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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SC Court of Appeals

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

REPLY IN SUPPORT OF APPELLANTS/RESPONDENTS' PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION

Appellants/Respondents Kiawah Resort Associates, L.P. ("KRA") and Kiawah Development Partners II LLC ("KDP II") seek a rehearing *en banc* of their appeal on the basis that the initial panel overlooked and misapprehended certain arguments and issues that must be addressed to permit a full resolution of the issues on appeal. When these arguments and issues are addressed, KRA and KDP II respectfully submit that the rehearing panel will recognize that reformation should have been granted in the case, and will reverse the orders of the Master-in-Equity denying reformation.

As confirmed by the initial panel's Opinion, Respondents/Appellants Kiawah Property Owners Group, Inc. ("KPOG"), and Inlet Cove Club Homeowners Association, Inc. ("Inlet Cove"), lack standing and should never have been allowed to intervene.[1] The real parties in interest to this dispute are, and have been, KRA (as the grantor under the Beachfront Deed), KDP II (as the successor in interest to the grantor), and Respondent Kiawah Island Community Association, Inc. (the grantee under the Beachfront Deed) ("KICA").

Although lacking standing, KPOG and Inlet Cove filed a Return to Petition for Rehearing or Rehearing En Banc ("Return"). KRA and KDP II believe that the Return should not be considered, as a pleading filed by a party without standing and without leave of court should be a nullity. However, to the extent that the rehearing panel would consider the Return, the Return fails to rebut the grounds presented for rehearing and reversal of the Master-in-Equity. The Return is premised on the incorrect contention that "KRA's Petition fails to identify any material fact or legal principle that this Court overlooked or misapprehended." Return at p. 4. One of the specific grounds in KRA and KDP II's Petition relates to the panel's failure to address the evidence of the

[1] Collectively, the Appellants/Respondents are referred to as the "Intervenors."

scrivener's error. This relevant testimony establishes a mistake in drafting of the property description. (R. p. 1119, line 14 – p. 1120, line 2; R. p. 1122, lines 6-23.) As a result of that mistake, the parties received something different than what they intended, which is an exact situation when reformation is proper. *See Timms v. Timms*, 290 S.C. 133, 137, 348 S.E.2d 386, 389 (Ct. App. 1986). The remaining two grounds of KRA's Petition relate to the legal principles of reformation that remain either undecided or unclear in the panel's Opinion, such as the fact that the 1994 Development Agreement should be treated as the antecedent understanding of the parties under the unique circumstances of this case. KRA is not looking for "one more opportunity" to persuade the Court, as the Intervenors suggest. Rather, KRA is seeking a rehearing due to the unresolved legal principles and evidence relevant to the reformation of the Beachfront Deed. Specifically, KRA seeks a rehearing incorporating all evidence and all issues presented. The applicable legal standard provides that reformation should be granted when a mistake in drafting results in an outcome different than what the parties intended, which is precisely what occurred here. A rehearing is necessary to address several issues that were overlooked or misapprehended, as described in Appellants/Respondents' Petition for Rehearing and below.

ARGUMENTS

I. THE REHEARING PANEL SHOULD RECOGNIZE THE ANTECEDENT UNDERSTANDING REGARDING THE SCOPE OF THE BEACHFRONT STRIP

The Intervenors affirmatively state in the Return that there is no antecedent agreement between KRA and KICA, but the panel makes no such finding in its Opinion. Reformation is based upon the principle that, preceding the execution of the instrument, the parties had an understanding of their intentions but the understanding was frustrated through a mutual mistake. *See Brock v. O'Dell*, 44 S.C. 22, 21 S.E. 976, 979 (1895). KICA's status as a third-party beneficiary under the 1994 Development Agreement, and the incorporation of that document into the

Agreement for Conveyance and Beachfront Deed, is clear and convincing evidence of the antecedent understanding of the parties. However, the panel's Opinion does not directly address this issue. The Opinion is unclear and appears to suggest that a third-party beneficiary (KICA) can have an independent intent that differs from the intent of the grantor (KRA). In other words, a third-party beneficiary could have an intent to receive something other than what the grantor intended to convey. KICA's status as a third-party beneficiary under the 1994 Development Agreement is a crucial part of the reformation analysis that was overlooked by the panel. Furthermore, there is no evidence to suggest that KICA actually had a differing intent than did KRA, as proven by KICA's admissions and subsequent conduct reflected in the Record on Appeal. Again, the evidence shows that KICA's intent matched the intent reflected in Exhibit 16.2 of the 1994 Development Agreement, which is the same as KRA's intent.

The panel overlooked the evidence that the 1994 Development Agreement was the antecedent understanding of KICA and KRA. If there is no antecedent agreement or understanding 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). However, evidence is presented that there was an antecedent understanding. Without a finding that the 1994 Development Agreement served as the antecedent understanding preceding the execution of the Agreement for Conveyance and Beachfront Deed, or that it was not the antecedent agreement, the panel's reformation analysis is incomplete. When the analysis is completed, the evidentiary basis for reformation is clear and convincing, as the antecedent understanding did not include a conveyance of the additional 4.62 acres.

The Intervenors argue that "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." Return at p. 7. The Intervenors conclude that the 1994 Development Agreement cannot be the antecedent understanding between KICA and KRA because "KICA must necessarily be one of the parties to such an agreement." *See* Return at p. 6. It is undisputed that KICA was a party to the Agreement for Conveyance and that KICA was not a signatory to the 1994 Development Agreement. KICA was, however, a third-party beneficiary under that agreement. The Intervenors do not address the fact that KICA, when it entered the Agreement for Conveyance, specifically incorporated the 1994 Development Agreement as an underlying, antecedent understanding regarding the conveyances thereunder. By doing so, and as is corroborated by subsequent conduct, KICA has shown that the 1994 Development Agreement is the antecedent understanding.

The stated purpose of the Agreement for Conveyance was to convey certain properties to KICA in accordance with the agreed-upon terms set forth in the 1994 Development Agreement. The terms of the Agreement for Conveyance indicate that KRA and KICA considered the 1994 Development Agreement to be the prior understanding that they sought to confirm:

> WHEREAS, **under the terms of the Development Agreement**, KRA, L.P., has agreed to convey to the Kiawah Island Community Association, Inc., (the "KICA") certain properties located on Kiawah Island, S.C., prior to certain dates more particularly set forth in the Development Agreement, **the terms and provisions of which are incorporated herein by reference**;
>
> WHEREAS, KRA, L.P., has **agreed to enter into the within Agreement for Conveyance** of Properties on Kiawah Island, S.C. (the "Agreement") **to evidence its agreement to the conveyance of such properties in accordance with the terms and conditions of the Development Agreement**.

(R. p. 2236 (emphasis added).) In all, the Agreement for Conveyance includes 26 different incorporations and references to the 1994 Development Agreement. For each property conveyance described in the Agreement for Conveyance, KRA and KICA stipulated that the individual conveyance was to be: "as set forth in [the 1994] Development Agreement;" "as more fully set

forth in [the 1994] Development Agreement;" "all as more particularly set forth in [the 1994] Development Agreement;" "all in accordance with [the 1994] Development Agreement;" or "pursuant to [the 1994] Development Agreement." (R. pp. 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, and 2246.) If the 1994 Development Agreement were not the antecedent understanding, there is no basis or reason for the parties to have assiduously referred to and incorporated it in this consistent manner.

The Intervenors concede that 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." Return at p. 7. In this case, the "contract" directly between KRA and KICA (i.e., the Agreement for Conveyance) cannot reasonably be characterized as the origin of the mutual intention of KRA to convey and KICA to receive the Beachfront Strip. As the record reflects, the origin of the Beachfront Strip conveyance was the 1994 Development Agreement, as is proven by the various incorporations by reference. In addition to the testimony and evidence indicating that the 1994 Development Agreement was the antecedent agreement between KICA and KRA, the relevant section of the Agreement for Conveyance relating to the conveyance of the Beachfront Strip provides that the Beachfront Strip is being conveyed "**pursuant to Paragraph 16(b) of the Development Agreement**." (R. p. 2244 (emphasis in original).) Paragraph 16(b) of the 1994 Development Agreement provides the description of the intended conveyance of the Beachfront Strip as "generally depicted on Exhibit 16.2." (R. pp. 1462-4163.) Exhibit 16.2 of the 1994 Development Agreement is a graphical depiction that confirms the intended boundaries specific to the conveyance of the Beachfront Strip. (R. p. 2183.) The panel acknowledged that Exhibit 16.2 of the 1994 Development Agreement does not include the additional 4.62 acres. *See*

Opinion at p. 38. The Intervenors' unsupported conclusion that there is no antecedent agreement between KRA and KICA should be rejected and a rehearing should be granted so that these overlooked or misapprehended issues can be determined.

II. THE SCRIVENER'S TESTIMONY PROVIDES CLEAR AND CONVINCING EVIDENCE OF A MUTUAL MISTAKE

The panel also overlooked the testimony of the scrivener, Beth Nimmons, which testimony was not referenced in the panel's Opinion.[2] Contrary to Intervenors' contention that KRA simply "takes issue with the weight and probative value given to certain evidence," the panel's failure to weigh or even address the testimony of the drafter of the mistaken property description warrants rehearing. Ms. Nimmons testified that she decided to use the Employee Tract to set the western boundary of the Beachfront Strip for the property description used in both the Agreement for Conveyance and the Beachfront Deed. (R. p. 1119, line 14 – p. 1120, line 2.) She testified that no one ever instructed her to use the Employee Tract to set the western boundary of the Beachfront Strip and that she made this determination herself. (R. p. 1122, lines 10-21.) The decision was inconsistent with Exhibit 16.2 of the 1994 Development Agreement, as well as the antecedent understanding and subsequent conduct of the parties. As a result, the intention of the parties was not met.

It was after the Agreement for Conveyance and Beachfront Deed had been finalized that Ms. Nimmons realized she had made a mistake in drafting the property description used in both documents. (R. p. 1129, lines 2-6.) This realization occurred to her when she pulled a copy of

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[2] Although the Intervenors do not address the issue of the Opinion's failure to mention the testimony of the scrivener, the Return incorrectly states that one of the grounds for KRA's Petition relates to the "testimony of the KRA employee who drafted the property description in the documents of conveyance." Return at p. 4. As demonstrated in the Record, Ms. Nimmons was not an employee of KRA at the time she drafted the mistaken property description. (R. p. 1081, lines 8-23.) Ms. Nimmons worked for attorney Tommy Buist until 1996. *Id.*

Exhibit 16.2 of the 1994 Development Agreement. (R. p. 1128, line 23 – p. 1129, line 1.) Although Ms. Nimmons was an experienced and competent real estate paralegal, she admitted that preparing the deeds was a time-sensitive, "monumental task." (R. p. 1119, lines 4-13; R. p. 1164, lines 3-8.) By her own admission, Ms. Nimmons stated that she "shouldn't have made this mistake." (R. p. 1137, lines 9-10.) Nevertheless, due to this mistake in drafting, the end point of the Beachfront Strip was not where the parties intended for it to terminate. (R. p. 1123, line 25 – p. 1124, line 5; R. p. 1012, lines 15-18; R. p. 1175, lines 21-25.) Instead, it deviated from what was intended and therefore, constitutes a mutual mistake justifying reformation. This is a basis for reformation under the applicable legal standard, but is not addressed in the panel's Opinion.

III. TAKEN AS A WHOLE, THE RECORD ESTABLISHES CLEAR AND CONVINCING EVIDENCE TO SUPPORT REFORMATION

The Intervenors insist that "there is no clear and convincing evidence to support reformation." Return at p. 8. The Intervenors' observation raises an important question: If the evidence presented in this case does not rise to the level of clear and convincing, what would rise to that level? This question is left unanswered by the Opinion, which includes a simple conclusion that the evidence presented falls short of a level of proof that it does not specifically analyze, define, or apply. *See, e.g., Satcher v. Satcher*, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002) (holding that clear and convincing evidence in the context of reformation of a written instrument 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."). The evidence presented meets this intermediate standard and justifies reformation.

The testimony of the scrivener is significant. It provides clear and convincing evidence that the mistake in drafting the property description was mutual. The evidence of KICA's subsequent conduct establishes that KICA has never undertaken any act of ownership, control, or maintenance

of the additional 4.62 acres and instead adheres to the western boundary line shown in Exhibit 16.2 of the 1994 Development Agreement. KICA has undertaken acts of ownership, control, and maintenance of the Beachfront Strip as depicted on Exhibit 16.2 of the 1994 Development Agreement.

KICA's admitted and demonstrated subsequent conduct is clear and convincing evidence for reformation. For example, the Beachfront Deed required that the Beachfront Strip be maintained and utilized as a Common Property:

> This conveyance is made further subject to the covenant, condition and restriction that the Property shall be maintained and utilized as a Common Property as defined in the Declaration of Covenants and Restrictions of the Kiawah Island Community Association, Inc., recorded in Book M114, page 407 in the R.M.C. Office, as amended, (the "KICA Covenants") and shall be made subject to such rights and restrictions as are applicable to the common properties set forth in said KICA Covenants.

(R. p. 2254.) KICA has never maintained or treated the 4.62 acres as a Common Property. KICA's own map of Common Property does not reflect the additional 4.62 acres as being Common Property or being owed by KICA. Instead, KICA's map reflects that KRA is the owner of the additional 4.62 acres. (R. p. 2192; R. p. 1234, line 7 – p. 1235, line 4.) KICA's 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. It is undisputed that KICA has never paid taxes on the additional 4.62 acres, a concession that was discussed during oral argument before the initial panel but ultimately not given any apparent weight in the Opinion. *See, e.g., Sims v. Tyler*, 279 S.C. 640, 642, 281 S.E.2d 229, 230 (1981) (payment of taxes since the date of purchase, planting of a garden after purchase on disputed property and purchase price paid were "clear and convincing evidence" relating to intent and whether reformation on the basis of mutual mistake should be granted).

There is specific evidence and affirmation by KICA that the 1994 Development Agreement was the antecedent understanding of KRA and KICA relating to the Beachfront Strip. There is evidence of admissions made by KICA 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.) In 1997, KICA "agreed and confirmed" in a solemn, recorded instrument relating to a separate 3.0-acre parcel also mistakenly included in the Beachfront Strip, that "the Property was not, nor was it ever intended to be included in the Beachfront Deed conveyance," and that "no portion of the Property is, or ever was intended to be maintained and utilized as a 'Common Property' as such term is defined in the KICA covenants." (R. p. 2126.) As these affirmative, voluntary acts demonstrate, KICA took actions that disavowed the Agreement for Conveyance and specifically indicated that it was the 1994 Development Agreement that KRA and KICA treated as the antecedent understanding in connection with the conveyance of the Beachfront Strip. A rehearing is needed so that these items of evidence can be considered together with the testimony of the drafter, the combined effect of this evidence is an ample basis for reformation to be granted.

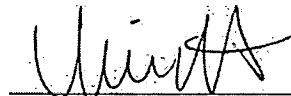
The evidence that the 1994 Development Agreement constitutes the antecedent understanding between KICA and KRA is clear and convincing. (R. pp. 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, and 2246.) The testimony of Ms. Nimmons establishes clear and convincing evidence that the western boundary of the property description used in the Agreement for Conveyance and Beachfront Deed was an error on the part of the scrivener, which resulted in the parties receiving something other than what they intended. KICA's subsequent conduct constitutes clear and convincing evidence that KICA intended to receive the Beachfront Strip in

accordance with Exhibit 16.2 of the 1994 Development Agreement. Taken as a whole, the record establishes clear and convincing evidence that there was a mistake in drafting and that the result of this mistake was something that neither party intended. KICA has disclaimed, in words and in conduct, an intent to have received the additional 4.62 acres as part of the Beachfront Strip, which should itself be sufficient to award reformation in this case.

CONCLUSION

WHEREFORE the Appellants/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: 

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November 14, 2017
Charleston, South Carolina

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and

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

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CERTIFICATE OF SERVICE

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

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By: ____________________
Ellis R. Lesemann

November 14, 2017
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November 14, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court of SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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

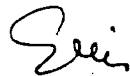
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of a Reply in Support of Appellants/Respondents' Petition for Rehearing or Rehearing en Banc in connection with the above-referenced matter.

Please file the original and six copies of this Reply with the Court and return one file-stamped copy to me in the self-addressed, stamped envelope provided.

Thank you for your assistance with this matter.

With best regards,



Ellis R. Lesemann

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ERL/ajs
Enclosure

cc: Allison C. Jett, Esq.
Amy E. Armstrong, Esq.

Carter, Elizabeth A.

From:	Ellis Lesemann <erl@lalawsc.com>
Sent:	Tuesday, November 14, 2017 4:22 PM
To:	Carter, Elizabeth A.
Cc:	Alden Stair; Allie Jett; Amy Armstrong
Subject:	Scanned Copy of Cover Letter and Reply in Support of Appellants/Respondents' Petition for Rehearing in Appellate Case No. 2015-001146
Attachments:	Cover Letter and Reply in Support of Petition for Rehearing.pdf

Dear Ms. Carter:

Thank you for speaking with my office earlier today regarding the submission of the attached cover letter and Reply in Support of Appellants/Respondents' Petition for Rehearing in Appellate Case No. 2015-001146.

As requested, we are providing this scanned copy of the cover letter and the Reply to you by email, and have copied all counsel of record on this email. Additionally, the original and seven copies of the Reply have been mailed to the Court of Appeals today, and copies have also been served on counsel of record. Please let me know if anything further is needed from us relating to the filing of the Reply, and thank you for the help and consideration that has been provided to us and the parties.

Best regards,

Ellis

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