

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case No. 2018-001969

RECEIVED
NOV 01 2019
SC Court of Appeals

Lady Beaufort, LLC & Tideland Realty, Inc., *Plaintiffs and Respondents/Appellants*,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender,
William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co.,
LLC, Defendants,

AND

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

*Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the
Appellants/Respondents.*

FINAL BRIEF OF RESPONDENTS/APPELLANTS AS RESPONDENTS

Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR RESPONDENTS/APPELLANTS

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
ARGUMENT	3
I. Contentions Not Preserved for Appeal (Appellants' Arguments II, IV, VI)	3
A. Sufficiency of the Evidence	4
B. Fender's Individual Liability	5
II. Facially Unmeritorious Arguments	5
A. A "New Trial" Regarding the Reasonableness of Attorneys' Fees	5
B. Good Faith?	6
C. Tideland's Damages	7
III. The Evidence Supports the Master's Findings	8
A. The Master's Finding of Appellant Hird Island's Breach of Contract Was Neither Unsupported Nor Error	8
<i>i. The Master Properly Found That the Title Issues Constituted Unsatisfied Contingencies</i>	<i>10</i>
B. The Master Properly Found Mr. Fender Individually Liable	11
C. The Record Supports the Master's Finding that Mr. Fender's and Hird Island's Conduct Was Sufficient to Sustain the Claim of Negligent Misrepresentation and Breach of Contract Accompanied by a Fraudulent Act	13
<i>i. Negligent Misrepresentation</i>	<i>13</i>
<i>ii. Breach of Contract Accompanied by a Fraudulent Act</i>	<i>13</i>
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Desmear Sys. Inc. v. Vines</i> , 305 Ga. App. 730, 700 S.E.2d 711 (2010)	10
<i>Gilbert v. Mid-South Mach. Co.</i> , 267 S.C. 211, 227 S.E.2d 189 (1976)	11
<i>Hardaway Concrete Co. v. Hall Contr. Corp.</i> , 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007)....	4, 10
<i>In re Michael H.</i> , 360 S.C. 540, 602 S.E.2d 729 (2004).....	4, 5
<i>Johnson v. Sonoco Prods. Co.</i> , 381 S.C. 172, 672 S.E.2d 567 (2009)	6
<i>Koutsogiannis v. BB & T</i> , 365 S.C. 145, 616 S.E.2d 425 (S.C. 2005)	7
<i>Lawlor v. Scheper</i> , 232 S.C. 94, 101 S.E.2d 269 (1957)	11
<i>Sierra v. Skelton</i> , 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1992)	14
<i>Sullivan v. Calhoun</i> , 117 S.C. 137, 108 S.E. 189 (1921).....	13, 14
<i>Woodside v. Woodside</i> , 290 S.C. 366, 350 S.E.2d 407 (Ct. App. 1986)	12

Statutes

S.C. Code Ann. § 12-54-124.....	8
---------------------------------	---

STATEMENT OF ISSUES ON APPEAL

1. Whether Appellants' challenges to the sufficiency of the evidence and Mr. Fender's personal liability are preserved.
2. Whether the Master's findings of liability are supported by the evidence and the law.

STATEMENT OF THE CASE

Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland"), Respondents/Appellants (hereafter "Respondents"), filed suit against Inverness, LLC ("Inverness") and Hird Island Investments, Inc. ("Hird") on January 7, 2014, bringing claims for breach of contract and fraudulent conveyance relating to a failed real estate closing in which Respondents were the buyer and broker respectively. (Compl., **R. p. 039**). Respondents settled with Inverness in May 2014 and dismissed Inverness from the litigation. The complaint was amended to name Sherwood N. Fender ("Fender"), the principal of Hird, as a defendant (hereafter, Hird and Fender will be collectively referred to as "Appellants"). (2nd Amd. Compl., **R. p. 060**). The Second Amended Complaint brought a claim of breach of contract against Hird Island, and breach of contract accompanied by a fraudulent act and negligent misrepresentation against Hird Island and Sherwood Fender.

A bench trial was held on March 1, 2017; on May 11, 2017, judgment was entered in favor of Respondent Lady Beaufort for \$33,654.15 in actual damages and prejudgment interest, in favor of Tideland Realty for \$17,500.17 in actual damages and prejudgment interest, and for \$53,924.41 in attorneys' fees and costs. (Order, May 11, 2017, **R. p. 018**). Appellants moved for reconsideration on May 19, 2017 (Mot. to Reconsider, **R. p. 070**), and the Court conducted a hearing on that motion on November 13, 2017. On February 14, 2018, Appellants' motion was denied as to reconsideration of Appellants' liability and Respondents' actual damages, but the

court allowed additional evidence as to the award of attorneys' fees (Order, Feb. 14, 2018, **R. p. 013**). Accordingly, a second hearing was held July 23, 2018.

On October 26, 2018, the trial court entered an order reducing Respondents' attorneys' fee award from \$53,924.41 to \$17,857.00. (Order, Oct. 26, 2018, **R. p. 001**). On November 5, 2018, Appellants filed a notice of appeal of both the underlying judgment and the amended judgment. (Notice of Appeal, **R. p. 037**). On November 15, 2018, Respondents cross-appealed with regard to the amended judgment's reduction of attorneys' fees. (Notice of Cross-Appeal, **R. p. 035**).

STATEMENT OF THE FACTS

On August 19, 2013, Respondent Lady Beaufort entered into a contract with Appellants for the purchase of a 2.99-acre parcel of real estate located in Beaufort County, with Respondent Tideland Realty as the broker. (Contract, **R. p. 076**). The contract provided a due diligence period ending on October 1, 2013, with closing to occur within 7 days of that time. The closing date would be extended by five business days if there were any unsatisfied contingencies. Appellants were required to convey title to Respondents free and clear of any liens or encumbrances.

Following completion of the due diligence period, closing was scheduled for October 7, 2013. However, a tax lien was discovered shortly before closing that had been filed after Respondents conducted their title search but before closing. In addition, by statute, because the property being conveyed constituted more than 50% of the assets of the entity selling it, any taxes owed would constitute a lien against the assets of the buyer unless a certificate of tax compliance was provided to the buyer. This did not occur. As the seller was a dissolved entity, a question arose as to how title could be transferred. These issues remained outstanding on the

scheduled closing date and prevented the issuance of title insurance, and so the transaction did not close on the 7th. The parties' attorneys continued thereafter to work together to resolve these issues.

On October 10, 2013, while the parties' counsel still attempted to close, Appellants hired new counsel and sold the property to a third party, Inverness. The transaction with Inverness included an additional property, meaning that Mr. Fender received an additional \$60,000, which was important to Mr. Fender as he had pending tax debts. Upon learning of the sale to Inverness, Respondents filed a *lis pendens* on the property and a suit to undo the transaction between Appellants and Inverness. On May 30, 2014, Respondents were able settle with and acquire the subject property from Inverness for \$25,000.00 more than the price agreed with Appellants.

ARGUMENT

Appellants contentions primarily deal with factual determinations by the Master, which are entitled to deference by this Court. *See infra*. However, there are other matters to resolve preliminarily.

I. Contentions Not Preserved for Appeal (Appellants' Arguments II, IV, VI)

Numerous contentions raised in this appeal were not preserved by Appellants at the trial court level. Appellants filed no pre-trial brief. As the transcript reveals, Appellants made no opening statement containing argument, no motion for nonsuit challenging the sufficiency of evidence, and no closing statement at trial containing argument. And, of the issues on appeal, Appellants raised only the following in their motion to reconsider the judgment: the propriety of (i) finding for Respondents with regard to the breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act causes of action, (ii) awarding damages

to Tideland Realty, and (iii) awarding \$53,000 in attorneys' fees to Respondents.¹ As there was no legal challenge to Mr. Fender's individual liability, and no timely challenge to the reasonableness of Respondents' attorneys' fees, these issues are not preserved.

A. Sufficiency of the Evidence

"On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings." *Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 221, 647 S.E.2d 488, 490 (Ct. App. 2007). "The appellate court must determine whether any evidence reasonably supports the factual findings of the trial court." *Id.*

As an initial matter, several of Appellants' arguments include the contention that there was no evidence to support certain findings. *See* Appellants' Brief at iii, Questions III, IV, and V. However, at the end of Plaintiffs' evidence at trial, Appellants made no motion under Rule 41(b), SCRPC to argue that Plaintiffs had not demonstrated a right to relief under the facts and the law. Nor was sufficiency of the evidence addressed in Appellants' motion for reconsideration.

It is axiomatic that "[a]n issue may not be raised for the first time on appeal," and that "[i]n order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). The failure to raise the issue of the sufficiency of the evidence to the trial court means the question is not preserved as to any cause of action.²

¹ This issue of attorneys' fees had not been raised prior to the motion for reconsideration. Appellants' waiver of this right to contest the reasonableness of fees and the lack of issue preservation regarding attorneys' fees is more fully briefed in Respondents' cross appeal.

² Were the issue preserved, it would nonetheless fail. *See infra* Part III.

B. Fender's Individual Liability

Appellants argue that the Master erred in holding Appellant Fender individually liable for negligent misrepresentation and breach of contract accompanied by a negligent act. *E.g.*, Appellants' Brief at iii, Questions IV, V, and VI. This question was not raised by pre-trial brief, at trial, nor in a motion for reconsideration. This argument is likewise not preserved for appeal. *In re Michael H.*, 360 S.C. at 546, 602 S.E.2d at 732.

II. Facially Unmeritorious Arguments

Appellants make arguments that facially have no merit: (A) that the Master erred in granting a "new trial" regarding the attorneys' fees awarded to Respondents, (B) that Mr. Fender's continued negotiations with Lady Beaufort after October 7 were not misrepresentations, but rather evidence of good faith, and (C) and that Appellants are not liable to Tideland.

A. A "New Trial" Regarding the Reasonableness of Attorneys' Fees

Appellants contend that, in conducting a post-trial evidentiary hearing to determine the reasonableness of the attorneys' fees claimed by Respondents, the Master had improperly "grant[ed] a new trial." Appellants' Brief at 20.

While this issue is not preserved,³ this is not the argument's biggest flaw. If the evidentiary hearing constituted a separate, new trial, that would mean that the order amending the original May 11, 2017 order constituted a new, separate judgment. That, in turn, would mean that Appellants failed to timely appeal the 2017 judgment, and this appeal must be dismissed.

The master did not grant a "new trial." He reopened the record and conducted an evidentiary hearing. (Order, Feb. 14, 2018 at 3, **R. p. 015**) ("the appropriate remedy is to reopen

³ As more fully briefed in Respondents' cross-appeal.

the record so as to allow the parties to submit evidence of, or in opposition to, the claimed attorney's fees").

Further, attorneys' fees are provided for in the contract for a prevailing party in any action stemming from a default of the other party. (Contract at 6, **R. p. 081**). Appellants' trial counsel⁴ stipulated to the reasonableness of the fees; when separate counsel for Appellants sought to contest the fees on reconsideration, the trial court granted an evidentiary hearing.

As the amount of the attorneys' fees was *not* contested at trial,⁵ in conducting the evidentiary hearing, the Master erred in that he entertained a post-trial argument regarding an uncontested issue at trial raised for the first time in a motion to reconsider. No additional evidence was required to sustain the award of attorneys' fees as their reasonableness was conceded at trial.

Appellants' argument that the hearing constituted an improper "new trial" is without merit.

B. Good Faith?

Curiously, Appellants contend that the continued negotiation between Hird Island⁶ and Lady Beaufort after October 7 is "evidence of Mr. Fender's *good faith*." Appellants' Brief at 28.

⁴ It is worth noting, for clarity, the sequence of counsel for Appellants. In the contract with Respondents to buy the property, Appellants were represented by Derek Gilbert. In the transaction with Inverness, Appellants' counsel was Alysoun Eversole. Trial counsel was William Bowen, and Mr. Kuhn, became involved to argue the motion for reconsideration and handle the appeal.

⁵ See Nov. 13, 2017 Hearing Tr. at 9:6-18, **Supp. R. p. 009** (as to attorneys' fees, Appellants' trial counsel, Mr. Bowen, acknowledged "I didn't raise that issue."). Even if raised in Appellants' motion to reconsider, this is not sufficient to preserve the issue. See *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

⁶ "In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their

While continued negotiation alone could constitute good faith in some circumstances, here it is coupled with the fact that Mr. Fender was simultaneously arranging to sell the property to a third party in a transaction that would return greater proceeds with which to resolve his outstanding tax issues. Order at ¶¶ 20, 22 (**R. p. 020**); Trial Testimony of Mr. Fender (**R. pp. 159-165**). Mr. Fender did not even inform his own attorney, Derek Gilbert, that he was planning to sell the property to someone else. Order at ¶21 (**R. p. 020**); Trial Tr., Gilbert Deposition Designations, (**R. pp.156-57**). In this context, his continued negotiation with Lady Beaufort was *not* in good faith. It benefitted Mr. Fender as it kept Respondents in the dark and denied them the opportunity to enforce their contract and file a *lis pendens* preventing the sale to Inverness. Appellants' argument that Mr. Fender's actions evidence good faith is without merit.

C. Tideland's Damages

As discussed, the argument regarding Mr. Fender's individual liability to Tideland is not preserved for appeal. *See supra* Part I.B. As to Hird Island, this is one of only a handful of arguments properly preserved by Appellants at trial. Trial Tr. at 13:9-14:24 (**R. pp. 097-098**). (contending Tideland's entitlement to damages would be contingent upon a finding that Hird Island was liable to Lady Beaufort). However, it is nonetheless without merit.

Section 33 of the contract states, "Seller to pay a commission 5% to Tideland Realty Inc. at closing." Contract at 7 (**R. p. 082**). The Master found that, as a direct result of Appellants' conduct, the deal failed to close, Order at ¶ 23 (**R. p. 020**), and Tideland was deprived of the commission it was entitled to under the contract. Order at 8 (**R. p. 025**); Trial Tr. (**R. p. 162**);

attorneys' authority." *Koutsogiannis v. BB & T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (S.C. 2005)

Plaintiffs' Trial Exhibit 1 (**R. p. 275** at ¶ 31). The award to Tideland was proper as a matter of fact and law.

III. The Evidence Supports the Master's Findings

Leaving aside the above threshold issues, the Master's findings in his May 11, 2017 Order are supported by evidence and should not be overturned.

A. The Master's Finding of Appellant Hird Island's Breach of Contract Was Neither Unsupported Nor Error

The Master found that the contract between Hird Island and Lady Beaufort remained in force through October 15, 2013 due to unsatisfied contingencies at closing, such that Hird Island breached the contract when it sold the subject property to a third party on October 10, 2013. Order at ¶¶ 5, 9, 13, 20 (**R. pp. 018-020**). This factual finding is based upon substantial evidence; it should not be disturbed.

Based on the evidence adduced at trial, the Master found that questions regarding the title prevented the closing on October 7, 2013.⁷ The issues of title were (i) a tax lien never disclosed by Appellants,⁸ (ii) a lack of a certificate of tax compliance⁹ which, under the circumstances,

⁷ Order at ¶ 15 (citing Testimony of Mr. Fender, Mr. Kerr, and Mr. Rogers) (**R. p. 019-023**).

⁸ At trial, Mr. Fender testified that he had not disclosed the lien to Lady Beaufort "because I didn't know about it either." Trial Tr. 155:16—20 (**R. p. 239**).

⁹ Appellants contend that it was incumbent upon the buyer, and not the seller, to obtain a certificate of tax compliance from the State and that the absence of such a certificate neither prevented closing or prevented passage of marketable title. Appellants' Brief at 14. This does not appear to comport with the express language of the statute, which states: "This section does not apply if the purchaser *receives* a Certificate of Compliance from the Department *stating that all tax returns have been filed and all taxes generated by the business have been filed.*" S.C. Code Ann. § 12-54-124 (emphases added). In any event, any ability of Lady Beaufort to obtain the certificate would depend on Appellants having filed all tax returns and paid all taxes, and it would not absolve Appellants of their obligation to provide title free and clear of any liens or encumbrances at closing. Appellants could not demonstrate this was the case at closing and would not take any of steps suggested by Lady Beaufort to resolve the issues.

meant there may be a lien against Lady Beaufort after closing, and (iii) a question about whether an administratively dissolved corporation was a valid entity for purposes of closing a real estate transaction.¹⁰ Appellants' closing attorney testified in his deposition that it was customary in South Carolina for sellers to provide a certificate of compliance "if the buyer wants it;"¹¹ nonetheless, Appellants would not agree to provide one or to provide adequate assurances in its absence.¹² Accordingly, the transaction did not close on October 7.¹³ The title issues prevented the title company from issuing the title insurance policy; this extended the contract end date until October 15, 2013.¹⁴

Hird Island never called a default on Lady Beaufort regarding the failed closing on October 7, nor did it state or suggest that the contract was terminated before selling the property to Inverness.¹⁵ Instead, counsel for Hird Island remained in negotiations with counsel for Lady Beaufort through October 10, working to resolve the issues so the deal could close.¹⁶ These

¹⁰ Order at ¶ 8–13 (**R. pp. 019**); Plaintiffs' Trial Exhibit 3 (**R. p. 281**); Testimony of Rogers Trial Tr. 85:21–86:11; 88:9–10; 90:16–22; 97:7–13 (**R. pp. 169–70, 172, 174, and 181**); Gilbert Deposition Designations, Trial Tr. 71:19–72:1 (**R. p. 155–56**); Plaintiffs' Trial Exhibit 18 (**R. p. 339**).

¹¹ See Trial Tr. at 71:19–72:1 (**R. pp. 155–56**).

¹² Order at ¶ 15 (**R. pp. 019–20**); Plaintiffs' Trial Exhibits 4, 5, 10, 11 (**R. pp. 283–84 and 294–95**).

¹³ Order at ¶¶ 15; 23 (**R. pp. 019–20**); Trial Testimony of Mr. Fender, Trial Tr. 137:18–21 (**R. p. 221**); Trial Testimony of Jimmy Kerr, Trial Tr. 24:25–25:1 (**R. p. 108–09**); Trial Testimony of Carl Rogers, Trial Tr. 83:9–133:11 (**R. pp. 167–217**).

¹⁴ Order at ¶¶ 9, 13 (**R. p. 019**); Contract a ¶ 4 (**R. p. 076**); Plaintiffs' Trial Exhibit 18 (**R. pp. 339–40**); Trial Testimony of Rogers, Trial Tr. 117:7–9 (**R. p. 201**); Trial Testimony of Fender, Trial Tr. 153:22–154:17 (**R. pp. 237–38**).

¹⁵ Order at ¶ 21 (**R. p. 020**); Plaintiffs' Trial Exhibit 12 (**R. p. 296**); Trial Testimony of Mr. Rogers, Trial Tr. 112:1–15 (**R. p. 196**).

¹⁶ Order at ¶ 18 (**R. p. 020**); Plaintiffs' Trial Exhibits 10, 11, 12 (**R. pp. 294–96**); Trial Testimony of Mr. Rogers, Trial Tr. 109:9–110:24 (**R. pp. 193–94**).

negotiations came to “an abrupt end” on October 10 when it was learned—by counsel for Lady Beaufort AND by counsel for Hird Island—that Mr. Fender had sold the property to a third party.^{17,18}

In short, the record is replete with evidence sufficient to sustain the Master’s determination that Appellants breached the contract. It is not subject to reversal. *See Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 221, 647 S.E.2d 488, 490 (Ct. App. 2007).

i. The Master Properly Found That the Title Issues Constituted Unsatisfied Contingencies

Whether something constitutes a contingency in a real estate contract is a question of fact, as acknowledged in Appellants’ motion to reconsider. Motion at 1–2 (**Rpp. 070–71**) (“The Court should reconsider, alter, or amend the following findings of fact: 1. The dissolution of Hird Island and refusal of Lady Beaufort’s chosen title insurance company to issue title insurance are not unsatisfied contingencies.”). This is an accurate concession. “Contingency” in the context of a real estate contract means something that must happen as part of performing the contract. *See, e.g., Desmear Sys. Inc. v. Vines*, 305 Ga. App. 730, 732, 700 S.E.2d 711, 713 (2010) (noting that a contingency is “not a condition precedent *to the existence of a valid contract*” but is “a condition precedent to the duty of both parties to render their promised performances”).

Whether such a thing occurs is a question of fact.

¹⁷ Order at ¶ 19 (**R. p. 020**); Plaintiffs’ Trial Exhibit 13 (**R. p. 297**); Deposition Designations of Mr. Gilbert, Trial Tr. 72:5–11 (**R. p. 156**); Trial Testimony of Carl Rogers, Trial Tr. 110:5–24 (**R. p. 194**).

¹⁸ Mr. Fender used a different attorney to close the transaction with Inverness, and the attorney used in the Lady Beaufort deal was unaware of the transaction with Inverness until after it closed on October 10. *See supra* note 4.

The contract between the Parties required Appellants to convey marketable and good title free and clear of any liens or encumbrances and to comply with all laws and regulations. The title issues above demonstrated that Appellants had not complied with those requirements of the contract¹⁹ and therefore constituted “unsatisfied contingencies” having the effect of extending the contract date until October 15, 2013.²⁰

The Master properly found that these issues—that raised questions about whether marketable title would be passed and thus whether Appellants could comply with the terms of the contract and prevented the title insurance company from issuing title insurance—constituted unsatisfied contingencies and extended the contract date through October 15. This finding by the Master, and the subsequent finding of breach of contract, should not be disturbed.

B. The Master Properly Found Mr. Fender Individually Liable

As noted *supra*, the issue of Mr. Fender’s liability is not preserved. Even were it preserved²¹ though, this Court should nonetheless affirm the Master’s holding, which was supported by ample evidence. It was Mr. Fender’s paranoia that Respondents were planning to

¹⁹ Appellants argue that any defects in title would be remedied by the execution of a General Warranty Deed and thus are not unsatisfied contingencies. Appellants’ Brief at 14. However, saying that title is good and marketable does not make it so; while a warranty deed may serve to indemnify a buyer should title not be as promised, it is nonetheless prudent for a buyer to confirm whether there are obstacles to the conveyance of good and marketable title clear of any liens or encumbrances before closing. That the title company would not issue title insurance under the circumstances demonstrates that Respondents’ concerns were valid.

²⁰ As only five business days were allotted by the contract for the resolution of any unsatisfied contingencies, it was reasonable for the Master to conclude that these issues—all of which were resolvable within five business days—were the nature of issues contemplated by the Parties when referring to “unsatisfied contingencies.”

²¹ Had this argument been properly raised below, Plaintiff would have had the opportunity to advance causes of action for tortious interference and fraud by Mr. Fender. In any event, “[a]n agent’s liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.” *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 221–22, 227 S.E.2d 189, 193 (1976) (quoting *Lawlor v. Scheper*, 232 S.C. 94, 98–99, 101 S.E.2d 269, 271 (1957)).

sabotage the deal that caused him to sell the property to Inverness on October 10.²² He unreasonably refused to accept any of Respondents' proposals to resolve title issues in the week leading up to closing.²³ He negotiated with Inverness and sold them the property without even informing his own attorney.²⁴ It was he who sold the property to Inverness while still under contract with Respondents.²⁵ It was he who benefitted from the transaction with Inverness in that it generated an additional \$60,000 in revenue with which to satisfy his tax debts.²⁶

Mr. Fender's conduct was undertaken as principal and sole shareholder of Hird Island in order to benefit himself and to Lady Beaufort's detriment. In this context, and because Hird Island is dissolved and judgment-proof, "equity requires the action [of disregarding the corporate form] to assist a third party." *Woodside v. Woodside*, 290 S.C. 366, 370, 350 S.E.2d 407, 410 (Ct. App. 1986). Accordingly, because the issue was not preserved for appeal and, in any event, the Master did not err in holding Sherwood Fender personally liable, the ruling should not be disturbed.

²² Order at ¶ 23 (R. p. 020); Trial Tr. 76:21–77:12 (R. pp. 160–61); 77:21–23 (R. p. 161). Mr. Fender testified: "[M]y paranoia also spilled over to the fact that I'm dealing with a bunch of Citadel boys, I think Matt and Jimmy and Jan. I'm convinced had I not sold it to *somebody* it would not have closed. It didn't — and maybe some paranoia there, but I think Jan had a program whereby he was going — he was going to foreclose on it." Trial Tr. 77:6–12 (R. p. 161).

²³ Order at ¶¶ 14–15 (R. p. 019–020) (citing exhibits, Trial Testimony of Mr. Fender, Mr. Kerr, Mr. Rogers).

²⁴ Order at ¶ 21 (R. p. 020); Plaintiffs' Trial Exhibit 12 (R. p. 296); Trial Testimony of Carl Rogers, Trial Tr. 110:5–24 (R. p. 194); Deposition Designations of of Mr. Gilbert, Trial Tr. 72:5–11 (R. p. 156).

²⁵ Order at ¶ 20 (R. p. 020).

²⁶ Order at ¶ 22 (R. p. 020) (citing Trial Testimony of Mr. Fender, Deposition Designations of Mr. Fender).

C. The Record Supports the Master's Finding that Mr. Fender's and Hird Island's Conduct Was Sufficient to Sustain the Claim of Negligent Misrepresentation and Breach of Contract Accompanied by a Fraudulent Act

i. Negligent Misrepresentation

The Master found that while “Mr. Fender’s lawyer, Derek Gilbert, was negotiating with Mr. Roger’s [sic] to resolve the issues raised by the title insurance company, and while Mr. Fender’s lawyer was making representations about trying to get the deal done, Mr. Fender was negotiating another deal with another buyer, Inverness.” May 11, 2017 Order at 6 (**R. p. 023**). Mr. Fender misled Respondents to believe the closing with them would still proceed; by doing so until the sale to Inverness had closed, Appellants prevented the filing of a *lis pendens* which would have stopped the sale to Inverness. The Master further found “[t]hese false representations continued even after the deed transferred to the second buyer.” *Id.* These findings were amply supported by evidence. *See id.* (citing testimony of Carl Rogers, Sherwood Fender, James Kerr, and Plaintiff’s Trial Exhibits 4, 10, 11, 12, & 20 (**R. pp. 283, 294–96, and 342**)).

The Master properly applied these factual findings to the standard for negligent misrepresentation and found Appellants were liable under this theory. *See id.* pp. 5-7. This finding is supported by substantial evidence, is not error, and is not subject to reversal.

ii. Breach of Contract Accompanied by a Fraudulent Act

The Master likewise found that, in addition to the breach of contract as discussed *supra*, Appellants’ conduct after the failed closing on October 7, 2013—namely, continuing to represent to Lady Beaufort that the contract was still operative and the property still available even while taking steps to sell the property to a third-party—constituted a fraudulent act.

In a claim for breach of contract accompanied by a fraudulent act, the fraudulent act is one characterized by dishonesty or unfair dealing. *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). Having found a breach of the contract,²⁷ the Master then found that the misrepresentations to Respondents in continuing to negotiate constituted dishonesty in fact and unfair dealing.” *Id.*

As explained by the *Sullivan* court, fraud in this context:

assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Sullivan, 117 S.C. at 137, 108 S.E. at 189. Accordingly, the Master’s finding that Appellants are liable for breach of contract accompanied by a fraudulent act²⁸ is properly afforded deference; moreover, it is supported by evidence and not subject to reversal.

CONCLUSION

Numerous of Appellants’ arguments, including all arguments concerning the sufficiency of the evidence and Mr. Fender’s individual liability, are not preserved for appeal. With regard to the remainder of Appellants’ contentions, Appellants were obligated to appear at closing able

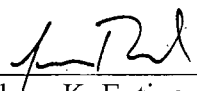
²⁷ See *supra* Part III.A.

²⁸ With regard to Mr. Fender’s liability, an issue that is not preserved (*supra* Part I.B), Appellants argue that he was not a party to the contract and therefore could not have breached the contract. Were the argument preserved, it would nonetheless amount to nothing unless the Master’s sustaining of Respondents’ claim for negligent misrepresentation were also reversed. See *Sierra v. Skelton*, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992) (“where a jury returns a general verdict involving two or more issues and its verdict is supported on at least one issue the verdict will not be reversed on appeal”).

to convey title free and clear of liens and encumbrances. They failed to do so and so are liable to Respondents. The Master's findings of liability in his May 11, 2017 Order should be affirmed.

Respectfully submitted,

October 30, 2019



Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
jgr@epting-law.com
ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case No. 2018-001969

RECEIVED
NOV 01 2019
SC Court of Appeals

Lady Beaufort, LLC & Tideland Realty, Inc., *Plaintiffs and Respondents/Appellants*,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender,
William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co.,
LLC, Defendants,

AND

William M. Bowen, Third-Party Plaintiff,

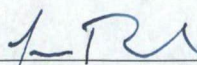
v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

*Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the
Appellants/Respondents.*

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(B)

The undersigned certifies that the Final Brief of Respondents/Appellants, Final Reply Brief of Respondents/Appellants, and Final Brief of Respondents/Appellants as Respondents comply with Rule 211(b).



Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street, Charleston, SC 29401

P: (843) 377-1871

F: (843) 377-1310

ake@epting-law.com

jgr@epting-law.com

ATTORNEYS FOR RESPONDENTS/APPELLANTS