

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

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OCT 25 2017
SC Court of Appeals

Appellate Case No. 2015-001146

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/APPELLANTS' RETURN TO
PETITION FOR REHEARING OR REHEARING EN BANC**

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October 23, 2017

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules (SCACR), the Respondent/Appellants Kiawah Property Owners Group, Inc. (“KPOG”) and Inlet Cove Club Homeowners Association, Inc. (“Inlet Cove”) submit this Return in opposition to the Appellant/Respondents Kiawah Resort Associates, L.P. and Kiawah Development Partners II, Inc.’s (“KRA”) Petition for Rehearing or Rehearing En Banc (“Petition”) and respectfully request that this Court deny the Petition as set forth more fully below.

None of the grounds raised by KRA in its Petition warrant a rehearing on the merits in this case.¹ Each of the issues have been exhaustively briefed, argued and considered by this Court, in addition to by the master below. This Court’s Opinion identifies errors in the master’s analysis but ultimately, upon conducting a *de novo* review of the evidence, it reached the same conclusion: KRA’s claim for reformation must be denied in the absence of clear and convincing evidence of mutual mistake. Indeed, in this equitable action, the Court is permitted to, and did in fact, make findings according to its own view of the preponderance of the evidence; however, this did not relieve KRA of its burden of convincing the Court that the trial judge committed error in his findings. Eldridge v. Eldridge, 398 S.C. 113, 118-19, 728 S.E.2d 24, 26-27 (2012). 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. Id.

¹ By contrast, KPOG and Inlet Cove filed a petition for rehearing based on the Court’s determination that the issues of the groups’ standing, their status as intervenors and the proper application of those legal standards were not preserved for review. As set forth in the groups’ petition, this forms a valid basis for rehearing because the Court misapprehended material facts and the core of the groups’ arguments on appeal.

Deed reformation is a “high remedy” which requires “courts of equity [to] proceed with the utmost caution.” Gowdy v. Kelley, 185 S.C. 415, 194 S.E. 156, 160 (1937). The critical missing link in KRA’s case is clear and convincing evidence of a mutual mistake between itself and KICA regarding the conveyance of the 4.62 acres. KICA was not a party to the 1994 Development Agreement and KRA cannot simply declare after-the-fact that it was in order to prove mutual mistake through an antecedent agreement. There is no antecedent agreement between KRA and KICA evidencing mutuality of the intent espoused by KRA upon which the deed can be reformed. Nor does the additional parol evidence presented by KRA rise to the requisite level of clear and convincing. KRA’s continued attempts to characterize disputed evidence as clear and convincing is grossly misleading, but more importantly, it simply cannot achieve that high standard of proof.

I. NO BASIS FOR REHEARING

The grounds upon which KRA argues for a rehearing were fully briefed, argued, considered and ultimately rejected. KRA’s Petition merely restructures the arguments made in its briefs to fit within the context of the rule, asserting that this Court, rather than the master, selectively disregarded certain evidence and misapplied the legal standard for reformation. However, petitions for rehearing are not intended to afford the losing party one more opportunity to persuade the Court. Hicks v. Hicklin, 187 S.C. 355, 197 S.E. 390, 393 (1938) (denying petition for rehearing where matters presented in petition “have already been presented to this Court in the printed briefs and in the oral argument [and] have been considered by this Court in the preparation of the filed opinion.”). “[N]or is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)).

KRA's Petition fails to identify any material fact or legal principle that this Court overlooked or misapprehended, and instead repeats the same arguments previously raised in briefing. The core of KRA's argument on appeal is that a full and proper reformation analysis was not undertaken because what it purports to be clear and convincing evidence was found unpersuasive. See KRA Br. pp. 19, 48-50. This is precisely what is raised in its Petition. More specifically, in conjunction with its contention that the reformation analysis was erroneously undertaken, KRA once again takes issue with the weight and probative value given to certain evidence:

- Exhibit 16.2 of the 1994 Development Agreement and other graphical depictions;²
- The lack of evidence of overt acts of control, maintenance or ownership by KICA relating directly to the 4.62 acres;³
- The subsequent acknowledgment by a later chairman of the KICA Board that KRA believed there was a mistake in the transfer;⁴
- The testimony of the interested, KRA-appointed directors who profess an understanding of KICA's intent;⁵
- The testimony of the KRA employee who drafted the property description in the documents of conveyance;⁶ and

² Compare Petition pp. 5-6 with KRA Reply Br. pp. 2-10 & KRA Br. Pp. 24, 34-35.

³ Compare Petition pp. 5-7 with KRA Reply Br. pp. 10-14 & KRA Br. pp. 23-25 .

⁴ Compare Petition p. 8 with KRA Reply Br. p. 13 & KRA Br. pp. 25, 46-47.

⁵ Compare Petition pp. 7-8 with KRA Reply Br. pp. 14-16 & KRA Br. 43-46.

⁶ Compare Petition pp. 11-13 with KRA Reply Br. pp. 17-19 & KRA Br. pp. 33, 42-43.

– The 1994 Development Agreement as an antecedent agreement and KICA’s status as a third-party beneficiary thereto.⁷

The law is clear that the purpose of a petition for rehearing is not to give parties a second bite of the apple on appeal. Yet, that is precisely what KRA seeks to do in its Petition – rehash the arguments it already made and which this Court already considered and found unconvincing. Accordingly, KRA’s Petition should be denied for it presents no valid basis for rehearing, let alone a rehearing en banc.

II. FAILURE TO MEET CLEAR AND CONVINCING BURDEN OF PROOF

The clear and convincing standard of proof required in order to obtain reformation is a challenging one to meet. Gowdy, 185 S.C. 415, 194 S.E. at 160 (concluding clear and convincing evidence required “for courts of equity do not grant the high remedy of reformation upon a mere probability.”).

A party seeking reformation must present clear and convincing evidence not only of an agreement actually made between the parties, but of the mutuality of the alleged mistake. “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 v. Tyler, 276 S.C. 640, 642, 281 S.E.2d 229, 230 (1981). Moreover, the general rule is that courts should “proceed with the utmost caution” in reforming a written contract or deed and only grant such a remedy where it is clear from the parties’

⁷ Compare Petition pp.9-11 with KRA Reply Br. pp. 19-21 & KRA Br. pp. 29, 31-32, 42.

prior agreement that the executed deed actually effects something other than what the parties agreed upon. Gowdy, 185 S.C. 415, 194 S.E. at 160.

The existence of an antecedent agreement stating something other than what is contained in an unambiguous deed cannot be assumed, but rather must be affirmatively proved by the party claiming a mistake. Gowdy, 185 S.C. 415, 194 S.E. at 159. “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. at 160.

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 representative of what the parties agreed upon. 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); N. Am. Rescue Prods., 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.”).

The existence of a written agreement between the parties creates a strong presumption that it reflects their true intentions, and this presumption can only be overcome with the most clear and convincing evidence to the contrary. KRA argues that the deed transferring the beachfront property to KICA does not accurately reflect the parties' intent. Therefore it must necessarily prove the existence of some other agreement between the parties evidencing the purportedly “true” intent. KICA must necessarily be one of the parties to such an agreement; KRA cannot meet its burden of proving mutual mistake through documents to which KICA was not a party.

The Agreement for Conveyance is a valid contractual agreement between KRA and KICA pertaining directly to the conveyance of the Beachfront Strip. 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. 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 transfer of the beachfront property as set forth in the Agreement for Conveyance. It is undisputed that the 4.62 acres was included in the property description contained in both the Agreement for Conveyance and the Beachfront Deed.

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. The Agreement for Conveyance is the only written agreement between KRA and KICA pertaining directly to the transfer of beachfront property, including the 4.62 acres. Furthermore, none of the additional evidence presented by KRA rises to the requisite level of proving mutuality of mistake between KRA and KICA and that the deed was intended by both to convey something different than what is described in plain terms therein.

The burden was on KRA to prove the existence of a mutual mistake through clear and convincing evidence. That evidence simply does not exist and no amount of reformulating what evidence KRA did present can overcome this fatal fact. While, as this Court stated, KRA may have presented evidence supporting its contention that the 4.62 acres was transferred by mistake, KRA failed to present clear and convincing evidence that KICA shared in that mistake. Rather the clear

and convincing evidence that was presented compels denial of reformation. See Intervenor's Response Br. pp. 14-17, 19-45.

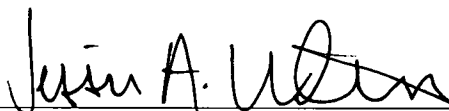
KRA is seeking specific rulings from the Court on evidentiary points it believes are compelling, but which both the master, twice, and this Court found insufficient to justify the drastic remedy of reformation. This Court is neither obligated to reference and analyze in detail *all* of the evidence presented by KRA, nor to explain what in particular made each piece of evidence unconvincing. Meinhard v. Youngblood, 37 S.C. 231, 16 S.E. 771, 771 (1892) (“[W]hile it may be true that every question presented by the argument may not have been specifically referred to in the opinion, yet it is clear that the principles laid down in the opinion as controlling the decision necessarily imply that all these questions were considered and determined”).

KRA's continued attempts to force a square peg into a round hole highlight the inescapable conclusion: there is no clear and convincing evidence to support reformation. Indeed, it is not possible for KRA to prove mutual mistake in this case, but that is because there is no clear and convincing evidence in the record and not due to the Court adopting an unduly burdensome rule, as KRA contends. See Petition p. 5. The Court did not overlook certain evidence or misapprehend the legal standard, rather it arrived at the inevitable determination 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.

CONCLUSION

Based on the foregoing reasons, the Respondent/Appellants KPOG and Inlet Cove respectfully request that the Appellant/Respondents KRA's Petition for Rehearing or Rehearing En Banc be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Return to Petition for Rehearing,
or Rehearing En Banc 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 the original and seven (7) copies of the Return to Petition for Rehearing, or Rehearing En Banc of Respondent/Appellants KPOG and Inlet Cove 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

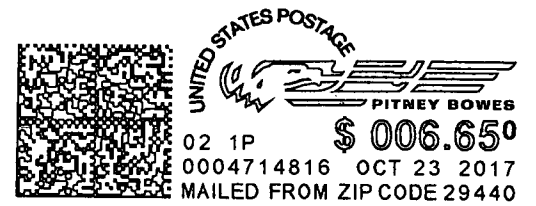
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Allison C. Jett, Esq.

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