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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

GORDON G. COOPER, MASTER-IN-EQUITY

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APPELLATE CASE NO. 2021-000762

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Patricia Miller..... Respondent,

v.

David Meeks.....Appellant.

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# FINAL REPLY BRIEF OF APPELLANT

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## STANDARD OF REVIEW

The case at bar is more than a simple boundary line dispute. As relevant to this appeal, the main purpose of this action was for reformation of the deed and specific performance. An action for the construction and reformation of a deed is an action in equity. Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake Condominiums, 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995). See also Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n., Inc., 421 S.C. 538, 808 S.E.2d 521 (Ct. App. 2017). Similarly, an action alleging mistake is an action in equity as is an action for specific performance. See In re Estate of Holden, 343 S.C. 267, 278, 539 S.E.2d 703 (2000) (action alleging mistake is action in equity); DuPont v. Southern Nat'l Bank of Houston, 288 S.C. 312, 342 S.E.2d 590 (1986) (same). Ingram v. Kasey's Ass., 340 S.C. 98, 531 S.E.2d 287 (2000) (an action for specific performance is an action in equity).

Because the predominant issues involved in this appeal are equitable, the appellate court is authorized to determine the facts based upon its view of the preponderance of the evidence. Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1993).

## 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.

Respondent Patricia Miller ("Seller") wants this court to ignore the fact that she acknowledged in this very case that the Souther Survey was incorrect and, thus, the property description in the Deed was incorrect. To support this position, Seller now wants to paint the picture that Appellant David Meeks ("Purchaser") is trying to take advantage of an elderly person who only intended to sell three acres of land but somehow got hoodwinked into selling more. In

arguing that Purchaser has "attempted twice to take property from" her, Seller does not cite the record. She also does not cite any law. The record and the law support Purchaser's position.

The circuit court made a finding of fact based upon admissions by both parties. The Souther Plat was incorrect which, in turn, made the Deed incorrect. (ROA p. 7). These factual findings are 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).

Furthermore, a party cannot adopt a position in conflict with one earlier taken in the same litigation. Cothran v. Brown, 350 S.C. 352, 358, 566 S.E.2d 548 (Ct. App. 2002). See also Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765, 779 (Ct. App. 2011) (the "parties to a suit are bound by admissions, made by the attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial").

Instead of directly addressing the fact that she conceded that the Deed was the product of a mutual mistake, Seller devotes her energy to reciting testimony of the surveyor out of context. It is patently obvious that Souther's testimony is tainted by the fact he made a blatant mistake when he prepared the Souther Survey and then attempted to minimize the impact of his mistake during his testimony.

Similarly, Seller now tries to minimize the surveyor's mistake by arguing "[a]ccordingly to Souther, the only error in the survey concerns the placement of property that adjoins the subject property." (Brief of Respondent p. 4). Contrary to the implication of Souther and Seller, this is a huge error in this particular case.

The Agreement to Sell and Buy describes the property to be sold by referencing the surrounding properties or, as stated by Seller, the property that "adjoins the subject property." One of the landmarks for determining the boundaries of the property to be sold was the property owned

by Frank C. Miller, Jr. ("Son"). (ROA p. 133). Unfortunately, the surveyor erred in his depiction of the property owned by Son on the Souther Survey. This admitted error made the entire Souther Survey incorrect. The surveyor's error in determining the property actually owned by Son resulted in a survey that was at odds with the property description contained in the Agreement to Sell and Buy. The mistake in the Souther Survey was perpetuated in the property description in the Deed.

As found by the circuit court, all parties agreed this was a mistake. Seller cannot avoid this factual and legal reality by attempting to argue that this was some master plan by Purchaser to "take property" from Seller not once, but "twice." (Brief of Respondent p. 8).

Seller now wants to imply that Purchaser was engaged in some sort of fraud by virtue of his attempts to seek reformation of the Deed and specific performance of the Agreement to Sell and Buy. The record simply does not support such blame-shifting.

Purchaser prepared the Agreement to Sell and Buy which described the property to be sold. The surveyor made a mistake in his determination of one of the boundary lines for the property that was to be sold. This admitted mistake was perpetuated in the Deed. Everybody recognized that there was a mistake in the Souther Survey and in the Deed. The parties acknowledged and conceded before the circuit court that the Souther Survey and Deed were mistaken. The Master-in-Equity erred in failing to correct this mistake.

Finally, Seller contends that it was Purchaser's responsibility and "duty to have the correct information, boundaries, and information included in the transfer of property." (Brief of Respondent p. 8). Seller cites no law for this proposition. Both parties have the same duty to ensure the Deed conveyed the property described in the Agreement to Buy and Sell. Both parties were mistaken when they operated as if the Souther Survey and the Deed conveyed the correct property.

The Master exceeded the scope of the Order of Reference by ignoring the law of the case and in making findings of fact and conclusions of law inconsistent with the law of the case. Furthermore, the Master erred in accepting an argument advanced by Seller which was polar opposite to the position previously taken by Seller before the circuit court.

**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 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. There are many exceptions to the doctrine of merger. See e.g., Charleston & Western Carolina Railway vs. Joyce, 231 S.C. 293, 99 S.E. 2d 187, 193 (1957)(mistake or fraud exception; Hughes v. Greenville Country Club, 283 S.C. 248, 322 S.E. 2d 827 (Ct. App. 1984)(contrary inent exception); Shoney's, Inc. v. Cooke, 291 S.C. 307, 311, 353 S.E. 2d 300, 303 (Ct. App. 1986)(collateral agreement exception). If the intent of the parties is contrary to the language in a deed, courts of equity must reform the deed. See Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App.)(documents should be reformed to conform to the actual agreement of the parties).

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 Souther Survey was just plain wrong. (ROA P. 21, p. 190 (Souther depo. p. 69 ll. 2-8); p. 191 (Souther depo. P. 73, ll 2-22); p. 361; p. 124, l.

11 – p. 15, l. 9; p. 319; p. 321; pp. 154-170 (Son's depo. p. 35, l. 11 – p. 102, l. 5); pp. 222-226). Seller acknowledged in no uncertain terms that the deed was "mistaken." (ROA p. 96, ll 20-21).

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 as well as the language in the Agreement to Sell and Buy. Accordingly, the Deed was the result of mutual 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. 306-307). 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.**

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. See Knox v. Bogan, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996). 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. Finally, Appellant seeks specific performance of the Agreement to Sell and Buy.

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ATTORNEY FOR APPELLANT

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**CERTIFICATE OF COUNSEL**

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

Respectfully submitted,

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June 23 2022

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