.2d at 304 (collateral agreement exception).

For example, the doctrine of merger does not apply "where there is mistake or fraud in the execution of the deed." Charleston & Western Carolina Railway Co. v. Joyce, 231 S.C. 493, 99 S.E.2d 187, 193 (1957). Although routinely cited as an exception to the doctrine of merger, the notion that the rights of the parties are not "fixed by their expressions as contained in the deed" is nothing more than a restatement of the foundation of the doctrine of merger. Shoney's, 219 S.C. at 311, 353 S.E.2d at 303.

Once again, the doctrine of merger is "founded upon the privilege, which parties always possess, of changing their contract obligation by further ***agreements*** prior to performance." Shoney's, 291 S.C. at 310, 353 S.E.2d at 303 (emphasis added). For the doctrine of merger to be triggered, there must be some evidence of the parties reaching "further agreements" subsequent to the execution of the antecedent contract. If the language in a deed varies from the language in the contract without any evidence of further negotiations or agreements subsequent to the original contract, the terms of the deed are the product of a mistake or some other wrongdoing.

Without requiring some evidence of "further agreements" subsequent to the original contract, the doctrine of merger would be absolute and would never be subject to the exceptions too numerous to list here.

If the doctrine of merger was absolute, it would lead to absurd results. For example, assume A owns twenty (20) one acre lots that run north to south. Further assume that A enters into a written contract to sell the northern-most one acre lot to B for $10,000. The parties have no more

communications from the date of the execution of the contract until the execution of the deed. A's lawyer inadvertently prepares the deed to convey the northern most *ten* acres to B instead of the northern most *one* acre. A signs the deed, delivers it to B and B records it. When B starts to clear the entire ten acres, A is going to object and claim that the deed mistakenly conveyed ten acres instead of one. Even though *generally* a "deed subsequent to the making of an executory contract for a sale of land supersedes that contract," B should not be entitled to retain ownership of the ten acres. The deed was mistakenly drafted by A's lawyer and B should not benefit from this mistake. The doctrine of merger does not control in this situation because the parties did not exercise their privilege of changing their contract obligations by further agreements prior to performance.

The result would be entirely different if, subsequent to the execution of the contract in this hypothetical, the parties discover that the one acre lot is unbuildable. In fact, the parties discover that all but one of the northern most lots are unbuildable. A and B have multiple meetings to discuss the issues related to the lots. The parties do not sign a new contract. Instead, A's lawyer prepares a deed which conveys ten acres to B for $10,000.

Under this scenario, the doctrine of merger actually makes sense and the rights of the parties "should be fixed by their expressions as contained in the deed." Joyce, 231 S.C. at 504-05, 99 S.E.2d at 193. In this hypothetical, there is evidence that the parties did exercise their privilege of changing their contract obligations by further agreements prior to performance.

In the present case, Seller did not argue or present any evidence that the parties engaged in negotiations or reached any "further agreements" after the execution of the Agreement to Sell and Buy.

Instead, Seller's lawyer prepared a Deed which varied from the terms of the antecedent Agreement to Sell and Buy. Seller signed the Deed. This Deed was predicated upon the admittedly

erroneous Souther Survey. It is not equitable for Seller to benefit from this mistake. The doctrine of merger is not even implicated because there is no evidence that the Seller and Purchaser ever changed "their contract obligations by further agreement prior to performance."

Despite the fact that Seller did not raise the doctrine of merger, the Master relied almost exclusively "on the long-standing precedent of the Doctrine of Merger" to deny Purchaser's request for reformation of the Deed. (ROA p. 5). In so holding, the Master found "insufficient evidence of mutual mistake." (ROA p. 4, para. III (2) and p. 6). The exception to the doctrine of merger does not require mutual mistake.[3]

The cases applying the doctrine of merger only require ***a*** mistake in the drafting of a deed. The Master erred in holding that a showing of mutual mistake was required to defeat the doctrine of merger. The doctrine of merger does not apply if there is any mistake or accident in the drafting of a deed. Accord Bellamy v. Bellamy, 292 S.C. 107, 110, 355 S.E.2d 1 (Ct. App. 1987) (extrinsic evidence can add, subtract, vary or explain the description in a deed upon a showing of as little as "accident or mistake in its procurement").

It cannot seriously be argued that there was no mistake or accident in the drafting of the Deed. Purchaser agreed to buy, and Seller agreed to sell, all the land owned by Seller which abutted Son's property, Roy McGraw's property, Hampton Road and the creek. There is no reasonable doubt that this is the tract that Purchaser thought he was purchasing. The Deed did not convey all the property described in the Agreement to Sell and Buy. The Master should have reformed the deed to correct this mistake. Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298,

[3] The cases cited by the Master which required a showing of mutual mistake do not involve the doctrine of merger. See e.g. Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981) (mutual mistake required to reform deed; doctrine of merger not implicated); Ives v. Ives, 223 S.C. 461, 76 S.E.2d 471 (1953) (same); Harrington v. Blackston, 319 S.C. 1, 459 S.E.2d 309 (Ct. App. 1995) (same); Timms v. Timms, 290 S.C. 133, 348 S.E.2d 386 (Ct. App. 1986) (same); Commercial Union Assurance Co. v. Castile, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984) (mutual mistake required to reform automobile liability insurance policy; doctrine of merger not implicated).

300 (Ct. App. 1987)("Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties.")

The genesis of the mistake was the surveyor's reliance on erroneous plats in preparing Souther's Survey. The surveyor mistakenly assumed that Son owned the 1.00 acre lot depicted at Plat Book 161 at Page 664 and mistakenly referenced this lot as being owned by "Frank Clyde Miller, Jr." on the Souther Survey. (ROA p. 204). Son never owned this lot. The surveyor's reliance upon this plat as the property line for Son was plainly in error. The surveyor admitted this mistake. (ROA p. 191 (Souther depo. p. 73, ll. 2-22); p. 210).

Without having more to go on, the closing attorney relied solely on this incorrect survey in describing the property in the Deed. The Deed merely perpetuated the mistake in the Souther Survey. In light of this mistake, the doctrine of merger does not apply and the Deed should be reformed to correct the mistake.

When a plat created for the purpose of a sale is in error, extrinsic evidence is admissible to establish the intent of the parties. See e.g. Smith v. Durant, 236 S.C. 80, 90, 113 S.E.2d 349, 355 (1960); Richardson v. Register, 227 S.C. 81, 87 S.E.2d 40, 43 (1955). The extrinsic evidence admitted in the case at bar *without objection* established that the parties intended to transfer ownership of all of the property owned by Seller which touched upon the land actually owned by Son.

Even if a mutual mistake is actually required by law to defeat the doctrine of merger[4], the evidence established that the language in the Deed also varied from Seller's understanding of the transaction. In fact, Seller testified that the "deed was mistaken." (ROA p. 96, ll. 20-21). A mistake

[4] Seller acknowledges that when the doctrine of merger is not implicated, the law generally requires a showing that the mistake be mutual to justify reformation of a deed. See supra n. 3.

is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Crosby, 293 S.C. at 206, 359 S.E.2d at 300.

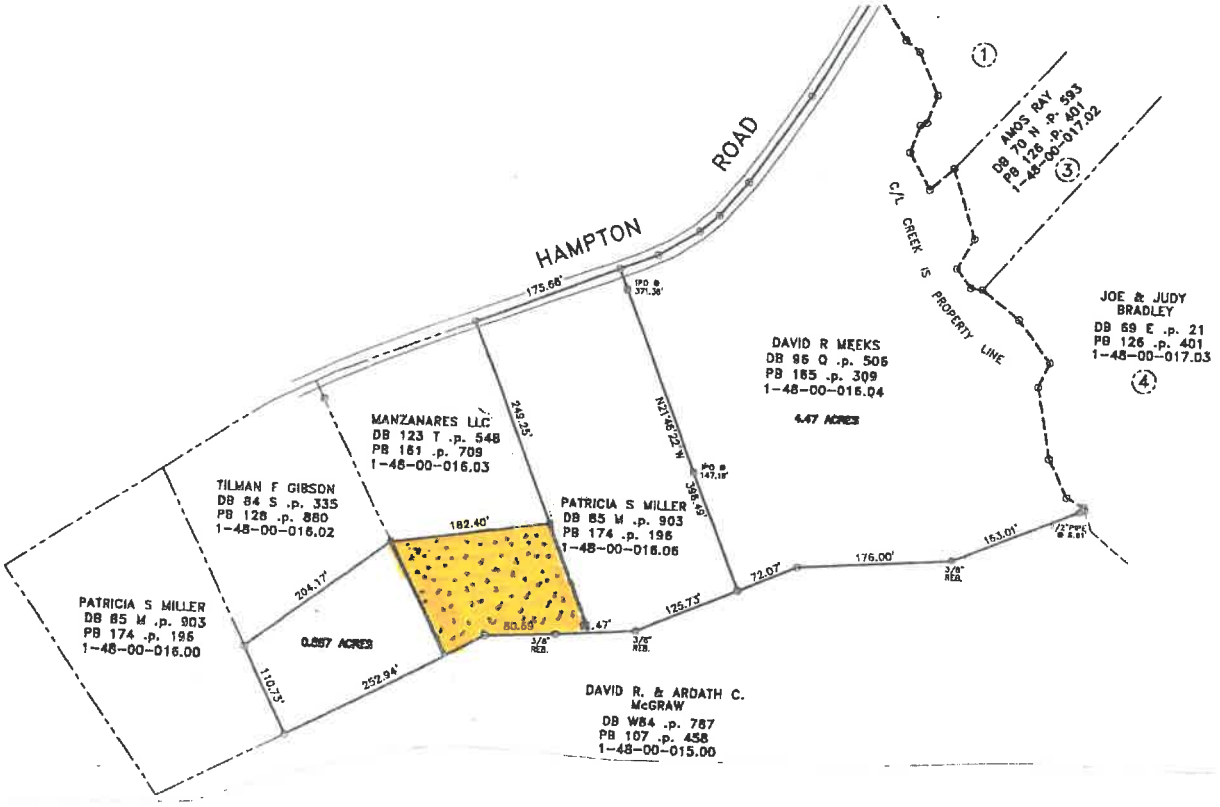
The property line shown on the Souther Survey (and perpetuated in the Deed) is approximately 175 feet east of Son's property line which is where Purchaser erected the fence in 2010. (ROA p. 203). Seller did not object to the location of the fence because Seller knew that Purchaser had bought the land that he fenced in in 2010. (ROA p. 104, ll. 14-21; p. 105, ll. 7-9). Seller conceded that the property line should have been at least to the eastern boundary of Son's property as shown on Exhibit H to Memorandum of Defendant Exhibit. (ROA pp. 308-309).

As noted in the Circuit Court Order, Seller's attorney also conceded that "the plat of the survey upon which the disputed property was decided is incorrect." (ROA p. 21). Seller is bound by those concessions. See Pope v. Heritage Communities, Inc., 395 S.C. 404, 430-31, 717 S.E.2d 765, 779 (Ct. App. 2011) ("the parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial").

Seller conceded that the property fenced in by Purchaser in 2010 was not in dispute. Seller's attorney acknowledged that Purchaser "fenced the property and added livestock" to the property he purchased in 2010. (ROA p. 319). Seller further acknowledged that the only property "at issue in this matter" was the "property behind Clyde Miller, Jr." (ROA p. 321).

Seller's daughter confirmed that Purchaser purchased all of the property up to Son's property which was the same property fenced in by Purchaser in 2010. The only disputed property was the property "behind" Son's property. (ROA p. 361).

In light of the testimony of all parties and witnesses as well as the concessions of Seller's attorney of record, the only property arguably in dispute is the small parcel of land south of the lot formerly owned by Son (now owned by Manzanares, LLC) as shown below[5]:



Although Seller and her daughter believed that the ownership of the land located directly "behind" (or south) of Son's property was in dispute, Son always believed that Seller sold the property highlighted above to Purchaser. (ROA pp. 154-156 (Son's depo. p. 38, l. 11- p. 46, l. 9); p. 170 (Son's depo. p. 101, l. 13- p. 103, l. 5)).

The Master cited the case of Ives v. Ives, 223 S.C. 461, 76 S.E.2d 471 (1953), for the proposition that "to justify reformation on the ground of mutual mistake, it is incumbent upon a party to show by clear and convincing evidence that the parties intend that the deed shall convey certain property and by mistake in the drafting of same, the conveyance did not represent such

[5] This diagram is derived from Exhibit 11 to Souther's Deposition with the highlighted portion added for illustrative purposes.

intention." (ROA pp. 6-7). That is exactly the situation in this case. By virtue of the mistake in the drafting of the Souther Survey, which became part of the Deed, the conveyance did not represent the intent of the parties. The Master erred as a matter of law and fact in failing to issue an order reforming the Deed to reflect the actual agreement and intent of the parties which was undermined by the incorrect Souther Survey. See, e.g., Timms v. Timms, 290 S.C. 133, 348 S.E.2d 386 (Ct. App. 1986).

In Timms, the parties intended to divide a large tract of land into two parcels of equal acreage. The surveyor prepared a plat that purported to subdivide the original tract equally. Based upon that survey and plat, a fence was erected near the subdivision line. The surveyor mistakenly drew the line such that one party received 121 acres and the other only received 87 acres. The Court of Appeals reformed the deed to effectuate an equal division of the original tract based upon "the error made by their surveyor." Timms, 290 S.C.at 138, 348 S.E.2d at 389.

Without citing any law for the proposition, the Master found that "mutual mistake cannot exist where the parties disagree." (ROA p. 7). This finding is not supported by the law or common sense. If the parties agree as to what the end result should be, they would simply prepare a corrective deed and there would be no need for litigation.

Under the Master's logic, if a seller intended to convey three acres to a purchaser, the purchaser intended to buy ten acres, but the deed mistakenly conveyed twenty acres, then the deed cannot be reformed because the parties do not agree as to what the end result should be. This interpretation of the law would lead to an absurd result with neither party receiving what they intended and the purchaser receiving a windfall of at least ten acres. Contrary to the implication by the Master, when a deed does not convey what either party intended, that deed must be reformed.

Even if the Master's interpretation of the law of merger and mutual mistake is correct, the Deed in the present case still needs to be reformed because both parties intended for the Deed to transfer more property than the 4.47 acres shown on the Souther Survey. Seller and Purchaser both agreed that the western boundary line of the land bought by Purchaser began at Hampton Road and followed the eastern boundary of Son's lot. The western boundary line did not begin at the eastern boundary of the 1.00 acre lot that Son initially wanted to own. The Deed which failed to convey at least this much property to Purchaser was the result of mutual mistake.

In finding that the doctrine of merger defeated Purchaser's claim for reformation despite the mutual mistake, the Master relied on the policy of *Alabama* not only to discourage fraud, but also to discourage negligence and inattention to one's own interest." (ROA p. 7) (citing Torres v. State Farm Fire & Casualty Co., 438 S.E.2d 757 (Ala. 1983). The Master implied that Purchaser "refuse[d] to exercise reasonable diligence and discretion to protect [his] own interests." Id.

In so implying, the Master completely ignored the fact that, *under South Carolina law*, Seller had the same duty to exercise diligence and discretion. Instead of exercising diligence, Seller admitted that she didn't even review the Southern Survey at the time of closing. (ROA p. 97, l. 20 – p. 98, l. 11; p. 136).

The Master failed to acknowledge the policy of South Carolina courts to "attempt to avoid outcomes in which a party receives a windfall." May v. May, 428 S.C. 131, 140, 833 S.E.2d 78, 82 (Ct. App. 2019). In May, the South Carolina Court of Appeals found:

> [W]e assert that it would be a monstrous perversion of justice to deny the right of reformation upon the ground that the defendant was negligent in not reading the contract before signing it. It was as much the duty of the plaintiff to read the contract and see that it conformed to the agreement as it was the defendant's. If the plaintiff read it and discovered the discord and allowed the execution to proceed intending to take advantage of it, he does not assume a position that commends him to a [c]ourt of [e]quity.

> [I]f when presented for their signatures [the parties] thought or assumed that no discord existed, their signing would be the result of their co-operative fault; if one of them discovered the discord and remained silent, it would be a fraud upon the other not to call attention to it. In any conceivable event, therefore, reformation would be decreed. Id. at 140, 833 S.E.2d at 82 (quoting Jumper v. Queen Mab Lumber Co., 115 S.C. 452, 464-65, 106 S.E. 473, 477-78 (1921).

Based upon the logic in May (as well as the logic in Jumper from 100 years ago), although Purchaser perhaps should have read the Deed more carefully before recording it, Seller either neglected to read the Deed herself or she recognized the error and elected to remain silent. Either way, Seller shouldn't benefit from her own negligence or purposeful silence. Allowing Seller to benefit from this mistake is a windfall to her.

The windfall to Seller is all the more obvious based upon the conduct of the parties subsequent to the closing. From the summer of 2010 until the summer of 2018, Purchaser kept his goats on the fenced in property without incident. When asked whether she had a problem when Purchaser fenced the property and put his goats on the fenced property, Seller testified "no, no, no, no, no." (ROA p. 104, ll. 14-21). She had no objection to Purchaser fencing in his property because he had bought the land. (ROA p. 105, ll. 7-9). Purchaser also constructed a barn and made other improvements to the property. Nobody objected to the "big barn" being built or other improvements that were made to the property. (ROA p. 154 (Son's depo. p. 37, ll. 7-22)).

The Master erred as a matter of law in relying upon the doctrine of merger to reject Purchaser's request for reformation of the Deed. The Master applied a defense not raised by Seller and erred in its interpretation of the law of merger. All negotiations leading up to the execution, delivery and recording of a deed are not automatically merged into that deed. If the intent of the parties is contrary to the language in a deed, courts of equity must reform the deed. The Deed in the present case conveyed only the property referenced in the Souther Survey. As acknowledged

by the Circuit Court Order, Purchaser, Seller, Seller's attorney, Seller's Son, Seller's daughter Kathy Boasi, and the surveyor, the Southern Survey was just plain wrong. Purchaser openly and obviously erected a fence approximately 175 feet west of the boundary line reflected on the Souther Survey and he constructed substantial improvements on the property he fenced in. Nobody objected to the fencing or the improvements because it was plainly obvious that one of the boundary lines of the property sold to Purchaser was the eastern boundary of the lot owned by Son. The property description set forth in the Deed was contrary to the intent of the parties and was the result of mistake. The Master erred in failing to reform the Deed to reflect the boundary lines as shown in Exhibit G to the Memorandum of Defendant filed September 26, 2019. (ROA pp. 307-308). The refusal to reform the Deed results in an inequitable windfall to Seller.

III. The Master-in-Equity erred in refusing to reform the Deed based upon the doctrine of boundary by acquiescence given the uncontradicted evidence that all parties recognized for approximately eight years that the true boundary line was not as reflected in the Deed.

Based upon the conduct of the parties for the eight years subsequent to the closing, the Master erred in refusing to apply the doctrine of boundary by acquiescence to justify reformation of the Deed. See Knox v. Bogan, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996).

Like the case at bar, Knox involved a boundary dispute. In that case, the South Carolina Court of Appeals held that "recognition of, and acquiescence in, a line as the true boundary line, if continued for a sufficient length of time, will afford a conclusive presumption that the line that is acquiesced in is the true boundary line." Id. ____, 472 S.E.2d at 48. The Knox court further held that "where there has been a recognition by adjoining property owners of a clearly defined line for a long period of time, there is no requirement under South Carolina law that the Plaintiff show an active dispute or uncertainty as to the true line in a settlement of that dispute or uncertainty by the parties as an element of proof of title by acquiescence." Id. at ____, 472 S.E.2d at 48-49.

The Knox court even went so far as to find that "to establish a fence as a boundary line, it is not necessary that there be an express agreement....The agreement 'may be inferred from or implied by the conduct of the parties.'" Id. at ____, 472 S.E.2d at 48. When "adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time...they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one." Id. at ____, 472 S.E.2d at 48. "Acquiescence can be established even if the period of time is very short; acquiescence need not continue for the period required to establish adverse possession." Jordan v. Judy, 413 S.C. 341, 349, 776 S.E.2d 96, 100 (Ct. App. 2015).

The "determination of the question concerning what constitutes recognition and acquiescence depends upon the particular facts of the case. Generally, the question turns on "the acts or declarations of the parties, on inferences or presumptions from their conduct, or on their silence." Croft v. Sanders, 283 S.C. 507, 510, 323 S.E.2d 791, 792-93 (Ct. App. 1984).

As with the Seller's silence in pointing out the error in the Deed itself, Seller should not benefit from her silence in connection with Purchaser's use and improvement of the disputed property for eight years. Discussing the doctrine of boundary by acquiescence, the Supreme Court of South Carolina has held:

> [I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. His silence is acquiescence and it estops him. McClintic v. Davis, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955).

As a result of the Master's order, Seller retains ownership of property she admittedly sold to Purchaser in 2010. The finding and conclusion of the Master refusing to reform the Deed to

convey to Purchaser the property contained within the fence erected in 2010 is not supported by the preponderance of the evidence.

Instead of holding Seller to task for her silence in waiting eight years to object to Purchaser's use of the property, the Master denied Purchaser's Motion to Reconsider, in part, based upon "the clear failure of Defendant [Purchaser] to meet the Statute of Limitations in his reliance on the Doctrine of Boundary by Aquiesce (sic)." (ROA pp. 12-13). Purchaser is not aware of any statute of limitations applicable to the assertion of the doctrine of boundary by acquiescence. As referenced above, acquiescence can be established even if the period of time is very short. Acquiescence need not continue for the period required to establish adverse possession. Jordan, 413 S.C. at 349, 776 S.E.2d at 100.

Instead of relying on a defense never raised by Seller, the Master should have relied on the doctrine of boundary by acquiescence as expressly argued by Purchaser. At the very least, Seller recognized and acquiesced in Purchaser's ownership of all the property east of the fence Purchaser erected in 2010 as depicted on Exhibit H to the Memorandum of Defendant filed September 26, 2019. (ROA pp. 308-309). Seller's recognition of, and acquiescence in, Purchaser's rights continued for eight years while Purchaser improved the property. The Master's rejection of the doctrine of boundary by acquiescence was controlled by error of law and not supported by the preponderance of the evidence. In the event the Master properly refused to reform the Deed to reflect the boundary lines requested by Purchaser as shown in Exhibit G to the Memorandum of Defendant, the Master should have reformed the Deed to reflect the property line as evidenced by the fence erected by Purchaser in 2010 and depicted on Exhibit H to the Memorandum of Defendant filed September 26, 2019. (ROA pp. 308-309). The refusal to reform the Deed results in an inequitable windfall to Seller.

CONCLUSION

Based upon the forgoing, Appellant David Meeks respectfully requests an order reversing the Order of Master in Equity filed May 24, 2021 and the Order Denying Defendant's Motion to Reconsider filed June 22, 2021. Appellant specifically requests an order reforming the Deed such that it is consistent with the intent of the parties and conveys the property set forth in the Agreement to Sell and Buy dated May 22, 2010 as confirmed by the conduct of the parties and the preponderance of the evidence.

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June 23, 2022

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

GORDON G. COOPER, MASTER-IN-EQUITY

APPELLATE CASE NO. 2021-000762

Patricia Miller..... Respondent,

v.

David Meeks.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Appellate Court Rule 211 (b).

Respectfully submitted,

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