850.10 DEEDS—ACTION TO SET ASIDE[1]—MUTUAL MISTAKE OF FACT.

The (*state number*) issue reads:

"Did (*name person*) [execute and deliver] [accept] (*identify deed*) under a mutual mistake of fact?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by clear, strong and convincing evidence,[2] three things:

First, that (*name person*) [executed and delivered] [accepted] (*identify deed*) while mistakenly [believing] [assuming] that (*state past or existing fact[3] comprising the mistaken belief or assumption*).

Second, that but for (*name person*'s) mistaken [belief] [assumption], (*name person*) would not have [executed and delivered] [accepted] (*identify deed*).[4]

And Third, [defendant] [defendant's agent][5]

[had the same mistaken [belief] [assumption] as (*name person*)][6]

[knew or had reason to know that (*name person*) [executed and delivered] [accepted] the deed based upon a mistaken [belief] [assumption]] [caused (*name person*'s) mistaken [belief] [assumption]].[7]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by clear, strong and convincing evidence that (*name person*) [executed and delivered] [accepted] (*identify deed*) under a mutual mistake of fact, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, it would be your duty to answer this issue "No" in favor of the defendant.

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1. In these types of cases, a decree setting aside the deed is not the only remedy. In many instances, the Court will reform the deed so that it conforms to the parties' original

mutual intent. *See Janice D. Willis Revocable Tr. v. Willis*, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (recognizing mutual mistake of the parties as one of the three circumstances in which reformation is an available remedy); *Maxwell v. Wayne Nat'l Bank*, 175 N.C. 180, 95 S.E. 147 (1918).

2. "The evidence presented to prove mutual mistake must be clear, cogent, and convincing, and the question of reformation on that basis is a matter to be determined by the fact finder." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003). *See* NCPJI 101.11 ("Clear, Strong and Convincing Evidence"). "Although this Court will readily grant equitable relief in the nature of reformation or rescission on grounds of mutual mistake when the circumstances require such relief, we jealously guard the stability of real estate transactions and require clear and convincing proof to support the granting of this equitable relief in cases involving executed conveyances of land." *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 139, 217 S.E.2d 551, 562 (1975). *See also Willis v. Willis*, 216 N.C. App. 1, 3–4, 714 S.E.2d 857, 859 (2011) ("[T]here is 'a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety.'") (quoting *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981)); *Inland Harbor Homeowners Ass'n v. St. Joseph's Marina, LLC*, 219 N.C. App. 348, 353-54, 724 S.E.2d 92, 97 (2012) (rejecting the plaintiff's request for reformation based on mutual mistake of fact when the plaintiff "failed to offer clear, cogent, and convincing evidence of [the defendant's] mistake").

3. The mistake must concern a past or existing fact. A mistaken belief or assumption as to a future performance or predicted future event does not qualify. *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 62, 344 S.E.2d 68, 72 (1986).

4. "[T]he mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement…and must be such that it animates and controls the conduct of the parties." *MacKay v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967).

5. "A unilateral mistake, unaccompanied by fraud, imposition, undue influence or like oppressive circumstances, is not sufficient to avoid a contract or conveyance." *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 56 (1975); *see also Tarlton v. Keith,* 250 N.C. 298, 305, 108 S.E.2d 621, *625 (1959); Howell v. Waters,* 82 N.C. App. 481, 487, 347 S.E.2d 65, 69 (1986). A mistake of law, even if mutual, will not justify the setting aside of a deed. *Roberson v. Penland*, 260 N.C. 502, 505, 133 S.E.2d 206, 208 (1963); *Gerdes v. Shew*, 4 N.C. App. 144, 151-152, 166 S.E.2d 519, 525 (1969).

6. If a party's agent knows or has reason to know of the mistake, *Howell v. Waters,* 82 N.C. App. 481, 488, 347 S.E.2d 65, 69 (1986), or causes the mistake, the agent's state of mind or conduct is imputed to its principal, *MacKay v. McIntosh*, 270 N.C. 69, 72–3, 153 S.E.2d 800, 803 (1967).

7. *Howell v. Waters,* 82 N.C. App. 481, 488, 347 S.E.2d 65, 69 (1986).