

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2015-001146

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SC Court of Appeals

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and
Kiawah Development Partners II, Inc.,

Appellant-Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-
for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners
Association, Inc.,

Respondent-Appellants.

RESPONDENT'S INITIAL BRIEF OF RESPONDENT-APPELLANTS

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OTHER AUTHORITIES:

S.C. Code Ann. § 48-39-250, *et seq.*

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S.C. R. Evid. 802 and 803

STATEMENT OF THE ISSUES

The Respondent-Appellants Kiawah Property Owners Group, Inc. (“KPOG”) and Inlet Cove Club Homeowners Association, Inc. (“Inlet Cove”) (hereinafter “Intervenors”) acknowledge that the issues listed are relevant to this appeal; however, Intervenors’ would assert that each should be answered in the negative.

STATEMENT OF THE CASE

Intervenors hereby adopt and incorporate by reference the Statement of the Case as provided in their Appellants’ Initial Brief filed with this Court on July 31, 2015.

ARGUMENT

Summary of Argument

At the heart of this appeal is Kiawah Resort Associates, L.P. and Kiawah Development Partners II, Inc.’s (hereinafter “KRA”) failure to prove by clear and convincing evidence that Kiawah Island Community Association (“KICA”) did not intend to receive the disputed 4.62 acres. KRA’s brief urges reversal based on what it refers to as KICA’s subsequent conduct.¹ Contrary to KRA’s assertions, subsequent conduct standing alone cannot be used to overcome the unambiguous language of a deed, particularly where that conduct is inconsistent with the meeting of the minds as embodied in an agreement antecedent to the deed.

¹

Intervenors note that elements of this “subsequent conduct” which specifically include KICA’s lack of action, fail to prove intent. For example, and as discussed further below, the fact that KICA has not undertaken construction or maintenance on property that is in a natural state does not prove lack of ownership or control.

Instead the master properly analyzed the circumstances existing during the time that the 4.62 acres was conveyed as most probative of the parties' intent. Given KRA's insistence that it would not convey "developable" property, (KRA Initial Br. p. 6), the master's determination that the vast majority of the parcel was not developable at the time of conveyance corroborates KRA and KICA's antecedent agreement to convey that parcel.

Finally, because the only evidence of KICA's intent, which is embodied in the antecedent agreement, warrants against reformation, KRA asks this Court to treat two documents, a 1994 Development Agreement and Exhibit 16.2 attached thereto, as reflecting the intent of the parties. These documents cannot be evidence of KICA's intent because KICA was not a party to, and played no role in drafting, either of those documents.

The master correctly determined the relevant time frame for ascertaining the parties' intent under the Beachfront Deed is 1994-1995. (Final Order pp. 10-17). Accordingly, the execution of the Agreement for Conveyance, the undevelopable nature of the disputed property, and the lack of clear and convincing evidence of a mutual mistake between KRA and KICA regarding the conveyance of the Beachfront Strip was most found probative. The master considered additional evidence allegedly demonstrative of intent, including subsequent conduct, but found it less probative and unpersuasive.

Throughout its brief, KRA misrepresents the relevant facts in this case. Notably, prior to its arguments on appeal, under the heading "Summary of Facts" KRA launches into a recitation of hotly contested factual issues, mischaracterizing the evidence as "clear and convincing" support for reformation (KRA Initial Br. pp. 3-18) when in fact such evidence was found insufficient and decided unfavorably against KRA. To the extent KRA is

attempting to present this Court with its preferred version of the facts and evidence as though they are undisputed, such a characterization is improper.²

I. FACTUAL OVERVIEW OF THE CASE

Historical Context

KRA was the primary developer of Kiawah Island since its purchase of the island in 1988. (Final Order p. 2; KICA Ex. 1). Following certain transfers among KRA's affiliates, KDP II acquired KRA's development rights and ownership interests on Kiawah Island, including those related to a 4.62 acre parcel that is the subject of the dispute. (Final Order p. 2).

KICA serves and operates as the principal property owners' association for Kiawah Island to which all property owners become members upon the purchase of their property. (Final Order p. 2; Order Granting Intervention p. 3). KICA is governed by its recorded Declarations and Covenants ("KICA Covenants"), which grant all members and their guests an easement of use and enjoyment in properties held as Common Property and restrict KICA's ability to transfer such properties without an affirmative vote of three-fourths (3/4) of its membership. (Final Order pp. 2, 3-4, 9-10; KICA Ex. 1 p. 10).

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The South Carolina Appellate Court Rules ("SCACR") clearly set forth the order, manner, and content for all appellant briefs. In pertinent part, Rule 208 provides that parties may include "a separate statement of facts relevant to the issues presented for review . . . which may include contested matters and summarize the party's contentions" but such a summary of facts must be included within the argument portion of that party's brief. Rule 208(b)(1)(D), SCACR. KRA's "Summary of Facts" section contains legal argument and disputed factual issues but is not included in the portion of its brief specifically designated for such material under the rules. As such, it should be stricken, disregarded or treated as part of KRA's argument on appeal.

On September 26, 1994, KRA entered into a Development Agreement (the “1994 Development Agreement”) with the Town of Kiawah Island (the “Town”) that required, in pertinent part, KRA to convey certain properties to KICA as Common Property subject to the KICA Covenants. (R.p. __, Development Agreement). In particular, Section 16(b) of the 1994 Development Agreement required that KRA convey what was generally described as a ten (10) mile strip of beachfront dunes and high land (the “Beachfront Strip”) to KICA as Common Property. (R.p. __, Development Agreement).

Attached as Exhibit 16.7 to the 1994 Development Agreement was the “Agreement for Conveyance” between KRA and KICA, which set forth the legal descriptions and draft quit claim deeds for those properties KRA was obligated to convey to KICA as Common Property, including the Beachfront Strip. (Intervenors’ Ex. 2). KICA was not a party to the 1994 Development Agreement; however, KICA was a party to the Agreement for Conveyance, which served as the contract between KRA and KICA regarding the conveyance of certain properties, including the Beachfront Strip. (Final Order p. 5).

On December 29, 1995, KRA transferred the Beachfront Strip to KICA as Common Property by quit claim deed (the “Beachfront Deed”) pursuant to the 1994 Development Agreement. (Intervenors’ Ex. 3). The Beachfront Deed describes the Beachfront Strip using identical language to the Agreement for Conveyance and draft quitclaim deed, and includes the 4.62 acre parcel. (Intervenors’ Ex. 2 & 3; Final Order pp. 6, 12-17).

KRA did not bring the alleged error in the property description to KICA’s attention until 2007 – twelve (12) years after the Beachfront Deed was executed. (Final Order p. 8). KRA claims that the description of the Beachfront Strip in both the Agreement for

Conveyance and Beachfront Deed, specifically the point of beginning included the 4.62 acre parcel by mistake. (Final Order pp. 8-9).

KRA requested that KICA issue a deed conveying back the 4.62 acre parcel; however KICA refused on the grounds that the 4.62 acres, along with the rest of the Beachfront Strip, was conveyed as Common Property subject to the KICA Covenants. The Covenants require an affirmative vote of three-fourths (3/4) of its membership in order to transfer Common Property. (Final Order pp. 8-9). Thus, KRA brought the underlying action seeking a declaratory judgment that the 4.62 acre parcel was included in the conveyance of the Beachfront Strip by mistake; reformation of the Beachfront Deed; or, alternatively, an order of specific performance requiring KICA to transfer the 4.62 acre parcel to KRA.

Rulings by the Master

On November 1, 2013, the master issued the Order Granting Intervention finding that KPOG and Inlet Cove held sufficiently distinct interests in this case that were not adequately represented and could be impaired without their direct participation. (Order Granting Intervention pp. 7-10). On June 4, 2014, following a hearing, the master signed an order denying KRA's requested relief from the Order Granting Intervention and upholding its ruling thereunder. (Order on Motion for Relief from Order Granting Intervention ("Order on Motion for Relief")).

Also on June 4, 2014, the master issued a comprehensive 25-page Final Order denying KRA's claims for deed reformation and specific performance and declaring the 4.62 acre parcel Common Property subject to the KICA Covenants. (Final Order p. 25). It is clear from the Final Order that the master carefully considered both the evidence and applicable

law, dividing its Findings of Fact into several sections in order to thoroughly cover the entirety of the evidence presented. (Final Order pp. 2-17).

On May 7, 2015, after a hearing and receipt of proposed orders by the parties, the master issued his Order on Motion to Alter or Amend the Final Order reaffirming his findings and conclusions on the merits that KRA's claim for reformation must be denied and that the 4.62 acre parcel was held by KICA as Common Property subject to the KICA Covenants. (Order on Motion to Alter or Amend the Final Order ("Order on Motion to Alter or Amend"))).

II. THE MASTER APPLIED THE CORRECT LEGAL ANALYSIS IN AN ACTION FOR DEED REFORMATION

A party seeking reformation of an instrument on the ground of mistake carries a heavy burden and must prove that at the time the agreement was entered into there was 1) a mutual mistake as to the facts upon which it was based or the terms expressed therein, or 2) one of the parties was under such mistake as a result of fraud, deceit, or imposition in any form by the other. Kennerty v. Etiwan Phosphate Company, 21 S.C. 226, 231 (1884); see also Forrester v. Moon, 100 S.C. 157, 84 S.E. 532 (1915). Here, KRA's claim for reformation is based on an alleged mutual mistake.

To reform a deed on grounds of mutual mistake, the party seeking reformation must demonstrate that "preceding the execution of the instrument, and as the inducement to its execution, *the parties to the same* had an understanding, an agreement, a contract; and, in the effort to reduce the evidence in writing of that contract, a mutual mistake was made, by which mistake, so made, the understanding, the agreement, the contract of the parties in

relation to the subject-matter thereof was not carried into effect.” Brock v. O’Dell, 44 S.C. 22, 21 S.E. 976, 979 (1895) (emphasis added).

“Before a court of equity will reform a solemn instrument, it must be shown *by evidence which is the most clear and convincing*, not simply it was a mistake on the part of one of the parties, but that it was a *mutual mistake*; that *both parties intended a certain thing*; and that by mistake in the drafting of the paper did not get what both parties intended.” Sullivan v. Moore, 92 S.C. 305, 307, 75 S.E. 497 (1912) (emphases added).

A court cannot merely assume such an agreement; it must be proved. Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156 (1937).

“In the exercise of this jurisdiction to reform written instruments, courts of equity *proceed with the utmost caution*. It must appear that the precise terms of the contract had been orally agreed upon between the parties and that the written instrument actually signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of mutual mistake. If there is *no antecedent agreement* to which the writing can be conformed, it is clear that *reformation on the ground of mistake must be refused*.”

Id. (emphases added).

The standard for obtaining reformation is a challenging one to meet. The claimant must present clear and convincing evidence not only of an agreement actually made between the parties, but of the mutuality of the alleged mistake. This high burden of proof is necessary in order to overcome the presumption that a writing represents the final agreement between the parties. See, e.g., Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct.App.1984) (“When there is no ambiguity in the language, a contract will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed therein.”); see also N. Am. Rescue Products, Inc. v. Richardson, 411

S.C. 371, 378, 769 S.E.2d 237, 240 (2015), reh'g denied (Mar. 19, 2015) (“The best evidence of the parties' intent is the contract's plain language.”).³ An agreement that appears to be clear and complete on its face will not be disturbed absent equally clear and convincing evidence that the writing is not actually what the parties agreed upon.

KRA is seeking to reform the 1995 deed, which conveyed the Beachfront Strip to KICA as Common Property. KRA alleges that the property description in the Beachfront Deed contains a mistake in that it included a 4.62 acre parcel with the conveyance of the Beachfront Strip. Therefore, KRA must present clear and convincing evidence⁴ that the

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This is consistent with basic principles of contract interpretation, including that a court is without authority to alter or add to the plain and unambiguous terms of the parties' agreement. See, e.g., S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (2008); Park Regency, LLC v. R & D Dev. of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct.App.2012) (“A meaning cannot be given to a contract other than that expressed; hence ***words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.***”) (emphasis added); Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct.App.2010) (“The ***court is without authority to consider parties' secret intentions***, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.”) (emphasis added); Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct.App.2009) (“Interpretation of a contract is ***governed by the objective manifestation of the parties' assent at the time the contract was made***, rather than the subjective, after-the-fact meaning one party assigns to it.”) (emphasis added).

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KRA references language from Chief Justice Toal's dissenting opinion in Wise v. Broadway, 315 S.C. 273, 282, 433 S.E.2d 857, 862 (1993) stating that the clear and convincing standard of proof lies between the lesser “preponderance of the evidence” standard used in most civil cases and the higher “beyond a reasonable doubt” standard in criminal cases. (KRA Initial Br. p. 48). It is also worth noting that in the Chief Justice's opinion, she expresses concern over the majority's treatment of the standard of proof necessary for the claimant to prevail (there on a claim for punitive damages). The majority agreed with appellant that violation of a traffic law constituted negligence *per se* and that such violation was itself sufficient evidence of recklessness, willfulness, and wantonness to put the issue of punitive damages before the jury. The Chief Justice takes

parties to the disputed instrument – itself and KICA – **both** intended to convey something other than the admittedly unambiguous property described in the Beachfront Deed. While KRA may have presented evidence supporting its contention that the 4.62 acre parcel was included in the conveyance by its own mistake, KRA failed to present clear and convincing evidence that **KICA** shared in that mistake. Rather the evidence supports intentional inclusion of the 4.62 acre parcel in the conveyance of the Beachfront Strip, as discussed in greater detail below. Accordingly, the master correctly concluded, and then reaffirmed, that KRA’s claim for reformation must fail for lack of mutual mistake. (Final Order pp. 20-22; Order on Motion to Alter or Amend pp. 3-4, 5, 11).

A. The Master’s Reliance on Penza v. Pendleton Station, LLC, 404 S.C. 198, 743 S.E.2d 850 (Ct.App.2013) was Proper

Contrary to KRA’s arguments (KRA Initial Br. pp. 20-22), the master’s use of and reliance on this Court’s opinion in Penza v. Pendleton Station, LLC, 404 S.C. 198, 743 S.E.2d 850 (Ct.App.2013) was not misplaced. Both the law and facts of that case are relevant to resolution of this dispute.

In Penza, the document at issue was a mortgage. When it was originally recorded, the property description in the body of the mortgage described 31.31 acres shown as “Tract B” on a certain plat and referenced two TMS parcel numbers. 404 S.C. at 201-02, 743 S.E.2d

issue with this because, as she argues, the standard of proof necessary for a claim of punitive damages is clear and convincing evidence and mere violation of the traffic law at issue is insufficient to meet that standard. Likewise, here, KRA’s claim for reformation is subject to the clear and convincing evidence standard, requiring more than a mere preponderance. KRA had to prove more than just that an alleged mistake was made, but also that it was mutual as to both parties.

at 851-52. Attached at the end of the recorded mortgage was a page entitled "Schedule A," which described 31.31 acres shown as "Tract A" on the same plat while also referencing the same two TMS parcel numbers. *Id.* The mortgage was later re-recorded without "Schedule A" and with language stating "Schedule A" was accidentally attached with the originally recorded mortgage as a result of a scrivener's error that described land that was not intended to be subject to the mortgage. *Id.* Penza, who held the mortgage, was not notified of this re-recording. *Id.*

A few years later, Penza brought an action seeking foreclosure of Tracts A and B pursuant to the mortgage, which was opposed on the grounds that the mortgage only encumbered Tract B and not Tract A. *Id.* at 202, 743 S.E.2d at 852. The draftsman testified that he had only intended for the mortgage to cover Tract B and that the inclusion of Tract A was a mistake. *Id.* The master granted partial summary judgment finding, in pertinent part, that there was no genuine issue as to the property encumbered by the mortgage. *Id.* Penza appealed arguing the master erred in granting partial summary judgment because there was a question of fact as to whether his mortgage was intended to cover Tract A in addition to Tract B and that the master's ruling essentially reformed the original mortgage. *Id.* Thus, the issue on appeal involved what property the parties intended to be encumbered by the mortgage.

The requisite first step for any court in determining the parties' intent to a disputed instrument is to look at the language of the document itself. "[O]nce a contract or agreement is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Id.* at 204, 743 S.E.2d at 853. This Court then set forth what the

master referred to as the Penza test: “When a deed is unambiguous, any attempt to determine the grantor’s intention when reserving the easement must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper. Only when the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent.” Id. at 204-05.

Next this Court recited several facts tending to show that a question of fact remained as to whether the original mortgage was intended to encumber both Tracts A and B, including that the originally signed and recorded document covered both tracts; that Penza was not notified of the re-recorded mortgage disclaiming encumbrance of Tract A; and that the mortgage references the same two TMS parcel numbers in conjunction with both Tract A and B. Id. at 205. Since this appeal was specifically related to a ruling on partial summary judgment and this Court found a question of fact remained, no further analysis was required, including on the issue of reformation, and the matter was reversed and remanded. Id. at 205-06, 743 S.E.2d at 853-54.

In this case, the document in dispute is the Beachfront Deed. KRA has placed the language used therein to describe the Beachfront Strip directly at issue, claiming it does not represent what was intended by the parties. Just like in Penza, the court is being asked to determine the intent of the parties to a disputed instrument. Thus, the court must first look to the language of the disputed document itself. Certainly this must be included as the first step in the court’s analysis regardless of whether the claim is one arising in construction or for reformation for the law generally favors an agreement reduced to writing as the best evidence of the parties’ intent. See N. Am. Rescue Products, 411 S.C. at 378, 769 S.E.2d at

240. And where, as here, the claim is for reformation based on an alleged mutual mistake, the court may consider extrinsic evidence purporting to prove such mistake. These were the precise steps followed by the master in his analysis.

The master first looked to the language of the Beachfront Deed and found that it was plain and unambiguous. (Final Order pp. 15-16, 19). The master then looked at the antecedent agreement of the parties – the Agreement for Conveyance – and similarly found that it was plain and unambiguous. However, the master also considered extrinsic evidence presented by KRA in connection with its contention of mutual mistake and ultimately concluded that reformation must fail. (Final Order pp. 20-22). Therefore, even if the master placed undue emphasis on KRA’s failure to pass the Penza test, the master’s analysis was not limited to the language of the Beachfront Deed itself, but included consideration of extrinsic evidence making any such error harmless. (Final Order pp. 18-22; Order on Motion to Alter or Amend pp. 10-11). The master’s thorough analysis, as well as the findings and conclusions in his Final Order, which were reaffirmed in the Order on the Motion to Alter or Amend, were proper and consistent with this Court’s opinion in Penza as well as the applicable law governing actions for reformation.

III. THE MASTER CAREFULLY CONSIDERED AND PROPERLY RULED ON ALL OF THE EVIDENCE PRESENTED BY THE PARTIES

KRA’s fatal flaw is lack of clear and convincing evidence of a mutual mistake between itself and KICA regarding the conveyance of the Beachfront Strip. Merely characterizing disputed evidence as clear and convincing does not achieve that high standard of proof. Indeed KRA’s continual attempts to frame the evidence this way is not only

contrary to the evidence on the record, but is also inconsistent with the master's findings on such evidence. The burden rests on KRA to **prove** existence of a mutual mistake through clear and convincing evidence. If the evidence presented does not rise to this level, then reformation must be denied as a matter of law. No amount of reformulating or distraction from the dispositive issues on KRA's part can make up for the insufficiency of the evidence it presented in seeking reformation.

As the finder of fact in a bench trial, the master has broad discretion to weigh and evaluate the evidence presented. While KRA may disagree with the weight assigned to certain evidence, the master's findings will be upheld unless no evidence is found to support them. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976) (stating rule that on appeal in an action in equity the master's ***factual findings will not be disturbed unless found to be without evidentiary support*** or against the clear preponderance of the evidence).

Indeed, the court on appeal in an equitable action may make findings according to its own view of the preponderance of the evidence; however, an appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. Lewis v. Lewis, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011) (stating that *de novo* standard of review ***does not relieve an appellant from demonstrating error in the trial court's findings***); Eldridge v. Eldridge, 398 S.C. 113, 118-19, 728 S.E.2d 24, 26-27 (2012) (same).⁵

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Moreover, the appellate court is neither required to disregard the findings of the trial judge who saw and heard the witnesses, nor to ignore the fact that the trial judge was in a superior position to assess the their credibility. Eldridge v. Eldridge, 398 S.C. at 118-19, 728 S.E.2d at 26-27.

KRA must affirmatively prove that the master's findings were erroneous.

As is clear in the Final Order, and reaffirmed in the Order on the Motion to Alter or Amend, the master carefully considered all of the evidence presented from each of the parties. The master was in the best position to assess the credibility of the witnesses' testimony and to assign weight to the evidence. The master was actively engaged during trial, frequently inquiring further into the evidence being presented and conducting its own examination of the witnesses. KRA failed to prove error in the master's findings and conclusions. Accordingly, even upon *de novo* review, the master's findings of fact as well as conclusions of law on the merits should be affirmed.

A. The Master's Treatment and Analysis of KICA's Intent was Proper

KRA seeks to reform the Beachfront Deed on grounds of mutual mistake. Thus, KRA must present clear and convincing evidence of an antecedent agreement between itself and KICA demonstrating that *both parties* intended something other than described in the admittedly unambiguous Beachfront Deed.

The Agreement for Conveyance and Beachfront Deed are the only documents to which both KRA and KICA are parties. The entire purpose behind the Agreement for Conveyance was to ensure that KRA's obligation to convey and KICA's right to receive the properties generally covered under the 1994 Development Agreement, including the Beachfront Strip, was manifested in an enforceable document since KICA was not a party to the development agreement. (Tr. pp. 226-228). Moreover, the testimony indicated that the interests of KICA and the property owner directors of the KICA Board were not often aligned with the interests of KRA and the KRA-appointed directors of the KICA Board. (Tr.

pp. 37-38, 143, 175-176, 198-201, 226-227, 236, 256-257, 262, 414-418). The separate, enforceable agreement with KRA was necessary to fully safeguard and secure KICA's rights under the 1994 Development Agreement.

The Agreement for Conveyance contains identical language as the Beachfront Deed in describing the Beachfront Strip. (Intervenors' Ex. 2 & 3). The Agreement for Conveyance was executed by KICA with every single page containing the signature of a KRA representative. (Intervenors' Ex. 2). As such, the Agreement for Conveyance was properly determined to be the best evidence of KICA's intent. (Final Order p. 16). It was not, however, the only evidence the master considered with regard to KICA's intent. (KRA Initial Br. pp. 26-27). As discussed in greater detail below, the master considered: 1) the lack of evidence showing KICA discussed, voted or otherwise took any action other than execution of the Agreement for Conveyance on the conveyance of the Beachfront Strip, let alone whether it specifically intended to include the 4.62 acre parcel; 2) the undevelopable nature of the Beachfront Strip and 4.62 acre parcel (see infra Section F); 3) the testimony as to what acts KICA has or has not undertaken with respect to maintenance or possession of the 4.62 acre parcel subsequent to the conveyance; 4) the evidence presented by KRA of illustrations from KICA's website; and 5) the document presented by KRA entitled "Talking Points for KDP," (see infra Section C). (Final Order p. 10-17; Order on Motion to Alter or Amend pp. 2-56).

The master also considered but found unpersuasive the testimony of the KRA partners who previously served as KRA-appointed directors of the KICA Board to the extent that the witnesses purported to show mutuality of intent between KRA and KICA. (Final

Order pp. 4-5, 8-9, 10-11, 16, 21-22; Order on Motion to Alter or Amend pp. 2-5, 11-15). The master did not discount or disregard the testimony of the KRA partners (Initial Br. of KRA pp. 27-28), he simply determined that such testimony could not overcome the only evidence of an antecedent agreement between KRA and KICA and only written manifestation of intent by KICA as shown through the Agreement for Conveyance and Beachfront Deed.

The master found “the evidence KRA offered in support of the alleged mistake of the Beachfront Strip is based on discussions or agreements, which KICA was not privy to, and which is contrary to the clear language of the Agreement for Conveyance.” (Final Order p. 15). Moreover, upon re-examination, the master confirmed that “the testimony of only interested directors to disavow a written agreement signed with apparent authority of the President of the KICA Board which has never been subsequently questioned by KICA *fails to rise to the level of clear and convincing evidence of mutual mistake required* by the applicable reformation case law.” (Order on Motion to Alter or Amend pp. 14-15) (emphasis added).⁶

It is undisputed that the KICA Board was controlled by a majority of KRA-appointed directors during the 1994 time period. (Final Order p. 4; Order on Motion to Alter or Amend p. 13). Furthermore, the evidence indicates the existence of a significant and contentious rift between the KRA-appointed directors and property owner directors of the KICA Board

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KRA failed to prove error in fact that the master found guidance in the statutory provisions governing nonprofit organizations in reconsidering the probative value of the KRA partners’ testimony. (KRA Initial Br. ___). To the extent any such reference was improper, it was harmless.

during the 1994 time period; that the property owner directors aired their concerns and sought the assistance of the Town in advocating on KICA's behalf during the negotiations of the 1994 Development Agreement; and that the Agreement for Conveyance was specifically entered into between KRA and KICA in order to secure in writing the rights and obligations of these adversaries as generally provided under the 1994 Development Agreement. (Tr. pp. 226-28). The only evidence of KICA Board action or position of intent through both the KRA-appointed directors and property owner directors of the KICA Board was the execution of the Agreement for Conveyance.

The case of Baptist Foundation for Christian Education v. Baptist College at Charleston, 282 S.C. 53 (Ct.App.1984) provides a useful comparison. In Baptist Foundation, transferor transferred funds to group A on the condition that group A would transfer funds to another group of the transferor's choosing anytime after a two-year period. Two years passed and transferor directed group A to transfer funds to group B; the transfer was completed and memorialized in a written document to which group A and group B were parties and to which a copy of the transferor's instructions directing the transfer from group A to group B was attached. Nothing in the language of the written document or the transferor's instructions indicated that the transfer was to be limited in any way, yet transferor later sought review of the transfer and succeeded in obtaining a ruling that the transfer was intended to be something other than what was described in the written document and instructions.

On appeal, this Court considered the written documents showing a clear intent to transfer the funds as was done from group A to group B, as well as the recent testimony of

the transferor purporting an intent to the contrary, and provided: “In determining the intent with which a transfer of property is made, *the testimony of the transferor cannot override the written statement of his intentions in terms of probative value.*” Baptist Foundation, 282 S.C. at 59 (emphasis added). This Court found mere improvidence is insufficient to invalidate a transfer; if the transferor had intended to limit the transfer in any way, he could have readily done so. This Court concluded that a written instrument of transfer, absolute on its face, is presumed to be what the words import; that the burden is on the challenger to overcome this presumption by clear and convincing evidence. Id. at 60.

Here, the Agreement for Conveyance is a written contract evidencing the intent between KRA and KICA with regard to the conveyance of the Beachfront Strip; its language is plain, unambiguous, and identical to the Beachfront Deed. (Final Order pp. 6, 15-16, 19). Both the Agreement for Conveyance and the Beachfront Deed include the subject 4.62 acre parcel in the conveyance of the Beachfront Strip. KRA cannot overcome the written statement of the intentions of both KICA and KRA with as-of-late testimony of only KRA witnesses claiming an intent different from that stated in plain terms. Hence the master found unpersuasive the testimony of KRA partners purporting to speak solely in their capacity as former KICA Board members. That they were KRA-appointed and controlling Board members during the 1994 and 1995 periods and testified as to intent can only go to the intent of KRA, not KICA.⁷ At best, such testimony may show a unilateral mistake on the part of

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Kishter v. Seven Courts Community Ass'n, 96 Md. App. 636, 626 A.2d 993 (Ct.Spec.App.1993), which KRA cites in support of its argument that the KRA-appointed members of the KICA Board could testify in dual capacities as to both KRA's and KICA's intent is distinguishable from this case. (KRA Initial Br. p. ___). In addition to the fact that Kishter is outside this Court's jurisdiction and therefore not binding authority,

KRA, but it cannot justify a claim for reformation based on mutual mistake.

The illustrations and maps from the KICA website presented by KRA in support of its claim (KRA Initial Br. ___) are not probative evidence of KICA's intent with regard to the conveyance of the Beachfront Strip and inclusion of the 4.62 acre parcel. As the master found, "no testimony was offered as to when these illustrations were created sufficient to derive any inference from them as to the intent of KICA in 1994 or 1995." (Final Order pp. 10-11). The mere existence of these illustrations is insufficient evidence of intent during the relevant 1994-1995 time frame, especially given the lack of evidence surrounding their creation.⁸

Nor is testimony of maintenance or control that KICA has or has not taken in relation to the Beachfront Strip property subsequent to the conveyance dispositive of intent as KRA implies. (KRA Initial Br. ___). Indeed, at the time of the conveyance, the Beachfront Strip, including the majority of the 4.62 acres, was undevelopable dunes and natural beach area. (See infra Section F). By its nature, such property does not require "maintenance." Moreover, there was testimony confirming that KICA holds title to the property conveyed as the

the trial court in that case heard testimony from another of the directors of the Community Association board in addition to the testimony of the developer directors that corroborated the developer-director testimony. Here, the only testimony of members of the KICA Board heard by the master was that of the KRA-appointed directors without independent corroboration. It is also unclear from Kishter whether the Community Association board there was governed by a similar set of restrictions as KICA is here with the KICA Covenants, which provide no mechanism for KICA to refuse transfers of Common Property from the developer and require an affirmative vote of three-fourths (3/4) membership in order to discard such property. (KICA Ex. 1).

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In addition, there was testimony that the illustrations and maps on the KICA website contained inaccurate information regarding the property conveyed as the Beachfront Strip. (Tr. pp. 364, line 6-365, line 2).

Beachfront Strip notwithstanding whether such property is actively managed. (Tr. pp. 364, line 6–365, line 2).

Members of KICA testified to their regular use and enjoyment of the Beachfront Strip and 4.62 acres as Common Property. (Tr. pp. 525, line 3–528, line 9, 530, line 13–531, line 8, pp. 539, line 21–540, line 11, pp. 546, line 2–549, line 24, 566, lines 12-22, pp. 570, line 6–572, line 14, 573, line 18–575, line 19). Upon reconsideration, the master found probative the testimony of KICA members' use of the disputed property and declined to disturb their rights and reliance on same for nearly two decades. (Order on Motion to Alter or Amend p. 10). By contrast, the master considered and confirmed that the evidence presented by KRA of actions or inactions taken by KICA subsequent to the conveyance bore little probative value and failed to overcome the plain terms of the Agreement for Conveyance and Beachfront Deed. (Final Order pp. 8-11; Order on Motion to Alter or Amend pp. 2-4, 11–13).

KRA placed the language of the Agreement for Conveyance and Beachfront Deed at issue by the very nature of its claims while at the same time taking issue with the weight the master assigned to the fact: 1) that execution of the Agreement for Conveyance was the only action taken by the KICA Board related to the Beachfront Strip; 2) that the Agreement for Conveyance is the only written manifestation of KICA's intent; 3) that the Agreement for Conveyance is consistent with the Beachfront Deed; and 4) that the Agreement for Conveyance and Beachfront Deed are the only documents related to the Beachfront Strip to which both KRA and KICA are parties.

KRA has failed to prove error in the master's findings. At base, KRA's claim for reformation must fail because it cannot prove an antecedent agreement demonstrating mutual

mistake between KRA and KICA.

B. The Master Properly Declined to Substitute the Intent of the Town for the Intent of KICA

To prevail on its claim for reformation, KRA must prove the existence of an antecedent agreement *between KRA and KICA* showing that both parties intended the conveyance of the Beachfront Strip to be something other than described in the 1995 deed. KICA must necessarily be one of the parties to such an antecedent agreement. KRA cannot meet its burden of proving mutual mistake through documents to which KICA was not a party.

The master correctly determined that the Town's intent cannot be substituted for KICA's intent for the Town was not a party to the Beachfront Deed. (Order on Motion to Alter or Amend pp. 7-10). Indeed, to substitute the Town for KICA ignores the existence of the Agreement for Conveyance, which is the only written manifestation and the best evidence of KICA's intent with regard to the conveyance of the Beachfront Strip. (Final Order pp. 15, 16; Order on Motion to Alter or Amend p. 5). The Agreement for Conveyance is an exhibit to the 1994 Development Agreement between KRA and the Town; however, it is also an independently enforceable contract, and one to which the Town is not a signatory.

KRA is clearly dissatisfied with the master's findings and conclusions but it cannot construct grounds for reversal through nonexistent inconsistencies in the master's rulings. (KRA Initial Br. 26-30). The proper inquiry is not whether KRA and KICA intended to deviate from something KRA and the Town agreed upon (KRA Initial Br. p. 33), but rather whether there is any evidence that *KRA and KICA* intended something other than the plain

language in the Beachfront Deed.⁹

Upon carefully considering all of the evidence, the master disagreed with KRA on the probative value of much of its evidence, including that the Town¹⁰ simply could be substituted for KICA in determining the parties' intent with regard to the instrument in dispute. (Final Order pp. 16-17, 21-22; Order on Motion to Alter or Amend pp. 5-10). KRA was unable to prove the existence of an antecedent agreement between KRA and KICA evidencing a mutual mistake between them, thus its claim for reformation was rightfully denied. Gowdy v. Kelly, supra, 185 S.C. 415 (“If there is no antecedent agreement to which the writing can be conformed, it is clear that reformation on the ground of mistake must be refused.”).

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Also irrelevant is whether KICA previously executed corrective deeds regarding other property conveyed under the Beachfront Deed (KRA Initial Br. ___) because such conduct was in direct violation of the KICA Covenants and, therefore, both legally and comparatively improper. To the extent this Court does find relevant the fact that prior corrective deeds were executed in violation of the KICA Covenants' prohibition against transfers of Common Property without an affirmative vote of three-fourths (3/4) of membership, it is worth noting that counsel for KRA was also serving as counsel for KICA and advised KICA that it did not need to abide by the voting requirement in order to transfer property. (Tr. pp. 219, lines 21-22, 236, line 22–238, line 13, 441, 470). Later, once KICA retained its own separate counsel, it was advised that it must abide by the terms of the KICA Covenants in order to make such transfers. (Tr. pp. 251 lines 1-19, 411-412).

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Additionally, as with all of the evidence presented, the master gave appropriate consideration to the Fifth Amendment to the 2005 Development Agreement, which was merely a reflection that **KRA** did not intend to convey the 4.62 acre parcel as part of the Beachfront Strip. (Final Order pp. 7-8, 17). The Town expressly rejected inclusion of language referencing the Town's intent with regard to the disputed conveyance. (Final Order pp. 7-8, 17; Tr. p. 587 lines 4-25).

C. The Master's Evidentiary Ruling on KRA's Proposed Trial Exhibit Number 17 entitled "Talking Points" was Correct

KRA argues the master erroneously refused to admit into evidence its proposed Trial Exhibit Number 17 entitled "Talking Points" because it was not an official action of the KICA Board. (KRA Initial Br. p. ___). Certainly the fact that the document's author, Craig Weaver, was not on the KICA Board during the relevant 1994-1995 time period is significant. Indeed the "Talking Points" document is dated from 2012, nearly two decades after the subject conveyance, and close in time to when KRA representatives were meeting with then-members of the KICA Board to "explain" the alleged mistake. (Tr. pp. 396, line 19-398, line 21, 406, line 9-408, line 17, 411 lines 1-25). Even if this Court finds that the master erred in limiting the admissibility of the "Talking Points," it should be deemed harmless as KRA has not established any prejudice.

KRA seeks to use the "Talking Points" as evidence that KICA shares in the mutuality of the alleged mistake in the Beachfront Deed, but it simply cannot serve that purpose. Under the South Carolina Rules of Evidence ("SCRE"), hearsay statements are generally prohibited unless they fall under an exception. Rule 802, SCRE. One such exception is for business records, allowing records created and kept in the ordinary course of business to be introduced into evidence for the truth of the matter *unless* the source of information or the method or circumstances of preparation indicate lack of trustworthiness" and "*provided, however*, that subjective opinions and judgments found in business records are not admissible. Rule 803(6), SCRE.

The "Talking Points" more clearly resemble documents relating to a business record

that do not speak to the truth of the matter asserted, and as such can only be admitted for a limited purpose if at all. In Butler v. Gamma Nu Chapter of Sigma Chi, 314 S.C. 477 (Ct.App.1994), this Court considered whether the trial judge abused his discretion in admitting three letters referencing the past behavior of a fraternity member who beat up the plaintiff. Two of the letters, which requested punishment be levied against the fraternity member for prior unrelated behaviors, were rightfully admitted under the Business Records Act. Butler, 314 S.C. at 481. A third letter, from one university official to another recommending the fraternity member's removal from the residence hall, was not admitted under the Act, but instead was admitted solely on the issue of the fraternity's notice of its member's past problematic behavior. Id. The third letter cited past behaviors, but was not used to prove the truth of the allegations. This Court upheld the judge's discretion in admitting the third letter, but not for the truth of the matter asserted, implying that the letter would be excluded as hearsay if offered for that purpose.

Likewise, the "Talking Points" reflect Mr. Weaver's subjective opinion following discussions with KRA representatives in 2012 in which KRA made its case for the alleged mistake in an effort to persuade KICA to agree to transfer the 4.62 acres. (Tr. pp. 396, line 19-398, line 21, 406, line 9-408, line 17, 411 lines 1-25). Such circumstances indicate lack of trustworthiness. While the document may be kept by KICA, it was not created in the ordinary course as other official documents of the KICA Board. The "Talking Points" are merely Mr. Weaver's notes upon which no formal action of the KICA Board was taken.

In addition, the "Talking Points" cannot be admitted under the admission of a party-opponent exception because Mr. Weaver did not have the authority to make such

statements on behalf of KICA in relation to the 1995 Beachfront Deed. He was not on the KICA Board during the 1994 or 1995 periods, and hence cannot act as a representative of KICA in his 2012 statements on the disputed property.¹¹

Nor do the cases cited by KRA demonstrate the master committed reversible error in his evidentiary ruling on the "Talking Points" document.¹² JKT Company v. Hardwick, 274 S.C. 413 (1980) said that business documents can be used as an admission of a party opponent to demonstrate business awareness of a defective product. The document in dispute in JKT Company was a letter to an injured party in which the company acknowledged a defect and promised to fix the problem but failed to do so before it happened again. That case involved products liability where notice is relevant and probative, but it is not applicable here to a case involving a property dispute and claim for deed reformation.

In Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972), the Supreme Court found that statements by a person driving defendant's car with permission during the incident at issue regarding a failed inspection and need for new tires were admissible as non-hearsay for the statements were not offered for the truth of the matter asserted (whether defendant was negligent) but rather for the limited purpose of notice. Here, KRA is not trying to offer the "Talking Points" for some limited non-hearsay purpose such as notice, but instead as the

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For purposes of admissibility of the "Talking Points," it is also irrelevant that some witnesses from the KICA Board did not disagree with Mr. Weaver's characterization of the controversy. (KRA Initial Br. ___).

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State v. Nichols, 325 S.C. 111 (1997) and State v. Plyler, 275 S.C. 291(1980), acknowledge admissions by a party-opponent as an exception to the hearsay rule in the criminal context, but are otherwise irrelevant to this case.

truth of the matter asserted: that KICA had intended something other than described in the Beachfront Deed to corroborate the alleged mistake. As such, the master correctly limited the admissibility of the "Talking Points" document.

D. The Master Gave Appropriate Weight and Consideration to Exhibit 16.2 and the 1994 Development Agreement

The master's findings regarding Exhibit 16.2 to the 1994 Development Agreement are factually and legally sound. Indeed they are inevitable in light of the following indisputable facts:

- Exhibit 16.2 is neither a survey nor an official plat of record;
- Exhibit 16.2 is a general illustration depicting the entirety of Kiawah Island, including the beachfront property that was to be dedicated to KICA under Sections 16(b) and 16(g) of the 1994 Development Agreement;
- Exhibit 16.2 was unilaterally altered by KRA's land planner, Mark Permar, to reflect something other than the Town's original version;
- Exhibit 16.2 was not used in drafting the property description for the conveyance of the Beachfront Strip;
- Exhibit 16.2 is not referenced in either the Beachfront Deed or Agreement for Conveyance in connection with the conveyance of the Beachfront Strip; and
- KICA was not a party to and played no role in the drafting or execution of the 1994 Development Agreement or Exhibit 16.2, other than the Agreement for Conveyance.

(Final Order pp, 4-5, 13-14; Order on Motion to Alter or Amend p. 5; Intervenors' Ex. 2 & 3; Tr. pp. 48-50, 73-74, 81-82, 333 lines 22-23, 381 lines 24-25).

Based on these facts, the master properly found that the accuracy of boundaries by reference to Exhibit 16.2 lack reliability and are of limited value in determining the intent of the parties with regard to the conveyance of the Beachfront Strip. (Final Order p. 14). Upon reconsideration, the master confirmed that Exhibit 16.2 simply was not clear and

convincing evidence as purported by KRA and could not support its claim for reformation:

As recited above, reformation can only be granted by a clear showing that the Beachfront Deed does not accurately reflect the intent of both parties to that document (here, KRA and KICA). Exhibit 16.2, is an Exhibit to the 1994 Development Agreement which was a contract between KRA and the Town of Kiawah. Exhibit 16.2 is not referred to in either the Agreement for Conveyance or the Beachfront Deed, which are the only two documents to which KICA is a party. There is no testimony presented by any party that points to KICA having either seen or approved Exhibit 16.2 prior to the receipt of the Beachfront Deed. As such, *Exhibit 16.2*, while perhaps demonstrative of KRA's intent, *does nothing to bolster any inference that it is a reflection of KICA's intent*. Without a showing that the Beachfront Deed inadequately represents KICA's intent, reformation cannot lie.

(Order on Motion to Alter or Amend pp. 4-5) (emphases added).

It is clear from the master's rulings that he exhaustively considered Exhibit 16.2. In light of the all of the facts and testimony surrounding that document, the master properly exercised his discretion and assigned it weight accordingly. KRA failed to demonstrate any error in the master's treatment of this evidence.

Furthermore, the master correctly declined to treat either Exhibit 16.2 or the 1994 Development Agreement as the antecedent agreement to which the Beachfront Deed can be reformed as KRA advocates. (KRA Initial Br. pp. 31-35). The 1994 Development Agreement and Exhibit 16.2 cannot be the antecedent agreement between the parties when one of the necessary parties (KICA) was not a party to those documents. The 1994 Development Agreement undoubtedly bears some relevance to this dispute since the genesis of KRA's obligation to convey the Beachfront Strip to KICA was under Section 16(b). (KRA Ex. 5 pp. 42-43). However, this obligation was further solidified through execution of the Agreement for Conveyance between KRA and KICA. (Intervenors' Ex. 2).

The Agreement for Conveyance is a valid contractual agreement between KRA and

KICA pertaining directly to the conveyance of the Beachfront Strip. The extent to which KICA is considered a third-party beneficiary to the 1994 Development Agreement is not determinative of its intent given the clear manifestation of the parties' intent regarding the Beachfront Strip that is contained in the Agreement for Conveyance.

Moreover, Section 16(b) of the 1994 Development Agreement *generally describes* KRA's obligation to convey the Beachfront Strip to KICA as Common Property, whereas the Agreement for Conveyance sets forth *specific legal descriptions* for the properties to be conveyed from KRA to KICA, including the Beachfront Strip, with draft quit-claim deeds for each. (KRA Ex. 5 pp. 42-43; Intervenors' Ex. 2). This is consistent with the very motivation behind the Agreement for Conveyance since KICA wanted assurance that it would receive the particular properties as promised by KRA. (Tr. pp. 226-228). Other than the Agreement for Conveyance, nothing in the 1994 Development Agreement can serve as an antecedent agreement for purposes of proving mutual mistake because KICA was not a party to the development agreement. Therefore, the Agreement for Conveyance and language used therein to describe the Beachfront Strip exceeds the 1994 Development Agreement, including Section 16(b) and Exhibit 16.2, in terms of probative value in determining the parties' intent with regard to the conveyance in dispute.

There is simply no support for KRA's recently crafted theory that the property intended to comprise the Beachfront Strip was lost in translation by the draftsman Beth Nimmons between Section 16(b) and Exhibit 16.2 and the legal description as drafted in the Agreement for Conveyance and Beachfront Deed. (KRA Initial Br. pp. 31-33). KRA attempts to capitalize on the general nature of the 1994 Development Agreement and Exhibit 16.2 in

order to corroborate its theory as-of-late that the 4.62 acres was not intended to be conveyed to KICA as Common Property. (KRA Initial Br. ____). In fact the 4.62 acre parcel was conveyed as part of the Beachfront Strip under the Beachfront Deed and there is a lack of clear and convincing evidence of any intent otherwise aside from recent KRA witness testimony.

Indeed, there is evidence that allows the intended property boundaries of the Beachfront Strip to be determined with precision, but Exhibit 16.2 is not among such evidence. (KRA Initial Br. p. 40). Additionally, the master considered but rightfully declined to adopt KRA's argument that Exhibit 16.2 depicted the intended western boundary of the Beachfront Strip as the eastern boundary line of a property referenced as "Parcel 13."¹³

The evidence supports an understanding that the Beachfront Strip would vary with the tides along its southern boundary and that the northern boundary would be high land and dunes "generally seaward" of most oceanfront lots, varying with the seaward property lines of those platted lots. (KRA Ex. 5 pp. 42-43). It was also understood that the western and eastern boundaries of the Beachfront Strip would correspond with extensions of the furthest platted points of record on either end of Kiawah Island in 1994. (KRA Ex. 5 pp. 42-43).

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"Parcel 13" is not a platted property of record, but rather was created by KRA's land use planner, Mark Permar, for development purposes. (Final Order p. 14). KRA partners testified to their intent that the western boundary of the Beachfront Strip correlate with the eastern boundary of "Parcel 13;" yet there is *no reference* to "Parcel 13" in connection with the conveyance of the Beachfront Strip anywhere in the 1994 Development Agreement. Nor was Ms. Nimmons instructed to use "Parcel 13" in drafting that property description. (Tr. pp. 204-07, 235-36, 254, 261, 271, 273, 274, 333, 335, 388-89, 390-91, 415). A portion of "Parcel 13" appears to have been derived from a plat of record for a 16-acre tract, dated May 16, 1988 (Intervenors' Ex. 5), but the entirety of the parcel has never been formally surveyed – "Parcel 13" does not exist as an official platted property of record on Kiawah Island. (Final Order p. 14).

Given the location of the 1991 DHEC/OCRM jurisdictional lines (see infra Section F), KRA had no intention or ability to develop beyond the furthest points of record on either end of Kiawah Island and, in fact, was obligated to dedicate the far western end, including Captain Sams Spit, as well as the far eastern end of the island under the 1994 Development Agreement. (KRA Ex. 5 pp. 44-45).

The master neither rejected Exhibit 16.2 nor disregarded witness testimony related to it or the 1994 Development Agreement as a whole. (KRA Initial Br. __). The master considered this evidence along with all of the evidence presented and issued his findings and conclusions accordingly. (Final Order pp. 2-7, 8-17; Order on Motion to Alter or Amend pp. 4-13). The master properly treated the Agreement for Conveyance as the best and only written manifestation of KICA's intent and declined to treat the 1994 Development Agreement or Exhibit 16.2 as the antecedent agreement between the parties. (Final Order p. 21; Order on Motion to Alter or Amend pp. 4-5, 14). Despite KRA's disagreement with the discretion exercised and weight assigned to certain evidence, the master's findings should be affirmed for they are factually sound and consistent with the applicable law governing reformation.

E. The Master's Treatment and Analysis of the Property Description in Dispute was Proper

KRA takes issue with the master's consideration of and findings on the admittedly unambiguous property description of the Beachfront Strip, asserting that it is the lack of ambiguity in the language, as well as the consistency between that language in the Agreement for Conveyance and Beachfront Deed, that evidences a mutual mistake. (KRA Initial Br. p.

____). If consistency between language in an option contract and a deed is evidence of a mutual mistake, then mutual mistake abounds and will be easy to prove. That is not, and never has been, the law. See Sullivan v. Moore, 92 S.C. at 307; Brock v. O'Dell, 21 S.E. at 979; Gowdy v. Kelley, 185 S.C. 415.

The property description for the Beachfront Strip in the Agreement for Conveyance and Beachfront Deed is consistent with the general language describing that requirement under Section 16(b) of the 1994 Development Agreement. (Intervenors' Ex. 2; KRA Ex. 5 pp. 42-43). It is consistent with the undevelopable nature of the beachfront property on Kiawah Island during 1994-1995. (See infra Section F). Moreover, it is consistent with the testimony of the draftsman and the guidance and instruction she received.¹⁴

Ms. Nimmons testified to drafting the property description of the Beachfront Strip based on guidance primarily from Mr. Long emphasizing a strip of beachfront and dunes generally 200 to 300 feet wide from the west end to the east end of Kiawah Island. (Tr. pp.

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KRA partner Leonard Long testified that he worked together with Ms. Nimmons, gave her instruction for drafting the property description for the Beachfront Strip, and remembered saying it should be "below all the lot lines that are of record, and surely that would cover it." (Tr. pp. 253, line 25–254, line 11). Mr. Long testified that the property intended to comprise the Beachfront Strip was not surveyed due to the time and expense of such an undertaking, that they "thought we could do it generally" and that they knew it was going to be "loosey-goosey." (Tr. p. 230 lines 10-19). He testified that the concept for the Beachfront Strip was simply to describe everything from the last property on the west, eastward along the beachfront, and seaward of all the beachfront parcels and lots conveyed as of the 1994 period. (Tr. pp. 230, line 20–231, line 6). Mr. Long further testified that he told Ms. Nimmons that the Beachfront Strip property was to be generally in front of other lots (Tr. pp. 271 lines 1-14); that he did not tell her to use a specific parcel as the western boundary but rather to go in front of platted properties and "try to capture the varying-width land as you go along 10 miles" (Tr. pp. 272, line 12–273, line 19); and that he told her to accomplish the objective of describing property in front of every other lot "whether built on or not" and "make sure we get that land all the way along." (Tr. pp. 274 lines 10-14).

333 lines 2-21, 334, line 21–335, line 19, 349, lines 2-14). Ms. Nimmons ultimately used the Employee Facility Tract in drafting the western boundary of the Beachfront Strip because it was the furthest plat of “residential, resort, or commercial” property of record on the west end of Kiawah Island and most representative of the Beachfront Strip beginning. (Tr. pp. 231-232, 254, 273, 274, 334, line 21–339, line 5, 343-344; KRA Ex. 5 pp. 42-43). She testified to specifically identifying and using the Employee Facility Tract¹⁵ because it was the furthest plat of record on the western end other than Captain Sams Spit, which she understood was to remain undeveloped under the 1994 Development Agreement. (Tr. pp. 362, line 15–363, line 19).

KRA takes particular issue with the weight afforded by the master to Ms. Nimmon’s testimony, citing to other jurisdictions finding an alleged mistake of a scrivener to be a mutual mistake of the parties. (KRA Initial Br. p. ____). However, in addition to the non-binding nature of these cases, each is distinguishable from the one at hand.

Sherman v. Woener Magnolia Farms, 565 So. 2d 601 (Ala. 1990), involved an alleged mutual mistake in the drafting of a promissory note. The trial court engaged in construction of the relevant documents as well as heard parol evidence testimony from the scrivener and others corroborating the alleged mistake in those documents, ultimately concluding such evidence was sufficient to warrant reformation. Sherman is not on point

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Ms. Nimmons testified she had used the 16-acre tract (Intervenors’ Ex. 5) in a previous draft of the property description, but specifically decided against using it as the western boundary because it was inconsistent with the instruction to describe from the farthest platted lot on the western end of the island. (Tr. pp. 343, line 9–344, line 8). She testified she was also aware of Beachwalker Park on the western end near the Employee Facility Tract and Captain Sams Spit but that it was likewise inconsistent with Section 16(b) and her instructions received. (Tr. pp. 343, line 9–344, line 8).

because KRA was not able to provide clear and convincing evidence of both the allegedly mistaken instrument and an antecedent agreement demonstrating the parties' intent to which the instrument could be reformed.

Edmiston v. Wilson, 146 W. Va. 511, 120 S.E.2d 491 (1961), Clemons v. Mallett, 445 So. 2d 276 (Ala. 1984), and Ferrell v. Ferrell, 53 W. Va 515, 44 S.E. 187 (1903) are cited for the proposition that the mistake of a scrivener can be regarded as a mutual mistake for the scrivener is considered the agent of both parties. (KRA Initial Br. p. ____). The particular facts and evidence presented in support of reformation in Edmiston¹⁶ are notably distinct: both parties to the disputed deed went together to the lawyer's office who ultimately drafted the deed; the terms of the subject conveyance were discussed among all three; the lawyer formally represented the grantor but also held the grantee's check for the purchase price pending final approval of the agreement and transfer; and both parties met with the lawyer and expressed desired changes to be incorporated in the final deed. Certainly under such circumstances the scrivener can be regarded as the agent for both parties.

Here, however, Ms. Nimmons drafted the property description for the Beachfront Strip based solely on discussions with and the guidance of KRA. As the party seeking to reform a plain and unambiguous deed, KRA must overcome the presumption that the written instrument reflects the intended final agreement between the parties by affirmatively proving through the existence of an antecedent understanding that the parties intended something

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In Clemons, the Supreme Court of Alabama affirms the lower court's finding that reformation is warranted but does not discuss the evidence actually presented and thus, is of little value to the issues of this case.

differently.¹⁷ KRA cannot ignore the fact that it has failed to meet this burden by contending Ms. Nimmons served as the agent of both KRA and KICA and relying exclusively on KRA witness testimony as-of-late to speak to the intent of both. There is no evidence to support KICA intended anything other than what was unambiguously described in and conveyed by the Beachfront Deed, which included the subject 4.62 acres.

In Ferrell, the scrivener was regarded as the agent of both parties since the contract was explained to him by the parties and he was directed to prepare a deed according to their explanation. 53 W. Va. 515, 44 S.E. at 189. In Ferrell, the parties' antecedent agreement to which the disputed instrument could be reformed was evidenced through proof of the instructions from the parties and the mutual mistake was evidenced by the *discrepancy between* the instructions and the instrument actually drawn. Id. By contrast, here, the only explanation Ms. Nimmons received was from one of the parties – KRA. Further, there is no proof of a discrepancy between the instruction received and the Beachfront Deed as drawn. Rather, the property description Ms. Nimmons drafted for the Beachfront Strip is *consistent with* the instructions given and the written documents describing the Beachfront Strip. As Ferrell points out, where an action is to reform the agreement itself it is necessary to prove the existence of a mutual mistake. Id. KRA has failed to meet this burden, and therefore its

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In Edmiston, the Supreme Court of Appeals of West Virginia explained that although parol evidence is admissible to establish mutual mistake, “the proof required to justify a court of equity to reform and correct such instrument to conform to the true intention of the parties must be strong, clear, unequivocal, preponderating and convincing” because the presumption is that a written instrument is complete on its face, contains the entire, final agreement between the parties, and can only be overcome by such strong, clear, unequivocal, preponderating and convincing evidence to the contrary. Edmiston, 146 W. Va. at 526-27, 120 S.E.2d at 500.

claim for reformation was properly denied.

The property description of the Beachfront Deed was placed directly at issue by KRA in seeking reformation. The master must necessarily look to and consider that language as it is presumed to represent the final agreement of the parties. KRA contends that there was a mistake in drafting and that the Beachfront Deed does not accurately reflect the parties' intended agreement. Thus, in order for equity to grant the high remedy of reformation, KRA must prove the existence of antecedent agreement between KRA and KICA regarding the Beachfront Strip that demonstrates a mutually shared intent otherwise. The only evidence of any such agreement between KRA and KICA is the Agreement for Conveyance, which is identical to and corroborates the conveyance of the Beachfront Strip as drawn in the Beachfront Deed. The master considered this evidence among all the other evidence presented and correctly concluded reformation cannot lie.

F. The Developability of the 4.62 Acre Parcel is Relevant to the Reformation Analysis and the Showing of the Parties' Intent

KRA takes particular issue with the master's findings regarding the undevelopable nature of the Beachfront Strip and 4.62 acre parcel during the relevant 1994-1995 time frame, arguing there is no connection between the location of the 1991 DHEC/OCRM beachfront jurisdictional lines¹⁸ and the property description of the Beachfront Strip. (KRA Initial Br.

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Pursuant to the Coastal Tidelands and Wetlands Act, as amended, § 48-39-250, *et seq.* (the "Beachfront Management Act"), the Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management ("DHEC/OCRM") establishes the location of the beachfront jurisdictional lines – the baseline and the setback line – along South Carolina's coastline and maintains jurisdiction over all development occurring seaward of the setback line, which is located twenty (20) feet landward of the baseline. S.C. Code Ann. § 48-39-290. (Final Order p. 12; Tr. pp.485-86,

pp. 36-37). In fact, there is a connection and it is relevant to the reformation analysis and showing of the parties' intent as determined by the master. (Final Order pp. 11-16; Order on Motion to Alter or Amend pp. 2-4). KRA repeatedly argues it only intended to convey "undevelopable" property to KICA. (Tr. pp. 127, line 25-128, line 18, 210 lines 1-10, 393 lines 20-24). Certainly, the location of the 1991 DHEC/OCRM jurisdictional lines and developability of property is relevant and provides context to the events surrounding the 1994 Development Agreement and subsequent conveyances.

The master found probative the evidence presented by Intervenors on the undevelopable nature of the Beachfront Strip and surrounding property as it bore on the parties' intent during the relevant 1994 time frame. (Final Order pp. 11-16; Order on Motion to Alter or Amend pp. 2-4). Indeed such evidence was significant to and properly considered in the court's reformation analysis.¹⁹

The master's findings relating to developability of the property in dispute are supported by a solid basis in fact and law: 1) the S.C. Beachfront Management Act, which was in existence during the 1994-1995 time period, and 2) Intervenors' Ex. 15 and 19 showing the location of the 1991 DHEC/OCRM jurisdictional lines for the west end of Kiawah Island, clearly placing the majority of the 4.62 acre parcel within the

495, 503). The Beachfront Management Act generally prohibits development seaward of the jurisdictional lines subject to very limited exceptions. S.C. Code Ann. § 48-39-290. (Final Order p. 12; Tr. pp. 487, 491, 503).

¹⁹

KRA cites to Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct.App.2000) in claiming the master's findings regarding the developability of the 4.62 acre parcel cannot be deemed harmless. (KRA Initial Br. p. 37). However, that case is dealing with review of a jury charge for alleged error, which has no application to the issues here.

“undevelopable” category.

Moving from east to west along the Kiawah Island beachfront, the 1991 DHEC/OCRM jurisdictional lines continued generally along the crest of the primary dunes closest to the ocean until reaching the western end of the island around Beachwalker Park, at which point the lines wrapped up and back around the park, placing all of the property seaward and westward of those lines, including the majority of the 4.62 acre parcel, as well as the entirety of Captain Sams Spit, within DHEC/OCRM’s jurisdiction and subject to the general prohibition on development. (Final Order pp. 12-13; Intervenors’ Ex. 19; Tr. pp. 508-510).²⁰

The 1994 Development Agreement addressed KRA’s rights to develop, as well as its obligations to convey many properties that were located along or near the Kiawah beachfront and were thus subject in part to DHEC/OCRM’s jurisdictional lines, including the Beachfront Strip. The Beachfront Strip was intended to be “a strip of scenic dunes and high land” generally comprising the area from the most seaward platted lot lines to the mean high water mark. (KRA Ex. 5 pp. 42-43). In other words – the undevelopable dunes and beachfront property in front of oceanfront lots, which corresponds to the location of the 1991 DHEC/OCRM jurisdictional lines and developability of beachfront property on Kiawah in 1994.

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Captain Sams Spit is adjacent to the 4.62 acres on the western end of Kiawah Island. Recently, the S.C. Supreme Court held that Captain Sams Spit was undevelopable in the 1994-1995 time period, Kiawah Dev. Partners, II v. S. Carolina Dep’t of Health & Env’tl. Control, 411 S.C. 16, 24, 766 S.E.2d 707, 712 (2014), for exactly the same reason that the master had concluded the land was not developable: it was seaward of the DHEC/OCRM jurisdictional lines.

Whether or not precise language referencing the 1991 DHEC/OCRM jurisdictional lines was used in discussions or in the written documents, their existence and location is a matter of fact and law that bears directly on the conveyance of the Beachfront Strip and the developability of that property at that time.²¹ During the relevant 1994-1995 period, the Beachfront Strip was considered undevelopable—there was no need to ensure boundary lines with the same degree of precision as property conveyed for potential development. (Tr. pp. 334, line 21–335, line 19). That the DHEC/OCRM jurisdictional lines later changed and KRA realized greater development potential in property it transferred and now wishes to recover from KICA demonstrates a relatively recent change of mind, not that there was a mistake in the property description or transfer at the time of conveyance.

KRA admits the issue of developability is important while simultaneously arguing the master erred in considering the developability of the 4.62 acres. (KRA Initial Br. pp. 38, 39). KRA's acknowledgment that it would not convey "developable" land is consistent with its conveyance of the 4.62, the vast majority of which was not developable at the time of the conveyance.

The developability of the beachfront property on Kiawah Island during the 1994 time frame is relevant and was properly considered and ruled on by the master. Despite KRA's attempt to characterize the evidence favorably to its position while contending no one offered testimony contesting its points (KRA Initial Br. ___), it cannot escape the fact that it failed to

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Mr. Long testified that he was familiar with the jurisdictional lines and that he spent a significant amount of time working with Ms. Nimmons in preparation for drafting the description for the Beachfront Strip. (Tr. pp. 264, line 6–265, line 17, 271 lines 1-14, 272, line 12–273, line 19, 274 lines 10-14).

meet the requisite burden of proof for reformation. As such, its claim for reformation was rightfully denied.

G. The Master Gave Appropriate Weight to Evidence of Subsequent Conduct

The master neither focused exclusively on a subset of evidence nor disregarded certain evidence KRA presented. (KRA Initial Br. p. ____). As evidenced by two robust opinions, the master carefully considered all of the evidence that was presented, including evidence of subsequent conduct. (Final Order pp. 2-22; Order on Motion to Alter or Amend pp.2-15). KRA's dissatisfaction that the master found its subsequent conduct evidence unpersuasive does not constitute reversible error. None of the arguments made by KRA or the cases cited in support of reversal on these grounds demonstrate that this Court should find otherwise. (KRA Initial Br. ____).

Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981), falls short of supporting KRA's contention that more weight should be given to evidence of subsequent conduct in discerning the intent of the parties. (KRA Initial Br. ____). KRA is asking this Court to read into that opinion a requirement that does not exist.

Sims involved an action by homeowners for unlawful taking of property and trespass against alleged purchasers of an adjoining lot. In 1969, the developer conveyed certain properties to the Sims, which were plainly identified by reference to a recorded plat as lots 46-A and 47-A; the Sims constructed a home on the former and a garden and dog house on the latter. In 1974, the same developer conveyed part of the Sims' property to the Tylers. On the basis of mutual mistake, the lower court reformed the deed and resolved the claim to the

disputed property in favor of the Tylers. The Sims appealed and the Supreme Court reversed holding that there was clear and convincing evidence that the Sims intended to receive the disputed property and that there was insufficient evidence to warrant reformation otherwise.

The Court's opinion in Sims is brief and does not elucidate on the evidence presented to the trial court. It does, however, recite the general principle that: "Before equity will reform an instrument, *it must be shown by evidence which is most clear and convincing not simply that it was a mistake on the part of one of the parties but that it was a mutual mistake[,]*" which requires a showing that "*both parties* intended a certain thing and by mistake in the drafting did not get what *both parties* intended." Sims, 276 S.C. at 642, 281 S.E.2d at 230 (emphases added).

The Court determined there was no evidence to support the claim that the Sims did not intend to receive the disputed property, but rather that there was clear and convincing evidence that they did intend to receive such property. And while the Court noted some acts of ownership taken by the Sims subsequent to the conveyance as indicative of intent, it also found significant the evidence during the time of conveyance, such as the parties' expectations, the purchase price paid, and the fact that there was adequate consideration. Thus, subsequent conduct was some but not all of the evidence considered by the Supreme Court in determining the parties intent.

The particular facts and circumstances of Sims are distinguishable from the present action in several respects. First, Sims involved *two* separate deeds from the same developer to *two* different grantees, and those two deeds conveyed part of the *same property* to both grantees. In other words, the court had no choice but to reform one of the two deeds. The

lower court ruled in favor of the Tylers, the second grantees to the disputed property, reforming the deed of the Sims, the first grantees to the disputed property. Therefore, the Supreme Court was looking to whether the Sims intended to receive the disputed property as drafted in their deed or if there was clear and convincing evidence that they intended something otherwise. Finding none, reformation was denied. Absent from the analysis, however, is a process for the treatment and resolution of situations involving the intent of multiple parties who are not all parties to the same instruments.

By contrast, this case involves just *one* deed from the developer to *one* grantee, and that deed conveyed the property as explicitly agreed upon in a *contractual agreement* between the developer and grantee. The deed also conveyed the property as generally agreed upon in a development agreement between the developer and the town (who was not a party to either the contract or the deed). The developer, KRA, claims there is a mistake in the property description of the deed such that 4.62 acres were mistakenly conveyed to the grantee, KICA. Thus, this Court must look to whether KICA intended to receive the 4.62 acres as drafted in the Beachfront Deed or if there is clear and convincing evidence that they intended something otherwise.

Significantly, unlike in Sims, there is an antecedent agreement – the Agreement for Conveyance – between KRA and KICA that expresses a clear intent to convey the disputed property to KICA. The existence of a written agreement between the parties to the subject instrument creates a strong presumption that it best evidences the final agreement and intention of the parties. See, e.g., Suttles v. Wood, supra, 280 S.C. 272. This presumption can only be overcome with the most clear and convincing evidence to the contrary. See, e.g.,

Sullivan v. Moore, 92 S.C. at 307. KRA argues that the written agreement pertaining to the conveyance of the property in dispute does not reflect the true intentions of the parties. Therefore it must necessarily prove the existence of some other agreement between the parties evidencing such intent in order to prove mutuality of this alleged mistake. Since KRA failed to meet this burden of proof, reformation was properly denied.

Merely because certain after-the-fact evidence was found persuasive in Sims under the circumstances of that case does not bind the relevant inquiry to events occurring subsequent to the 1994-1995 time frame. Nor does Sims create a blanket standard under which all evidence of subsequent conduct is considered probative and convincing. At most, Sims provides that subsequent acts of ownership or control may be considered among other evidence in making a determination of intent upon allegations of mistake, particularly where there are multiple parties claiming title to the same property as in that case. There is nothing in Sims that supports reversal of the master's findings and ultimate conclusion that reformation must fail.

The facts in Darst v. Lang, 367 Ill. 119, 122, 10 N.E.2d 659, 661 (1937), though not entirely fleshed out, are also distinguishable. First, Darst involved a gratuitous gift between family members, which is clearly not the case here. Second, the defendant/grantee lived with plaintiffs/grantors in the subject premises after the conveyance. Both plaintiffs and defendant later joined in a written lease to a tenant for the subject premises while continuing to live together in another house for several years. These facts more clearly lend themselves to knowledge by both parties that plaintiffs were collecting rent from and intended to retain an interest in the subject property. Moreover, there was testimony from the attorney in whose

office the deed was delivered that an oral agreement between the parties was made that was consistent with plaintiffs' allegations. Accordingly, the defendant's allegations in support of a different agreement and version of events was unpersuasive.

Here, the subsequent actions or inactions taken by the parties with regard to the 4.62 acres are far from clear, let alone dispositive.²² There was conflicting evidence of maintenance and control of the subject property, none of which rose to the level of clear and convincing needed to overcome the parties' unambiguous agreement. However, there was substantial evidence of individual KICA members' use and enjoyment of the property as Common Property. Contrary to KRA's implication, Darst does not stand for the proposition that subsequent conduct alone can prove mutual mistake. (KRA Initial Br. ___). Testimony supporting the existence of the antecedent agreement between the parties as alleged by plaintiffs in Darst was corroborated by a neutral third party who had personal knowledge of such agreement. In this case, the only testimony alleging a mistake comes from KRA witnesses who were unable to establish the existence of an agreement with KICA to convey anything other than what was transferred under the Beachfront Deed.

Tidwell v. Bassett, 271 Ga. App. 867, 869, 611 S.E.2d 123, 125-26 (2005) involved dissolution of a medical practice that consisted of an office building on three lots, in which each doctor held a one-half undivided interest, as well as two additional lots purchased by

²²

For instance, there were allegations that KRA paid the taxes on the disputed property but a lack of documented proof. (Tr. pp. ___). There were also allegations that KICA fails to maintain the subject property, but a lack of concrete evidence suggesting KICA treats the subject property any differently than the vast majority of its Common Properties. (Tr. pp. ___).

the doctors to be used for parking. During litigation, the parties entered into a proposed settlement agreement, which provided that doctor A would own the building and assume all associated debts and that doctor B would be released from all debts and would lease his space in the building and right to park in the lots from doctor A. This agreement was effectuated with a deed transferring doctor B's interests in the property to doctor A and a lease from doctor A to doctor B for the office space and right to park. However, the legal description in the deed only referred to the three lots with the office building without reference to the two lots used for parking.

The appellate court in Tidwell ultimately affirmed the lower court's judgment for reformation of the deed to include the two omitted lots. The court first looked to the language in the relevant documents and determined when read together they clearly evidenced a mutual intent for all of doctor B's interest in the property to be transferred to doctor A and for doctor B to lease the property back from doctor A, including the right to park in the disputed lots. The court found that doctor B would have no need to lease property in which he still held an interest and such portion of the lease agreement would be completely unnecessary had the parties intended him to retain ownership in those lots. Notably, the court provided *in addition* that subsequent conduct of the parties may be considered as evidence of intent, but that *the relative weight of this evidence was for the finder of fact*, not the appellate court. Tidwell, 271 Ga.App. at 869, 611 S.E.2d at 125-26.

In Tidwell, there was clear evidence of an antecedent agreement, which was corroborated by subsequent conduct of the parties. Here, the only evidence of an antecedent agreement between KICA and KRA is the Agreement for Conveyance, which contains a

property description identical to the Beachfront Deed, and which was corroborated by additional evidence from the 1994-1995 time frame. KRA has failed to present clear and convincing evidence that KRA and KICA both intended to convey anything other than what is described in admittedly unambiguous terms in the Beachfront Deed.

Finally, unlike in De Simone v. Kramer, 77 Wis.2d 188, 252 N.W.2d 653 (1977), there is no evidence that the parties' intent regarding the Beachfront Strip was based in any way upon physically inspecting the property's boundaries.

Under these cases, subsequent conduct becomes relevant to corroborate an antecedent agreement. In the present case, there is conflicting subsequent conduct and that which was presented by KRA did not corroborate the antecedent agreement.

KRA wants all the focus to be on subsequent conduct rather than the evidence found most relevant and probative, including execution of the Agreement for Conveyance and the fact that the majority of the 4.62 acre parcel was undevelopable at the time of the conveyance. (KRA Initial Br. p. __). The master was the finder of fact and, as the one best situated to weigh the evidence and assess the credibility of witnesses, considered and found unpersuasive KRA's subsequent conduct evidence. The master determined that the most reliable and convincing evidence on the question of intent involved the facts and circumstances that existed during the 1994-1995 period. KRA's disagreement with the master's findings is palpable but insufficient to prove error warranting reversal.

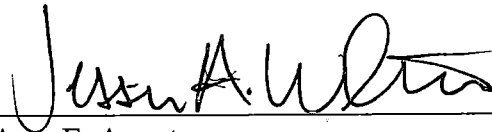
CONCLUSION

The master carefully considered all of the evidence presented in this case. KRA sought reformation of the admittedly unambiguous Beachfront Deed requiring proof by clear

and convincing evidence that both KRA and KICA had intended the conveyance to be other than as drawn. KRA failed to present evidence sufficient to meet this burden of proof. Therefore, the master properly denied reformation and concluded that the 4.62 acre parcel was conveyed to KICA as part of the Beachfront Strip. KRA has failed to demonstrate error in any of the master's findings or conclusions on the merits warranting reversal.

For the foregoing reasons, the master's findings and ultimately conclusion denying reformation should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2015-001146

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OCT 02 2015

SC Court of Appeals

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and
Kiawah Development Partners II, Inc.,

Appellant-Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-
for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners
Association, Inc.,

Respondent-Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Respondents' Initial Brief of Respondent-Appellants on counsel for the parties by placing copies of same in the U.S. Mail addressed to:

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Re: Kiawah Resort Associates, L.P., et al. v. Kiawah Island
Community Association, Inc.
Appellate Case No. 2015-001146

Dear Ms. Kitchings:

Enclosed for filing please find Kiawah Property Owners' Group
and Inlet Cove Club Homeowners Association's Response Brief in
the above-referenced matter, along with my certificate of service.

Please return a clocked-in copy in the self-addressed,
stamped envelope provided.

Thank you very much for your kind cooperation and
assistance.

Yours very truly,

Jessie A. White

cc: Ellis Lesemann, Esq.
Allison C. Jett, Esq.

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