IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POINT MANAGEMENT, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	*Civil Action No. 4835-VCG*
	)	
MACLAREN, LLC; TUNNELL & RAYSOR, P.A.; and ARTISANS' BANK,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
TUNNELL & RAYSOR, P.A.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
YOUNG CONAWAY STARGATT & TAYLOR, LLP,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION

Date Submitted: June 7, 2012
Date Decided: June 29, 2012

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Andrew P. Taylor, of COOCH & TAYLOR, P.A., Wilmington, Delaware, Attorney for Defendant Artisans' Bank.

Craig A. Karsnitz and James L. Higgins, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Richard H. Morse, Wilmington, Delaware, Attorneys for Third-Party Defendant Young Conaway Stargatt & Taylor, LLP.

GLASSCOCK, Vice Chancellor

This Opinion is unpleasant to write. I expect for some it will be painful to read. It involves at its at heart a most simple question: did the buyer and seller of commercial property in the town of Milton, Delaware, also intend to include in the sale a separate residential parcel, or was that parcel included in the sale documents by mistake? The amount at issue is small. The matter has been litigated far beyond what a rational evaluation of its costs and potential benefits would dictate. It has placed at issue documents that would otherwise be subject to attorney-client privilege, and has thus laid bare actions of individuals at respected law firms, in a way that hardly reflects well on those involved.

For the reasons that follow, I find that a deed recorded on behalf of the buyer, purporting to transfer the residential parcel, was altered by the buyer's attorney, to the detriment of the seller and without the effective consent of the seller. Because this altered deed was not signed by the seller, it is a nullity, and is ineffective to convey any property. The actual deed signed by the parties contained a reference to the residential parcel by tax number, but omitted that property from the metes and bounds description. The record makes it overwhelmingly clear that neither the buyer nor the seller intended to convey the residential property. For the sake of clarity, and in equity, I find that a reformed deed omitting reference to the residential property shall be executed and filed with the Sussex County Recorder of Deeds.

I. BACKGROUND

The facts below are not in dispute unless otherwise noted.

A. The Players

The Plaintiff, Point Management, LLC ("Point Management"), is a Delaware limited liability company comprising four members who are also family members: Colby Cox, Jessica Cox, Westley Cox, and their mother, Karla Draper. Colby Cox acted for Point Management in the sale of property to MacLaren, LLC.

Defendant MacLaren, LLC ("MacLaren"), is also a Delaware limited liability company. It is owned and managed by Dr. Jonathan L. Patterson.

Defendant and Third-Party Plaintiff Tunnell & Raysor, P.A. ("Tunnell & Raysor"), is a Delaware law firm. Tunnell & Raysor represented MacLaren in connection with its purchase of properties from Point Management and drafted the deed conveying those properties.

Third-Party Defendant Young Conaway Stargatt & Taylor ("Young Conaway") is a Delaware law firm. Young Conaway represented Point Management in its sale of properties to MacLaren and drafted the related purchase and sale agreement.

Artisans' Bank is a Delaware banking corporation holding liens for the benefit of MacLaren on properties conveyed by Point Management. Artisans' Bank was made a party to this action for notice purposes, as it holds liens on property

over which Point Management claims rightful ownership, possession, and control, free of any liens or encumbrances.

B. The Properties

On July 31, 2006, Point Management acquired property in Milton, Delaware, from Pintail Management, LLC ("Pintail"), as part of the resolution of a property division arising out of the divorce of Colby Cox's mother and stepfather. The deed named five tax parcels (the "Pintail Properties") and contained metes and bounds for each of the parcels.[1] Four of the parcels—Sussex County Tax Parcel Nos. 2-35-20.11-20.02, 2-35-20.11-22.00, 2-35-20.11-19.00, and 2-35-20.11-20.01 (parcels "20.02," "22.00," "19.00," and "20.01," respectively)—now constitute a commercial office park known as the "Federal Street Office Park" (the "Office Park").[2] When conveyed in 2006, parcel 20.01 was irregularly shaped in that it included a narrow, trapezoidal protrusion extending from the middle of its western boundary toward the center of the Office Park area. The Office Park is bordered by Federal Street to the west and Chestnut Street to the east. Around three hundred yards up the road at 515 Chestnut Street lies the fifth tax parcel, Sussex County Tax Parcel No. 2-35-20.11-52.03, a residential property (parcel "52.03" or the "Residential Property").

[1] *See* Deed Between Pintail Management, LLC, and Point Management, LLC, Pl.'s Opening Br. Ex. 4 [hereinafter "POB ___"].
[2] *See* Lot Line Adjustment and Parcel Consolidation Plan, POB Ex. 5.

C. Point Management Lists the Pintail Properties for Sale and Conveys Parcel 20.01 to a Non-Party

On January 25, 2007, Point Management entered into an Exclusive Listing Agreement ("Listing Agreement") placing the Office Park for sale with William "Bill" Lucks of Commercial Sales Group ("CSG").[3] The Listing Agreement described the Office Park as "Office Building Plus Additional Lands and Site Improvements Thereon. GBA [Gross Building Area] 6,250 sq. ft. 3.34 acres offering includes additional building pads, plus separate lot zoned commercial."[4] Neither the Listing Agreement nor the listing itself[5] made reference to parcel 52.03, the Residential Property. These documents are consistent with the sworn statements of Bill Lucks and Rosemary Aslin, an agent at CSG who assisted in the sale of the Office Park. Lucks and Aslin both indicated that they were unaware at the time of the listing that Point Management or Colby Cox owned or was offering for sale any residential property.[6] Their statements are also consistent with the fact that one day after it listed the Office Park with CSG, Point Management entered a *separate* exclusive listing agreement with RE/MAX to list the Residential Property through RE/MAX agent Gregory Cox, Colby Cox's father.[7]

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[3] *See* William Lucks Aff. Ex. A, POB Ex. 6 [hereinafter "Lucks Aff. ___"].
[4] Exclusive Listing Agreement, Lucks Aff. Ex. A, at PM000366.
[5] *See* Lucks Aff. Ex. C.
[6] *See* Lucks Aff. ¶¶ 8-9; Rosemary Aslin Aff. ¶¶ 11-12, POB Ex. 7 [hereinafter "Aslin Aff. ___"].
[7] *See* Exclusive Listing Agreement, POB Ex. 8.

The "separate lot" referred to in the Listing Agreement is parcel 20.01, the southeastern portion of the Office Park. On June 25, 2007, Point Management deeded parcel 20.01 to O. Blake Reed and Donna Reed.[8] The Reeds are not parties to this litigation. Parcel 20.01 is hereinafter referred to as the "Reed Property."

D. MacLaren Visits the Office Park and CSG Drafts a Mistake-Riddled Purchase Offer

On or about August 18, 2007, Kristin Patterson, wife of Dr. Patterson, MacLaren's principal, saw a sign outside of the Office Park indicating that the property was for sale. She called CSG, whose phone number the sign listed, to inquire about the property. Rosemary Aslin received the call and scheduled a showing of the Office Park for Sunday, August 20, 2007. On that day, Aslin showed the Office Park to Dr. Patterson and his wife. The Pattersons did not view and were unaware of the Residential Property when they visited the Office Park.[9]

After the Sunday showing, CSG, acting as dual agent for Point Management and MacLaren, prepared a document titled "Contract of Sale and Purchase Real Property," in which MacLaren offered to purchase the Office Park from Point Management for $2,000,000 (the "Offer").[10] Though purporting to make an offer for the Office Park and identifying the property as consisting of 3.34 acres, the

[8] *See* Deed Between Point Management, LLC, and O. Blake Reed and Donna Reed, POB Ex. 9.
[9] Statement of Dr. Jonathan L. Patterson Under Oath Taken by Larry W. Fifer, Esquire 16:6-17:11 (Jan. 5, 2010), POB Ex. 2 [hereinafter "Patterson-Fifer Statement ___"]; Jonathan Patterson Dep. 28:13-15 (Oct. 15, 2011), POB Ex. 3 [hereinafter "Patterson Oct. Dep. ___"].
[10] *See* Contract of Sale and Purchase Real Property, Lucks Aff. Ex. D.

Offer mistakenly listed only parcel 19.00, the southwestern portion of the Office Park. The Offer also described the deed to the subject property as being "recorded in Liber 3348 and Folio 311 among the Land records of Sussex County, Delaware,"[11] a reference to the deed conveying all of the Pintail Properties from Pintail to Point Management. This also appears to have been a mistake, as Pintail conveyed not only the Office Park, but also the Residential Property, a parcel of which Dr. Patterson had no knowledge at the time. In addition to mistakenly identifying the subject property, the CSG-drafted Offer named "Pintail Management LLC," the previous owner of the Pintail Properties, as the seller, instead of Point Management. On August 21, 2007, Aslin went to the Pattersons' home and picked up the signed Offer and MacLaren's deposit check of $50,000. The next day, Bill Lucks forwarded the Offer by email to Colby Cox of Point Management.[12]

E. Young Conaway Revises the Mistake-Riddled Purchase Offer and Makes Errors of Its Own

Colby Cox forwarded the Offer to Jennifer Noel, a Young Conaway attorney, on the same day that he received it. Colby indicated that a few minor changes needed to be made, including the name of the seller,[13] and he identified the

[11] *See id.* at PM000378.
[12] *See* POB Ex. 10, at YCST_002157.
[13] *See id.*

property he intended to sell as the "Federal Street Office Park."[14] Noel forwarded the Offer to Cheryl Santaniello, another Young Conaway attorney, for review.

After reviewing the Offer, Santaniello determined that it was "bare bones" and that it would be quicker and easier to import the key terms of the Offer into a Young Conaway template sale agreement.[15] Accordingly, Santaniello prepared a new agreement of purchase and sale (the "Sale Agreement"), incorporating the terms from the Offer and correcting the original document's errors. Unfortunately, Santaniello overcorrected. When attempting to fix the Offer's description of the property, which listed only parcel 19.00, Santaniello used the parcel numbers from Point Management's title insurance policy, which Noel had forwarded to her along with the Offer. The title insurance policy was issued to Point Management when it purchased the Pintail Properties, however, and so it covered *all* of the properties received by Point Management from Pintail, including the Residential Property.[16] Thus, in the description of the property in the Sale Agreement, Santaniello included parcel 52.03, the Residential Property, in addition to the four parcels constituting the Office Park.[17] She also copied and included as Exhibit A to the Sale Agreement the metes and bounds of the five parcels listed in the title

[14] *See* Colby D. Cox Dep. 67:2-16 (Nov. 15, 2011), POB Ex. 1 [hereinafter "Cox Dep. ___"].
[15] *See* POB Ex. 11.
[16] *See id.* Ex. 12, at YCST_003057-62.
[17] *See* Purchase and Sale Agreement, POB Ex. 16 at YCST_000018-22. The recitals in the Sale Agreement also listed parcel 52.03. *See id.* at YCST_000001.

insurance. That description included both the Residential Property and the previously out-conveyed Reed Property. The copied title insurance language also included a clause identifying the property as "the same lands conveyed to Pintail Management, LLC by deed of Pintail Management, LLC . . . dated March 30, 2006."[18] Santaniello testified at her deposition that, when drafting the Sale Agreement, she was under the impression that the properties described in the title policy reflected the Office Park, the property she was told was being sold.[19]

F. The Parties Execute a Sale Agreement Conveying All of the Pintail Properties to MacLaren, Including the Reed Property, Which Point Management Does Not Own, and the Residential Property, Which Point Management Does Not Intend to Convey

On August 24, 2007, Noel sent Colby Cox the draft Sale Agreement, which included the mistaken parcel number and the metes and bounds describing the Residential Property. Cox then executed the Sale Agreement on behalf of Point Management, unaware that it contained those errors.

That same day, Dr. Patterson signed the Sale Agreement on behalf of MacLaren. At the time he signed the agreement, Patterson was also unaware that the sale included the Residential Property.[20] To boot, Patterson had never visited the Residential Property,[21] had never discussed the Residential Property with

[18] *See id.* at YCST_000018-22.
[19] *See* Cheryl A. Santaniello Dep. 60:14-19 (Sept. 6, 2011), POB Ex. 13 [hereinafter "Santaniello Dep. ___"].
[20] Patterson-Fifer Statement 20:4-8.
[21] Patterson Oct. Dep. 32:9-11.

anyone,[22] did not know that the Residential Property existed,[23] and was unaware that Point Management owned a residential property.[24] According to Patterson, he thought he was buying the property Aslin had shown him, the Office Park.[25]

CSG added its signature to the Sale Agreement as escrow agent and then faxed the executed agreement to Karen Miller, a real estate paralegal at Tunnell & Raysor. Tunnell & Raysor was not otherwise involved in the drafting of the Sale Agreement or the signing process. Dr. Patterson claims that he felt pressured by Young Conaway to execute the Sale Agreement quickly and that he did not review the terms of the Agreement with his attorney, Harold "Hal" Dukes of Tunnell & Raysor, prior to signing.[26] Cheryl Santaniello also testified that she had no communications with Tunnell & Raysor while she was preparing the Sale Agreement.[27]

G. The Due Diligence Period

The execution of the Sale Agreement triggered the beginning of a sixty-day due diligence period as provided in the agreement. Upon receiving the executed Sale Agreement from CSG on October 1, 2007,[28] Tunnell & Raysor ordered title searches of the five identified parcels. Dr. Patterson also had the Office Park

[22] *Id.* at 32:12-15.
[23] *Id.* at 122:21-23.
[24] *Id.* at 28:16-19, 32:6-8.
[25] *Id.* at 33:17-34:23.
[26] *Id.* at 30:14-31:11.
[27] Santaniello Dep. 87:13-20.
[28] *See* POB Ex. 17.

inspected during the diligence period.[29] Dr. Patterson did not, however, have the Residential Property inspected, nor did he visit that property or speak with the tenants residing there.[30] Dr. Patterson also did not tell his lender, Artisans' Bank, that MacLaren was acquiring a residential property as part of the transaction, and Artisans' Bank did not appraise the Residential Property in connection with its mortgage loan to MacLaren.[31]

During this same period, Point Management was working with RE/MAX to lease the Residential Property, clearly unaware that it had just contracted to sell that property to MacLaren. On September 11, 2007, Gregory Cox of RE/MAX, Colby Cox's father, emailed Colby Cox notifying him that tenants had been located and attaching a form to remove the Residential Property from the market.[32] On October 15, 2007, those tenants, the LoBiandos, signed a one-year lease with Point Management that included a right of first refusal to purchase the Residential Property.[33]

1. The Mistaken Conveyance of the Reed Property Is Discovered and Corrected

Meanwhile, during its title search of the five parcels identified in the Sale Agreement, Tunnell & Raysor discovered that parcel 20.01, the Reed Property,

[29] Patterson Oct. Dep. 41:22-24.
[30] *Id.* at 39:20-40:1, 42:7-10.
[31] Patterson-Fifer Statement 22:11-16, 63:6-9.
[32] *See* POB Ex. 18.
[33] *See* Residential House Lease Agreement, POB Ex. 19.

was not owned by Point Management, as it had been conveyed to the Reeds in June 2007, two months before MacLaren submitted its Offer. As described above, the Reed Property was irregularly shaped and included a narrow, trapezoidal portion that protruded from the western boundary of the Reed Property into the center of the other Office Park parcels. Colby Cox testified at his deposition that when he transferred parcel 20.01 to the Reeds, he believed the trapezoidal protrusion to be a separate parcel and not part of the conveyance.[34] Cox also testified that he had intended to convey to MacLaren the remaining parcels of the Office Park—parcels 20.02, 22.00, 19.00, and the Reed Property protrusion.[35] Point Management, MacLaren, and the Reeds through their counsel negotiated a resolution to have the protrusion re-conveyed to Point Management so that it could be conveyed to MacLaren as part of the Office Park. Per the resolution, Point Management agreed to pay the Reeds $15,000 (the Reeds' attorneys' fees for the lot line adjustment) and to pay Tunnell & Raysor $5000 to do the legal work necessary to obtain approval from Milton for the lot line adjustment and consolidation of the parcels to be conveyed to MacLaren (the Office Park sans the corrected Reed Property).

These title defects with the Reed Property and the lot line adjustments they necessitated caused multiple delays in the closing date, which was originally

[34] Cox Dep. 90:19-91:12.
[35] *Id.* at 80:20-81:2.

scheduled for October 2007. According to Tunnell & Raysor attorney Jane Patchell, numerous other title defects existed in addition to the earlier conveyance of the Reed Property, including easements for incomplete utility lines and deed restrictions that were required to be terminated and removed to provide good marketable title to MacLaren.[36] On October 18, 2007, Point Management and MacLaren amended the Sale Agreement to extend the original settlement date from October 22, 2007, to November 15, 2007.[37] Milton finally approved the lot line adjustment and consolidation plan on February 21, 2008, and the parties scheduled settlement for February 29, 2008.

2. Patterson Purportedly Learns of the Residential Property

According to Dr. Patterson's deposition testimony, he first learned of the Residential Property during the diligence period through a conversation with Hal Dukes. Patterson testified that he was reviewing papers with Dukes when Dukes notified him that there was "a little house up the street that's included."[38] Dr. Patterson, unaware of the Residential Property until that point, asked why the property was included, to which Dukes purportedly responded, "It probably has something to do with parking."[39] Dr. Patterson testified that because he was frustrated with the transaction, which he perceived as having been botched by Cox

[36] Jane Patchell Dep. 11:2-14 (Dec. 13, 2011), MacLaren's Opening Br. Ex. 12 [hereinafter "MOB ___"].
[37] *See* POB Ex. 20.
[38] Patterson Oct. Dep. 68:1-18.
[39] *Id.* at 69:4-17.

and the Young Conaway attorneys, he did not question his attorney's explanation.[40]

For his part, Dukes testified that between signing in August 2007 and closing in February 2008, though he had several conversations with Dr. Patterson, Patterson never discussed purchasing a residential property on Chestnut Street.[41] Regarding whether during that period he informed Patterson that MacLaren was buying a residential property, Dukes testified,

> [I]t's speculation at this point. It's been a long time, but I think that some of these parcels that are listed in the contract were not part of the office park and I do remember telling him that when you're in the process of buying an assembled park there's residue property that's not part of the transaction and that's why it's important to have a survey and an engineer's report on what you're acquiring . . . . I can't remember the details of the conversation. I just remember telling him that the descriptions that were provided by the seller's contract didn't fit the park, but not to worry because our goal is to buy the park and we will fix it and he doesn't need to be worried.[42]

3. Circulated HUD Documents Reference the Residential Property

Of the documents circulated during the due diligence period, only the HUD-1 settlement statement (the "HUD-1") referenced the Residential Property by street address. Four versions of the HUD-1 were circulated before closing.[43] Section G of all four versions, labeled "PROPERTY ADDRESS," listed "Federal Street Office

[40] *Id.* at 68:1-18, 69:4-17.
[41] Harold E. Dukes Dep. 37:15-38:9 (Mar. 6, 2012), Pl.' s Reply Br. Supp. Mot. Summ. J. Ex. C [hereinafter "Dukes Mar. 6 Dep. ___"].
[42] *Id.* at 38:17-39:1, 41:20-42:1.
[43] *See* POB Exs. 25, 26, 27, 28.

Park, Milton, DE," and identified parcels "2-35-20.11 19, 20.02, 22 & 52.03 and p/o 2-3."[44] The only references to the street address of the Residential Property appeared at Lines 513 and 517 of the HUD-1, under the heading "Adjustments for items unpaid by seller."[45] These lines listed unpaid amounts, totaling less than $60, for "Final Sewer Bill - 515 Chestnu [sic]" and "Water for 515 Chestnut St."[46]

On February 29, 2008, Karen Miller forwarded the fourth version of the HUD-1 to Cheryl Santaniello, indicating: "There are more changes to the HUD. The City taxe [sic] have not been paid and the final water reading for 611 Federal Suite A and 515 Chestnut need to be collected."[47] Miller copied Colby Cox on the email, and at his deposition Cox testified that the email's reference to "515 Chestnut" was "more than likely what flagged [his] attention" to the mistaken inclusion of the Residential Property.[48] An hour after receiving the email from Tunnell & Raysor, Cox replied to Santaniello, "What does 515 chestnut have to do with this deal? And what is the other property?"[49] Santaniello responded to Cox's question with two emails: one to Karen Miller, questioning the street addresses referenced in Miller's earlier email,[50] and one to Cox, stating that she did not know

[44] *See* HUD Settlement Statement, POB Ex. 28. at TR-RES 0296 [hereinafter "HUD ___"].
[45] *See id.*
[46] *Id.*
[47] POB Ex. 29 at PM000212.
[48] Cox Dep. 175:18-21.
[49] POB Ex. 29 at PM000210-11.
[50] *Id.* at PM000210.

to which properties the street addresses referred.[51] In her email to Cox, Santaniello inquired whether Point Management had any connection to "611 Federal Street" and suggested that the Chestnut Street property might be the Reed Property.[52] She also indicated that she was waiting to hear from Tunnell & Raysor. To this email, Cox replied: "I don't think we own 611—we do own 515 but it is not part of this transaction—we would be happy to pay any $ owed on property we own—but I obviously don't want to pay for a property we don't own—611."[53] Aside from this email to a Young Conaway attorney, the parties have not pointed to any additional instances in which Cox expressly indicated that the Residential Property was not part of the transaction.

Karen Miller soon responded to Santaniello, stating:

> 515 Chestnut is . . . 52.03 per the town.
> This is Parcel 2 which is part of subdivision of Round Pole Branch
>
> 611 Federal is . . . 20.02 per the town
> 613 Federal is . . . 19.00 per the town
> 611 Federal, Suite A is . . . 22.00 per the town These are considered all of Federal Street Office Park.[54]

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[51] POB Ex. 30 at YCST_003086.
[52] *Id.*
[53] *Id.* at YCST_003085-86.
[54] POB Ex. 29 at PM000209-10. In documents produced by Tunnell & Raysor and Young Conaway, this email is displayed in a manner that, according to Tunnell & Raysor, calls into question the meaning of the phrase "These are considered all of Federal Street Office Park." *See* Tunnell & Raysor's Mem. Supp. Mot. Summ. J. Exs. S-5, W [hereinafter "T&R's Opening Mem. ___"]. Exhibit S-5, produced by Young Conaway, displays the email with each phrase on a separate line with no spaces between any of the lines. *See id.* Exhibit W, produced by Tunnell & Raysor, shows an empty line between the "Round Pole Branch" line and the descriptions of

Santaniello then relayed this information to Cox: "[611] is a street address assigned by the town to one of the parcels that makes up the federal street industrial park. Are we ok with the HUD-1? The water bills do pertain to the property being sold."[55] Santaniello has testified that her understanding was that the Town of Milton was requiring payment and that she continued to think the payment had something to do with the Office Park.[56] Cox has testified that in addition to the emails in the record, he had a telephone conversation with Santaniello in which she explained to him that Tunnell & Raysor was telling her that the water charges had to be paid simply due to Point Management's common ownership of 515 Chesnut Street and the property to be transferred, not a result of any conveyance of the Residential Property.[57] With this understanding, and

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the Federal Street properties. *See id.* Ex. W. Tunnell & Raysor argues that these two versions of the email demonstrate that Karen Miller intended the last line to mean that all of the listed properties, including 515 Chestnut Street, "are considered all of Federal Street Office Park." Miller asserted as much, albeit tepidly, at her deposition. *See* Karen Miller Dep. 100:22-24 (Dec. 13, 2011), T&R's Opening Mem. Ex. T [hereinafter "Miller Dep. ___"] ("Knowing me, the way I do things, I'm trying to tell her that these are all part of the Federal Street Office Park.").

Though I do not doubt that Ms. Miller testified honestly, the email's meaning appears contrary to her recollection. Both the Tunnell & Raysor version and the version cited by Point Management suggest that the "Round Pole Branch" line was meant to describe 515 Chestnut Street, while the "Federal Street Office Park" line was meant to describe the three listed Federal Street properties. The Young Conaway version is at most ambiguous. Moreover, regardless of whether Ms. Miller intended "Federal Street Office Park" to refer a Chestnut Street property listed in a separate paragraph and identified as "part of [the] subdivision of Round Pole Branch," it is difficult to take seriously the argument that a property that (1) in no way abuts Federal Street, (2) is residential, (3) is noncontiguous with the other properties composing the Office Park, and (4) is absent from any plot plan or survey of record depicting the Office Park is nonetheless part of the Federal Street Office Park.

[55] POB Ex. 30 at YCST_003085.

[56] *See* Santaniello Dep. 258:8-259:19.

[57] Cox Dep. 144:9-145:5.

because the water charges were minimal, Cox purportedly concluded that Point Management should just "[p]ay the damn thing and . . . move on."[58] Whatever the reason, Santaniello and Cox did not again discuss the Residential Property before closing.

H. The Transaction Closes and Tunnell & Raysor Files an Altered Deed

On February 21, 2008, Milton approved the lot line adjustment and consolidation of the Office Park parcels, and the transaction proceeded to close on February 29, 2008. In the run-up to the closing, Tunnell & Raysor and Young Conaway circulated the necessary closing documents. Because Point Management would not be attending the closing, Tunnell & Raysor, on February 27th, sent Colby Cox a deed to be signed and notarized in advance of the February 29th settlement date.[59] Tunnell & Raysor also sent a copy of the draft deed to Young Conaway, who plotted the legal description therein and confirmed to Tunnell & Raysor that the metes and bounds closed.[60]

Young Conaway reviewed the deed it received from Tunnell & Raysor and approved it for signature. On February 29, 2009, Cox signed the deed on behalf of Point Management and returned it to Tunnell & Raysor. This deed, which was the only deed signed by all of the parties, comprised three pages and included the tax

[58] *Id.*
[59] *See* POB Ex. 21.
[60] *See id.* Ex. 22; Pl.'s Answering Br. Resp. Tunnell & Raysor's Mot. Summ. J. Ex. E.

parcel number for the Residential Property, together with those for the Office Park parcels, in the top right corner of the first page (the "Executed Deed").[61] The Executed Deed contained a legal description of the Office Park, less the corrected Reed Property.[62] It did *not*, however, contain a legal description of the Residential Property. The Executed Deed did contain a clause identifying the property to be conveyed as "BEING the same lands conveyed to Point Management, LLC from Pintail Management, LLC, by deed dated July 31, 2006 . . . . ALSO BEING a part of the land lands [sic] conveyed to Point Management, LLC . . . from O. Blake Reed and Donna Reed."[63] As noted above, the Residential Property was among the parcels conveyed to Point Management from Pintail.

The Executed Deed, i.e., the version of the deed last seen and approved by Colby Cox, was not the deed ultimately recorded. The "Recorded Deed" contained four pages instead of three, and it included an entirely new section, labeled "Tract No. 2: 2-35 20.11 52.03."[64] This new section comprised a paragraph laying out the properties bounding the Residential Property and a metes and bounds description for the Residential Property.[65] These elements were absent from the Executed Deed, which, though naming the Residential Property by tax parcel number on

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[61] *See* Deed Between Point Management, LLC, and MacLaren, LLC, POB Ex. 23, at 1 [hereinafter "Executed Deed ___"].
[62] *See id.* at 2.
[63] *Id.* at 2.
[64] Deed Between Point Management, LLC, and MacLaren, LLC, POB Ex. 24 [hereinafter "Recorded Deed ___"].
[65] *See id.* at 2-3.

page one, provided metes and bounds and bordering properties only for the Office Park. In the Recorded Deed, the description of the Office Park was relabeled "Tract 1."[66] The parties do not dispute that Jane Patchell of Tunnell & Raysor, attorney for MacLaren, made these alterations. The parties also do not dispute that Patchell altered the Executed Deed sometime after Point Management signed it and before Tunnell & Raysor recorded it. The dispute is whether Patchell, or any other representative from Tunnell & Raysor, communicated with Point Management and received Colby Cox's permission to alter the Executed Deed.

At her deposition, Patchell testified that after the closing she discovered the discrepancy between the tax parcels named in the Executed Deed and the properties described in the metes and bounds.[67] Due to a time constraint between the closing and the deadline for recordation, Patchell purportedly had authorization from Point Management's attorney, Cheryl Santaniello, to go directly to Santaniello's client, Cox, with any questions, and so Patchell had intended to call Colby Cox to obtain his permission to add the legal description for parcel 52.03.[68] According to Patchell, Colby Cox called her first, however.[69] Patchell claims to have then requested his permission to add a legal description to the Executed Deed

[66] *Id.* at 1.
[67] Jane Patchell Dep. 14:13-18 (Mar. 28, 2011), Third Party Def.'s Opening Br. Supp. Mot. Summ. J. Ex. E [hereinafter "Patchell Mar. Dep. ___"].
[68] *Id.* at 18:12-19:5.
[69] *Id.* at 18:17-19. Patchell could not recall at her deposition the purpose of Cox's call. *See id.* at 12:23-13:7.

to match the property listed in the Sale Agreement.[70] Patchell testified that she did not know at the time that the missing metes and bounds described a residential property but that she knew the description referenced a noncontiguous parcel of what she believed to be the Office Park.[71] Patchell did not explain to Cox that she intended to add a description for a residential property noncontiguous with the Office Park, or that the alteration would convey property not described in the Executed Deed, to Point Management's detriment. She informed him only that the Sale Agreement and Executed Deed were inconsistent and that the language she wished to add described a property listed in the Sale Agreement.[72] At his deposition, Colby Cox flatly denied that he and Patchell ever had a conversation regarding a correction to the legal description in the Executed Deed.[73] In any event, Patchell added the legal description of the Residential Property to the Executed Deed as a new page three, changed the signature page to new page four, and recorded the altered deed on March 4, 2008. Patchell did not contact Cheryl Santaniello to inform her of the alteration to the deed until an ownership dispute

[70] *Id.* at 17:6-16.
[71] *Id.* at 16:25-17:5.
[72] *Id.* at 17:6-16.
[73] Cox Dep. 199:15-19.

over the Residential Property arose almost a year after settlement.[74] According to Patchell, she meant to contact Santaniello at the time, but forgot to do so.[75]

I. The Aftermath

On March 11, 2008, Tunnell & Raysor forwarded the final version of the HUD-1 by email to Stephen Melanson, a Point Management representative. As discussed above, the HUD-1 referenced a water bill due for 515 Chestnut Street. In this email, Jane Patchell asked Melanson to confirm whether "the two tenants at Federal Street Office Park made their March rental payments to Point Management."[76] The email did not reference the Residential Property tenants.

Over the next several months, Point Management took actions consistent with its purported belief that it still owned the Residential Property. In September

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[74] Patchell Mar. Dep. 29:14-30:4.

[75] Ms. Patchell's forgetfulness in this instance appears somewhat at odds with her conduct earlier in the course of the transaction. At her deposition, Patchell testified that she had a "very close and good working relationship" with Santaniello, and that she (Patchell) was "very careful not to communicate directly with Colby Cox." *Id.* at 13:8-19. Patchell further testified that at one point, Cox emailed her directly, and she immediately notified Santaniello because she "understood the ethical issues that are involved with talking to a represented person." *Id.* at 13:20-14:2. In regards to why she forgot to report to Santaniello her communication with Cox regarding a stroke-of-midnight amendment to the deed, Patchell testified:

> We had a time constraint based on when settlement was happening and when documents needed to be recorded. I knew that if I called her, she would need to contact him, and I had her authorization prior to this, because of the complexity and the time frame, to contact him if there were any questions.
>
> . . . .
>
> So I went straight to the person who could provide the authority to remedy the situation.

Id. at 18:22-19:5.

[76] *See* T&R's Opening Mem. Ex. BB.

2008, Point Management and the LoBiandos renewed their lease agreement.[77] Later in 2008, because the LoBiandos were experiencing financial difficulties, Point Management worked with them to develop a payment plan for back rent.[78]

The dispute over the rightful ownership of the Residential Property would not materialize until January 2009, nearly a year after settlement, when Dr. Patterson contacted Tunnell & Raysor regarding tax or water bills he had paid on parcel 52.03, which Dr. Patterson would soon learn was an occupied residence. Among the documents circulated at the closing was an Assignment and Assumption of Leases from Point Management to MacLaren. The executed version of this document identifies the two tenants at the Office Park but makes no reference to the LoBiandos, the Residential Property tenants.[79] For many months following the closing, MacLaren was unaware that tenants were residing at the Residential Property. On January 17, 2009, Dr. Patterson emailed Hal Dukes and Jane Patchell inquiring as to which properties owned by MacLaren in Milton were associated with tax bills he had received and paid on parcels "2352011005203" and "2352011001900."[80]

[77] *See* POB Ex. 33.
[78] *See id.* Ex. 32.
[79] *See id.* Ex. 31, at TR-RES 0065-66.
[80] *See* Pl.' s Reply Br. Supp. Mot. Summ. J. Ex. K, at TR RES 1901 [hereinafter "PRB ___"].

Dr. Patterson also called Hal Dukes sometime in January 2009 expressing the same concern regarding a tax or utility bill he had paid.[81] As Dukes recounted this phone call at his deposition, Dr. Patterson was concerned because he had received a water, sewer, or tax bill for a residential property in Milton.[82] When asked why Dr. Patterson had a problem with the utility bill, Dukes recounted:

> He wanted to know why it was in his name. He never had any intention of owning any residential property in Milton. He bought an office park and he was upset. . . . He indicated he had no insurance on the property, he didn't know who owned it, who was occupying it, and I said that obviously it's a typographical error or an error and I said we would do a corrective deed in the morning. And he said, Make sure you do it first thing in the morning, I do not want this property, I do not want the liability. He said, Suppose something happens tonight? I said, Well, probably Mr. Cox has insurance on this property and it is a mistake but we'll take care of it first thing in the morning.[83]

According to Dukes, he contacted Karen Miller, the real estate paralegal who had worked on the transaction, and the next morning Dukes's office prepared and delivered to Dr. Patterson a corrective deed that omitted the Residential Property (the "Corrective Deed").[84] Dukes testified that he followed up with a phone call that afternoon and several additional calls during the week, in which Dr. Patterson indicated that he was "reviewing" and "reading" the Corrective Deed.[85]

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[81] *See* Patterson-Fifer Statement 10:6-12:11; Dukes Mar. 6 Dep. 42:15-24.
[82] Dukes Mar. 6 Dep. 42:19-24.
[83] *Id.* at 43:3-17.
[84] *Id.* at 43:18-20.
[85] *Id.* at 44:4-45:3.

Patchell responded to Dr. Patterson's email regarding the tax bills on January 21, 2009, and confirmed that parcel "23520110019OO" represented former parcels 19.00, 20.02, 22.00, and part of 20.01 (the Reed Property protrusion), as combined by Sussex County.[86] Patchell did not address the second parcel, "2352011005203," in her response, but implied that the dual tax bills might have been the result of lag or miscommunication between Sussex County and Milton regarding the consolidation of the Office Park parcels.[87]

Dr. Patterson was apparently confused by Patchell's response. He replied, "In the last settlement meeting, I think Hal said that the property is two parcels in case I wish to sell one. But maybe Hal could comment."[88] Patchell attempted to clarify her explanation in another email:

> Originally, Maclaren purchased 5 tracts of land from Point Management, LLC. [The Office Park] consisted of four of those tracts, each with a separate tax map and parcel number. The office park properties have been combined by Sussex County and are now identified by one tax map and parcel number (2-35 20.11 19.00). The lot on Chestnut Street that is not contiguous with the office park has always been identified by its own number (2-35 20.11 52.03). . . . The

[86] *See* PRB Ex. K, at TR RES 1900.
[87] *See id.* at TR RES 1900-01 ("The County should notify the Town of Milton of the assemblage of the various parcels into one tax map and parcel number. According to the [sic] Milton's Tax Office, the notification from the County is sent to a different department within the Town and then forwarded to the Tax Office. Kathy from the Town of Milton is checking to find out when, or if, the Town received notification from the County (which it claims was sent) that several aprcels [sic] had been combined into one tax map and parcel number. . . . As soon as I hear from her, I will contact you.").
[88] *Id.* at TR RES 1899-1900.

> Chestnut Street lot was not included in my discussion [in my previous email] . . . .[89]

Evidencing his continued confusion regarding the properties owned by MacLaren and a lack of knowledge of the Residential Property, Dr. Patterson responded, "We do not own the lot on Chestnut St. It was bought by the Reeds as part of the settlement. If I understand this correctly, did I pay their property taxes (2352011005203 $571.20?) this round. Please comment."[90] Dr. Patterson's evident confusion is inconsistent with any intent on his part to purchase the Residential Property before settlement.[91] His confusion appears to stem from the fact that the Reed Property, which was originally a piece of the Office Park and was the subject of a pre-settlement dispute between the parties, abuts Chestnut Street. Patchell then forwarded a tax map to Dr. Patterson showing the two properties, the Office Park and 515 Chestnut Street. Dr. Patterson's response suggests that his wife thereafter visited the Residential Property and discovered that it was occupied: "My wife went by the house and evidently it is occupied. How should we approach this? Are you sure no mistake has been made on the sellers [sic] part?"[92]

It is an ill wind indeed that blows no man good. At some point following his phone conversation with Hal Dukes and his email exchange with Jane Patchell, Dr.

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[89] *Id.* at TR RES 1900.
[90] *Id.* at TR RES 1899.
[91] *See* Patterson Oct. Dep. 68:1-18, 69:4-17 (Patterson's testimony regarding a purported pre-closing conversation about the Residential Property with Hal Dukes).
[92] PRB Ex. K, at TR RES 1899.

Patterson's attitude toward the Residential Property apparently shifted from one of concern for liability exposure in a property he had not intended to purchase to one of opportunism born from the notion that he might get a free house out of this mess. By letter dated January 23, 2009, Dr. Patterson's wife advised the LoBiandos that MacLaren owned the Residential Property and that future rent should be paid to MacLaren.[93] The LoBiandos, understandably confused, contacted Colby Cox, who then apparently asked Dr. Patterson's wife not to contact the Residential Property tenants.[94]

Representing his change of heart in this matter, Dr. Patterson emailed his Tunnell & Raysor attorneys on January 26, 2009, informing them of Cox's communication with Dr. Patterson's wife:

> Mr. Cox called my wife Kristin and asked her not to contact the tenant at 515 Chestnut St. Evidently, he thinks he still owns that property. I would like Mr. Cox to pay the back rent on the property, and cease any other contact with the tenant or Kristin. How should this be addressed?[95]

Patchell responded to Dr. Patterson's email, indicating that she had just spoken to Cheryl Santaniello of Young Conaway, who had indicated that the inclusion of the Residential Property was a mistake.[96] Patchell further explained that "[i]t appear[ed] that the district map and parcel number and the legal description for the

[93] *See* POB Ex. 37.
[94] *See* PRB Ex. I, at TR RES 1595.
[95] *Id.*
[96] *Id.* at TR RES 1594.

[Residential Property] were included in the contract of sale by error"[97] and that it was Santaniello's position that no meeting of the minds with regard to a sale of the Residential Property had occurred, necessitating a correction of the deed.[98] Patchell also noted:

> *You indicated during our discussions last week that you had no knowledge of a house being included in the sale of [the Office Park]*. Therefore, Ms. Santinello's [sic] recollection and position on the house not being part of the office park sale appear to be correct. If the inclusion of the house in the contract of sale and its subsequent conveyance to you was in error and you and Colby never had an agreement to convey the house, then you are not entitled to retain title to the property or to collect back rent. However, you are entitled to reimbursement for the title search on the property that was completed based upon the contract of sale, the taxes that you paid on the property since the time that it was conveyed to you, and any cost to correct the error, such as the cost to prepare and record a Corrective Deed.[99]

Patchell's email conflicts with Dr. Patterson's assertion that Tunnell & Raysor alerted him to the Residential Property before settlement.[100] Without confirming or denying any of the statements in Patchell's email, Dr. Patterson responded that he wanted Hal Dukes to comment.[101] Patchell explained that Dukes had already reviewed Patchell's email before it was sent. Nonetheless, Patchell requested a phone number where Dr. Patterson could be reached and assured Dr. Patterson that

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[97] *Id.*
[98] *Id.* at TR RES 1594-95.
[99] *Id.* at TR RES 1595 (emphasis added).
[100] *See* Patterson Oct. Dep. 68:1-18, 69:4-17.
[101] PRB Ex. I, at TR RES 1594.

Dukes would call him to discuss the matter.[102] Patchell also emailed Dr. Patterson later that afternoon and expressed that Dukes had spoken with the real estate agent involved in the transaction, who "verified that the property listing and the sale were never intended to include a residential property."[103]

When Dukes did not receive a signed version of the Corrective Deed he had sent to Dr. Patterson, they communicated again. Though the record is unclear as to who initiated the phone call and when exactly the call occurred, Dr. Patterson's email exchange with Jane Patchell, described above, indicates that in late January 2009, Dr. Patterson wished to speak with Dukes and provided his phone number to Patchell for that purpose. At his deposition, Dukes recounted his conversation with Dr. Patterson:

> I told him that I was in the process of waiting for him to return the corrective deed that we had given him . . . and I said, You're making a mistake here because you bought the office park, the Federal Street Office Park, and the mistake is that the house was included in the deed. And he recognized that and then I said, Well, we need to clear

[102] *Id.*

[103] Third Party Def.'s Reply Br. Supp. Mot. Summ. J. Ex. G, at TR RES 1598 [hereinafter "YCST's Reply Br. ___"]. This is corroborated by the affidavit of Bill Lucks, in which he states that he was not aware of any residential property owned by Colby Cox or Point Management, that the Listing Agreement for the Office Park did not reference any residential property, that the listing itself did not reference any residential structures or property, that the only property ever shown to Dr. Patterson or his agents was a commercial property, that the written offer prepared by CSG on behalf of MacLaren was for a commercial property and did not include any residential property, and that he only became aware of the Residential Property in January 2009 when contacted by Colby Cox and his attorneys. *See* Lucks. Aff. ¶¶ 8-9, 12-13, 16, 18-19; *see also* Aslin Aff. ¶¶ 6-8, 11-13 (attesting to the same information).

> this up and he said, Well, I'm still thinking about it and taking advice from other people.[104]

In a January 28, 2009, voicemail left with Cheryl Santaniello, Dukes conveyed Dr. Patterson's stance regarding the Residential Property. Dukes explained that Dr. Patterson did not "per se" object to anything wanted by Santaniello or Colby Cox, but that Dr. Patterson needed time to "think it over" because he had paid for a title search and some legal work in connection with the Residential Property.[105] Dukes indicated his belief that the parties would be able to resolve the dispute and that "there [was no] need to get real concerned."[106]

Apparently dissatisfied with the advice he was receiving from his Tunnell & Raysor attorneys, Dr. Patterson at some point reached out to David Barrett, his father-in-law and a Washington, D.C., attorney. On January 31, 2009, Dr. Patterson emailed Dukes and Patchell expressing that he appreciated the excellent service of Tunnell & Raysor and that he looked forward to working with the firm in the future.[107] With regard to "the 515 Chestnut property in Milton," however, Dr. Patterson requested that Tunnell & Raysor "maintain . . . attorney client privilege and defer any further discussion by Mr. Cox's representative concerning that parcel to . . . David M. Barrett, Esq."[108] Shortly thereafter, Patchell spoke with

[104] Dukes Mar. 6 Dep. 59:14-22.
[105] MOB Ex. 47.
[106] *Id.* Ex. 47.
[107] *See id.* Ex. 49, at TR RES 1099.
[108] *See id.*

Mr. Barrett, who allegedly "assert[ed] that Dr. Patterson owns the [Residential Property] as it is contained in the deed and the deed is self-contained."[109] In an email to Dukes on February 11, 2009, Patchell relayed that she tried to explain to Barrett the evidence that was stacked against Dr. Patterson's assertion that he intended to purchase the Residential Property.[110] By Patchell's account in her email to Dukes and as evidenced by this ongoing litigation, her explanation fell on deaf ears:

> Mr. Barrett is a litigator, has served as Recorder of Deeds in Indiana, taught law school in Indiana, etc. He tried to "school" me on attorney-client privilege, real estate law, etc. and you [Hal] would be proud of me—I just bit my tongue . . . !!![111]

Dukes responded that Cheryl Santaniello should be notified of Barrett's involvement on the ground that she might "make [Barrett] see that this matter will not result in a free house for Dr. Patterson."[112]

Despite Dr. Patterson's email to Tunnell & Raysor requesting that any further discussion of the Residential Property with Cox's attorneys be directed to David Barrett, Tunnell & Raysor continued to communicate with Young Conaway and other attorneys who became involved as the dispute spiraled out of control. In a February 2, 2009, email to Santaniello, Patchell indicated that she and Dukes had

[109] *See* YCST's Reply Br. Ex. H, at TR RES 1723.
[110] *See id.*
[111] *See id.*
[112] *See id.*

spoken with Gene DiPrinzio, another attorney from Young Conaway, that afternoon, and that "[b]ased upon that conversation, Hal Left a message for Joe and Jan LoBiando on their home voice mail to continue paying monthly rent for 515 Chestnut Street to Colby Cox. . . . Hal has known Joe and Jan for years."[113] On March 4, 2009, Dukes left a voicemail with Santaniello stating:

> Jane is gone for an operation on her knee and I am involved in this trying to pick up the loose ends for her. We ___ talk about this McLaren [sic] LLC and that park over there. The guy has basically fired us, but, we would be willing to do anything necessary to help you out on this and we told Gene Bayard[114] that too. I am hoping that [Dr. Patterson's] brother-in-law [sic] the famous lawyer will see the reality of this . . . .[115]

Several weeks later, by letter dated March 20, 2009, Dukes contacted David Barrett, stating that "it would appear that MacLaren, LLC should sign a corrective deed as soon as possible and straighten out this matter without the cost and time of litigation."[116] Dukes also directed Barrett to contact him or Eugene Bayard, attorney for Point Management, directly with any questions or comments.[117] In a letter to Bayard, also dated March 20, Dukes stated:

> I have had several conversations with the MacLaren Group concerning the mistake in the deed description. I have explained to them that the realtors and the parties to the negotiations never included this property to be part of the transfer. While it is obvious

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[113] *See* MOB Ex. 48.
[114] Eugene Bayard is an attorney at Wilson, Halbrook & Bayard, P.A., a Delaware firm, and is representing Point Management in this action.
[115] *Id.* Ex. 47.
[116] *Id.* Ex. 50.
[117] *Id.*

> that the MacLaren Group should not receive the house as a result of this mistake, they have not replied to any of my requests.
>
> Recently I was told that our law firm can no longer represent the MacLaren Group in this matter. Given this fact, I can only suggest that you contact the MacLaren Group directly. If there is anything that you think I can do in this matter feel free to contact me at your convenience.[118]

Shortly after Point Management initiated this action, on September 2, 2009, Dukes sent out two more letters, one to John Sergovic of Sergovic, Carmean & Wiedman, P.A., then-attorney for MacLaren,[119] and one to Bayard in an apparent attempt to give Tunnell & Raysor's take on Point Management's claims against it. Dukes's letter to Bayard was "intended to outline [Tunnell & Raysor's] understanding of the timeline of events surrounding the conveyance of the property from [Point Management] to MacLaren, LLC."[120] The letter defended Tunnell & Raysor's actions and made clear the firm's position that the Residential Property had been conveyed in error. Notably, MacLaren had not yet asserted cross-claims against Tunnell & Raysor.[121]

In a similar letter to John Sergovic, Dukes expressed his positions that the Residential Property was conveyed by mutual mistake and that Dr. Patterson's statements demonstrated that "he had no knowledge of this property, had never

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[118] *Id.* Ex. 51.
[119] MacLaren has since substituted the law firm of Rhodunda & Williams, LLC.
[120] *Id.* Ex. 53, at TR RES 1906.
[121] MacLaren did not file its Amended Answer, which asserts cross-claims against Tunnell & Raysor, until April 5, 2012.

looked at the property, did not intend to include this property in his offer to purchase the office park and that the lending institution had never appraised the property as part of the business park loan."[122] Sergovic responded on September 21, 2009, stating,

> The legal conclusions set forth in your . . . letter and all factual reference are disputed. The conclusions that you assert . . . appear to be an effort to absolve yourself and your firm of claims made against you for altering the Deed after it was executed by the Seller . . . . Our client will hold you accountable for your apparent violation of the attorney/client privilege . . . .[123]

J. Allegations and Procedural History

On August 29, 2009, Point Management filed a Verified Complaint asserting eleven counts against MacLaren, Tunnell & Raysor, and Artisans' Bank, including claims for reformation, fraud, misrepresentation, breach of contract, mistake, unjust enrichment, tortious interference, conversion, imposition of a constructive trust, and a notice count against Artisans' Bank. On January 15, 2010, Tunnell & Raysor filed a motion to dismiss the claims against it. On December 14, 2010, by telephonic ruling, I dismissed the claims of fraud and misrepresentation alleged against Tunnell & Raysor. In my ruling, however, I acknowledged that Point Management appeared to have claims against Tunnell & Raysor as the settlement agent, but that those claims did not lie in misrepresentation or common law fraud.

[122] *Id.* at TR RES 1904.
[123] MOB Ex. 54.

Thus, I deferred dismissal for thirty days to allow Point Management to amend its complaint.

On January 5, 2011, Point Management filed its Verified Amended and Supplemental Complaint (the "Amended Complaint"), in which it asserts ten counts. Count I seeks a declaration that the Recorded Deed is defective on the ground that it was not the deed executed by the parties. Count I also seeks an order providing that a corrective deed conveying only the Office Park be executed and delivered by Point Management and accepted and recorded by MacLaren.

Count II seeks reformation of the Recorded Deed on account of mutual mistake. Point Management asserts that neither the Sale Agreement nor the Recorded Deed reflects the intent of the parties and that both documents should be reformed to remove all reference to the Residential Property.

Count III seeks reformation on the ground of mutual mistake coupled with inequitable conduct. Point Management alleges inequitable conduct on the part of Tunnell & Raysor for filing a different deed than the one executed and for failing to inform Point Management for nearly one year that it had filed an altered deed. MacLaren is alleged to have initially agreed to correct the mistaken conveyance of the Residential Property before inequitably shifting its position and claiming rightful ownership of the property.

Count IV alleges breach of contract and negligence as a settlement agent against Tunnell & Raysor for inducing Point Management to rely on Tunnell & Raysor's representation that the deed it provided to Point Management for execution would be the deed filed. Point Management alleges that in filing an altered deed and in failing to inform Point Management of its having done so, Tunnell & Raysor, acting on behalf of MacLaren, breached an implied contract between Tunnell & Raysor and Point Management and negligently harmed Point Management.

Count V asserts a legal malpractice claim against Tunnell & Raysor on the basis that it owed duties of care and candor to Point Management and that it breached those duties when it recorded the altered deed and did not inform Point Management that it had done so.

Count VI alleges that, in the event that Tunnell & Raysor thought the Residential Property was part of the transaction, it was negligent in failing to include a description of that property in the deed it provided to Point Management for execution.

Count VII accuses MacLaren of tortiously interfering with Point Management's contract with the former tenants of the Residential Property.

Count VIII alleges unjust enrichment and conversion against MacLaren for obtaining the Residential Property without consideration, ejecting the tenants

therein, and wrongfully continuing to possess and use the Residential Property without the permission of or compensation to Point Management.

Count IX seeks the imposition of a constructive trust against MacLaren with respect to all funds, consideration, and other things of value received by MacLaren as a result of its allegedly wrongful possession of the Residential Property.

Count X seeks to put Artisans' Bank, the holder of allegedly wrongful encumbrances on the Residential Property, on notice of Point Management's claims of rightful ownership, possession, and control of the Residential Property free and clear of liens and encumbrances placed thereon by or for the benefit of MacLaren.

Tunnell & Raysor answered the Amended Complaint on January 20, 2011, and asserted counterclaims and crossclaims for contribution or indemnification against all other parties, except for Artisans' Bank.

MacLaren answered the Amended Complaint on February 8, 2011, and asserted counterclaims against Point Management.[124] MacLaren's first counterclaim alleges that Point Management breached its contractual obligations in failing to deliver the entire Reed Property, as provided in the Sale Agreement.

[124] On April 5, 2012, with the Court's permission, MacLaren filed an amended answer asserting crossclaims for malpractice, professional negligence, and tortious interference against Tunnell & Raysor, its former counsel. I allowed MacLaren to file its crossclaims at this late stage subject to a stay pending trial (as necessary) on Point Management's claims against MacLaren, Tunnell & Raysor, and Artisans' Bank; MacLaren's earlier-filed counterclaims against Point Management; and Tunnell & Raysor's claim, counterclaim, and crossclaim against Young Conaway, Point Management, and MacLaren, respectively, for contribution and indemnification.

MacLaren's second counterclaim alleges that Point Management breached the covenant of good faith and fair dealing by representing that it owned the entire Office Park when it had already conveyed part of the Office Park to the Reeds, a misrepresentation that MacLaren purportedly relied upon to its detriment.

On February 1, 2011, Tunnell & Raysor filed a third-party complaint against Young Conaway asserting that Young Conaway was negligent throughout the course of the transaction, particularly in its preparation of the Sale Agreement, and breached its contractual duties to Point Management. Tunnell & Raysor asserts that, on these bases, it is entitled to contribution or indemnification from Young Conaway for any liability assessed against Tunnell & Raysor arising out of the transaction at issue.

Point Management and MacLaren have cross-moved for partial summary judgment on the issue of reformation. Tunnell & Raysor has moved for summary judgment on the counts asserted against it by Point Management—breach of contract and negligence as a settlement agent, legal malpractice, negligence, and unjust enrichment and conversion. Young Conaway seeks summary judgment against Tunnell & Raysor's claims for contribution and indemnification.

This Opinion addresses those motions.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the record reflects that no genuine issue of material facts exists and that the moving party is entitled to judgment as a matter of law.[125] When considering a motion for summary judgment, this Court views the evidence and draws all reasonable inferences in the light most favorable to the non-moving party, "accepting as true all evidence uncontroverted by the record."[126] Cross motions for summary judgment are deemed the equivalent of a stipulation for decision on the merits based on the extant record, and this Court may render judgment in the absence of a genuine issue of fact material to the disposition of either motion.[127]

III. ANALYSIS

A. The Recorded Deed Is Invalid

The deed recorded on March 4, 2008, was not a document signed by the parties to the real estate transfer. Its metes and bounds description included the Residential Property, which the description in the Executed Deed did not. The Executed Deed, post execution, was placed in the possession of MacLaren's attorney who, as agent for the parties, was charged with recording it with the Sussex County Recorder of Deeds.

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[125] Ch. Ct. R. 56(c).
[126] *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999); *see also Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009).
[127] Ch. Ct. R. 56(h).

Upon review of the Executed Deed, however, the undisputed facts indicate that MacLaren's attorney, Ms. Patchell, noticed an inconsistency between the Sale Agreement and the Executed Deed, in that the latter did not include the Residential Property in the metes and bounds description. She therefore created a new document, the Recorded Deed. The Executed Deed was three pages long, and the third page was the signature page. Patchell created a new page three for the Recorded Deed, which comprised the metes and bounds description of the Residential Property "missing" from the Executed Deed. She renumbered the signature page (page three) of the Executed Deed as page four of the Recorded Deed, and attached that signature page to the Recorded Deed as though the parties had executed the Recorded Deed, and not the Executed Deed. She then caused this document, the Recorded Deed, to be recorded as though it were the deed executed by the parties. These facts are not in dispute.

The parties disagree vehemently, however, as to what permission, if any, was given by Point Management to MacLaren's attorney to alter the Executed Deed. According to Ms. Patchell, she spoke to Colby Cox on the telephone and explained that there was an inconsistency between the Sale Agreement and the Executed Deed. She purportedly sought Cox's permission to reconcile the property listed in the Executed Deed with the property described in the Sale Agreement. Patchell claims to have spoken directly to Cox, without his attorney present.

Patchell admits that she did not tell Cox that the language she wished to add to the deed described the transfer of a parcel noncontiguous with the Office Park, or that it was a residential, rather than a commercial, property. She also did not tell Cox the address of the parcel to be added or read to Cox the description she intended to add to the deed. Patchell failed to send the new language she intended to add to the deed to Cox, or to his attorney, for review. Patchell never notified Cox's attorney that the deed had been altered. After receiving Cox's permission to make the change she had vaguely described, according to Patchell, she made the alteration in the deed.

Cox strongly denies that this conversation took place or that he ever authorized any alteration of the Executed Deed.

Assuming for purposes of this Opinion that Patchell's version of events is correct, the permission she received from Cox is insufficient to ratify the altered document she caused to be recorded with the Sussex County Recorder of Deeds.[128] I have no doubt that Patchell acted without bad intent. She noticed a discrepancy between the Sale Agreement and the Executed Deed, and acted to correct it. The alteration of the Executed Deed is but one of a concatenation of errors that have led

[128] It is as yet undecided in this jurisdiction whether a deed, executed and notarized, may be altered, as may a simple contract, by the express direction of the party charged, without re-execution. For the reasons stated in this Opinion, I need not resolve that question; the permission obtained by Patchell, looked at in the light most favorable to MacLaren, was insufficient to alter the contractual rights between the parties.

to this unfortunate situation. In her *ex parte* conversation with Cox, however, Patchell failed to indicate clearly that she was adding to the property conveyed a separate, noncontiguous parcel; she never identified the address of that parcel; she did not read Cox the description she wished to add; and she utterly failed to explain the alteration, totally against Point Management's interest, that she intended to make in the Executed Deed. If she had, or if, more properly, a draft amendment had been given to Cox and his counsel for his review and execution, this litigation would likely have been avoided. In any event, however, Cox's permission to correct the deed and waive his rights under the document executed by the parties was woefully insufficient to ratify the Recorded Deed as a deed transferring the Residential Property.[129] The Recorded Deed is, effectively, a nullity.

That leaves, as between the parties, the Executed Deed as the effective deed. As described below, that deed does *not* transfer the Residential Property.[130]

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[129] Because deeds are specialized contracts, the rules governing oral modification of a contract are applicable. "A party asserting an oral modification must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.'" *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1230 (Del. 2000) (quoting *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. 1979)).

[130] It is true that the Sale Agreement, as written, purports to evidence an intent to convey the Residential Property. Under the doctrine of merger by deed, however, the deed trumps the sale contract. *See Haase v. Grant*, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008) ("Title passes if a deed is validly executed and delivered . . . . At that point, under the doctrine of merger by deed, the contract typically is extinguished. This means that, after title has passed via the deed, the contract generally ceases to be a viable basis upon which plaintiff may sue." (footnotes omitted)).

B. The Effect of the Executed Deed

Because the Recorded Deed is a nullity, the Executed Deed is the operative document. The application of well-settled principles of deed construction supports a finding that the Executed Deed did *not* transfer the Residential Property. "The construction of a deed is a question of law."[131] Similar to rules governing contract interpretation, "[t]he fundamental rule in construing a deed is to ascertain and give effect to the intent of the parties as reflected in the language they selected."[132] Where a deed follows the statutory form, as the Executed Deed does here, the controlling language in determining the property conveyed is the description of the property in the deed.[133] If the meaning of that language is clear within the four corners of the deed, this Court will not consider extrinsic evidence regarding the parties' intent.[134] If the language in the deed is ambiguous, however, the intent of the parties must be determined "by the facts and circumstances surrounding the transaction."[135] Even when required to consider extrinsic evidence, this Court may resolve an ambiguity on a summary judgment motion "when the moving party's

[131] *Smith v. Smith*, 622 A.2d 642, 645 (Del. 1993).
[132] *Id.* at 646.
[133] *See* 25 *Del. C.* § 121 ("A deed in the form prescribed . . . duly executed and acknowledged . . . unless contrary intention appears within, shall be construed to pass and convey to the grantee . . . the fee simple title . . . in and to the property therein described . . . .").
[134] *See Smith*, 622 A.2d at 646 ("If there is no reasonable doubt as to the meaning of the words, the deed is unambiguous and the Court's role is limited to an application of the meaning of the words.").
[135] *Smith v. Reserves Dev. Corp.*, 2008 WL 3522433, at *6 (Del. Ch. Aug. 12, 2008).

record is not . . . rebutted so as to create issues of material fact."[136] After considering the extrinsic evidence, to the extent necessary, the court resolves any remaining ambiguities in favor of the grantee.[137]

The Executed Deed is not internally consistent. The legal description begins by identifying the subject properties as

> lying on the east side of Federal Street, being bounded on the north in part by lands now or formerly of William and Carolyn Pettyjohn, in part by lands now or formerly of Stansky Venture, LLC and in part by lands now or formerly of B. Reed Family L.P., on the east in part by lands now or formerly of Blake and Donna Reed and in part by other lands now or formerly of Blake and Donna Reed, on the south by lands now or formerly of the State of Delaware, and on the west by Federal Street, as shown on a recent survey entitled "Lands of Point Management, LLC and Blake & Donna Reed – Lot Line Adjustment and Parcel Consolidation Plan."[138]

As is clear from the referenced consolidation plan,[139] these boundaries exclude the Residential Property. The Executed Deed does not describe any additional

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[136] *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997)).

[137] *See Reserves Dev.*, 2008 WL 3522433, at *6 ("If . . . an ambiguity remains after an inquiry into the intent of the parties to a deed it must be resolved in favor of the grantee."); *see also Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977) ("Where uncertainties appear in the grant, they must be resolved in favor of the grantee as long as such a construction does not violate any apparent intention of the parties to the transaction."); *Maciey v. Woods*, 154 A.2d 901, 904 (Del. 1959) ("It is true that ambiguities in a grant are to be resolved in favor of the grantees, but we think this rule of construction must yield to the paramount rule that the intention of the parties is to be given effect if it can be ascertained and if, as ascertained, it does not contravene the clear meaning of the words of the grant. No other rule can be accepted because the fundamental function of rules of construction is to determine the intention of the parties.").

[138] Executed Deed at 1-2.

[139] *See* Lot Line Adjustment and Parcel Consolidation Plan, POB Ex. 5.

boundaries. Moreover, the subsequent metes and bounds description encloses a contiguous parcel that clearly excludes the Residential Property.[140]

Some elements of the Executed Deed appear to contradict these clear exclusions of the Residential Property. The top-right corner of page one of the Executed Deed lists tax parcel 52.03.[141] Further, the legal description in the Executed Deed contains a "BEING" clause that identifies the to-be-conveyed properties as the same lands conveyed from Pintail to Point Management on July 31, 2006,[142] which lands, as discussed above, included the Residential Property. The exclusion of the Residential Property from the metes and bounds likely controls over the listing of parcel number 52.03 and the arguable inclusion of the Residential Property through the "BEING" clause. This Court so found, impliedly, in *Mehaffey v. Raley*, which involved a deed with inconsistencies identical to those here.[143] To the extent the description in the Executed Deed is ambiguous, I must consider extrinsic evidence in determining the parties' intent. Either approach yields the same result: the Executed Deed does not convey the Residential Property.

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[140] *See* Executed Deed at 2; POB Ex. 22.
[141] *See* Executed Deed at 1.
[142] *See id.* at 2.
[143] *See generally Mehaffey v. Raley*, 2002 WL 31112196 (Del. Ch. Aug. 29, 2001) (declining on cross motions for summary judgment to find a resulting trust in favor of the buyer where a prior deed from seller to buyer described in metes and bounds only one parcel but identified two parcels by tax parcel number and derivation clause, and a later deed from seller to a third party conveyed the parcel omitted from the prior deed's metes and bounds).

The evidence of record overwhelmingly reflects that Point Management did not intend to sell and MacLaren did not intend to purchase the Residential Property. To begin with, the interactions between Point Management, MacLaren, and CSG, the real estate agency responsible for selling the Office Park, do not evidence an intent to convey the Residential Property. The Listing Agreement did not mention the Residential Property, and affidavits submitted by CSG agents Bill Lucks and Rosemary Aslin confirm that they had no knowledge of the Residential Property, that they did not list the Residential Property, and that the transaction in which they served as dual agents for Point Management and MacLaren was for the Office Park only. In fact, Point Management listed the Residential Property separately with RE/MAX. Moreover, Aslin showed only the Office Park to the Pattersons, who did not actually visit the Residential Property until January 2009, almost a year after settlement. Dr. Patterson has additionally confirmed that he was not aware of the Residential Property when Aslin showed him the Office Park in August 2007. Finally, the introduction of the Residential Property into the transaction occurred not by an act of either of the parties, but by a mistaken reference in the Offer drafted by CSG to the deed conveying the Pintail Properties.

The interactions between the parties and their attorneys up to and beyond the signing of the transaction also dispel any notion that the Residential Property was meant to be included. Colby Cox told his attorneys from Young Conaway that he

intended to convey the Office Park; he made no mention of the Residential Property. Rather, Young Conaway clearly added the Residential Property by mistake, committing the same error made by CSG in using the Pintail Properties as a reference during the drafting process. Dr. Patterson admits that when he signed the Sale Agreement, drafted by Young Conaway, he was not aware of the Residential Property, had never visited it, and thought he was buying the property shown to him by Rosemary Aslin—the Office Park.

Evidence from the due diligence period and the closing of the transaction further weighs against the inclusion of the Residential Property. Dr. Patterson had the Office Park inspected but did not do the same for the Residential Property. Nor did Dr. Patterson inform his lender, Artisans' Bank, of the Residential Property. Post-signing, Point Management continued to act consistent with its belief that it owned the Residential Property, working with RE/MAX to sell or lease the property and eventually renting it out to the LoBiandos in a one-year agreement that included a right of first refusal in the event of a sale. Further, in the only instance in which Cox saw the *address* of the Residential Property, as opposed to its tax parcel number, in the context of the Point Management-MacLaren transaction, Cox immediately expressed his confusion to Young Conaway and informed his attorneys that Point Management was not selling the Residential Property. Unfortunately, in response Young Conaway assured Cox that the listing

of utility charges for the Residential Property in the HUD documents was probably only a result of Milton collecting payments from him due to his common ownership of the Office Park.

Events surrounding the closing also belie Dr. Patterson's purported intent to purchase the Residential Property. The Assignment and Assumption of Leases circulated at closing, though transferring the leases of the Office Park tenants, made no mention of the Residential Property tenants.

After closing in March 2008, Point Management continued to act as if it had not conveyed the Residential Property, as it worked with the LoBiandos to establish a back rent payment plan. Point Management's ownership of the Residential Property was apparently unquestioned until January 2009, when Dr. Patterson received a utility bill for that property. According to Hal Dukes, Patterson became upset because he had no intention of purchasing a residential property, had no insurance on the Residential Property, and did not know who owned the property or who occupied it. Dukes testified that Patterson wanted the problem rectified immediately. In one email exchange with Jane Patchell, in which Patchell explicitly described a residential property noncontiguous with the Office Park, Patterson indicated that MacLaren did not own a Chestnut Street property.

Dr. Patterson soon changed his tune, however. Once informed by his Tunnell & Raysor attorneys that the Residential Property was in his name,

Patterson seemingly convinced himself that he was entitled to retain the property. Dr. Patterson's sense of entitlement was not mollified by the advice of Hal Dukes,[144] who advised not only Patterson, but Patterson's replacement counsel and prior and current counsel for Point Management, that Patterson had never intended to purchase the Residential Property, that the property's inclusion was a mistake, and that Patterson had no right to retain the property.[145]

The only evidence presented by MacLaren in support of Dr. Patterson's purported intent to purchase the Residential Property is Dr. Patterson's deposition testimony. Yet over the course of multiple depositions, not once did Dr. Patterson affirmatively represent that he intended to purchase or expected to receive the Residential Property as part of the transaction. When asked this most basic and central question, i.e., what he intended to purchase, Dr. Patterson supplied circuitous half-answers. For example, when asked what his expectation was as to what he was purchasing for $2 million, Patterson responded that he expected to

[144] The parties agree that the attorney-client privilege was waived through the closing and recording of the deed. I found, for reasons set forth in my February 16, 2012, oral ruling, that subsequent statements by and to MacLaren's counsel were also admissible. Even without post-closing extrinsic evidence, however, the record would be clear that no genuine issue of material fact remains, and that the Executed Deed does not, and was not intended to, convey the Residential Property.

[145] Apparently, Dukes was not always of the impression that MacLaren did not own the Residential Property. Shortly after the confusion with the ownership of the Residential Property arose, Dukes advised Patterson, "I think that your friend in Colodado [sic] [Colby Cox] owes you and Kristin some money. You can address that issue when you figure out the amount." MOB Ex. 44, at TR RES 1600.

purchase "[w]hat was described in the contract."[146] Asked to clarify whether he had any expectations in entering the real estate transaction, Patterson responded, "I do, but I don't know the details."[147] Asked again what he thought he was buying, Patterson responded, "What I thought I was buying was the Office Park and all it entailed."[148] When asked whether this meant he thought he was buying what he had been shown by Rosemary Aslin of CSG, Patterson indicated, "I thought so. But then again, I don't know the details."[149] Even when confronted with the absurdity of his own responses, Patterson managed to circle back to a non-statement:

> Q. [Karsnitz] All right. Let me ask it this way, I'm going to ask a hypothetical question: If the contract, by mistake, if what was presented to you by Rosemary, by mistake, only included half of the Office Park, then you would not have thought that that was what you were purchasing, correct?
>
> A. [Patterson] Well, my lawyer would have told me that.
>
> Q. Right, and you would have said that's not what you were purchasing; you were purchasing the whole thing, correct?
>
> A. Well, there might be. But the thing about it, I don't know the details of it until my lawyer tells me what it is.[150]

Patterson even refused to acknowledge whether he knew or did not know what he was purchasing from Point Management:

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[146] Jonathan Patterson Dep. 31:2-9 (Jan. 23, 2011), PRB Ex. A [hereinafter "Patterson Jan. Dep. ___"].
[147] *Id.* at 32:3-11.
[148] *Id.* at 32:12-16. Later in his deposition, Patterson glossed this description, explaining that he thought he was buying "[t]he Federal Street Office Park and all it entails as described in your [Young Conaway's] contract." *Id.* at 34:18-23.
[149] *Id.* at 32:17-20.
[150] *Id.* at 34:24-35:12.

> Q. [Karsnitz] . . . Are you telling us here tonight that you didn't know what you were purchasing when you committed to pay two million dollars when you signed Exhibit 2?
>
> . . .
>
> [A. Patterson] That would be incorrect.
>
> . . .
>
> Q. All right, so you did know what you were purchasing?
>
> A. That would not be correct either.
>
> Q. Well, what are the alternatives other than you did know, or you did not know what you were purchasing when you committed to pay two million dollars?
>
> A. I think the answer is obvious. I was purchasing what was described in the contract, okay? You don't know the details of something until your lawyer tells you what it is. I cannot read metes and bounds. Is the railroad track included? Is it not? Is this over there included? Is it not? We have to wait for the lawyer to tell us what's there.[151]

Dr. Patterson's testimony can essentially be summarized as, "I intended to purchase whatever was in the contract, though I had no idea what was in the contract." In other words, Patterson argues that MacLaren intended to purchase whatever it ultimately purchased, grab-bag fashion. This circular reasoning does not controvert the ocean of evidence indicating that neither Point Management nor MacLaren intended to include the Residential Property. Tellingly, not once during his multiple depositions did Dr. Patterson testify in a straightforward manner that he intended to purchase the Residential Property. No amount of circuitous prevarication by Dr. Patterson can conceal the fact that, despite numerous

[151] *Id.* at 35:17-36:13.

opportunities, he never asserted under oath the very position he now argues before this Court.

The Plaintiff offered in its briefing an analogy which I find apt.[152] A department store customer undoubtedly intends to purchase the items that are placed in his bag at checkout, as he presumes they are the items he selected and deposited in his cart while shopping. When the customer gets home, however, if upon removing his items from the bag he finds therein a $400 wristwatch that he did not view in the store, did not place in his cart, did not pay for at the register, and did not have bagged by the cashier, he is not entitled to keep the wristwatch on account of his intent to purchase the items placed into his bag at checkout. Rather, if he is a responsible citizen, he returns the watch. Dr. Patterson did not "return the watch." Instead, when Dr. Patterson realized he had been conveyed a parcel that he had never visited, heard of, discussed, or paid for, rather than sign the corrective deed prepared by his then-attorney, Patterson maneuvered to retain the property.

In his testimony since, Dr. Patterson has artfully avoided answering whether MacLaren actually intended to purchase the Residential Property from Point Management, a straightforward issue that has somehow generated countless hours of legal work and innumerable pages of legal briefing and document production. Though these efforts may have squandered attorney and judicial resources, they

[152] Pl.'s Answering Br. Resp. MacLaren's Cross-Mot. Summ. J. at 20.

have nonetheless resulted in a staggering amount of evidence confirming that the parties did not intend to include the Residential Property in the transaction.

The only evidence suggesting that Patterson even knew of the Residential Property before closing is his contention that Hal Dukes informed him of that property's existence during the diligence period.[153] While this issue is contested, I assume, as required at the summary judgment stage, that Dr. Patterson has testified truthfully and accurately that this pre-closing conversation occurred and that Dukes informed him that the transaction included "a little house up the street." As Patterson also testified, however, Dukes told him that the Residential Property "probably has something to do with parking," and Patterson did not discuss further the inclusion of a noncontiguous residential property in the sale. At most, Patterson's and Dukes's testimony indicates that the two had a conversation about the Residential Property, but that Dukes characterized the property's inclusion as an error or for parking purposes. Neither Patterson's nor Dukes's testimony

[153] MacLaren also argues that title searches and a survey performed during the due diligence period by Tunnell & Raysor caused Tunnell & Raysor to have pre-closing knowledge of the Residential Property, and that this knowledge should be imputed to MacLaren. *See* MOB Ex. 39, at TR-RES 0126 (survey maps). Karen Miller testified that she forwarded to Patterson a survey map showing the Residential Property. Miller Dep. 38:12-39:14. Patterson does not argue that, upon receiving this map, he developed an intent to purchase the Residential Property. In fact, the record is silent as to whether Patterson reviewed, or even received, the map. Instead, MacLaren argues that because Tunnell & Raysor knew of the noncontiguous Residential Property due to the post-closing title searches and survey, Tunnell & Raysor's knowledge is imputed to MacLaren. Imputed or not, knowledge of the existence of the Residential Property does not equate to an intent to purchase it. Intent, not knowledge, is the governing inquiry when interpreting an ambiguous deed. While knowledge may support an *inference* of intent, here, the evidence to the contrary is insurmountable.

suggests that Patterson came to expect during the diligence period that he would be receiving, in its entirety, a residential property noncontiguous with the Office Park.

MacLaren argues that (1) Patterson's purported pre-closing awareness of the Residential property and (2) Patterson's testimony that he intended to purchase "what was described in the contract" support MacLaren's argument that it intended to purchase the Residential Property. In ruling on a motion for summary judgment, this Court must determine whether a genuine issue of material fact exists requiring a trial.[154] A disputed fact does not alone give rise to a *genuine* or *material* factual dispute.[155] Rather, the question is whether any rational fact-finder, upon reviewing the record before the court, could disagree as to the issue of material fact.[156] If not,

[154] Ch. Ct. R. 56(c).

[155] *See* Ch. Ct. R. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 ("It is not enough that the nonmoving party put forward a mere scintilla of evidence; there must be enough evidence that a rational finder of fact could find some material fact that would favor the nonmoving party in a determinative way, drawing all inferences in favor of the nonmoving party.").

[156] *See Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) ("The question is whether any rational finder of fact could find, on the record presented to the Court of Chancery on summary judgment viewed in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied. . . . If a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate."); *id* at 1151 ("Stated differently, the judge as gate-keeper merely considers whether the finder of fact could come to a rational conclusion either way . . . .").

and the facts establish the moving party's right to relief, this Court may grant summary judgment in that party's favor.[157]

Patterson's self-interested, *ex post* averments that he intended to purchase "whatever was in the contract" do not directly contradict the Plaintiff's assertion that the parties did not intend to include the Residential Property in the transaction, an assertion verified by the record evidence. Further, MacLaren's arguments find no support from Dr. Patterson's testimony regarding his pre-closing conversation with Hal Dukes. Even if that conversation occurred as described by Patterson, no rational fact-finder could find, in light of the overwhelming evidence to the contrary, that, because of Dukes's comments, Patterson expected to receive a noncontiguous residential property as part of the transaction. Thus, no *genuine* issue of material fact requiring a trial exists regarding the effect of the Executed Deed.

MacLaren has not argued in the alternative that the Executed Deed should be reformed to include the Residential Property. A party seeking reformation must prove by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.[158] Based on the

[157] *See, e.g.*, *Geier v. Meade*, 2004 WL 243033, at *4-9 (Del. Ch. Jan. 30, 2004) (granting summary judgment where the movant provided convincing evidence and the adverse party failed to present contrary evidence beyond a conclusory denial).
[158] *Cerberus*, 794 A.2d at 1151-52.

discussion above, it should be clear that the record strongly indicates that no basis for such a reformation exists.

C. The Remedy

The operative deed here, the Executed Deed, has not been recorded. Moreover, the Executed Deed contains inconsistencies that I have resolved in this Opinion, but which have the potential for confusion if that deed is recorded. The parties shall execute a corrective deed that corrects the parcels listed on page one of the Executed Deed to match the metes and bounds in that document (i.e., the reference to tax parcel 52.03 on page one shall be removed). Additionally, the "BEING" clause on page two of the Executed Deed shall be corrected to read "BEING part of the lands conveyed to Point Management, LLC from Pintail Management, LLC . . . ." Any additional corrections necessary to remove all reference to the Residential Property from the Executed Deed shall also be made. This corrective deed shall be recorded in substitution for the Recorded Deed, *nunc pro tunc*. The parties shall provide me a form of order to be recorded with the corrective deed, consistent with this Opinion.

D. Young Conaway's and Tunnell & Raysor's Motions for Summary Judgment

The findings in this Opinion will necessarily affect the outstanding motions of Young Conaway and Tunnell & Raysor. The parties should supplement or revise their arguments accordingly. I will schedule a conference with all of the

parties to discuss how to proceed on the remaining claims and motions. The parties should confer in advance and determine what supplementation of the existing briefing is necessary.

IV. CONCLUSION

For the reasons above, MacLaren's Motion for Partial Summary Judgment is denied. Because I have found that the Recorded Deed is a nullity, and that the Executed Deed does not convey the Residential Property, Point Management's Motion for Summary Judgment seeking reformation of the deed is moot. A corrective deed shall be filed consistent with this Opinion, however, removing ambiguities from the Executed Deed. The parties shall provide a form of order consistent with this Opinion.