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

---

PETITION FOR REHEARING OR REHEARING EN BANC

Ellis R. Lesemann
Michelle A. Matthews
Lesemann & Associates LLC
418 King Street, Suite 301
Charleston, South Carolina 29403
(843) 724-5155
Attorneys for Appellants/Respondents

TABLE OF CONTENTS

INTRODUCTION

Pursuant to Rule 221(a) and Rule 219(b), SCACR, Appellant/Respondents Kiawah Resort Associates, L.P. ("KRA") and KDP II, LLC ("KDP") respectfully petition this Court for a rehearing *en banc* of Opinion No. 5517, dated September 27, 2017, in the matter of *Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n, Inc.*, Op. No. 5517 (S.C. Ct. App. Sept. 27, 2017) ("Opinion").

Rehearing is warranted when the Court has overlooked or misapprehended an argument. *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." *Covar v. Sallat*, 22 S.C. 265, 272 (1885). On the basis of these authorities, there are issues that justify a rehearing.

SUMMARY OF ARGUMENT

Although a party seeking reformation bears a burden of proof that is higher than a preponderance of the evidence, the Record on Appeal indeed includes clear and convincing evidence that justifies reformation. KRA has presented this higher level of proof, which is lower than the "reasonable doubt" standard applicable in criminal cases. Although some of this proof is referenced in the Opinion, substantial items of evidence are not addressed, such as: (1) the testimony of Ms. Nimmons relating to the scrivener's error in the property description; (2) the incorporation of the terms of the 1994 Development Agreement into the Agreement for Conveyance, such that the 1994 Development Agreement serves as the antecedent agreement; (3) the Fifth Amendment to the 2005 Development Agreement; and (4) other significant evidence appearing in the Record on appeal and raised in the briefs filed by KRA and KDP.

The panel's reformation analysis is ultimately incomplete. In undertaking a reformation analysis, the panel makes no finding as to whether the 1994 Development Agreement, to which KICA is a third-party beneficiary, either did or did not serve as the antecedent understanding of KRA and KICA based on the facts and arguments presented. The Opinion also fails to apprehend the significance of the graphical depiction of Exhibit 16.2 of the 1994 Development Agreement in light of the clear and convincing evidence of KICA's subsequent conduct in conformance with the parties' prior, actual intent that the Beachfront Strip extend "along the Kiawah Island beachfront for approximately 10 miles as generally depicted on Exhibit 16.2." In other words, the fact that all meaningful evidence of *KICA's* specific intent shows that KICA did not intend to receive the additional 4.62 acres, as KICA *never* took any action consistent with an intent of ownership. In fact, all evidence in the Record points to the opposite conclusion: KICA did not intend to own or believe itself to be the intended owner of the additional 4.62 acres.

The panel did find that the Master made errors of law and had failed to consider evidence of subsequent conduct. When the panel undertook a *de novo* review of the evidence, it found evidence "that KICA did not take actions consistent with owning the disputed property." However, the panel concludes that "there is no evidence in the record that KICA intended to receive anything other than what KRA conveyed." This conclusion is inconsistent with the finding that preceded it. If KICA did not act as if it was the owner of the additional 4.62 acres, but did act as if it was the owner of the Beachfront Strip, this is evidence that KICA intended to receive something less than what was conveyed. The Opinion is unclear as to the weight given to the evidence of KICA's subsequent conduct and the testimony of KICA's board members relating to KICA's intent, and of the evidence of admissions made by KICA that the transfer of the additional 4.62 acres was a "mistake." Furthermore, the Opinion makes no mention of the scrivener's testimony that she

created the incorrect property description without instruction from either KICA or KRA. The scrivener's testimony provides clear and convincing evidence that the mistake in drafting the property description was mutual. For these reasons, a rehearing *en banc* is required because the panel's decision conflicts with legal precedent and the evidence in the record.

ARGUMENT

I. THE PANEL FAILS TO RECONCILE ITS FINDING THAT KICA'S SUBSEQUENT CONDUCT IS INCONSISTENT WITH KICA'S INTENT TO RECEIVE THE 4.62 ACRES WITH ITS CONCLUSION THAT THERE IS "NO EVIDENCE IN THE RECORD" OF KICA'S INTENT

The Opinion is unclear as to the reasons why the evidence, taken as a whole, does not rise to the level of being clear and convincing. 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.*

The panel acknowledges the Master erred in limiting its inquiry to the terms of the express contract in reliance on this Court's decision in *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 743 S.E.2d 850 (Ct. App. 2013). As stated in the Opinion, "[t]o the extent the master found *Penza* to preclude its consideration of parol evidence if it found the deed was unambiguous, the master erred." Opinion at p. 31[1]. Furthermore, a central issue to this appeal was the Master's finding that all evidence of intent presented by KRA "came from events, not at the time the conveyance was made, but from after the fact." The panel correctly found that, applying *Sims v. Tyler*, 276 S.C.

[1] Citations in this Petition correlate to the page numbers of the Opinion as published in the Court's Advance Sheets.

640, 281 S.E.2d 229 (1981), "the master erred to the extent it failed to consider KICA's subsequent acts in determining whether to reform the deed." Opinion at p. 31.

A claim for reformation of a written instrument arises in equity. Even after recognizing the legal errors made below, the panel appears to itself adopt a rule rendering it impossible to establish intent where there is an unambiguous instrument even in view of the surrounding circumstances evidencing mutual mistake. The panel noted the evidence that KICA "did not take actions consistent with owning the disputed property." Nevertheless, it found that there is "no evidence in the record that KICA intended to receive anything other what KRA conveyed." Opinion at p. 38. These two findings are internally inconsistent.

The evidence establishes that KICA has never undertaken any act of ownership, control, or maintenance of the additional 4.62 acres. The record demonstrates that KICA has consistently adopted and adhered to the western boundary line shown in Exhibit 16.2 of the 1994 Development Agreement as the actual boundary of the Beachfront Strip, not the Employee Tract. If KICA had intended for the additional 4.62 acres to be part of the conveyance, its conduct would have been different. Although KICA was obligated to maintain the properties conveyed by KRA as KICA's Common Property, KICA's own map of Common Property depicts the western boundary of the beachfront strip in exactly the same location as it is depicted on Exhibit 16.2 of the 1994 Development Agreement. The KICA-created Common Property map is consistent with Exhibit 16.2 and inconsistent with the mistaken property description inserted in the Agreement for Conveyance and Beachfront Deed. Another map created and published by KICA as part of its Dunes Management Guidelines also depicts the Beachfront Strip terminating at the boundary line depicted on Exhibit 16.2 of the 1994 Development Agreement. KICA testified that the map contained "no errors" to KICA's knowledge. Tr. at p. 447, line 5 – p. 48, line 22. This evidence of

KICA's subsequent conduct is inconsistent with an intent or belief or ownership, which is the very purpose of examining subsequent conduct in a reformation case.

The Opinion appears to give significant weight to the timing of KICA's creation of the maps, as indicated by the panel's finding that the maps published by KICA on its website "do not show the additional 4.62 acres as common area owned by the association, though there was no evidence presented to establish *when those maps were created.*" Opinion at p. 34 (emphasis added). However, earlier in the Opinion, the Court found that "applying *Sims*, we believe the master erred to the extent it failed to consider KICA's subsequent acts in determining whether to reform the deed." Opinion at p. 31. As such, the temporal aspect of the KICA-created maps does not preclude the panel from considering the evidence. The panel concludes that "KICA's maps do not indicate it owns the disputed property," but fails to apprehend the significance of this fact. *See* Opinion at p. 38. Furthermore, KICA's sole fact witness corroborated the maps and confirmed that they were correct. Also, the inclusion of the Beachfront Strip, but the exclusion of the additional 4.62 acres, is evidence of what was, and what was not, intended.

To the extent that the Agreement for Conveyance obligated KICA to receive the conveyance from KRA as Common Property, it also obligated KICA to maintain such conveyance as Common Property. It is undisputed that KICA has never paid taxes on the additional 4.62 acres since the execution of the Agreement for Conveyance. KICA has never maintained or treated the additional 4.62 acres as Common Property, which is indicative of intent. Tr. at p. 66, lines 10-13; Tr. at p. 67, lines 3-6, Tr. at p. 395, 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 of the 1994 Development Agreement, i.e., the area to the east of Tract 13 excluding the additional 4.62 acres. This also indicates intent. No witness could identify any actions of maintenance or

control that KICA had ever undertaken relating to the additional 4.62 acres, which is probative of intent in light of the fact that KICA's underlying mission and obligation is to steward Common Property. Tr. at p. 452, line 15 – p. 453, line 13; p. 395, lines 1-18. There is also no record of KICA ever incurring any expense relating to the additional 4.62 acres. Tr. at p. 453, lines 14-17. No activities or investments have been undertaken by KICA relating to the additional 4.62 acres. Tr. at p. 65, line 21 – p. 67, line 6; Tr. at p. 69, lines 18-22. The evidence establishes that KICA did not intend to receive anything other than what was depicted on Exhibit 16.2 of the 1994 Development Agreement. There are references in the Opinion to some of these items, but no analysis that explains why the evidence is not clear and convincing.

The evidence of KICA's subsequent conduct does not stand alone but is corroborated by KICA's testimony from its former board members. The panel found that there is no evidence that KICA's board considered the conveyance of the Beachfront Strip in anyway. However, the record demonstrates that KICA's then-President and then-Secretary reviewed Exhibit 16.2 prior to the execution of the 1994 Development Agreement. Tr. at pp. 275, 422. Leonard Long, who was the Secretary of KICA in 1994, testified that the Beachfront Strip would terminate at Tract 13 and not the Employee Tract. Tr. at p. 220, lines, 5-10, p. 231, lines 1-15, p. 236, lines 9-14. Townsend Clarkson, KICA's President in 1994 and the Chief Financial Officer of KRA, testified that it was KICA's intent that the Beachfront Strip would begin at Tract 13 and continue for ten miles. Tr. at p. 386, lines 2-3, p. 388, line 23 – p. 389, line 9. Clarkson testified that, during his time on the KICA Board from 1989 – 2001, KICA did nothing to exercise control or ownership over the 4.62 acres. Tr. at p. 393, line 25 – p. 394, line 4. Patrick McKinney, who was on the KICA Board in 1994 and a partner of KRA, testified that the Beachfront Strip would terminate at Tract 13 and not the Employee Tract. Tr. at p. 176, lines 12-17, p. 185, lines 10-21. He further testified that neither

KICA nor KRA intended for the additional 4.62 acres to be conveyed to KICA. Tr. at p. 190, lines 3-6. All of this testimony is relevant notwithstanding any conflict of interest analysis that the Master or the panel believed to be salient, albeit not relevant to the issue of reforming the Beachfront Deed. Tammy McAdory, a long-standing employee of KICA who was employed by KICA at the time of the 1994 Development Agreement and thereafter, confirmed that she did not contest or challenge the testimony of McKinney, Long, and Clarkson relating to KICA's intent. Tr. at p. 446, lines 6-14.

Additionally, the panel concluded that the Talking Points from KICA's former board chairman "suggest" that the additional 4.62 acres was mistakenly conveyed. *See* Opinion at p. 38. The Talking Points exhibit was prepared by KICA former board chair and states, *inter alia*, that the property description used in the Agreement for Conveyance and Beachfront Deed is a "mistake" and that "KICA does not desire to benefit from this unintended transfer" of the additional 4.62 acres, which was "not intended by the original parties" to the 1994 Development Agreement. (R. p. 2166.) This evidence is remarkable, but appears to have been misapprehended as being suggestive rather than an admission by party opponent.

The body of evidence presented is clear and convincing. Simply put, there is no competent evidence that KICA intended to receive the additional 4.62 acres, and substantial evidence sufficient to create a firm belief that KICA did not intend to receive this property. Ultimately, reformation appears to have been denied on the basis of the property description itself, which indicates a full reformation analysis has still not been conducted. If that full analysis is conducted, the burden of proof has been met and reformation is proper.

II. THE PANEL MAKES NO FINDING AS TO WHETHER THE 1994 DEVELOPMENT AGREEMENT IS THE ANTECEDENT AGREEMENT OF THE PARTIES

The principle upon which reformation is based is that, preceding the execution of the instrument, the parties had an understanding of their intentions but the understanding was frustrated through mutual mistake. *See, e.g., Brock v. O'Dell*, 44 S.C. 22, 21 S.E. 976, 979 (1895). The Opinion makes no finding as to whether the 1994 Development Agreement constitutes the antecedent understanding between KICA and KRA. For equity to reform an instrument, there must have existed an antecedent understanding as to the terms of the instrument. The underlying purpose of requiring evidence of a prior understanding is to provide a court with something that it can use as a basis to reform the incorrect instrument. 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. *Gowdy v. Kelly*, 185 S.C. 415, 194 S.E. 156 (1937). The panel fails to decide the issue of the existence of an antecedent understanding. As a result of the failure to undertake a complete reformation analysis, the Opinion is unclear. It cannot be ascertained from the Opinion as to whether the panel found there is no antecedent understanding between KICA and KRA such that reformation is precluded or whether the evidence of the parties' prior understanding that the Beachfront Strip would be conveyed as depicted on Exhibit 16.2 of the 1994 Development Agreement failed to rise to the level of clear and convincing. Without a determination relating to the antecedent understanding, the panel could not give effect to the intention of the parties.

The only written agreement between KICA and KRA is the Agreement for Conveyance. However, the Agreement for Conveyance recites that the sole consideration for the various properties conveyed by KRA to KICA is Five Dollars and the Town's execution of the 1994 Development Agreement, indicating that the 1994 Development Agreement was the driving force

behind the Agreement for Conveyance. In fact, the Agreement for Conveyance states no fewer than 26 times that each property conveyance was to be "in accordance with the terms of [the] Development Agreement," or similar language. The panel examined Exhibit 16.2 of the 1994 Development Agreement and found that, although it is not clear that the western boundary line depicted on Exhibit 16.2 begins at Tract 13, "it is clear that the 4.62 acre additional lot, which is physically disconnected from the beachfront property, is not shaded in the same way the beachfront property is." Opinion at p. 34. The panel concluded that the "1994 Development Agreement evidences that KRA intended to convey the ten-mile strip of beachfront property beginning at Tract 13; however, KICA was not a party to that agreement and KICA's intent cannot be inferred from its terms." Opinion at p. 38.

The 1994 Development Agreement, Paragraph 16(b), and Exhibit 16.2 constitute an antecedent understanding under the circumstances of this case, as corroborated by the conduct of the parties and the testimony at trial. If Exhibit 16.2 of the 1994 Development Agreement did not represent KICA's antecedent understanding of the intended western boundary of the Beachfront Strip, there is no explanation for KICA's subsequent representations, conduct, and admissions that precisely conform with the boundaries depicted on Exhibit 16.2 of the 1994 Development Agreement.

KICA, as a third-party beneficiary to the 1994 Development Agreement had the same intent as the Town and KRA in terms of the intended western boundary of the Beachfront Strip. The panel gives dispositive weight to its finding that KICA had no intent to enter into the Agreement for Conveyance notwithstanding the ample evidence of KICA's understanding that the Beachfront Strip would be gratuitously conveyed to KICA in accordance with Exhibit 16.2 of the 1994 Development Agreement. The Opinion states that the master found that KICA's position as

a third-party beneficiary of the 1994 Development Agreement did nothing to answer the question of KICA's intent. The panel's analysis ended upon its determination that the 1994 Development Agreement was between KICA and the Town and therefore, KICA's intent cannot be inferred from its terms. This fails to address whether a third-party beneficiary to an agreement can have an independent intent to receive something that was not intended by the parties to that agreement.

By failing to analyze the evidence of an antecedent understanding between KRA and KICA, it is impossible for the panel to give effect to the intention of the parties.

III. THE PANEL FAILS TO ADDRESS THE TESTIMONY OF THE SCRIVENER, WHICH DEMONSTRATES THAT THE PROPERTY DESCRIPTION WAS NOT REFLECTIVE OF KICA'S INTENT

The panel's Opinion confirms the legal precedent that a mutual mistake is one whereby both parties intended a certain thing but because of a mistake in drafting did not get what they intended. *See Timms v. Timms*, 290 S.C. 133, 137, 348 S.E.2d 386, 389 (Ct. App. 1986). However, in undertaking a reformation analysis, the panel utterly fails to address or weigh the testimony of the drafter of the property description. The panel's Opinion appears to suggest that the consistency of the property description in the Agreement for Conveyance and the Beachfront Deed is dispositive without any mention or consideration given to the testimony of the scrivener, Beth Nimmons.

Beth Nimmons testified that she decided to use the Employee Tract to set the western boundary of the Beachfront Strip in both the Agreement for Conveyance and the Beachfront Deed and did so without instruction from either KRA or KICA. Tr. at p. 339, line 9. She testified that she prepared the property description by making a choice while under pressure to complete a significant, time-sensitive task and without a copy of Exhibit 16.2 of the 1994 Development Agreement. (R. p. 1122, lines 6-23). Nimmons further testified that if she had pulled all the plats

for all east to west parcels on Kiawah Island, or if she had been given Exhibit 16.2, she would have known that she should not have used the southernmost corner of the Employee Tract as the starting point for the western boundary of the Beachfront Strip. (R. p. 1123, line 25 – p. 1124, line 5.) Thus, the consistency of the property description in the Agreement for Conveyance and the Beachfront Deed is not indicative of the parties' prior intent. The scrivener prepared the property description and "cut and pasted" it into both documents in a manner that is inconsistent with intended conveyance as reflected in Exhibit 16.2 of the 1994 Development Agreement. Tr. at p. 339, lines 6-23.

The Opinion concludes that "this case is the result of KRA's failure to have the property properly surveyed and the consequential results of that failure." Opinion at p. 38. This conclusion is inconsistent with the holding in *Timms*, which establishes that reformation may be an appropriate remedy even where the disputed land has been surveyed. The relevant consideration is whether the language of the instrument fully or accurately reflects the agreement and intention of the parties. As a result of an honest mistaken on the part of the scrivener, KICA and KRA did not get what they intended to be the conveyance to KICA, as a third-party beneficiary, under the 1994 Development Agreement. The imaginary boundary line that Nimmons created resulted in an outcome that neither party intended.

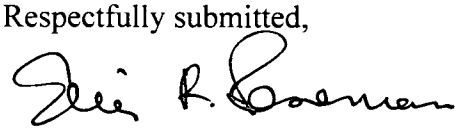
This is clear and convincing evidence of a mutual mistake that was overlooked by the panel in its reformation analysis. The existence of the scrivener's error is not the only evidence showing that the property description as written was contrary to the intention of the parties. In light of the evidence presented, reformation should have been granted to conform the Beachfront Deed to the intended conveyance set forth in Exhibit 16.2 of the 1994 Development Agreement. However, as a result of the panel's failure to weigh the cumulative evidence and resolve the necessary issues in

undertaking its reformation analysis, the Opinion fails to establish a clear principle as to the level of proof required for the reformation of a deed.

CONCLUSION

WHEREFORE the Appellant/Respondents Kiawah Resort Associates, L.P. and Kiawah Development Partners II, LLC, seek an Order granting a Rehearing *en banc* and ultimately reversing the Master's Final Order and granting reformation of the Beachfront Deed.

Respectfully submitted,

By: 

Ellis R. Lesemann
erl@lalawsc.com
Michelle A. Matthews
mam@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
Phone: (843) 724-5155

Attorneys for Appellants/Respondents

October 12, 2017
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

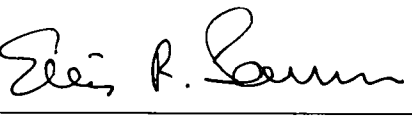
---

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the **Petition for Rehearing or Rehearing En Banc** to the following counsel of record:

Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA 30326
Attorneys for Respondent
Kiawah Island Community Association

Amy E. Armstrong, Esquire
Jessie White, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Attorneys for Respondents/Appellants
Kiawah Property Owners Group, Inc.,
and Inlet Cove Homeowners Association, Inc.

By: 
Ellis R. Lesemann

October 12, 2017
Charleston, South Carolina

LESEMANN & ASSOCIATES LLC

CIVIL LITIGATION | BUSINESS DISPUTES

ELLIS R. LESEMANN
EMAIL: erl@lalawsc.com

418 KING STREET, SUITE 301
CHARLESTON, SOUTH CAROLINA 29403

TELEPHONE (843) 724-5155

DIRECT: (843) 724-5156
WEBSITE: www.lalawsc.com

October 12, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court of SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of a Petition for Rehearing or Rehearing en Banc in connection with the above-referenced matter. Also enclosed is this firm's check made payable to the South Carolina Court of Appeals in the amount of Twenty Five and No/100 Dollars ($25.00) representing the applicable filing fee.

Please file the original and six copies of this Petition with the Court and return one file-stamped copy to me.

Thank you for your assistance with this matter.

With best regards,

Ellis R. Lesemann

ERL/ajs
Enclosures

cc: Allison C. Jett, Esq. (via Federal Express overnight)
Amy E. Armstrong, Esq. (via Federal Express overnight)