THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson, Master in Equity

Case No. 2010-CP-08-4140

Marion Creel, Appellant,

v.

Douglas Creel, Respondent.

REPLY BRIEF OF APPELLANT

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I. EVIDENCE ADMITTED IS NOT BARRED BY THE STATUTE OF FRAUDS OR PAROL EVIDENCE RULES, AS ARGUED BY THE RESPONDENT

The Respondent argues Appellant's claims should be dismissed the Statute of Frauds and Parol Evidence Rule, which were not addressed by the Final Order, although the Statute of Frauds was pleaded as an affirmative defense in the Respondent's Answer to the Complaint. However, the Court may consider evidence presented by these parties as not barred by the Statute of Frauds or Parol Evidence Rule. The following excerpt from *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 747 S.E.2d 178, 405 S.C. 35 (S.C. 2013), and other cases cited below, reflect our courts' application of these doctrines:

> "A contract may be clear and unambiguous as far as it goes and yet may not express the agreement of the parties, by reason of mutual mistake." *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 309, 350 S.E.2d 194, 198 (Ct. App. 1986) (quoting 66 Am. Jur. 2d *Reformation of Instruments* § 6 (1973)). "[A]mbiguity or uncertainty has nothing to do with the reformation of a written instrument, but rather reformation is adjudged because the instrument, by reason of mistake or fraud, does not embody the true agreement of the parties." Id. The court explained, "Both the parol evidence rule and the doctrine of merger are rules governing the construction of written documents." Id. at 308, 350 S.E.2d at 197 (emphasis added). However, where the parties conceded that the document in question did not contain certain desired language, they did not seek its construction, but rather, reformation to accord with their true intent. Id.
>
> The essential question becomes the parties' intent, and "[p]arol evidence is admissible to show mistake." Id. at 309, 350 S.E.2d at 198. The court recognized that "[i]t would be virtually impossible to prove mutual mistake as a ground for reformation without parol evidence." Id.; see 27 Richard A. Lord, *Williston on Contracts* § 70:52 (4th ed. 2003) (stating the parol evidence rule "is inapplicable in a suit for reformation on the basis of mutual mistake" and noting one jurisdiction had remarked that "[i]t is practically a universal rule that in suits to reform written instruments . . . parol evidence is admissible to establish the fact of fraud or of a mistake" (citation omitted)). Consequently, we confirm here the general principle that extrinsic evidence is admissible to prove mutual mistake in cases seeking reformation.

Respondent mis-quotes *Ray v. South Carolina Nat'l Bank,* 281 S.C. 170, 314 S.E.2d 359 (Ct.App. 1984) in support of its argument for exclusion under the Parol Evidence Rule, by omitting a crucial phrase. Respondent wrote, in quotes, on page 19:

> Where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it, made contemporaneously with or prior to its execution, is inadmissible to contradict, add to, subtract from, vary or explain its terms.

Ray, at 172, actually states:

> Where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it, made contemporaneously with or prior to its execution, is inadmissible to contradict, add to, subtract from, vary or explain its terms, **in the absence of fraud, accident or mistake in its procurement**. Proffit v. Sitton, 244 S.C. 206, 136 S.E.2d [281 S.C. 173] 257 (1964); Charleston & W.C. Ry. Co. v. Joyce, 231 S.C. 493, 99 S.E.2d 187 (1957); McLeod v. Sandy Island Corp., 265 S.C. 1, 216 S.E.2d 746 (1975). See also Suttles v. Wood, 312 S.E.2d 574 (S.C.App.1984). (Emphasis added).

This is not a case where one party brought an action to enforce an oral executory contract, which could bring in the Statute of Frauds. Further, exceptions to the Statute of Frauds exist to make the statute inapplicable. Here, the parties have performed. *See Dewitt v. Kelly*, 256 S.C. 224, 182 S.E.2d 65 (1971)(The courts have repeatedly reiterated that the statute of frauds only applies to executory, as distinguished from executed, contracts). Partial performance may make the statute inapplicable. *See Stackhouse v. Cook*, 248 S.E.2d 482, 271 S.C. 518 (S.C. 1978). Most of the reported South Carolina unilateral mistake cases are claims for relief from contracts or sale of lands that have or are being performed, and are too numerous to cite. These theories do not provide grounds to uphold the trial court.

Secondly, although the Respondent now advances these theories, he has not cited in his Brief any references to the evidence or trial record to show this Court where he

asserted them. So, not only do these doctrines fail to apply, this Court does not have evidence before it to apply them because they have not been shown. Even if Respondent cited to what sparse references existed, this Court would not be persuaded to follow theories advanced by the Respondent, as to do so would effectively preclude claimants from having a cause of action whenever fraud or mistakes occur on a performed written contract.

II. AT TRIAL, THE RESPONDENT DID NOT INTRODUCE THE "OFFER TO PURCHASE REAL ESTATE" INTO EVIDENCE TO PROVE ITS TERMS.

Following his argument on Statute of Frauds and Parol Evidence, commencing on Page 20, the Respondent reprints excerpts from Respondent's Exhibit 1, the "OFFER TO PURCHASE REAL ESTATE." On Respondent Brief Page 9, he writes an "OFFER TO PURCHASE REAL ESTATE" was executed by Appellant and Respondent, citing T2 p. 31 lines 6-12. The May 9th transcript Page 31 lines 6-12 do not agree. The "OFFER TO PURCHASE REAL ESTATE" (which Appellant also refers to as the "Proposal") was admitted into evidence as "Plaintiff's Exhibit No. 1, Second Day." T2, P. 22, 5-25 – P. 23, 1-15, on the basis that Marion Creel became familiar with the document after the Closing. Thereafter, during cross-examination, the Respondent introduced this same document as Defendant's Exhibit No. 1, Second Day. T2, P. 58, 3-25 – P. 59, 1-3, as stated by Respondent's counsel: "Your Honor, I will offer this in evidence at this particular point for reasons of comparative signature for the Court and numerous exhibits signed." Therefore, this document was offered into evidence for two purposes only: (1) by the Appellant, to show that Marion Creel became familiar with the document after closing, and (2) by the Respondent, for purposes set forth above. This document has

been discussed or referred to by other testimony, but Respondent Douglas Creel did not, while testifying, examine this Exhibit and assert that is was genuine. The Appellant submits this document should be viewed for the limited purpose for which it was admitted into evidence. Rule 105, SCRE. It is noteworthy that Respondent made no further request of the trial court to compare or authenticate signatures, hence the trial court made no findings to authenticate the signatures on the questioned document.

III. RESPONDENT SELECTIVELY EXCERPTS THE "OFFER TO PURCHASE" DOCUMENT, AND ARGUES FOR AN UNAMBIGUOUS READING WHEN SUCH READING BOLSTERS MARION CREEL'S REPEATED TESTIMONY THAT HE ONLY AGREED TO SIGN A PROPOSAL

Without conceding that this document is admitted to prove its terms, on grounds previously argued, this Court would find this document bolsters Marion Creel's testimony, that he agreed to sign a proposal that would require a formal agreement to be prepared. Respondent omits Paragraph 4, which states: "The parties agree to execute a standard purchase and sales agreement on the terms contained within 30 DAYS days." This document was an agreement to enter into a future formal agreement, just as Marion Creel testified.

IV. THE RESPONDENT CLAIMS THIS SUIT STEMS FROM "SELLER'S REMORSE" BUT EVIDENCE SUPPORTS FAMILY CONCERNS MOTIVATE THIS ACTION

The Respondent's only explanation for this dispute is that Marion Creel had seller's remorse, or that a father may give his son favorable terms. The essence of this dispute is over a "call" feature mistakenly omitted from the promissory note, that would provide an option to increase the interest rate by up to two percent every five years during the twenty year life of the note and mortgage. Why would this concern an ill man in his seventies? Suzette Creel testified Marion asked for her help to calculate a payment that Douglas could afford not only for his own

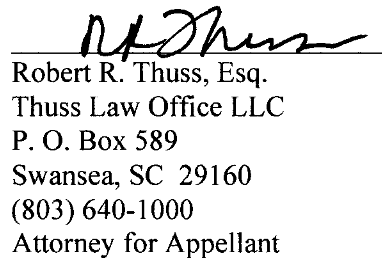
living, but he had five other children, and the interest rate adjustment would make up for the money for the other children. T1, P. 25, 12-25 – P. 26, 1-3: P. 33, 20-25 – P. 34, 1-8. Marion testified he had shown Douglas a commercial appraisal valuing the property at $1,200,000, that the tax assessor valued the property at $650,000, but that he agreed to sell the buildings to Douglas for $550,000, and nobody was trying to sell something to his son to make a profit off it. T2, P. 48, 23-25 – P. 49, 1-23. So, although the Respondent would argue to reduce this case to an arm's length transaction, unfortunately, family concerns and injuries to trust underlie this action, at least for Marion Creel.

CONCLUSION

The Appellant respectfully requests the court grant Marion Creel relief. For reasons stated, this Court should reverse the judgment of the Master.

Respectfully Submitted,

July 28, 2014



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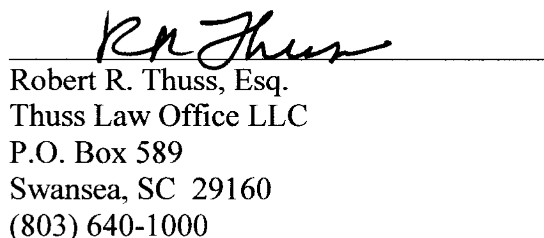
PROOF OF SERVICE

I certify that I have served the Reply Brief and Designation of Matters on Douglas Creel by depositing a copy of it in the United States Mail, postage prepaid, on July 28th, 2014, addressed to his attorneys of record, Grover Seaton, Esq, P.O. Box 38, Moncks Corner, SC 29461, and Michael M. Murphy, III, 105 Carolina Ave., Moncks Corner, SC 29461.

July 28, 2014



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July 28, 2014

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RE: Appellate Case No. 2014-001166
Marion Creel v. Douglas Creel

Please see the accompanying Reply Brief of Appellant, Designation of Matter, and Proof of Service.

Respectfully,

Rob Thuss

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