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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

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Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II LLC, — Appellants/Respondents,

v.

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. — Respondents/Appellants

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APPELLANTS' FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS

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INTRODUCTION

During the proceedings below, the Master applied the wrong legal standard and undertook the wrong analysis. He then declined to consider extrinsic evidence arising after the execution of the Quit-Claim Deed contrary to binding precedent. Testimony of multiple witnesses with contemporaneous and personal knowledge of KICA's intent was given no regard, even though KICA's sole witness confirmed that she did not contest or challenge the testimony. The Master refused reformation upon having considered only a subset of the evidentiary record, on the basis of a nonexistent rule that unambiguous written instruments are impervious to claims for reformation. KICA and the Intervenors ask this Court to affirm this outcome, but fail to account for the legal and factual errors made. Instead, they reiterate the errors in their own analysis.

Upon the Court's *de novo* review, there is a fundamental fact that should be dispositive. Other than the mistaken property description itself, there is nothing to indicate that either KRA or KICA intended the Additional Land to be conveyed as part of the Beachfront Strip. All evidence points to the opposite conclusion. This includes graphical evidence, subsequent conduct, and testimony. The legal test for reformation has been met as a mistake in drafting created a result that neither party intended. There also is an antecedent understanding to which the subject deed can be reformed. For these reasons, KRA and KDP II respectfully request that this Court reverse the Master's Final Order and Order on Motion to Alter or Amend the Final Order, remanding this case with instructions that the Master reform the Quit-Claim Deed and return the Additional Land to KDP II through execution of the proposed Corrective Master's Deed.

ARGUMENTS

A. THE GRAPHICAL EVIDENCE IS CLEAR AND CONVINCING

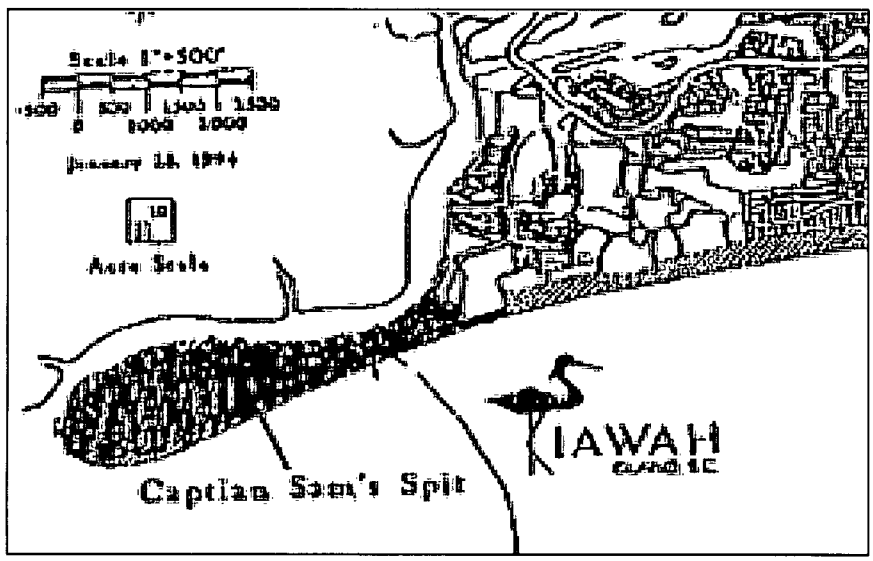
The proceedings below involved an arbitrarily selective analysis of the evidence. One example is the graphical evidence indicating that the Additional Land was not intended by the Town, KRA or KICA to be included as part of the Beachfront Strip. Pls.' Exs. 27, 28, 29, 30, 31, 32, 33, and 36 (R. pp. 2182, 2183, 2184, 2186, 2190-2191, 2192, and 2193-2194). Due to misapprehension of the legal standard, the Master and the responding parties fail to give this evidence proper weight. Upon due consideration, the graphical evidence indicates that KICA has never claimed or exercised any intent of ownership over the Additional Land, which is clear and convincing evidence of intent that justifies reformation in this case.

A claim for reformation of a written instrument must be supported by clear and convincing evidence, which "is simply that degree of proof which produces in the fact finder a 'firm belief' as to the allegations sought to be established." *Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002). Such measure of proof is intermediate, more than a mere preponderance, but less than is required for proof beyond a reasonable doubt; it does not mean "clear and unequivocal." *Id.* This evidentiary standard is fully attainable, unless the wrong legal standard is applied and probative evidence is disregarded.

This Court's *de novo* analysis should begin with Exhibit 16.2 to the 1994 Development Agreement. (R. p. 2183). In the proceedings below, the Master acknowledged that the property description prepared by Ms. Nimmons is "contrary" to what is shown in Exhibit 16.2, but then stated that Exhibit 16.2 is "not solely

determinative of the reformation issue." Final Order, at R. p. 20; Order on Motion to Alter or Amend Final Order, at R. p. 42. The next step in the analysis – one that the Master declined to undertake – was to examine whether the conduct of the parties was consistent with the western boundary of the Beachfront Strip shown in Exhibit 16.2. This allows for a determination whether the intent of the parties is reflected by either: (1) Exhibit 16.2; or (2) the imaginary line extending from the Employee Facility Tract that was created and placed into the mistaken property description by the scrivener. When this analysis is undertaken, the evidence supports a firm belief that the intent of the parties is reflected by the western boundary depicted in Exhibit 16.2.

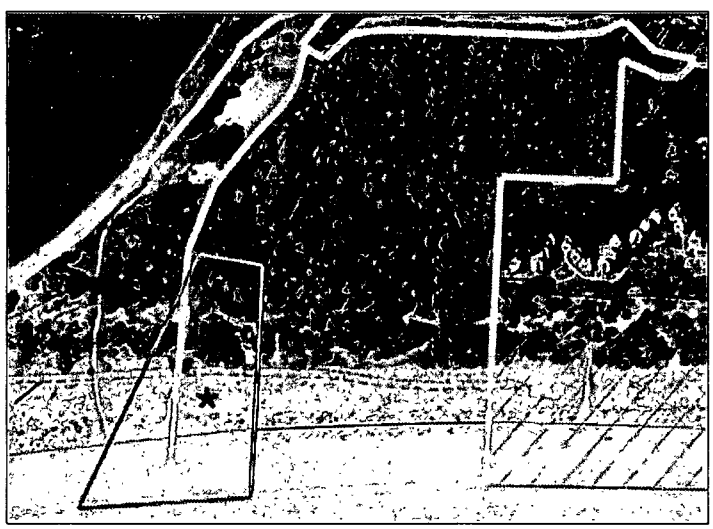
The relevant excerpt of Exhibit 16.2 is reproduced below, enlarged from its original size. The intended Beachfront Strip is shown as the boxed area running along the Atlantic Ocean extending from left to right (east to west) with diagonal hatchmarks (▨), but clearly stopping at the point where it reaches the eastern edge of Parcel 13, the large "r" shaped parcel located just above the Kiawah logo:



Pls. Ex. 28 (R. p. 2183). Exhibit 16.2 is the only depiction of the Beachfront Strip referenced within the body of the 1994 Development Agreement as depicting the

Beachfront Strip and specifically referenced within the operative paragraph, which is Paragraph 16(b). Paragraph 16(b) does not reference the mistaken property description or its imaginary western boundary line.

It is uncontested that the scrivener, Beth Nimmons, did not have a copy of Exhibit 16.2 when she prepared the mistaken property description. (R. p. 1116, lines 22-23). Instead, under time pressure to complete the deeds and exhibits, she made the decision based on her own judgment to utilize the southwestern corner of the Employee Facility Tract thereby creating an imaginary line to serve as the western boundary for the Beachfront Strip. (R. p. 1121, line 11 – p. 1122, line 21). It was this decision that resulted in the accidental inclusion of the Additional Land as part of the Beachfront Strip that was ultimately conveyed. The Additional Land is shown bordered in red below:

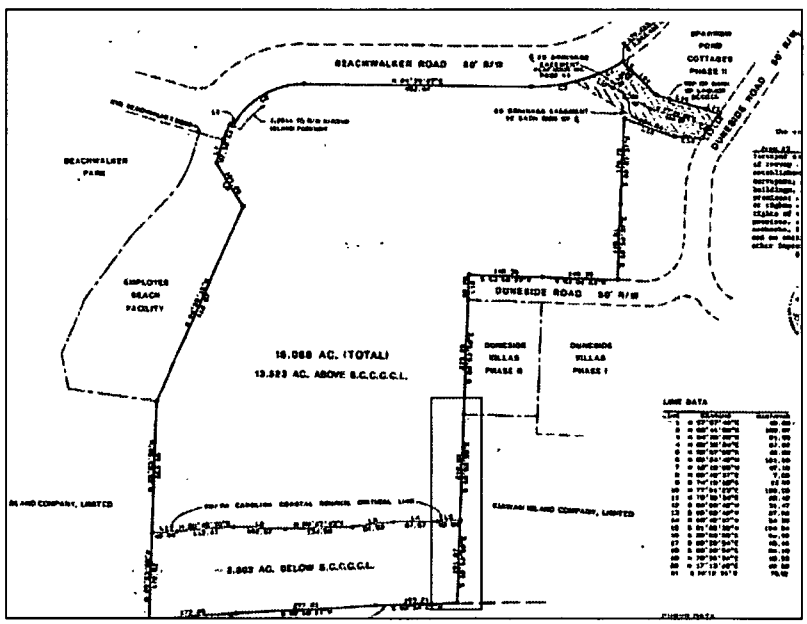


Pls. Ex. 29 (R. p. 2184). [1] The boxed area with the diagonal black hatchmarks on the right (eastern) side of the exhibit reflects the intended Beachfront Strip as depicted in

[1] Also shown on the exhibit are the Duneside Villas, appearing on the right of the exhibit in the shape of an "m." As Pat McKinney testified, the Duneside Villas were the westernmost property that had been sold to third parties and, therefore, would be the intended stopping point of the Beachfront Strip. (R. p. 967, line 15 – p. 968, line 21).

Exhibit 16.2. Plaintiffs' Exhibit 29 demonstrates the physical disconnect between the Additional Land and the intended Beachfront Strip as reflected in Exhibit 16.2.

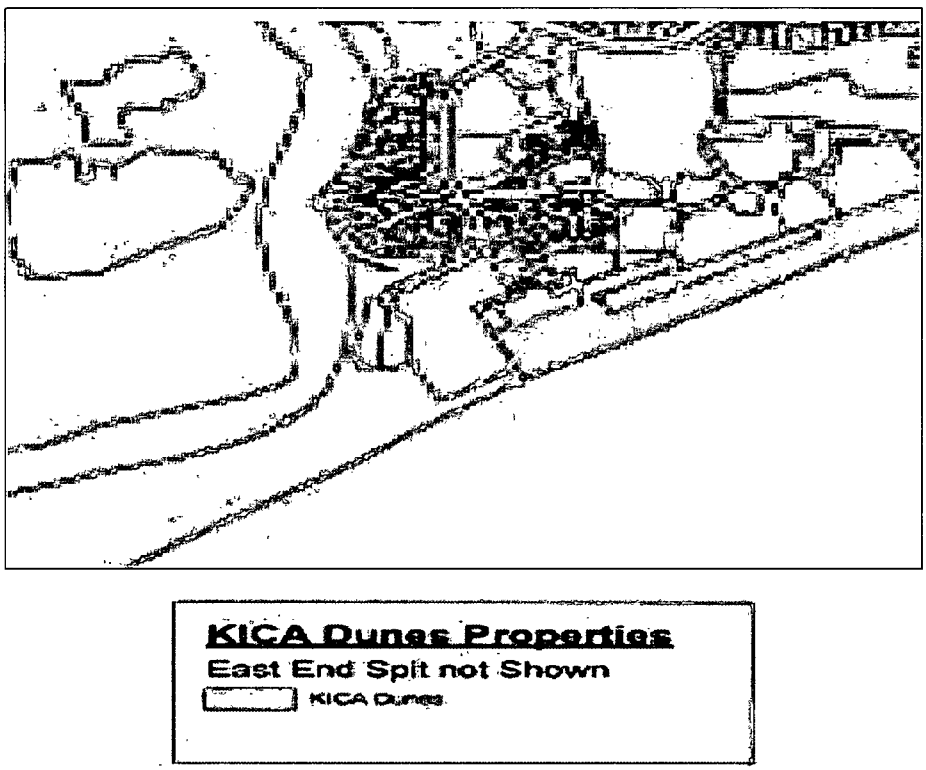
All of the witnesses at trial testified that the inclusion of this physically disconnected land was not intended by any of the parties, specifically including KICA. Furthermore, KICA's conduct after the conveyance has been consistent with Exhibit 16.2, which excludes the Additional Land. KICA's counsel and the Intervenors, however, argue that Exhibit 16.2 should be disregarded because it is not a survey or plat of record and is unreliable. KICA's Initial Br., at p. 38; Intvrs' Initial Br., at pp. 26, 29. This argument fails, as the western boundary of the Beachfront Strip reflected on Exhibit 16.2 is the eastern boundary of Parcel 13, which is a surveyed boundary line:



Intvrs. Ex. 5 (R. p. 2258) (emphasis added). Using this survey, which dates from 1988, the precise location of the intended western boundary can be set. Ironically, it is the imaginary line extending from the Employee Facility Tract created as part of the mistaken property description that was not a surveyed line. *See* Intvrs. Ex. 3 (R. p. 2253)

(describing an "imaginary line" extending from southwesternmost corner of the Employee Facility Tract).

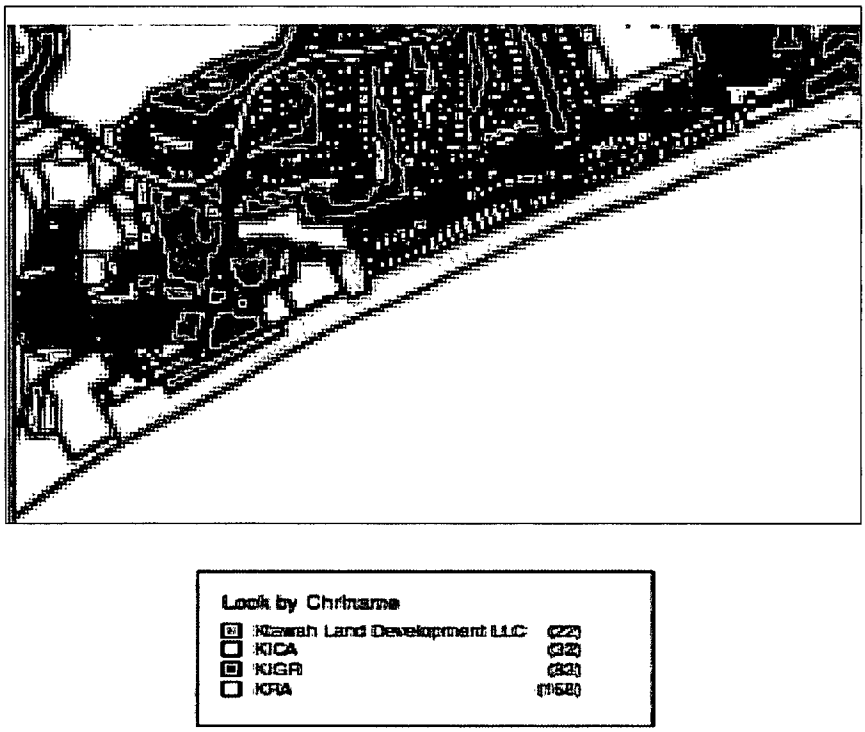
Furthermore, notwithstanding the arguments of counsel, KICA has consistently adopted and adhered to the western boundary line shown in Exhibit 16.2 as the actual boundary of the Beachfront Strip. One example is the map created and published by KICA as part of its Dunes Management Guidelines. The map reflects the "KICA Dunes Properties" in yellow and includes a legend:



Pls. Ex. 31 (R. pp. 2190-2191). On appeal, KICA's counsel argues that this a "lay illustration" that should be given no consideration whatsoever. KICA's Initial Br., at p. 38. However, at trial, KICA admitted that this is its actual and current map that contains "no errors" to KICA's knowledge. (R. p. 1230, lines 5-22). If KICA truly believed itself to be the intended owner of the Additional Land, it would not exclude the Additional Land from its depiction of the Beachfront Strip. That would have been an error.

Instead, the map reflects that the Beachfront Strip stops exactly where Exhibit 16.2 indicates that it would stop. KICA's adoption of the boundary shown in Exhibit 16.2 is evidence of its intent at the time of the conveyance. Arguments of KICA's counsel are not. If Exhibit 16.2 were inapplicable, unreliable or unintelligible, KICA could not and would not have adopted and adhered to it. KICA's counsel also argues that Exhibit 16.2 was never "seen" by KICA, an assertion that mischaracterizes the record. KICA's then-President and then-Secretary reviewed Exhibit 16.2 prior to the execution of the 1994 Development Agreement. (R. p. 1058; R. p. 1205). Furthermore, several KICA members not affiliated with KRA (including Tug Greer, a KICA Board member) obtained copies of the relevant documents, reviewed them, engaged their own legal counsel (Larry Estridge, Esq.), met with the Town, provided input, and successfully obtained the items on their "wish list." (R. p. 1039, line 18 – p. 1040, line 19). The assertion that KICA had no involvement or knowledge regarding Exhibit 16.2 is false. However, if that argument were to be taken as true, KICA's consistent adoption of the boundary line in Exhibit 16.2 underscores another important point. KICA, as a third-party beneficiary to the 1994 Development Agreement and a community association then under declarant control (i.e., KRA), had the same intent as the Town and KRA in terms of the intended western boundary of the Beachfront Strip.

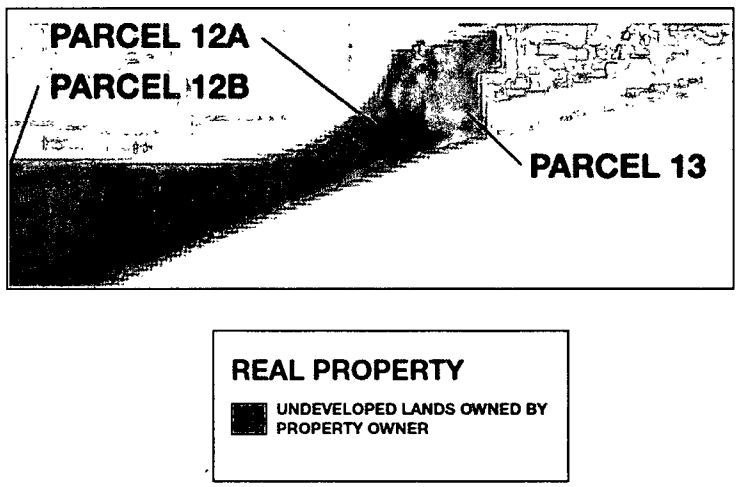
Another map created and maintained by KICA conforming with the western boundary reflected in Exhibit 16.2 is KICA's Common Property Map. This map also specifically excludes the Additional Land. However, it also affirmatively represents that the Additional Land is owned by KRA. On the Common Property Map, KICA reflects the Beachfront Strip owned by KICA in green, and reflects the property owned by KRA in beige:



Pls. Ex. 32 (R. p. 2192). As with the map of the Dunes Property owned by KICA, the Common Property Map is consistent with Exhibit 16.2, and inconsistent with the mistaken property description. Again, if KICA intended to be the owner of the Additional Land, it would neither disclaim ownership of the Additional Land nor depict it as property of KRA. KICA presented no claim or testimony that the depiction of the Additional Land as property of KRA was a mistake.

As demonstrated at trial, KICA is not alone in adopting and adhering to Exhibit 16.2 as the intended depiction of the western boundary. KRA and the Town also affirmed that Exhibit 16.2 "established the western boundary of the Beachfront Strip as the eastern boundary of and extended eastern boundary of Parcel 13" and that this is "clearly shown on Exhibit 16.2." Intvrs. Ex. 9 (R. pp. 2261-2262). When Exhibit 16.2 has proven clear and reliable enough for the Town, KRA, and KICA to adopt it, there is no legitimate basis for the Master to have rejected it. Additionally, the maps and exhibits attached to the 2005 Development Agreement re-confirm the western boundary

established by Exhibit 16.2 and confirm that the Additional Land was intended and believed to be owned by KRA:



Pls. Ex. 30 (R. p. 2186). If the Additional Land had been intended to become property of KICA, there is no explanation for why this exhibit, along with every other graphical depiction, would show otherwise. The Master failed to apprehend the significance of this graphical evidence, choosing instead to treat the mistaken property description that Ms. Nimmons "cut and pasted" into the Agreement for Conveyance and the Quit-Claim Deed as dispositive.[2] The Master erred in disregarding probative evidence of intent. When a defendant in a reformation action has created graphical evidence indicating that it does not consider itself to be the intended owner of the subject property, there is no possible rationale for disregarding the evidence. Once considered along with the remaining

[2] Within the responding briefs, and in the proceedings below, there is a suggestion that the consistency of the mistaken property description in the Agreement for Conveyance and the Quit-Claim Deed should be given dispositive weight. This is not so. The mistaken property description is not consistent because it reflects the intent of the parties. It is consistent because Ms. Nimmons prepared it and then "cut and pasted" it into both documents. (R. p. 1117, lines 4-20). Ms. Nimmons confirmed at trial that neither KRA, nor KICA, nor the Town instructed her to select the southwesternmost corner of the Employee Facility Tract and create an imaginary line therefrom as the western boundary of the Beachfront Strip. (R. p. 1122, lines 6-23). The elevation of the mistaken property description as dispositive evidence of intent is the result of circular reasoning and use of an improper legal standard.

evidence under the correct legal standard, the graphical evidence warrants reformation of the Quit-Claim Deed and reversal of the Master's Orders.

B. THE SUBSEQUENT CONDUCT EVIDENCE IS CLEAR AND CONVINCING

Another fundamental error that KICA and the Intervenors fail to justify is the Master's failure to also consider other evidence of subsequent conduct. In the Final Order, the Master refused to consider evidence of subsequent conduct that was not contemporaneous with the execution of the instrument. This refusal is contrary to South Carolina law. The South Carolina Supreme Court has specifically considered evidence of subsequent conduct when deciding whether to grant reformation of a deed on the basis of mutual mistake. *See Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981) (considering evidence of the purchaser's payment of taxes since the date of purchase, the construction of a doghouse and the planting of a garden on the disputed parcel in determining whether to grant reformation of a deed). Consistent with this precedent, KRA and KDP II presented clear and convincing evidence of subsequent conduct justifying reformation. However, due to the Master's adoption of a nonexistent legal standard, the evidence was not considered.

The genesis of the error was a misreading of this Court's decision in *Penza v. Pendleton Station*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013) In the proceedings below and the responding briefs, there are repeated references to a "*Penza* test." The Master and the responding parties claim that the *Penza* test establishes a rule whereby it is impossible to seek reformation of an unambiguous instrument. There is no such *Penza* test, and unambiguous instruments are fully subject to equitable reformation. As indicated by a reading of *Penza*, this Court did not even reach the issue of reformation in

that case, much less create a new legal standard to be applied in future reformation actions:

> Penza asserts the master's order essentially reforms Penza's first mortgage so it does not encumber Tract A. Penza maintains this was error because equity did not permit the master to do this without Penza's consent. Our decision that the master erred in granting summary judgment because there are issues of material fact is dispositive. **Thus, we need not address this issue.**

Id. at 205, 743 S.E.2d at 853-854 (emphasis added).

This legal error in the Master's analysis led to a series of others, including a refusal to consider extrinsic evidence and a conclusion of law that the doctrine of merger applies in cases seeking reformation of a deed. When improper limitations are placed upon the evidence that will be considered, reformation is rendered virtually impossible. *See, e.g., Southern Realty & Const. Co., Inc. v. Bryan*, 290 S.C. 302, 308-09, 350 S.E.2d 194, 197-98 (Ct. App. 1986) ("it would be virtually impossible to prove mutual mistake as a ground for reformation without parol evidence"). For this reason, rules of construction (such as the parol evidence rule and the doctrine of merger) do not apply in reformation cases. Ultimately, the Master treated this case as one seeking construction of a written instrument rather that one seeking reformation. KICA and the Intervenors, in their responding briefs, advocate that this Court follow the same approach.

The Master's treatment of extrinsic evidence is undermined by the Supreme Court's analysis in *Sims* as well as the decisions of courts in other jurisdictions where parol evidence of subsequent conduct has been given significant weight. For example, in *Neal v. Green*, 71 Wash.2d 40, 426 P.2d 485 (1967), the Supreme Court of Washington affirmed reformation in an action brought by sellers against purchasers of property that mistakenly included a parcel which was not intended to be sold. In the years subsequent to the execution of the real estate contract, the purchasers never took possession of the

additional tract and the sellers continued to pay taxes and receive rents on the additional parcel. *Id.* at 43, 426 P.2d at 487. The court found that the conduct of the parties subsequent to the execution of the real estate contract was consistent with the testimony of the sellers and that the evidence was "clear, cogent and convincing that the mistake was made" at the time of the conveyance. *Id.*; *see also McCormick v. Edwards*, 351 Mo. 1017, 174 S.W.2d 826 (1943) (affirming reformation of deed where defendants relinquished possession of the tract, had not paid taxes on the tract, had never demanded possession and did not claim any interest in the title until plaintiff discovered the mistake and attempted to correct the deed).

When this Court conducts its *de novo* review, it should give significant weight to the evidence that KICA has never undertaken any act of ownership, control, or maintenance of the Additional Land. This is inconsistent with an intent or belief of ownership, which is the very issue that should be in focus. The responding parties suggest that the total lack of activity is due to the natural state of the property. This argument is undermined by the fact that KICA maintains a dunes management program of the Beachfront Strip up to the very point where Exhibit 16.2 reflects that the Beachfront Strip was intended to stop. Pls. Ex. 31 (R. pp. 2190-2191). It is also undermined by KICA's obligation to maintain Common Property. If KICA had ever intended the Additional Land to be Common Property, its conduct would have been different. Furthermore, belated rationales do not address the fact that the property taxes on the Additional Land have been paid by KRA and KDP II, not KICA. Neither KICA, nor the Intervenors, nor the Master ever addressed this key issue, which was one of the specific instances of subsequent conduct considered probative in *Sims*.

KICA's inaction has continued unabated even after the scrivener's error was brought to KICA's attention. This is understandable, as the consensus of KICA's then Board of Directors when the issue was brought forward was that the conveyance of the Additional Land was a mistake from which KICA did not intend to benefit. (R. p. 1243, line 16 – p. 1244, line 5).[3] This consensus was corroborated by KICA's sole witness at trial. Such evidence in the context of a reformation action is highly probative, as a defendant would not be expected to make such admissions regarding the property in dispute.

Contrary to the arguments presented by counsel, each and every instance of KICA's subsequent conduct is indicative of its intent "at the time of the conveyance." KICA has never maintained or treated the Additional Land as Common Property, which is indicative of intent. (R. p. 849, lines 10-13; R. p. 850, lines 3-6; R. p. 1178, lines 5-8). Conversely, KICA has maintained, utilized and asserted control over the entire portion of the Beachfront Strip as depicted on Exhibit 16.2, i.e., the area to the east of Parcel 13 excluding the Additional Land. This also indicates intent. No witness was able to identify any actions of maintenance or control that KICA had ever undertaken relating to the Additional Land, which is probative of intent in light of the fact that KICA's underlying mission and obligation is to steward Common Property. (R. p. 1235, line 15 – p. 1236, line 13; R. p. 1178, lines 1-18). There is also no record of KICA ever incurring any expense relating to the Additional Land. (R. p. 1236, lines 14-17). No activities or investments have been undertaken by KICA relating to the Additional Land. (R. p. 848, line 21 – p. 850, line 6; R. p. 852, lines 18-22). When evidence of this kind exists, it is

[3] This evidence was admitted through the testimony of Tammy McAdory. Admission of corroborating evidence in the form of the Talking Points (Pls. Ex. 17 (R. p. 2166)) was refused.

considered probative in the context of a reformation action. KICA and the Intervenors fail to account for the Master's errors in refusing to consider this evidence. This error cannot be dismissed as harmless.

Additional examples of subsequent conduct include the instances where the parties corrected other mistaken conveyances of property following the 1994 Development Agreement. In 1997, KICA executed a Confirmatory Quit-Claim Deed returning a separate 3.054 acre parcel to KRA. Within that instrument, which was introduced in the records, KICA "agree[d] and confirm[ed] that . . . the Property was not, nor was it ever intended to be included in the Beachfront Deed conveyance." Pls. Ex. 13 (R. p. 2126). KICA's counsel argues that "no evidence exists that KICA intended to receive anything other than what the Beachfront Deed conveyed." This mischaracterizes the record, as the record is full of such evidence. Contrary to the arguments of counsel presented in this case, KICA has created multiple maps and executed solemn instruments indicating that the mistaken property description was contrary to its intent. The fact that Ms. McAdory was not able to locate any contemporaneous written memorialization of KICA's intent in the form of a board resolution only heightens the importance of subsequent conduct in determining intent. The Master's charge was to determine the true intent of the parties, not to abandon the inquiry because there was an unambiguous property description. The intent of the parties was not achieved due to a mistake in drafting, as demonstrated by the evidence of subsequent conduct. This constitutes a mutual mistake that should be corrected.

C. THE WITNESS TESTIMONY IS CLEAR AND CONVINCING

KRA and KDP II presented a constellation of witnesses uniquely able to provide testimony regarding the intent of the Town, KRA, and KICA. However, in the Final

Order, the Master concluded that the testimony of "only interested directors to disavow a written agreement signed with apparent authority of the President of the KICA Board" failed to rise to the level of clear and convincing evidence of mutual mistake. Final Order, at R. pp. 26-27. The Master found that Clarkson, Long, and McKinney were "interested directors" by virtue of their dual capacities in KRA and KICA, conceding that they had a capacity with KICA for the purpose of using it to disregard their testimony. In other words, the Master found that Clarkson, Long, and McKinney's interests were mutual enough to make them interested directors, but not mutual enough to support evidence of mutual mistake.

This is a false dichotomy that cannot be, and has not been reconciled by the responding parties. If the KRA-appointed KICA Board members were "interested directors," then they had a legal capacity with KICA and can provide testimony regarding their own understanding of KICA's intent, regardless of whether there was a vote or resolution to memorialize that intent. Furthermore, the testimony regarding KICA's intent does not stand alone, but is corroborated entirely by KICA's conduct. However, the weight of the evidence can only be appreciated if it is actually considered. The Master, believing that this Court's decision in *Penza* prevented him from considering the extrinsic evidence, defaulted to upholding the imaginary boundary line that none of the parties intended or expected.

KICA and the Intervenors ask this Court to affirm, but fail to rebut the evidentiary significance of the fact that every witness affiliated with KICA either testified that it was not KICA's intent to receive the Additional Land or acceded to this testimony:

- Mark Permar, who has worked with KICA for decades as a land planner, testified that the conveyance of the Additional Land as part of the Beachfront Strip was not KICA's intent;

- KICA's then President, Townsend Clarkson, testified that it was not KICA's intent to receive the Additional Land;

- KICA's then Secretary, Leonard Long, affirmatively indicated that it was not KICA's intent to receive the Additional Land;

- KICA's then Board Member, Pat McKinney, affirmatively indicated that it was not KICA's intent to receive the Additional Land; and

- KICA's sole witness at the proceeding, Tammy McAdory, did not "contest or challenge" the testimony provided by the then-officers and board members of KICA regarding KICA's intent

(R. p. 836, lines 11-18) (Mark Permar); (R. p. 967, lines 15-23) (Pat McKinney); (R. p. 1019, lines 9-14) (Leonard Long); (R. p. 1171, line 23 – p. 1172, line 9) (Townsend Clarkson); (R. p. 1229, lines 6-14) (Tammy McAdory). The Master erred by failing to recognize that the parties to the Agreement for Conveyance and Quit-Claim Deed, while represented by the same individuals, were in fact separate and distinct entities each capable of forming an intent through their officers or directors. *See, e.g., Kishter v. Seven Courts Cmty. Ass'n, Inc.*, 96 Md. App. 636, 642, 626 A.2d 993, 996 (Ct. Spec. App. 1993) (reversing judgment of trial court in deed reformation case for failure to consider evidence of mutual intent provided by witness who had legal capacity on behalf of both developer and property association). Upon *de novo* review, this Court should correct this error through reversal of the Master's Order and remand with instructions to enter the Corrective Master's Deed.

D. A MISTAKE IN DRAFTING RESULTED IN AN OUTCOME NONE OF THE PARTIES INTENDED

KICA's argument that the mistaken property description represents an "affirmative judgment" rather than a scrivener's error does not affect the propriety of reformation in this case. KICA's Initial Br., at p. 18. Ultimately, it is immaterial whether the mistake was an error in judgment, a miscommunication, or a scrivener's error. Reformation is available when there is an omission or insertion of some material element affecting the subject matter such that the parties intended a certain thing and by mistake in the drafting did not obtain what was intended. *See George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001). As a result, it is not necessary that the mistaken property description be adjudged a "scrivener's error" in order for reformation to be granted. Mistakes in drafting take myriad forms and would include the scrivener's creation of a boundary line that is not consistent with the intentions of the parties.

Furthermore, KICA's characterization of a scrivener's error is inapplicable, as it based upon a statutory definition within the Commonwealth of Virginia's Condominium Act that exists for the purpose of determining whether the declarant in a given development has the unilateral right to amend recorded property covenants without seeking reformation on the basis of unilateral or mutual mistake. KICA cites to a case decided by the Virginia Supreme Court in which the court found that the property description prepared by a third party did not constitute a scrivener's error under § 55-79.71(F) of the Condominium Act. *See Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 621 S.E.2d 114 (2005). Neither Virginia common law nor the statutory definition of "scrivener's error" applicable to horizontal property regimes in

Virginia is relevant here. In *Westgate*, the seller and buyer/developer entered into a contract to purchase an 11.913-acre parcel of property that consisted of two different zoning classifications. The seller intentionally conveyed the entire parcel even though he intended to keep a 0.978 acre tract that was zoned commercial in order to avoid delaying the closing while a subdivision application was submitted to the city. A third party expert, AES Consulting Engineers, was hired to prepare a metes and bounds property description and plat of the condominium property of purposes of Condominium Declaration and included the entire parcel in the deed conveying the land to the condominium association. In this case, there was no intention to convey the Additional Land, making *Westgate* inapposite as well as inapplicable due to the context. Furthermore, the purpose of the "scrivener's error" definitional analysis under the Condominium Act is to determine whether the declarant can make unilateral alterations to a recorded set of covenants. It is not applicable in a case of reformation on the basis of mutual mistake, either in Virginia or in South Carolina, where a mistake in drafting has resulted in an outcome that none of the parties intended.

Here, there was a mistake in drafting that justifies reformation. Based on her own knowledge of Kiawah Island, but not upon specific instructions from the parties and without aid of reference to Exhibit 16.2, Ms. Nimmons decided she would use the Employee Facility Tract in order to set the western boundary of the Beachfront Strip in the Agreement for Conveyance and Quit-Claim Deed. (R. p. 1119, line 14 – p. 1120, line 2). This Court has found that a scrivener is a "writer; scribe; conveyancer. One whose occupation is to draw contracts, write deeds and mortgages, and prepare other species of written instruments." *McNair v. Rainsford*, 330 S.C. 332, 348-49, 499 S.E.2d 488, 497 (Ct. App. 1998). Under South Carolina law, Ms. Nimmons and Mr. Buist were

scriveners. The imaginary boundary line that Ms. Nimmons created resulted in an outcome that neither party intended, as proven at trial. This was a mistake in drafting, whether it be an error in judgment or a scrivener's error. The intended western boundary was not captured. Reformation is warranted to fulfill the intentions and expectations of the parties.

E. THE RECORD DEMONSTRATES AN ANTECEDENT UNDERSTANDING TO WHICH THE QUIT-CLAIM DEED SHOULD BE REFORMED

The Final Order, and the submissions of KICA and the Intervenors on appeal, suggest that the remedy of reformation on the basis of mutual mistake is unavailable in this case because there is no antecedent agreement or understanding that has been shown. However, this argument is undermined by KICA's continuous adoption and adherence to the western boundary shown in Exhibit 16.2. Pls. Ex. 31 (R. pp. 2190-2191); Pls. Ex. 32 (R. p. 2192). If Exhibit 16.2 did not represent the antecedent understanding of the parties as to the intended western boundary, there is no explanation for why KICA's representations, conduct and admissions have conformed so precisely to it.

If the mistaken property description were the antecedent understanding, KICA's maps would include the Additional Land, rather than exclude it. KICA would undertake ownership of the Additional Land, rather than disclaim it. KICA would maintain the Additional Land rather than ignore it, leaving KRA and KDP II to pay the property taxes. Reforming the Quit-Claim Deed does not require "disavowal" of the Agreement for Conveyance. It requires disavowal only of the imaginary line that Ms. Nimmons confirmed was created by her without instruction from KRA or KICA. It only requires an exercise of equity under the correct legal standard upon fair consideration of the evidence.

KRA and KDP II have shown an antecedent agreement exists in the form of the 1994 Development Agreement and Exhibit 16.2, which is proven by KICA's conduct. As noted in KRA and KDP II's initial brief, the Agreement for Conveyance was intended to follow, not modify, the 1994 Development Agreement. In fact, the heading of the mistaken property description itself reads:

Approximately 10 Miles of Beachfront Property pursuant to Paragraph 16(b) of the Development Agreement.

Intvrs. Ex. 2 (R. p. 2244). The stipulation that the conveyance is made pursuant to Paragraph 16(b) of the 1994 Development Agreement is significant, indicating that Paragraph 16(b) is part of the antecedent understanding that the parties are seeking to confirm and implement.[4] Paragraph 16(b) states that the Beachfront Strip is depicted on Exhibit 16.2, which indicates that the Beachfront Strip would conclude at the eastern boundary of Parcel 13. This Court has found an antecedent understanding to have been established for purposes of reformation as a result of a telephone call that one of the parties did not even remember having. *See Commercial Union Assur. Co. v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984). In another instance, the South Carolina Supreme Court recognized an antecedent understanding by implication. *See Timms v. Timms*, 290 S.C. 133, 138, 348 S.E.2d 386, 389 (1986) ("the record fails to disclose any evidence that Charles intended for his brother Grady to have less acreage than he in the partition").

The underlying purpose for requiring evidence of a prior understanding is to provide a court with something that it can use as a basis to reform the mistaken instrument. The 1994 Development Agreement, Paragraph 16(b), and Exhibit 16.2

[4] Additionally, the Agreement for Conveyance includes 26 references to the 1994 Development Agreement to indicate that each conveyance is intended to be in accordance with the relevant terms of the 1994 Development Agreement, rather than contrary to them.

constitute an antecedent understanding under the circumstance of this case, as corroborated by the conduct of the parties and the testimony at trial. The antecedent understanding need not be so complete and certain to constitute a contract in itself. *See, e.g., Ceberus Int'l., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1152 (Del. 2002) (stating that the "understanding need only be complete as to the issue involved" and "need not constitute a complete contract in itself"). The record provides this basis, and KICA has already and always acted in accordance with it.

The Master, and the responding parties in this appeal, rely heavily upon the cases of *Gowdy v. Kelley,* 185 S.C. 415, 194 S.C. 156 (1937) and *Brock v. O'Dell,* 44 S.C. 22, 21 S.E. 976, 979 (1895), to suggest that reformation is unattainable in this case. Although both of these old cases are indeed reformation actions, they both involve claims for reformation where the grantor under the subject written instrument was deceased. As a result, the grantor was not available to testify. The then-existing Dead Man's Statute further complicated proof of the grantor's intent or any antecedent understanding. Such complications are not present here. The grantor, KRA, can and did testify through its officers and directors. Similarly, testimony relating to the intent of the grantee was provided through its contemporaneous officers and directors, and was not contested by Ms. McAdory. This case also involves graphical evidence, admissions, and evidence of subsequent conduct bearing on intent. Such evidence was not present in either *Gowdy* or *Brock.*

Also, the relief sought in both *Gowdy* and *Brock* is dissimilar to the relief sought in this case. In an effort to have a life estate converted into a fee simple interest, the plaintiffs in *Gowdy* and *Brock* asked for the operative phrase "and their heirs and assigns" to be imposed through reformation into wills where the phrase did not appear. This

would result in a grant of fee simple title through the devise, as opposed to a mere life estate. Certainly, in such a case, the analysis must be rigid, particularly when the grantor is deceased. The difference to the heirs is dramatic. Here, there are no such drastic implications. KRA and KDP II do not contest, and would not contest, that KICA is the intended and rightful owner of the intended 10-mile Beachfront Strip. This case relates solely to the Additional Land, disconnected property over which KICA has never exercised ownership or control. This is property in which KICA has repeatedly disclaimed an interest through its business records and through its conduct. It is a circumstance that, according to the consensus of KICA's prior board, was a mistake from which it did not intend to benefit. Unlike the plaintiffs in *Gowdy* and *Brock*, KRA and KDP II do not seek to overturn the Beachfront Deed altogether, nor do they seek a return of the Beachfront Strip. KRA and KDP II merely ask for reformation of the Quit-Claim Deed only to return the Additional Land, property that KICA has repeatedly disclaimed and ignored.

CONCLUSION

The Master's several, compounding errors resulted in a defective ruling that refused equitable relief that should have been provided. Reformation is the correct and sustainable result under the circumstances. Equity weighs heavily in favor of returning property that KICA never considered itself to own and never stewarded in any respect. For these reasons, KRA and KDP II request that the Final Order and the Order on the Motion to Alter of Amend Final Order be reversed, that reformation be granted, and that this matter be remanded with instructions to execute the Corrective Master's Deed implementing the relief sought.

Respectfully submitted,

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December 14, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II LLC, Appellants/Respondents,

v.

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. Respondents/Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellants' Final Reply Brief of Appellants/Respondents complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I have this date served (via federal express overnight delivery) a true and correct copy of **Appellants' Final Reply Brief of Appellants/Respondents** to the following counsel of record:

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December 14, 2015