

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Marlboro County
Court of Common Pleas
Civil Action No. 2021-CP-34-00163

The Honorable Michael S. Holt, Circuit Court Judge

Appellate Case No. 2023-000919

RECEIVED

JAN 22 2024

SC Court of Appeals

Ronald David Kirby, Jr. Appellant,

v.

Todd Provencher.....Respondent.

RECORD ON APPEAL

Florence, South Carolina

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 19, 2024

J. René Josey (S.C. Bar #3230)
Jeffrey L. Payne (S.C. Bar#15136)
1831 West Evans Street, Fourth Floor
Post Office Box 5478
Florence, SC 29501 (29502-5478)
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Other Counsel of Record:

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Marlboro
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP3400163

Todd Provencher
PLAINTIFF(S)

Ronald David Kirby, Jr.
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court grants Plaintiff's Motion for Summary Judgment. The Court finds that Defendant's failure to produce a certified title to the real estate violates such terms of the Land Sale Agreement between the parties to provide for the conveyance of fee simple title. So Ordered.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/11/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Marlboro Common Pleas

Case Caption: Todd Provencher VS Ronald David Kirby Jr.
Case Number: 2021CP3400163
Type: Order/Electronic Form 4

So Ordered

s/ Michael S. Holt, 2772

Electronically signed on 2023-05-11 12:07:16 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)
IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
Case No. 2021-CP-34-

Todd Provencher,)
Plaintiff,)
vs.) **SUMMONS**
Ronald David Kirby, Jr.,) **(Non-Jury)**
Defendant.)

THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THE PURPOSE.

TO ABOVE NAMED DEFENDANT: RONALD DAVID KIRBY, JR.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices in Florence, South Carolina, within thirty (30) days of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

DATED in Florence, S.C., this 8th day of June, 2021.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ E. Lloyd Willcox II
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO	)	
		Case No. 2021-CP-34-
Todd Provencher,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	
Ronald David Kirby, Jr.,	)	(Non-Jury)
	)	
Defendant.	)	
	)	

THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THE PURPOSE.

The Plaintiff, Todd Provencher, hereby alleges and will respectfully show unto this Court:

1. The Plaintiff Todd Provencher is a citizen and resident of the County of Hartford, State of Connecticut.
2. Defendant Ronald David Kirby, Jr. is a citizen and resident of the County of Marlboro, State of South Carolina.
3. On or about December 8, 2020, the Plaintiff entered into a Real Estate Purchase Contract with the Defendant to purchase the property located at 2094 Mays Road, Bennettsville, SC, 29517.
4. The purchase price for said lots was \$45,000.00. Attached as Exhibit "A" is the fully executed Real Estate Purchase Contract memorializing the debt.
5. On or about December 8, 2020 the Plaintiff wired \$7,000.00 to the Defendant as the deposit money for the properties. On or about December 9, 2020, the Plaintiff paid the Defendant an additional deposit of \$30,000.00. Attached as Exhibit "B" is a Statement of Account signed by Plaintiff.

**FOR A FIRST CAUSE OF ACTION
(Breach of Contract)**

6. Plaintiff and Defendant entered into a Real Estate Purchase Contract.
7. Defendant breached the Real Estate Purchase Contract.
8. The Defendant has failed to repay the deposit money or attempted to repay the deposit money and Plaintiff is owed \$37,000.00.
9. Plaintiff has made repeated demands for payment, but Defendant continues to refuse to pay sums owed under the terms of the Real Estate Purchase Contract.

**FOR A SECOND CAUSE OF ACTION
(Unjust enrichment)**

10. The Plaintiff reasserts each and every allegation contained in the foregoing paragraphs as if fully set forth verbatim herein.
11. Because Plaintiff made a deposit to the Defendant in the amount of \$37,000.00 and Defendant has not repaid it the Defendant has been unjustly enriched.

WHEREFORE, Plaintiff Todd Provencher demands judgment against the Defendant Ronald David Kirby, Jr. in the amount of \$37,000.00, plus attorney fees in the amount of \$5,550.00, interest at least at the statutory rate, costs and for such other and further relief as this Court deems just and proper.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ E. Lloyd Willcox II
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEY FOR PLAINTIFF

June 8, 2021

Record on Appeal 006



REAL ESTATE PURCHASE CONTRACT

Greater Hartford Association of REALTORS®, Inc.



When signed by Buyer and Seller this is intended to be a legally binding contract. If either party has any questions about any aspect of this transaction, he/she should consult with an attorney before signing this Contract.

1. Parties
Buyer

Todd Prevercher

Name(s)

41 POLO VIEW ROAD, SOMERS, CT 06077

Address

Seller

Name(s)

RONALD DAVID KIRBY, JR.

Address

2039 MAUS ROAD, BENNETTSVILLE, S.C. 29512

2. Property. Buyer agrees to purchase from Seller, and Seller agrees to sell to Buyer, certain real property, known as
* 2094 MAUS ROAD BENNETTSVILLE, SC. Lots 4-8 29512 ("Property").
Number Street * And 2 adjacent Town

3. Fixtures and Personal Property. Except as specifically indicated below or on the attached Property Inclusions/Exclusions Rider (if checked), all fixtures located on the Property are included in this sale, and all personal property located on the Property is excluded from this sale. Included as fixtures in this sale as part of the Property are the buildings, structures and improvements now thereon, and the fixtures belonging to the Seller and used in connection therewith, including, if any, all blinds, window shades, screens, doors, door and window hardware, wood and gas stoves, storm windows, landscaping, awnings, shutters, electrical and lighting fixtures, door mirrors, pumps, mailboxes, plumbing fixtures, cabinetry, door and cabinet hardware, pool house and other outbuildings, mantels, flagpoles, alarm system and codes, swimming pool and swimming pool pumps and equipment (if any), garbage disposal, garage door openers, central air conditioning equipment, and built-in dishwashers. No part of the purchase price below is assigned to any personal property or fixtures.

☐ See Property Inclusions/Exclusions Rider attached. (CHECK IF APPLICABLE)

The following personal property is INCLUDED (NOT APPLICABLE UNLESS FILLED IN):

The following fixtures are EXCLUDED (NOT APPLICABLE UNLESS FILLED IN):

4. (a), (b), (c) and (d) BELOW ARE NOT APPLICABLE UNLESS FILLED IN

4. Price. The total purchase price is \$ 45,000.00

(a) Buyer has made the following deposit by personal check, cashier's check or certified funds with this Contract, to be applied to the total purchase price, subject to collection:

7,000.00

(b) Buyer will make the following additional deposit by cashier's check or certified funds on or before _____ calendar days after the date that this Real Estate Contract is fully executed, to be applied to the purchase price or closing costs, subject to collection:

(c) Buyer will assume the existing mortgage on the Property which, at the closing, will not be in default and will have a principal balance of approximately:

(d) Buyer will pay the following amount at the closing by cashier's or certified check by obtaining a Bank or Institutional Mortgage as described in paragraph 5:

38,000.00 *

(e) Buyer will pay the following balance at the closing by cashier's or certified check:

(f) TOTAL (If the total shown in 4(f) exceeds the total purchase price, the excess shall be returned to Buyer at closing.)

Buyer Initial

TP

Date

12/8/2020

Seller Initial

RK

Date

12/8/2020

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(GHR Form #A-1)

Todd Prevercher

12/8/20 I will send receipt once the funds are transferred RK

Property Address 2094 MAJIS ROAD, BENNETT MILK, SC Real Estate Purchase Contract Page 2 of 5
THE FOLLOWING MORTGAGE CONTINGENCY IS NOT APPLICABLE UNLESS FILLED IN

5. Mortgage Contingency.

- ☒ N/A - No Mortgage, this is a Cash Transaction.
☐ N/A - Mortgage Contingency Waived
☐ Mortgage Contingency (AS PROVIDED BELOW)

Buyer will make prompt and diligent efforts to obtain a written commitment for a mortgage loan ("Mortgage") from a bank or other institutional lender on or before _____ ("Mortgage Contingency Date"). Buyer will provide Seller and Broker, not later than the Mortgage Contingency Date, with a copy of any written commitment for a Mortgage obtained by Buyer. Buyer will pay all application fees, points (not to exceed _____), and other charges in accordance with the policies established by the applicable lender. The Mortgage must be on the following terms:

(a) Amount \$ _____ (b) Maximum Initial Interest rate: _____ % per annum (c) Minimum term: _____ years (d) Types of mortgage: CHECK THE FOLLOWING AS APPLICABLE:

- ☐ Conventional Fixed Rate ☐ CHFA ☐ FHA ☐ Other: _____
☐ Conventional Variable Rate ☐ VA (Seller will pay termite inspection charges if required by the applicable lender.)

CHECK ONE OF THE FOLLOWING, AS APPLICABLE:

☐ Buyer represents that upon obtaining Mortgage, Buyer will have sufficient funds to close without the necessity of selling any real estate.

☐ Buyer's ability to close is contingent upon the sale of Buyer's property. See attached Rider.

If Buyer cannot obtain a written commitment for the Mortgage, Buyer may terminate this Contract by providing Seller and Broker, not later than the Mortgage Contingency Date, with written notice of Buyer's inability to obtain such commitment.

If Buyer obtains a written commitment but such commitment contains any of the following conditions and such condition(s) has/have not been satisfied on or before the Mortgage Contingency Date: appraisal, lender verification of employment, lender verification that Buyer has sufficient funds to close, lender approval of Buyer's creditworthiness, or if applicable, lender approval of common interest community; then Buyer may terminate this Contract by providing Seller and Broker, not later than the Mortgage Contingency Date, with written notice of Buyer's inability to obtain such commitment.

If the reason for Buyer's termination of this Contract is that the lender to which Buyer applied for the Mortgage denied such application, then Seller shall be entitled to request from and receive from Buyer a copy of the adverse action notice which is required to be delivered to the Buyer by such bank or institutional lender under the Fair Credit Reporting Act. If the reason for Buyer's termination of this Contract is that the commitment received by Buyer did not meet the requirements set forth in this paragraph 5, then Buyer shall provide Seller with a copy of such commitment not later than the Mortgage Contingency Date.

If Buyer does not elect to so terminate, then this Contract will remain in full force and effect free of this mortgage contingency, unless Seller, within seven (7) days from the Mortgage Contingency Date, gives written notice to Buyer and Broker that Seller has elected to terminate this Contract as a result of Buyer's inability to obtain such commitment. If either party so terminates this Contract, then all deposits will be returned to Buyer, and, except as provided in paragraph 17, the obligations of the parties under this Contract shall end.

6. Deposit and Escrow of Deposits. The deposit(s) payable under this Contract shall be made at the time(s) and in the manner specified in paragraph 4, payable to the listing Broker. Time is of the essence with respect to payment of such deposit(s), and if any deposit payable under this Contract is not so paid by Buyer at the stated time, and if such failure shall continue for a period of three (3) calendar days thereafter, then until such time as Buyer makes such deposit(s) Seller shall have the right to (a) declare Buyer to be in default, and (b) terminate this Contract by written notice to Buyer, and Seller shall thereafter be relieved of all obligations hereunder. All deposits will be held in escrow by listing Broker in accordance with Connecticut law until: CHECK ONE.

☐ The earlier of (a) the date on which the Buyer obtains the mortgage commitment described in Section 5, or (b) the eighth (8th) day following the Mortgage Contingency Date.

☐ Transfer of title unless requested earlier by settlement agent/attorney to satisfy good funds requirement

7. Closing. The closing will take place on See page 3 (date) or sooner as mutually agreed by the parties. The closing will be held at the offices of the Buyer's attorney or at such other place as Buyer's mortgage lender may reasonably require.

8. Possession at Closing; Condition of Property; Risk of Loss. At the time of closing, possession and occupancy of the improvements and personal property on the Property included in this Contract shall be delivered to Buyer in the condition they were in on the date of this Contract, subject to ordinary wear and use and, except as otherwise agreed by the parties, free of all tenants and occupants. Seller agrees to deliver the Property to Buyer in broom clean condition. Seller agrees (unless the Property is a common interest community and Seller is not responsible for the grounds) to continue to maintain the grounds until closing. Buyer shall have the right to inspect the Property for compliance with this Contract before the closing, upon reasonable notice to Seller. Risk of loss or damage to the Property shall be upon the Seller until the closing.

Buyer Initial TV Date 12/8/20 Seller Initial RR Date 12/8/20

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(GHAR Form #A-2)

Produced with 20 Form 9 by 24 Logic 18075 Fifteen Mile Road, Fenton, Michigan 48028 www.24logic.com

Todd Provencher

Property Address: 2011 Main Street, Marlboro, MA 01904, Lot 4-8, Real Estate Purchase Contract Page 2 of 2

6. Other Conditions. As per the 2011 Main Street, Marlboro, MA 01904, Lot 4-8, Real Estate Purchase Contract Page 2 of 2, the Buyer agrees to the following conditions:

10. Title. Seller will transfer fee simple title to the Property to Buyer by a Connecticut form of Warranty Deed, (or Connecticut Form of Reliance Deed if Seller is an Executor, Administrator, Conservator or Trustee), subject to (a) any and all provisions of any ordinance, municipal regulation, or public or private law, declaration, restrictions, covenants, and amendments of record; any state of facts on a title survey or personal inspection of the Property might reveal; provided that none of the above interfere with the present location of any building now located on the Property, prevent the use of the Property as a residence, or render title to the Property unmarketable; (b) current taxes and municipal assessments; (c) any mortgage which Buyer has agreed to assume under this Contract; and (d) the following additional liens and encumbrances which shall be assumed and paid by Buyer in addition to the purchase price: Seller and water here will not be assumed by buyer unless specifically stated here;

Seller agrees to furnish such evidence concerning title, encumbrances, mortgages, liens and other items and in such form as Buyer's title insurance company may require in order to allow Buyer to obtain seller's title insurance coverage on the Property or to waive exceptions to the title policy that are objectionable to Buyer's lender.

11. Adjustments. Adjustments for taxes, nonadoption fees, rents, rental security deposits, water, fire taxes, sewer, interest, fuel, condensation loss, municipal assessments, special assessments, and other charges will be made as of the date of closing in accordance with the custom of the jurisdiction for the county or municipality where the Property is located. (Use Common Interest Community Rider, if applicable)

12. Default Liquidated Damages/Remedies. If Buyer defaults under this Contract and Seller is not in default, Buyer's deposits shall be paid over to and retained by Seller as liquidated damages and both parties shall be relieved of further liability under this Contract, except to the extent of Buyer's obligations under paragraph 17.

If Seller defaults under this Contract and Buyer is not in default, Buyer shall be entitled to any and all remedies provided by law and equity including, but not limited to, specific performance and recovery of amounts spent for mortgage application, appraisal, title search, and tests or inspections. If a legal action is brought to enforce any provision of the Contract, the prevailing party, including a broker who is made party to such action and who has not negligently contributed to the default, shall be entitled to court costs and attorneys' fees.

13. Complete Agreement. This Contract, including riders and/or addenda, contains the entire agreement between Buyer and Seller concerning this transaction, and supersedes any and all previous written or oral agreements concerning the Property. This contract may only be amended by a writing signed by all parties.

14. Assignability. Buyer may only assign its rights under this Contract by mutual written consent of both parties.

15. Survival. This Contract shall be binding upon and inure to the benefit of the respective personal representatives, heirs, successors and assigns of Buyer and Seller.

16. Equal Housing Rights. Buyer acknowledges that he/she is aware of his/her right to be shown any home within his/her price range in any area specified by Buyer and which is available to the REALTORS in the area in which he/she is licensed.

17. Home, Pest and Environmental Inspection/Tests. Buyer acknowledges that Buyer has the opportunity to make a full and complete inspection of the Property and other improvements, to the extent checked by Buyer. If Buyer elects to make a less than thorough inspection, Buyer waives any right to object to any defects in the Property and other improvements that would have been disclosed by a full and complete inspection. Buyer has the right to have the lead inspection or risk assessment described below (unless voluntarily waived by Buyer) and the other inspections checked below performed on the Property.

☒ Buyer waives inspections under this section

☐ Buyer elects the following inspection(s):

(Applicable Only if Checked)

☐ A HOME INSPECTION performed by an engineer licensed by the State of Connecticut or a home inspection service licensed by the State of Connecticut determining whether or not the buildings and other improvements located on the Property are structurally sound and whether or not the mechanical, electrical and plumbing systems of any of the buildings are in good repair.

Buyer Initial: JP Date: 12/8/20

Seller Initial: RK Date: 12/8/20

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(GAR Form 9A-3)

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10/1/2010

Property Address 4 and 2 adjacent lots - Lot 4-B
2094 MAINE ROAD, BENNETTSVILLE, SC Real Estate Purchase Contract Page 4 of 5

☐ A TERMITE OR WOOD DESTROYING INSECT INSPECTION performed by a licensed exterminator or inspection service licensed by the State of Connecticut and determining whether or not the buildings on the Property are infested by termites or wood-boring insects and whether or not the buildings on the Property are damaged as a result of such infestation.

☐ OTHER INSPECTIONS/TESTS of the buildings located on the Property for ☐ asbestos; ☐ radon; ☐ mold; and ☐ (other(s)), performed by a licensed inspector or inspection service licensed by the State of Connecticut, the results of which are satisfactory to Buyer, provided that Buyer's determination is reasonable in view of the written report of any inspection and/or test.

Buyer must arrange and pay for all inspections including any additional inspections recommended by the inspector (except if the mortgage described in paragraph 5 is VA, Seller will pay termite inspection charges to the extent required by the applicable lender). Buyer must give Seller written notice of any inspection that does not meet the standards set forth above together with a copy of the relevant pages of the inspection report, on or before _____ calendar days after the date that this Contract is fully executed (Inspection Contingency Date). If Buyer does not give Seller such notice, Seller shall have no responsibility or obligation concerning any condition to which this paragraph 17 applies. At Buyer's sole cost and expense, Buyer shall restore the Property to substantially the same condition it was in immediately before any inspections.

If an inspection report given by Buyer to Seller on or before the Inspection Contingency Date reveals that the Property or other improvements do not meet the terms set forth above, then Buyer may, at Buyer's option, terminate this Contract by giving Seller written notice of termination no later than the Inspection Contingency Date. Alternatively, Buyer may give Seller the option to correct the conditions that are unacceptable to Buyer. If Seller and Buyer cannot reach a mutually satisfactory written agreement regarding the correction of these matters, then Buyer may terminate this Contract by giving Seller written notice of termination no later than 5 calendar days after the Inspection Contingency Date. Failure by Buyer to so terminate relieves Seller from all responsibility and obligation concerning any condition to which this paragraph 17 applies. If Buyer terminates this Contract pursuant to Buyer's rights under this paragraph 17, Buyer shall receive all deposited sums and the obligations of the parties under this Contract shall end, except with respect to the obligations under this paragraph 17.

In consideration of the rights of inspection, and whether Buyer exercises such rights or not, Buyer hereby releases Seller, Broker and Co-Broker (if any) from any and all liability related to any defects in the Property or the cost of addressing any environmental condition in the Property of which Seller, Broker or Co-Broker, as the case may be, had no actual knowledge before the execution of this Contract. This release and the obligations and agreements of Buyer contained in this paragraph 17 shall survive the deed and the termination of this Contract.

In completing paragraph 17, Buyer and Seller understand that: If the Property is "target housing" under federal law (meaning with some exceptions, housing built before 1978), Seller must permit Buyer a 10-day period (unless the parties mutually agree in writing to a different time period) to conduct a risk assessment or inspection of the Property for the presence of lead-based paint and lead-based paint hazards before Buyer is obligated under this Contract. Buyer may waive this right of inspection in writing.

BUYER MAY CONDUCT AN INSPECTION OR RISK ASSESSMENT (as defined by federal law) by a licensed environmental inspector or recognized inspection service for lead-based paint and lead based paint hazards in the Property (as those terms are defined by federal regulation) within the time period stated in paragraph 17, with the results being satisfactory to Buyer, provided that Buyer's determination is reasonable in view of the written report of any such inspection. Buyer may waive this right by completing the WAIVER below (if applicable, Buyer executed HUD notice on lead-based substances, attached).

☒ WAIVER. By initialing here: AB, Buyer waives the right to conduct a risk assessment or inspection for the presence of lead-based paint and lead-based paint hazards in the Property. Seller acknowledges such waiver by initialing here: _____

18. Riders. The riders which are checked below and which are attached to the Contract are made part of this Contract.

APPLICABLE ONLY IF CHECKED

RIDERS:

☐ Appraisal ☐ As Is ☐ Attorney Approval ☐ Combined Contingency Addendum ☐ Common Interest Community Rider
☐ Insulation (New Homes only) ☐ Perc/Pit Test ☐ Sale of Buyer's Residence Contingency (AKA Hubbard)
☐ Sale of Buyer's Residence Contingency (Under Contract) ☐ Short Sale ☐ Septic/Well ☐ TRID/CFPB Rider
☐ Other _____

Buyer Initial AB

Date

12/8/20

Seller Initial RK

Date

12/8/20

(GAR Form #A-4)

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Todd Prosser

*and 2 adjacent lots Lots 4-8
Property Address 2094 Mays Road Bennett, SC Real Estate Purchase Contract Page 5 of 5

19: (a) Property Condition Disclosure Report. To the extent required by Section 20-327b of the Connecticut General Statutes, Seller shall furnish Buyer with a Residential Property Condition Disclosure Report before Buyer's execution of this Contract or credit Buyer with \$500 toward the purchase price at closing.

(b) Smoke and Carbon Monoxide Detectors. In the event the Property is a one or two family residence and Seller fails to provide Buyer at closing with an affidavit concerning smoke and carbon monoxide detectors required by Section 20-463 of the Connecticut General Statutes, Seller shall credit Buyer with the sum of \$250 at closing unless the transaction is otherwise exempted under subsection (e) of such Act.

20. Notices to Buyer. (a) Lists of Hazardous Waste Sites. Buyer is notified that the Department of Energy and Environmental Protection is required pursuant to Section 22a-134f of the Connecticut General Statutes to furnish lists of hazardous waste facilities located within the town to the Town Clerk's office. Buyer should refer to these lists and the Department of Energy and Environmental Protection for information on environmental questions concerning the Property and the lands surrounding the Property. This paragraph constitutes Seller's notice to Buyer of the availability of such lists, as provided in Section 20-327f of the Connecticut General Statutes.

(b) Lists of Properties where Shooting Sports Conducted. Buyer is notified that a list of local properties upon which hunting or shooting sports regularly take place may be available at the Town Clerk's office. This paragraph constitutes Seller's notice to Buyer of the availability of such lists, as provided in Section 20-327g of the Connecticut General Statutes.

(c) Information Concerning Environmental Matters. Buyer is notified that information concerning environmental matters on the Property and surrounding properties is available from the federal Environmental Protection Agency, the National Response Center, the Department of Defense and third-party providers.

(d) Educational Material Concerning Well Water Testing. If the Property is served by a private well, Buyer is notified that important educational material concerning private well testing is available on the Department of Public Health's web site.

21. Execution by Electronic Methods. The parties agree that they may enter into this Contract (including any amendments and riders hereto) via facsimile (fax) machine and/or email. This consent applies only to this transaction, and either party may withdraw such consent by fax or email or in writing, but such withdrawal will not affect the validity or enforceability of this Contract (or any amendments or riders hereto) after it has been entered into. Faxing, and retention of and access to fax records, requires a fax machine or other appropriate fax technology. Email, and retention of and access to email records, requires a computer, Internet account and email software.

Buyer elects to use:

☐ Fax: Fax number is:

☒ Email: Email address is: todd@richardflorrey.com

Seller elects to use:

☐ Fax: Fax number is:

☒ Email: Email address is: RKPool71@yahoo

If any party changes its email address or fax number it will promptly notify the other party of the new email address and/or fax number.

22. Broker(s) Buyer and Seller recognize none (firm name) and none (firm name) as the sole broker(s) in this transaction.

When signed by Buyer and Seller this is intended to be a legally binding contract. If either party has any questions about any aspect of this transaction, he/she should consult with an attorney before signing this Contract.

BUYER

SELLER

Todd Prowancher

Ronald David Kirby

Date: 12/8/2020

Date: 12/8/2020

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(GHA Form #A-5)

Produced with eForm by eScribe, 10070 Fitch Ave Road, Fraser, Michigan 48026 www.escribe.com

Todd Prowancher

STATE OF CONNECTICUT)

AFFIDAVIT OF DEBT

COUNTY OF TOLLAND)

DEBITS

\$ 37,000.00

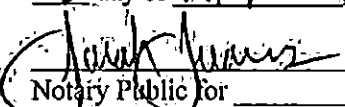
BALANCE DUE

\$ 37,000.00

PERSONALLY appeared before me, Todd Provencher who, under oath states that he is familiar with its books and records as they relate to the debts of Ronald David Kirby, Jr. and that the above statement is true and correct and Ronald David Kirby, Jr. is truly and justly indebted to Todd Provencher in the amount Thirty-Seven Thousand and 00/100 (\$37,000.00), no part which has been paid by cash, discount or otherwise. This amount does not include attorney's fees, interest and costs. Todd Provencher is also entitled to receive attorney fees and costs. Upon information and belief 15% of \$37,000 is a reasonable attorney fee and 15% of \$37,000 is \$5,550.00.


 Todd Provencher

 SWORN to before me this
25 day of MAY, 2021


 Notary Public for _____

(L.S.)

My commission expires: _____



SARAH SUAREZ
NOTARY PUBLIC - CT 165233
 MY COMMISSION EXPIRES SEPT. 30, 2023

STATE OF SOUTH CAROLINA

COUNTY OF MARLBORO

Todd Provencher,

Plaintiff,

v.

Ronald David Kirby, Jr.,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2021-CP-34-00163

ANSWER
(Non-Jury)

**TO: PLAINTIFF TODD PROVENCHER AND HIS ATTORNEY, E. LLOYD
WILLCOX, II**

The Defendant Ronald David Kirby, Jr. ("Defendant") hereby answers the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not hereinafter specifically admitted is denied.
2. The Defendant admits the allegations contained in paragraphs 1, 2, 3 and 4.
3. Answering the allegations contained in paragraph 5, the Defendant admits that it received \$37,000.00 as a deposit from the Plaintiff, but as to the remaining allegations, it lacks sufficient information and belief, and therefore denies those allegations.
4. The Defendant admits the allegations contained in paragraph 6.
5. The Defendant denies the allegations contained in paragraph 7.
6. As to the allegations contained in paragraph 8, the Plaintiff failed to fulfill his obligations to close on the transaction, and the Defendant had the right to retain the deposit made by the Plaintiff.
7. Answering the allegations contained in paragraph 9, the Defendant admits that the Plaintiff

has requested that the deposit be returned, and that he has refused to return the deposit as a result of the Plaintiff's breach of the Contract and his failure to complete the transaction.

8. Answering the re-allegations contained in paragraph 10, the Defendant would re-assert and re-allege each and every defense previously stated herein.

9. The Defendant denies the allegations contained in paragraph 11.

FOR A SECOND DEFENSE

10. The Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action, and thus, pursuant to Rule 12(b)(6) of the South Carolina Civil Rules of Procedure, the Complaint should be dismissed with prejudice.

FOR A THIRD DEFENSE

11. The Plaintiff has failed to satisfy the conditions precedent in the Contract between the parties, and therefore, there is no obligation on behalf of the Defendant to return the deposit to him.

FOR A FOURTH DEFENSE

12. The Defendant detrimentally relied on the Contract between the parties especially the obligation of the Plaintiff to purchase the property and in reliance thereon, the Defendant expended significant sums for moving crews, lawyer's fees, title search, purchasing price of substitute real estate, and other costs, and is therefore, allowed to recoup those costs as a result of the Plaintiff's breach of the contract.

FOR A FIFTH DEFENSE

13. The Defendant is allowed to set-off any damages that it has incurred as a result of Plaintiff's breach of the Contract.

FOR A SIXTH DEFENSE

14. The Plaintiff waived any right to recover the deposit he made with the Defendant when he

failed to purchase the property as agreed.

FOR A SEVENTH DEFENSE

15. The Plaintiff is estopped from recovering any of the deposit as a result of his breach of the Contract.

WHEREFORE, having answered the Plaintiff's Complaint, the Defendant Ronald David Kirby, Jr. requests that the Court dismiss the Plaintiff's Complaint with prejudice, and that he be awarded his costs, reasonable attorneys' fees incurred in defending this action, and that the Court award such other and further relief as it deems just and proper to the Defendant.

TURNER, PADGET, GRAHAM & LANEY, P.A.

July 1, 2021

Florence, South Carolina

By: s/ Jeffrey L. Payne
Jeffrey L. Payne, Esquire
SC Bar No.: 15136
Post Office Box 5478
Florence, South Carolina 29502
(843) 662-9008 tel
Email: JPayne@turnerpadget.com

ATTORNEYS FOR THE DEFENDANT

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)
IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
Case No. 2021-CP-34-00163

Todd Provencher,)
))
Plaintiff,)
))
vs.) **PLAINTIFF'S MOTION FOR**
) **SUMMARY JUDGMENT**
Ronald David Kirby, Jr.,)
))
Defendant.)
_____)

TO: DEFENDANT RONALD DAVID KIRBY, JR. AND HIS ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof, or as soon as counsel may be heard, the Plaintiff, by and through its undersigned counsel, will move before the Judge of the Court of Common Pleas for Marlboro County for an Order granting the Plaintiff summary judgment against Defendant in the above-entitled cause of action.

This Motion is based on the pleadings, verified statement of account, deposition transcripts of Defendant and exhibits. Plaintiff is also seeking attorney's fees and Defendant is being notified of that relief.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ E. Lloyd Willcox II
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEY FOR THE PLAINTIFF

February 3, 2023
Florence, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO	)	
		Case No. 2021-CP-34-00163
Todd Provencher,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN SUPPORT
	)	OF MOTION FOR SUMMARY JUDGMENT
Ronald David Kirby, Jr.,	)	
	)	
Defendant.	)	
_____	)	

Pursuant to Rule 56, SCRCP, Plaintiff has moved the court for Summary Judgment. This motion is based on the Verified Statement of Account, attached hereto, and labeled Exhibit A and portions of the Deposition Transcript of Defendant Ronald D. Kirby, Jr., attached hereto, and labeled Exhibit B.

Plaintiff filed a verified Complaint with liquidated damages on June 8, 2021. The Defendant, Ronald David Kirby, Jr. answered on July 1, 2021. Plaintiff now files a Motion for Summary Judgment.

Applicable Standard

Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004).

Argument

Plaintiff requests judgment in the amount of Thirty-Seven Thousand 00/100 (\$37,000.00) Dollars as principal, plus interest at the statutory rate from the date of the judgment, plus attorney's fees in the amount of \$5,550.00 and for court costs. Plaintiff has sworn that is the amount owed (Exhibit A – Affidavit of Debt).

The amount owed to Plaintiff is verified and liquidated (Exhibit A – Affidavit of Debt). Defendant filed an Answer stating Plaintiff failed to satisfy the conditions precedent in the Contract between the parties. Defendant admits he has refused to return Plaintiff's deposit. (See

Exhibit B- Kirby Dep., pp. 15-16). Standard written discovery has been conducted in that the Plaintiff has served Defendant with standard Interrogatories and Requests for Production and Defendant has responded and visa versa. The Deposition of Defendant Kirby was held on December 22, 2021, and he testified as follows:

1. That Plaintiff was not entitled to get his money back (Kirby Dep. p. 71, ll. 21-25).
2. Defendant admitted that he signed the Real Estate Purchase Contract (Kirby Dep. p. 45).
3. The written Contract should govern the relationship between the parties (Kirby Dep. p. 45, ll. 23-25).
4. Kirby does not deny he did not have clean title (Kirby Dep. p. 16, ll. 12-15).
5. He admits that he did not have title to the real property on the day of closing (Kirby Dep. p. 16, ll. 17-25).
6. Kirby admitted there was a lien on "the Sandhills lots" and the closing attorney advised of same (Kirby Dep. p. 17, ll. 3-9).
7. Kirby's property lawyer, Ingram, does not check title (Kirby Dep. p. 22, ll. 2-51 pp. 23, ll. 4-6).
8. Kirby admitted he spent the escrow funds (Kirby Dep. p. 29, ll. 2-3).
9. Kirby admits he read the contract (Kirby Dep. p. 29, l. 24).
10. Kirby admits he signed the Real Estate Purchase Contract (Kirby Dep. p. 35, ll. 17-18; Exhibit A to Kirby Dep.).
11. Kirby admits he received \$37,000.00 in deposits (Kirby Dep. p. 37, ll. 8-10 and 24-25).
12. Kirby admits he the closing attorney would not certify clear title (Kirby Dep. p. 40-41, ll. 22-2).

13. Kirby admits he gave the closing attorney false financial information (Kirby Dep. p. 51, ll. 11-13).

14. Kirby admits he did not pay his son for the lots owned by his son (Kirby Dep. p. 68, ll. 14-16).

15. The Real Estate Contract, at issues requires Seller to provide Buyer with marketable title (Ex. A to Kirby Dep., para. 10). Specifically, the Contract states "Seller will transfer fee simple title to the Property to Buyer ...". Kirby was unable to do so and Plaintiff is entitled to be reimbursed for any funds paid Kirby.

The amount remains unpaid. There is no issue as to any material fact and Plaintiff has met the standard for granting Summary Judgment.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ E. Lloyd Willcox, II
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEY FOR THE PLAINTIFF

February 3, 2023
Florence, South Carolina

EXHIBIT A

“Omitted” as Duplicative –

**Verification of Account found
in the “Record on Appeal” at
p. 12**

EXHIBIT B

**“Omitted” as the entire
Transcript is duplicated in the
“Record on Appeal” at pgs.
52-146.**

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

Todd Provencher,

Plaintiff,

v.

Ronald David Kirby, Jr.,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2021-CP-34-00163

AFFIDAVIT OF DEFENDANT
RONALD DAVID KIRBY, JR.

1. On December 8, 2020 Todd Provencher and I signed the Contract ("Contract") attached as Exhibit 1 whereby Provencher agreed to purchase Lot 4 and the Cabin ("Cabin") thereon, along with Lots 5,6,7, and 8 ("Lots") all located on 2094 Mays Road, Bennettsville, SC from me for a total purchase price of \$45,500. Todd Provencher prepared the contract and emailed it to me. At some point Provencher provided me a deposit of \$37,000 pursuant to the Contract.

2. Prior to the closing Todd Provencher and I agreed that we would close on the sale of a building and land that I was also selling him on Friday February 12, 2021 at the Easterling Law Firm in Bennettsville, SC. Mr. Easterling informed us in late January that he did not want to handle the closing of the Cabin and Lots since he was unfamiliar with the Sandhill Recreation Club, Inc. the owner of lots 5 and 6.

3. Tom Ingram, Esquire was ultimately hired to assist with this transaction. Mr. Ingram had assisted me with the purchase of the Cabin and Lot 4 and he was familiar with the property on Mays Road.

4. In reliance on the Contract and in good faith that Mr. Provencher would pay the Contract price as agreed, I purchased Lots 5 and 6 from the Sandhill Recreation Club, Inc. for \$4,000 and received a deed to these lots. (Exhibit 2 is a true and correct copy of the Deed from Sandhill Recreation Club to me). Mr. McAlpine on behalf of the Sandhill Recreation Club, Inc. signed the deed to Lots 5 and 6 on February 10, 2020 and delivered the deed to Tom Ingram's office.

5. In addition to purchasing Lots 5 and 6, I also acquired Lots 7 and 8 from my son Donovan Kirby. Mr Ingram prepared the deed for these lots and my son signed it. Exhibit 3 is a true and correct copy of the deed to Lots 7 and 8.

Affidavit of Ronald D. Kirby, Jr.
C/A No.: 2021-CP-34-00163

6. Thomas Ingram prepared the deed that was necessary to transfer the Lots to Todd Provencher. Todd Provencher knew that Thomas Ingram was getting the documents and deeds ready for the closing.

7. Todd and I agreed that the closing for the other property would take place on Friday February 12, 2020 at the Easterling Law Firm. As to the Cabin and the Lots, Todd and I agreed that this closing would take place on Monday February 15, 2020 at Tom Ingram's office. I told Todd that he could stay at the Cabin over the weekend and he was planned on staying at the Cabin.

8. Todd and a man he said was his brother appeared on Friday February 15, 2023 as agreed. He requested information about the power company and he went to have the power to the Cabin put in his name. Thereafter we met at the Easterling law firm. When he arrived at the Easterling Law Firm Todd told me that his brother did not like the deal and he was backing out of both transactions.

9. I made Todd go inside the Easterling law firm to tell them that he was backing out which he did. I called Ingram's office to tell them that Todd had "backed out" of the deal.

10. According to the notes provided by Ingram law firm that are attached as Exhibit 4, Todd's girlfriend Sara Boucher called the Ingram law firm on February 16, 2020 and told them that they backed out because I did not own some of the Lots. Prior to the Closing, I owned all of the Lots, I had been deeded the Lots and I was ready willing and able to sell the Lots.

11. Paragraph 10 of the Contract required that I convey fee simple title to the Cabin and Lots which I was ready and willing to do. Mr. Ingram had prepared the warranty deed and I was ready to sign it and thereby convey the Lots and Cabin to Todd Provencher per the Contract. However, Todd Provencher chose to default on the Contract and refused to pay me even after I had gone to great expense to meet my obligations under the Contract.

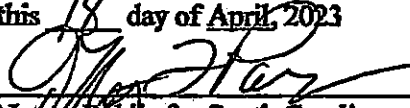
12. Paragraph 12 of the Contract specifically allows me to retain the deposit should Todd Provencher default on the Contract. Todd has defaulted and I have retained the \$37,000 deposit as I am allowed to do pursuant to the Contract.

FURTHER AFFIANT SAYETH NOT.

Affidavit of Ronald D. Kirby, Jr.
C/A No.: 2021-CP-34-00163


Ronald D. Kirby, Jr.

Subscribed and sworn to before me
this 18 day of April, 2023

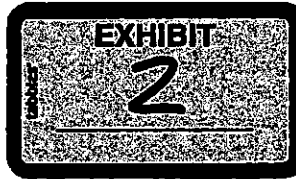

Notary Public for South Carolina

Print Name: Jeffrey L. Parn
My Commission Expires: 1-15-2030

EXHIBIT 1

“Omitted” as Duplicative –

**Contract found as an Exhibit
to the Summons and
Complaint in the “Record on
Appeal” at p. 7.**



RTN: Thomas E. Ingram, Jr.
Post Office Drawer 865
Cheraw, South Carolina 29520

STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

TITLE NOT ABSTRACTED

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that I, Donovan J. Kirby, hereinafter the "Grantor", for and in consideration of the sum of FIVE DOLLARS (\$5.00) LOVE AND AFFECTION to me paid by Ronald D. Kirby and Angela M. Kirby, hereinafter the "Grantees", the receipt whereof is hereby acknowledged; have granted, bargained, sold and released and by these presents do hereby grant, bargain, sell and release unto the said Grantees, their heirs and assigns forever, the following described property:

SEE ATTACHED EXHIBIT A

Together with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantees, their heirs and assigns forever, subject nevertheless to covenants, conditions and easements hereinbefore set forth.

AND I do hereby bind myself and my heirs, executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said Grantees, their heirs and assigns forever, against me and my heirs, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 8th day of February in the year of our Lord Two Thousand Twenty-One and in the Two Hundred and Forty-Fifth year of the Sovereignty and Independence of the United States of America.

WITNESSETH:

Jeffrey R. Williams
Adam K. Adams

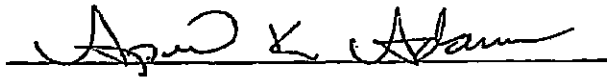
Donovan J. Kirby
Donavan J. Kirby

STATE OF SOUTH CAROLINA)

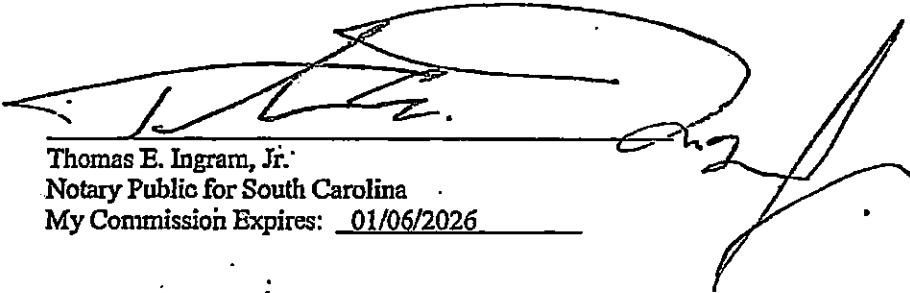
COUNTY OF CHESTERFIELD)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named Donovan J. Kirby sign, seal, and as his act and deed, deliver the within written deed for the uses and purposes therein mentioned and that s/he with the other witness whose signature appears above witnessed the execution thereof.



SWORN to before me this 8th
day of February, 2021



Thomas E. Ingram, Jr.
Notary Public for South Carolina
My Commission Expires: 01/06/2026

EXHIBIT A

All those certain pieces, parcels or lots of land shown and designated as Lots numbered seven and eight (7 & 8) on a plat of lots, Property of Dr. Chas. R. May, M.D. Sandhill Lodge Place made May 10, 1965 by John M. Jackson, Jr., P.E. & L.S. and recorded in Plat Book 21, Page 24 in the office of the Clerk of Court for Marlboro County.

Said lots are bounded generally on the north by an unnamed road; on the east, south and west by other property of the grantors herein and reference is craved to the above mentioned plat for a more complete description as to courses, metes and bounds.

The with described property was conveyed to Donovan J. Kirby by deed of Ronald D. Kirby and Angela M. Kirby dated May 22, 2018 and recorded May 29, 2018 in Deed Book 700 at Pages 209-212, Office of Clerk of Court, Marlboro County, South Carolina.

MARLBORO COUNTY, SOUTH CAROLINA
TAX ASSESSOR'S MAP NO.:
014-01-04-007

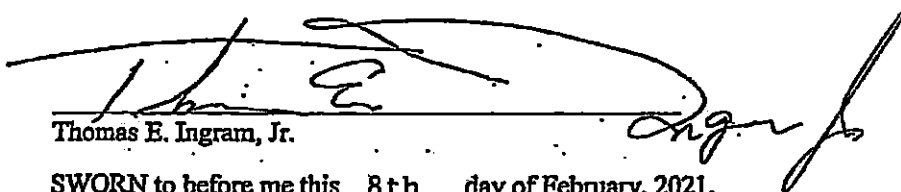
Donovan J. Kirby Grantor, TO	I hereby certify that the within Deed has been this ____ day of _____, 2021. Recorded in Deed Book ____ at Pages ____ at ____ O'Clock ____ M. CLERK OF COURT, MARLBORO COUNTY
Ronald D. Kirby and Angela M. Kirby 2059 Mays Road Bennettsville, South Carolina 29512 Grantees,	I hereby certify that the within Deed has been this ____ day of _____, 2021, transferred on Auditor's Book ____ at Pages ____ AUDITOR, MARLBORO COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF MARLBORO

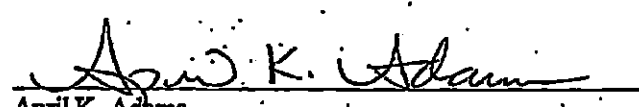
) AFFIDAVIT FOR EXEMPT TRANSFERS
)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on the back of this affidavit and I understand such information.
2. The property being transferred is located at see Exhibit A, bearing Marlboro County Tax Map Number 014-01-04-007, was transferred by Donovan J. Kirby to Ronald D. Kirby and Angela M. Kirby on February 8, 2021.
3. The deed is exempt from the deed recording fee because: Grantor is conveying to Grantee as a gift.
If exempt, the agent and principal relationship existed at the time of the original sale as well as for the purpose of purchasing the realty.
4. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Grantor's attorney.
5. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


Thomas E. Ingram, Jr.

SWORN to before me this 8th day of February, 2021.


April K. Adams
Notary Public for South Carolina
My Commission Expires: 03/21/2027

RTN: Thomas E. Ingram, Jr.,
Post Office Drawer 865
Cheraw, South Carolina 29520



STATE OF SOUTH CAROLINA

Marlboro County
Assessor's ID

TITLE NOT ABSTRACTED

COUNTY OF MARLBORO

014-01-04-05

TITLE TO REAL ESTATE

FEB 23 2021

KNOW ALL MEN BY THESE PRESENTS, that Sandhill Recreation Club, Inc., hereinafter the "Grantor", for and in consideration of the sum of FOUR THOUSAND AND 00/100 DOLLARS (\$4,000.00) to it paid by Ronald D. Kirby and Angela M. Kirby, hereinafter the "Grantees", the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these presents do hereby grant, bargain, sell and release unto the said Grantees, their heirs and assigns the following described property:

SEE ATTACHED EXHIBIT A

Together with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in any wise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantees, their heirs and assigns forever, subject nevertheless to covenants, conditions and easements hereinbefore set forth.

AND it does hereby bind itself and its successors or assigns to warrant and forever defend, all and singular, the said premises unto the said Grantees, their heirs and assigns forever, against it and its successors, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS the Hand and Seal of the Grantor this 10th day of February in the year of our Lord Two Thousand Twenty-One and in the Two Hundred and Forty-Fifth year of the Sovereignty and Independence of the United States of America.

WITNESSETH:

SANDHILL RECREATION CLUB, INC.

Janet R. Williams
Anita M. Williams

James C. McAlpine, Jr.
By: James C. McAlpine, Jr.
Its: President

ATTEST:

James C. McAlpine, Jr.
Secretary

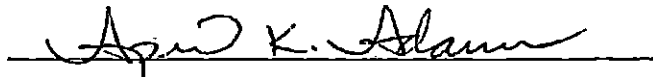
Doc ID: 000595860005 Type: LAN
Kind: DEED
Recorded: 02/19/2021 at 11:05:39 AM
Fee Amt: \$29.80 Page 1 of 5
Revenue Tax: \$14.80
Instr# 202100000327
Marlboro County, South Carolina
Anita M. Williams Clerk of Court

BK 747 PG 23-27

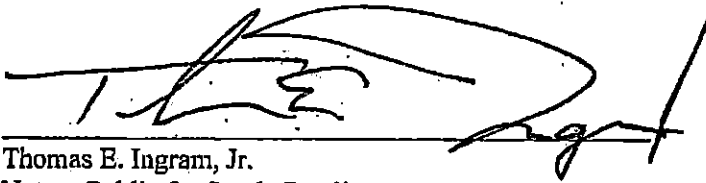
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that s/he saw the within named Sandhill Recreation Club, Inc. by James C. McAlpine, Jr., its President, sign, seal, and as its act and deed, deliver the within written deed for the uses and purposes therein mentioned and that s/he with the other witness whose signature appears above witnessed the execution thereof.



SWORN to before me this 10th
day of February, 2021



Thomas E. Ingram, Jr.
Notary Public for South Carolina
My Commission Expires: 01/06/2026

Corporate Resolution

WHEREAS, at a meeting of the Directors of Sandhill Recreation Club, Inc., held after due and proper notice, at the office of the Corporation on the 9th day of February, 2021, the following resolution was unanimously adopted:

"BE IT RESOLVED that the Corporation shall sell certain real estate generally described on Exhibit A attached hereto, to Ronald D. Kirby and Angela M. Kirby on such terms as may be negotiated by the President of the corporation.

RESOLVED FURTHER, that James C. McAlpine, Jr., the President of the corporation, is hereby authorized to execute and deliver on behalf of the Corporation any and all documents necessary to effectuate the transfer.

There being no further business, the meeting was adjourned.

I, the undersigned Secretary for Sandhill Recreation Club, Inc. do hereby certify the above to be a true and correct transcript of the minutes taken and the resolution passed at the meeting held on the date and at the place hereinabove mentioned.


James C. McAlpine, Jr.

EXHIBIT A

All that certain piece, parcel or lot of land, with all improvements thereon, lying and being situate in the County of Marlboro, State of South Carolina, shown and designated as Lot Five (#5) and Lot Six (#6) on a Plat entitled 'Plat of Lots, Property of Dr. Chas. R. May, M. D.' dated May 10, 1965 and made John M. Jackson, Jr., P. E., & L. S. and recorded in Plat Book 22 at Page 62 in the Office of the Clerk of Court for Marlboro County.

For a more particular description reference is directed to the aforementioned plat.

The within described property was conveyed to Sandhill Recreation Club, Inc. by deed of Charles R. May, III, A Matheson May and Mildred T. May dated May 21, 1981 and recorded May 28, 1981 in Deed Book 181 at Pages 124-126 in the aforesaid Clerk's Office.

PORTION OF
TAX ASSESSOR'S MAP NO.:
014-01-01-001
MARLBORO COUNTY, SOUTH CAROLINA

SANDHILL RECREATION CLUB, INC. Grantor, TO	I hereby certify that the within Deed has been this _____ day of _____, 2021, recorded in Deed Book _____ at Pages _____ at _____ M. CLERK OF COURT, MARLBORO COUNTY
RONALD D. KIRBY AND ANGELA M. KIRBY 2059 MAYS ROAD BENNETTSVILLE, SOUTH CAROLINA 29512 Grantees,	I hereby certify that the within Deed has been this _____ day of _____, 2021, transferred on Auditor's Book _____ at Pages _____ AUDITOR, MARLBORO COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF MARLBORO)

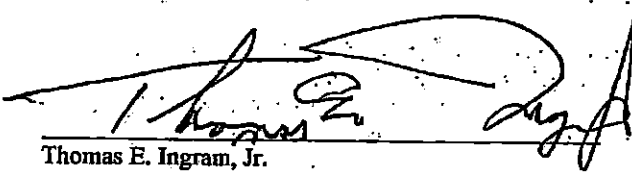
AFFIDAVIT FOR TAXABLE TRANSFERS

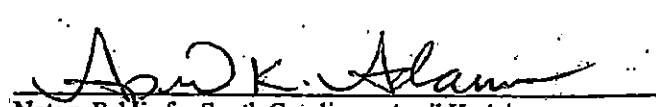
PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

- I have read the information on this affidavit and I understand such information.
- The property being transferred is located at Lots 5 & 6 on Mays Rd, Bennettsville, bearing Marlboro County Portion of Tax Map Number 014-01-01-001, was transferred by Sandhill Recreation Club, Inc. to Ronald D. Kirby and Angela M. Kirby on February 10, 2021.
- Check one of the following: The deed is:
 - ☒ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- Check one of the following if either item 3(a) or item 3(b) above has been checked:
 - ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of: \$ 4,000.00.
 - _____ The fee is computed on the fair market value of the realty which is _____.
 - _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is: _____.
- Check Yes ☐ or No ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.
- The deed recording fee is computed as follows:
 - Place the amount listed in item 4 above here: \$ 4,000.00
 - Place the amount listed in item 5 above here: \$ 0.00 (If no amount is listed, place zero here.)
 - Subtract Line 6(b) from Line 6(a) and place result here: \$ 4,000.00
- The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$14.80.
- As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Grantor's attorney.
- I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction

SWORN to before me this 10th day of February, 2021.


Thomas E. Ingram, Jr.


Notary Public for South Carolina: April K. Adams
My Commission Expires: 03/21/2027

2-16-21 @ 10:

Sara Boucher called asking about transaction with Ronnie Kirby. Said he kept \$30,000 of their money to pay for the purchase of 2096 Mays Rd, Bennettsville. Sara said they backed out because they saw he didn't own some of the property. (She is referring to the piece Ronnie is getting back from his son, Donovan, & also the property ~~owned~~ owned by Sandhills Recreation Club. Both of these have been deeded to Ronnie & will be recorded.) I told her we were contacted by Ronnie to prepare a deed & Settlement Statement, no title exam. I told her we don't do title exams in Marlboro County any longer. She asked the sales price on the deed & I said we were →

told \$10,000 & she said it was \$45,000. She said they had a contract & I told her we were not provided with a contract. She was glad I was able to answer those few questions & she said possibly Todd might call if he has any other questions & they were going to hire an attorney to try & get their money back.

Record on Appeal 036

EXHIBIT

4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF MARLBORO	)	Civil Action No. 2021-CP-34-00163
	)	
Todd Provencher,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM IN OPPOSITION TO
	)	PLAINTIFF'S MOTION
	)	FOR SUMMARY JUDGMENT
Ronald David Kirby,	)	
	)	
Defendant.	)	
	)	
	)	

The Defendant, Ronald David Kirby ("Kirby" or "Defendant"), by and through his undersigned counsel, submits this Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"). In addition to this memorandum, Kirby offers his deposition testimony and his affidavit in opposition to the Plaintiff's motion.

INTRODUCTION

This case arises out of Plaintiff's breach of a real estate purchase contract between Plaintiff and Kirby where the Plaintiff failed to pay Kirby the purchase price to purchase a Cabin and certain lots located at 2094 Mays Road, Bennettsville, South Carolina. The Plaintiff filed the instant action on June 8, 2021, in an effort to get the Defendant to return the deposit, asserting two causes of action for breach of contract and unjust enrichment.

For the reasons detailed below, Plaintiff's Motion should be denied.

FACTUAL BACKGROUND

On December 8, 2020, the Plaintiff and Kirby entered into a Real Estate Purchase Contract ("Contract") whereby the Plaintiff agreed to purchase the Cabin and lot and

adjacent Lots (Lots 5-8) ("Cabin and Lots") located at 2094 Mays Road, Bennettsville, SC for a purchase price of \$45,000. The Plaintiff prepared the Contract and sent it to Kirby for execution. (Kirby Aff. Par. 1). In order to secure his obligations under the Contract, the Plaintiff provided Kirby a deposit of \$37,000. (Kirby Aff. Par. 1).

At or about this time, the Plaintiff and Kirby had also entered into an agreement for the purchase and sale of other property owned by Kirby in Marlboro County ("Shop Property") with the closing for this transaction scheduled to occur near the time of the closing for the sale of the Cabin and Lots. (Kirby Aff. Par. 2).

In reliance on the Contract, Kirby purchased Lots 5 and 6 from the Sandhills Recreation Club, Inc. for a purchase price of \$4,000. In addition, he acquired the title to Lots 7 and 8 from his son Donovan Kirby, to ensure that he met his obligations due under the Contract. Kirby hired Tom Ingram to prepare all of the necessary documents for these transactions. (Kirby Aff. Par. 3).

The parties scheduled the closing for the Shop Property on Friday February 12, 2020 at Harry Easterling's office in Bennettsville, SC, while they scheduled the closing for the Cabin and Lots at Tom Ingram's office on Monday February 15, 2020. (Kirby Aff. Par. 7).

The parties appeared at Harry Easterling's office to close on the Shop Property on Friday February 12, 2020 at which time the Plaintiff informed Kirby that he was "backing out" of both deals. Kirby's attorney Tom Ingram had the necessary warranty deed prepared and he was ready, willing and able to close on the Cabin and Lots. (Kirby Aff. Par. 10). As a result of the Plaintiff's default on the Contract, Kirby retained the Deposit as he was allowed to do pursuant to the Contract. ,

LEGAL STANDARD

Summary judgment shall only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that ... no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c), SCRCP*. When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). When the preponderance of the evidence standard applies, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners Nash v. Tindall Corp.*, 650 S.E.2d 81, 375 S.C. 36 (S.C. App. 2007) *v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct.App.1995) (citing *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991)).

ARGUMENT

Kirby did not breach the Contract and thus, the Plaintiff's motion for summary judgment should be denied.

Kirby has complied with the terms of the Contract and he is allowed to retain the Deposit. The Plaintiff is attempting to rewrite the Contract by now claiming that Kirby owed him an obligation to obtain an attorney to close the transaction that would certify title to the Cabin and Lots to the Plaintiff. Despite the Plaintiff's attempts to argue

otherwise, the Contract placed no such obligations on Kirby. Paragraph 10 of the Contract sets forth Kirby's obligations at Closing and it states as follows:

Par. 10. Title. Seller will transfer fee simple title to the Property to the Buyer by a ... Warranty Deed ...

(Real Estate Purchase Contract Dated December 8, 2020, par. 10).

Kirby met his contractual obligations. He was ready willing and able to convey "fee simple title" in the Cabin and Lots to the Plaintiff pursuant to a warranty deed. (Kirby Aff. Par. 6 and 11). Kirby owned the fee simple interest in the Cabin and Lots without any limitations or conditions. He hired Tom Ingram, esquire to prepare the necessary warranty deed which conveyed fee simple title to the Cabin and Lots to the Plaintiff. (Kirby Aff. Par. 6). The evidence before the Court indicates that the Plaintiff changed its mind and he now desires to rewrite the Contract in an effort to recover the Deposit from Kirby. (Kirby Aff. Par. 10).

As is set forth in Paragraph 12 of the Contract, in the event of a default by the Plaintiff/buyer Kirby is entitled to retain the Deposit as liquidated damages. (Contract, Kirby Aff. Exb. 1). The Deposit was Kirby's sole remedy under the Contract for a breach by the Plaintiff. The Liquidated Damages provision was included in the Contract to eliminate disputes as to the amount of damages that would arise as a result of a default by the Plaintiff, especially in this situation where Kirby spent significant sums in purchasing two of the Lots and in legal costs and fees. The Contract authorizes Kirby to retain the Deposit and that is all he requests.

In support of its motion, the Plaintiff on page three of his memorandum has made assertions and statements that are not supported by the cited certain portions from Kirby's deposition. In certain instances, the statements pertain to the sale of the Shop Property

being handled by Harry Easterling's office and not to the sale of the Cabin and Lots. The Plaintiff makes no attempt to distinguish the two transactions in his assertions.

For example, the Plaintiff makes the following assertions in his memorandum which are contradicted by Kirby's actual testimony for the particular question:

4. Kirby does not deny that he did not have clean title
(Kirby Dep. p. 16, ll. 12-15).
5. He admits that he did not have title to the real property on the day of closing (Kirby Dep. p. 16, ll. 17-25).
6. Kirby admitted that there was a lien on "the Sandhills lots" and the closing attorney advised of same (Kirby Dep. p. 17, ll. 3-9).

As is set forth below, the Kirby's actual testimony contradicts the assertions made by the Plaintiff:

Q: He's telling me Easterling's office told him you didn't have clear title.

A: He knew everything going on. Everything. He knew –

Q: Well –

A: He knew – when I went down there, I told him from day one that I was buying two of those properties from the McAlpines. He knew it from day one. He knew I didn't own it. I told him when I – when I sold him the property, lots five and six, I'm in the process of buying. So if you buy this, I can give you four, which I currently own, five, six and my son will sign off on seven and eight. It was already worked out. He knew it. When we took the properties all together to Goldberg Easterling, Goldberg Easterling did a title search and they said they

did not feel comfortable with doing the Sandhills Rec lots five and six because they were incorporated some kind of way in that rec club and they didn't feel good giving title to it because there was no named whoever over – you know, person that could make decisions to sell it. I had already bought lots seven and eight. And they were at one point part of that same piece of land. Ingram did that closing. So I went back to Ingram. I told them – I told Provencher then – this was weeks before the closing.

(Kirby Dep. p.16, ll. 12 – p. 17, ll.14)

12. Kirby admits he (sic) the closing attorney would not certify clear title (Kirby Dep. p. 40-41, ll. 22-2).

Kirby's actual testimony does not say what the Plaintiff represents in this assertion:

Q: Doesn't this contract give him the right to do that?

A: I don't know. I don't know. He pulled this thing off the internet. I don't know what he – what it gives him the right to do.

Q: And – well, have you read it?

A: I've read over it. I've breezed over it. I know it was Mickey Mouse off the internet.

Q: Okay. Gives him the right to inspect it?

A: Yep. I didn't have a problem with him giving a title search. It was free and clear. I didn't owe anything on the – on the cabin and I was already purchasing the other property and

my son was giving me the other to give to him. So I didn't have a problem with any title search being done.

Q: But it sounds like Easterling Law Firm did?

A: They had a problem with giving him title because of the – because of the Sandhill Rec organization being incorporated and they didn't feel comfortable with no named person authorized to sign off on it. So they declined doing it. So –

Q: Doesn't that give him the right to back out of the contract?

A: No.

Q: Why not?

A: Because I still got title done for him at Ingram's. And he was okay with it still, friend.

Q: But doesn't –

A: Up to that point –

Q: I'm sorry. I – I'm interrupting. Doesn't Ingram not do title Searches in Marlboro County?

A: No.

Q: Then how can – how could we – how could you or I assert that Ingram was gonna protect him?

A: He wasn't. And – and Todd knew that. Todd knew that the Paperwork was going over here and that it was gonna be done. He had an appointment the morning of. It was already

confirmed with the people at Ingram's. He knew all about it.

He was still okay with it until the morning of the 12th.

(Kirby Dep. p.40, l. 3 – p. 41, l. 25)

The Plaintiff has offered no other evidence to support its motion and it is clear that Kirby's deposition testimony and his affidavit refutes the assertions made by the Plaintiff that he offers to support his motion. At the least there is a factual dispute as to the Plaintiff's claim that Kirby breached the Contract.

CONCLUSION

There are issues of material facts that preclude the court from granting the Plaintiff's motion for summary judgment and thereby award the repayment of the Deposit to the Plaintiff. Kirby therefore respectfully requests that the Court deny the Plaintiff's Motion for Summary Judgment.

TURNER, PADGET, GRAHAM & LANEY, P.A.

May 2, 2023

Florence, South Carolina

By: s/ Jeffrey L. Payne
Jeffrey L. Payne, Esquire
SC Bar No.: 15136
Post Office Box 5478
Florence, South Carolina 29502
Phone: (843) 662-9008
Email: JPayne@turnerpadget.com

ATTORNEYS FOR THE DEFENDANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO	)	
		Case No. 2021-CP-34-00163
Todd Provencher,	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF'S SUPPLEMENTAL
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
Ronald David Kirby, Jr.,	)	
	)	
Defendant.	)	
	)	

Pursuant to Rule 56, SCRCP, Plaintiff has moved the court for Summary Judgment. This motion is based on the Verified Statement of Account, previously provided and portions of the Deposition Transcript of Defendant Ronald D. Kirby, Jr.

Plaintiff filed a verified Complaint with liquidated damages on June 8, 2021. The Defendant, Ronald David Kirby, Jr. answered on July 1, 2021. Plaintiff now files a Motion for Summary Judgment. In opposition Defendant filed several exhibits-deeds and the Kirby deposition Transcript.

Supplemental Argument

Plaintiff requests judgment in the amount of Thirty-Seven Thousand 00/100 (\$37,000.00) Dollars as principal, plus interest at the statutory rate from the date of the judgment, plus attorney's fees in the amount of \$5,550.00 and for court costs. Plaintiff has sworn that is the amount owed (Exhibit A – Affidavit of Debt). Defendant has submitted deeds purportedly proving he was willing and able on the day of the closing to provide marketable title to the real property at issue.

Although dated prior to the proposed closing date (the parties differ as to that date) the deeds submitted were not filed and therefore did not become a part of the recorded title until long after the proposed closing. No lawyer or title searcher looking to confirm Kirby owned the property in question

would have been able to establish Kirby owned the property in question. Additionally, Provencher had been advised there was a cloud on the title and the lawyer searching the title could not certify title. *See email from Easterling office to Provencher dated February 1, 2021 and labeled Ex. C.* Kirby asserts he was willing and able to provide good marketable title on the closing date but the information provided by The Easterling Law Firm and the deeds upon which Kirby relies belie that assertion. Provencher had every right under the terms of the contract to withdraw from the contract and demand his deposit back.

Kirby asserts the lawyer hired by him to conduct the closing at issue (not Easterling) was prepared to conduct the closing and give Provencher fee simple title. Yet that lawyer, according to Kirby, does not certify title to real estate in Marlboro County. *Kirby Depo at p. 23.* Provencher is and was entitled to ensure he is receiving clear title. On the date of closing, Kirby could not and still cannot provide evidence he was able to provide same. The deeds he purports prove he could provide clear title say on their face “Title Not Abstracted.” Again, the defective Deeds were not a part of the real property records for this county on the day of closing. On that basis alone, Provencher properly declined to go forward with the closing and is entitled to recover his funds.

Any contention that the Defendant Kirby has complied with the terms of the Contract is false. *See Ex. D – Contract.* First, the terms of the Contract require Defendant Kirby to provide “fee simple title to the Property to the Buyer.” *See Ex. D- Contract, ¶ 10.* Defendant Kirby was unable to provide a marketable title at the time of closing for the reasons previously stated.

A marketable title is one free from encumbrances and any reasonable doubt to its validity. It is title which a reasonable purchaser, well informed, as to the facts and their legal significance is ready and willing to accept. Scalise Dev., Inc. v. Tideland Invs., LLC, 392 S.C. 27, 707 S.E.2d 440 (Ct.App. 2011). A purchaser of realty cannot be required to take doubtful title. Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). An action to rescind a contract is in equity. Davis v. Cordell, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract. Smith v. First Provident Corp., 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965); Davis, 237 S.C. at 99, 115 S.E.2d at 654;

Martin v. Carolina Water Service, Inc., 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984). Rescission is an appropriate remedy for a purchaser whose seller has contracted but is unable to provide marketable title because of defects in the title. Gibbs, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

It is undisputed that no attorney would certify title to the real property at issue in the written contract and in this suit. Ingram does not according to Kirby testimony, and Easterling could not according to his email. *Ex. C*. It was reasonable for the Plaintiff to rely on an attorney and decline to proceed. As such, Plaintiff properly rescinded the contract due to the Defendant's inability to provide marketable title.

Plaintiff is entitled to rely on the provisions included in the Contract relevant to Defendant's default (failure to provide clear title) *see Ex. D-Contract*, ¶ 12, which states that if seller defaults, buy "shall be entitled to any and all remedies provide by law and equally including, but not limited to, specific performance and recovery of amounts spent for mortgage application, appraisal, title search, and tests or inspections.... court costs and attorneys' fees." Defendant arranged for all attorneys involved. Defendant was obligated to provide clear title. No deed can convey interest which a grantor does not have even though by its terms a deed may purport to do so. Cummings v. Varn, 307 S.C. 37, 413 S.E.2d 829 (1992). A general warranty deed includes the covenant that the seller is seized in fee, has the right to convey and that the land is free from all encumbrances. Bennett v. Investor Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006). Plaintiff Provencher was alerted by the lawyer Easterling that Defendant Seller Kirby may not be seized in fee, might not have the right to convey, and the real property was not free from all encumbrances. *See Ex. C-Easterling email*.

The amount remains unpaid. There is no issue as to any material fact and Plaintiff has met the standard for granting Summary Judgment.

[SIGNATURE ON FOLLOWING PAGE]

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/ E. Lloyd Willcox, II
E. LLOYD WILLCOX, II
I.D. No. 015093
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
ATTORNEY FOR THE PLAINTIFF

May 3, 2023
Florence, South Carolina

EXHIBIT C

ELECTRONICALLY FILED - 2023 May 03 4:45 PM - MARLBORO - COMMON PLEAS - CASE#2021CP3400163

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Rosalind Johnson <hreasterling@gmail.com>
Date: February 1, 2021 at 11:10:11 AM EST
To: todd@reliableflooring.com
Subject: purchase from Kirby

Mr. Provencher,

Mr. Easterling gave me the files back the end of last week. The Store property is fine but we cannot certify title to the properties on Mays Pond. I have contacted the group that Mr. Kirby is buying those from to see if they can fix the issues. I will let you know when I hear back from them.

Thank you,

Rosalind

--


Rosalind Johnson
Legal Assistant

EXHIBIT C

Harry R. Easterling, Jr.
Easterling Law Firm, PC
120 North Liberty Street
Post Office Box 611
Bennettsville, South Carolina 29512
843-454-1711
hreasterling@gmail.com

****Due to the overwhelming amount of fraudulent cashier's checks circulating, we will require all cash to close to be tendered in the form of a wire transfer. A certified check will only be accepted if it is for less than \$5,000 and you are physically closing in our office. Our wire instructions will be sent with every closing transaction and are available upon request. Thank you.****

WARNING - FRAUDULENT FUNDING INSTRUCTIONS

Email hacking and fraud are on the rise to fraudulently misdirect funds. Please call your escrow officer immediately using contact information found from an independent source, such as the sales contract or internet, to verify any funding instructions received. We are not responsible for any wires sent by you to an incorrect bank account.

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department Regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement or other matter

PRIVILEGED AND CONFIDENTIAL INFORMATION: This electronic message, including any attachments, is intended solely for the use of the intended recipient(s) and may contain information that is attorney-client privileged, may be confidential work product, or may be proprietary. If you are not the intended recipient, please notify the sender, then delete and destroy all copies of this communication and any attachments. If you have received this e-mail in error, please note that any dissemination, distribution, or copying of this communication is strictly prohibited and may subject you to civil liability.

NOTICE REQUIRED BY FEDERAL FAIR DEBT COLLECTION PRACTICES ACT: This firm collects debts for mortgage lenders and other creditors, and any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt but only as an attempt to enforce a lien.

ELECTRONICALLY FILED - 2023 May 03 4:45 PM - MARLBORO - COMMON PLEAS - CASE#2021CP3400163

EXHIBIT D

“Omitted” as Duplicative –

**Contract found as an Exhibit
to the Summons and
Complaint in the “Record on
Appeal” at p. 7.**

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF MARLBORO)

COURT OF COMMON PLEAS NONJURY

3
4 TODD PROVENCHER,)

5 PLAINTIFF,)

6 vs.)

7 RONALD DAVID KIRBY, JR.,)

8 DEFENDANT.)

TRANSCRIPT

OF

RECORD

2021-CP-34-163

9
10 April 20th, 2023

11
12 B E F O R E :

13 THE HONORABLE MICHAEL S. HOLT, Judge.
14

15 A P P E A R A N C E S :

16 E. LLOYD WILLCOX, II
17 ESQ.

Attorney for the Plaintiff

18 JEFFREY L. PAYNE

19 ESQ.

Attorney for the Defendant
20
21
22

23 Transcribed by Pamela E. Green, from
24 WebEx
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I N D E X

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

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P R O C E E D I N G S

THE COURT: All right. Next matter on the Court's docket is Todd Provencher versus Ronald David Kirby.

All right. Court will come to order.

This is 2021-CP-34-00163, Todd Provencher versus Ronald David Kirby. Appearing before the -- on behalf of plaintiff is Mr. Willcox. On behalf of the defendants, Mr. Payne.

All right. All right. Gentlemen, I'll be happy to hear from you.

MR. WILLCOX: Thank you, Your Honor. This is Lloyd Willcox on the -- for the plaintiff, Todd Provencher. This is my motion for summary judgment.

Your Honor, this is an argument or a disagreement over a contract to buy and sell real estate. We have taken Mr. Kirby's deposition, the defendant in the matter, the seller under the contract. We have also admitted a limited partially in support of the -- which is the -- which is supported by the deposition of (indiscernible) and a few other documents, Your Honor.

The defendants have submitted -- but the defendant has submitted an affidavit in opposition and an affidavit (indiscernible).

For the most part, Your Honor, I'm gonna let some of the issues speak for themselves. Mr. Payne and I are

1 arguing over a contract. We both (indiscernible)
2 significant (indiscernible) in support of our position.

3 My guy, the buyer, paid \$37,000 in deposit to buy this
4 real estate. Century (indiscernible) we got to the closing
5 of the (indiscernible). The closing attorney advised him
6 that Mr. Kirby did not have clear title.

7 We support that position and, therefore, we've moved
8 for summary judgment. The contract did not go forward
9 meaning the sale did not take place.

10 well, I'm about to point out a few things that the, the
11 seller, Mr. Kirby, sound the contract. He did not have
12 clear title on the day of the closing. He admits that
13 there's a lien on what we call a Sandhill Lots. He thinks,
14 the closing attorney, (indiscernible).

15 The contract requires Mr. Provencher, the buyer,
16 receive marketable fee simple clear title. Mr. Kirby,
17 Mr. Kirby, the defendant, has submitted an affidavit which
18 he concludes the deeds that showed -- that he says showed
19 that he did the -- he's submitting deeds that satisfied that
20 requirement.

21 I would like to point out to the Court that the
22 exhibits that Mr. Kirby was or have admitted all have the
23 word -- defaulting words on it. The title not as
24 (indiscernible). The deeds that he's -- needs to support
25 his position, clearly no one had checked, when the person

1 prepared the deed, not checked the title for the property.
2 Mr. Kirby, on the date of closing, could not convey fee
3 simple title which the contract required.

4 Both parties have pointed out two sections in the
5 contract submitted. Section 10, which says in several
6 (indiscernible) for a fee simple title to the property to
7 the buyer by a Connecticut form of warranty deed.

8 My clients, who are out-of-state -- my client, who's
9 out-of-state, used a form that I imagine he found on the
10 Internet to, to create the original contract. I don't think
11 either side (indiscernible) that a Connecticut form of
12 warranty deed is required. However, we do see that a deed
13 that's -- that conveys fee simple title is legal under the
14 contract.

15 The contract also called before that if the buyer
16 defaults under the contract, and the seller is not in
17 default, then the buyer loses. But -- and the contract -- I
18 mean the -- issued by the defendant suggests that. I just
19 wanted to point out for the Court that the vice versa is
20 also true.

21 The seller ultimately and the buyer (indiscernible) the
22 buyer (indiscernible) to the premises. The prevailing party
23 is entitled to (indiscernible) of attorney's fees under this
24 contract.

25 We have pointed out to the Court that the fees, the

1 exhibits that the defendant has submitted for the
2 proposition that he was prepared to and could indeed convey
3 fee simple title to the court are inadequate. Again, title
4 not abstracted.

5 Additionally, the closing attorney emailed my client a
6 week before the closing and said Mr. Provencher,
7 Mr. Easterling, who wasn't the closing attorney, gave legal
8 files, and this is from Mr. Easterling's (indiscernible)
9 form, gave them the files back to the (indiscernible). The
10 store properties (indiscernible), and I don't think the
11 parties disagree about that, but we can not certify title to
12 the property on May (indiscernible). His employer
13 (indiscernible) is notified the buyer that the suit -- title
14 can not be served.

15 I have contacted the group Mr. Kirby's (indiscernible)
16 to see if they could fix the issue. I will let you know
17 when I hear back from them. Signed Rossalyn who works for
18 Mr. Easterling here in, in Bennettsville.

19 Again, Your Honor, the deed submitted says that the
20 title is not abstracted. The deed's have since been filed.
21 But on the day of the closing, they were not filed for
22 (indiscernible). They were not part of the title, and even
23 if they were, they don't prove that he could convey fee
24 simple title.

25 we took the advice of our lawyer. We stopped when the,

1 the sale and the closing right there and we want our deposit
2 back.

3 Thank you, Your Honor.

4 THE COURT: So, the closing didn't take place?

5 MR. WILLCOX: The closing did not take place.

6 THE COURT: Okay.

7 All right. Mr. Payne.

8 MR. PAYNE: Your Honor, there's a little confusion
9 going on here. There was -- there were two transactions
10 between these parties, two different contracts.
11 Mr. Easterling was handling the shop that my client owned
12 that was nearby.

13 There was another contract, the contract for the deal
14 that we're here today, in what we call the Mays Road
15 (indiscernible). It's out here on this (indiscernible)
16 foundation lines. Two different situations.

17 Mr. Easterling was involved with the shop closing. He
18 said I don't feel comfortable dealing with the Mays Road
19 property (indiscernible). It's owned by a corporation back.
20 Got to track down who, who controls that corporation. Said
21 I'm just not familiar with it and that's what's set forth in
22 my affidavit and we've brought up several distinctions here.

23 That's the deed -- whether that's the blatant owed.
24 The evidence here is such that my clients (indiscernible)
25 keeping the deposit cause they breached the contract. They

1 didn't show up. They didn't (indiscernible). We had all
2 the property. We had what was required under the contract
3 and they changed their mind on (indiscernible) properties as
4 well as the other ones that Mr. Easterling was handling.
5 And that's like referring to this, this affidavit.

6 And when you look at the, the submission that Mr.
7 Willcox (indiscernible), in parts from the deposition he
8 keeps referring to, they're all talking about
9 Mr. Easterling. It never talks about Mr. Thomas Ingram
10 who's the one that's prepared all the deeds for the Mays
11 Road property.

12 But this is a contract dispute and the most readable
13 version, last line is not very readable, the one
14 (indiscernible) said that is not very good. But on the
15 complaint, I finally found (indiscernible) complaint you
16 could actually read it a little bit better.

17 But what they're trying to do is rewrite the contract.
18 This contract, in Paragraph 10, required two things.

19 One, he's gonna provide a thorough argument -- the
20 warranty deed, all right, which he's got ready and it's
21 attached to his affidavit. Mr. (indiscernible) in response.
22 But what the affi -- the, the deed is ready and the other is
23 fee simple title.

24 Okay. Fee simple title means a hundred percent title.
25 You can't just give us the light (indiscernible) state or

1 remainder of interest. You give us a hundred percent.

2 No where in there does it say we've got the -- we've
3 done a title search for the buyer. The buyer's the one who
4 goes out and does all this stuff. But we've complied.
5 we've had the title, the deeds prepared, and we relied on
6 the contract to be ready.

7 Now, one other thing that we did, Your Honor, is
8 that -- is at issue is detrimental reliance here. So, in
9 this situation, my client owned the lot. The lot
10 (indiscernible) cabin. He also told the buyer hey, to get
11 these adjacent lots, we're gon' sell those to you too. So,
12 it's Plots 5, 6, 7, and 8 were also part of it, and, to make
13 the deal happens (sic), he goes out and buys the lots.

14 So, he spends thousand of dollars to buy Lots 5 and 6
15 from the Sandhill Recreation (indiscernible) from a guy
16 named Mr. (indiscernible.) Mr. -- and that deed's attached
17 to our affidavit.

18 So, in reliance on their promises, he goes out and
19 spends I think \$4,000 on that deed. He gets Mr. Ingram
20 involved. Mr. Ingram starts preparing all the paperwork and
21 then, low and behold, you get to February, 2021,
22 Mr. Easterling was gonna handle the Shop deed. Mr. Ingram
23 was gonna handle this issue on Monday, the 15th of February,
24 and they back out on Friday. He says I changed my mind.
25 Not gonna do it. So the deal was stopped.

1 We're ready to go on -- with both pieces. Like I said,
2 this was just dealing with the one Mr. Ingram's handling.
3 So he relies on the contract. He hires Ingram. He buys the
4 property. Attached to his affidavit are all the deeds where
5 we acquired all this property.

6 One of the big issues that was in this affidavit too
7 was he didn't even -- he don't even own this property. He
8 don't own one of these properties and he did at the time of
9 closing. He bought it. So -- and the contract doesn't say,
10 you know, just like look at the property, whatever. Their,
11 their discussions were he acquired a -- the bank of lots.

12 But he's got it all here. He's ready to go, and under
13 the contract, paragraph -- I think it's Paragraph 12, it
14 specifically states, if the buyer defaults, he gets to keep
15 the deposit and (indiscernible) for any damages.

16 He can't get his lost profits. He can't get whatever
17 else consequential damages. But the liquidated damages here
18 are he gets to keep the deposit.

19 I think, when you see the -- read my client's
20 affidavit, the, the submissions by the plaintiff here, some
21 of these statements are just wrong. In the deposition he
22 said he admits he did not have the title to the real
23 property on the day of the closing and that's not what the
24 deposition says for these particular lines that we're
25 talking about here.

1 So you've got to be careful when they're -- they're
2 mixing up these two transactions with the (indiscernible)
3 from the deposition been cited here because one of them
4 which said (indiscernible) admits closing attorney would not
5 certify clear title.

6 Well, that's not true. Mr. Easterling says I'm not
7 comfortable doing the banks lots because of this corporation
8 issue and who can satisfy one or two of these lots. He
9 doesn't say that -- the closing attorney is Tom Ingram
10 saying no -- there's just different distinctions that are
11 going on here.

12 I think clearly it's not a case of summary judgment.
13 You got a factual issue going on. We actually think, when I
14 filed my motion for summary judgment, that you'll be able
15 to, to -- I haven't done it yet. But we maybe should of had
16 cross motions here. But I think clearly we're entitled to
17 keep the deposit because they failed to vehicle on -- failed
18 to close as agreed and he spent a bunch of money relying on
19 them and they just backed out and it's not right.

20 Thank you.

21 THE COURT: Yes, sir.

22 MR. WILLCOX: Two things, Your Honor, on the
23 (indiscernible) Mr. Ingram, the other attorney in this
24 matter.

25 He would not certify the title. He does not certify

1 title in Marlboro County. He does not check title that he's
2 involved with. All he does is prepare a deed according to
3 the current deposition.

4 Number two. Mr. Easterling's office relied on
5 Mr. Easterling, Mr. Easterling's office. We can not supply
6 title to the property on Mays Road. That's what they told
7 us and we're told to rely on the attorney. We're not gonna
8 settle with the attorney (indiscernible). We
9 (indiscernible) for once. And there -- and the submission
10 by Mr. Kirby are not a civil warranty deed.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. PAYNE: Well, just lastly.

14 This is where they're rewriting the contract. We're
15 not the fire -- we're not responsible for him to go out and
16 certify the title. We have warranty deed to -- just like
17 the contract requires.

18 We don't have to go get them a title opinion. That's
19 their job to find out. Mr. Easterling (indiscernible)
20 several lawyers in the (indiscernible). But the contract
21 does not require that we go out and somehow certify -- get a
22 lawyer for him to certify the title.

23 The contract says we provide warranty deed and we give
24 them fee simple title and that warranty deed does exactly
25 that. It's getting them (indiscernible). And the only

1 thing they have a problem about was Sandhill Recreation from
2 and armed -- attached to the deed that he got for the
3 Sandhill Recreation plot, which were two lots,
4 (indiscernible) with the cabin on it, James McCalvin is who
5 signed the corporate resolution saying that he -- that he's
6 authorized to sign it and sign the deed (indiscernible).

7 That's all there is and there's no requirement that we
8 have to go out and somehow get them a certified title to
9 them. It's fee simple title and a warranty deed. Both of
10 those things were there. We were ready to close and we
11 spent all, all this money relying on it and now they want to
12 get the money back. We're not willing to do it. It's clear
13 title per the contract.

14 Thank you.

15 THE COURT: Yes, sir.

16 Anything else?

17 MR. WILLCOX: One more thing. He is required to give
18 us clear title. He is. We can check on it. But he's
19 required to give us the good deed. He hasn't done it.

20 THE COURT: All right.

21 MR. PAYNE: And if he does -- it's a clear title. It's
22 good. We're swearing to it by warranty. I don't know why
23 they think it's not clear title.

24 MR. WILLCOX: Title not abstracted. Nobody checked.

25 THE COURT: All right. Okay. Interesting.

1 All right. All right. Y'all submitted some things as
2 well.

3 MR. WILLCOX: We did.

4 THE COURT: Okay. All right. Let me review those.

5 MR. PAYNE: Thank you judge.

6 THE COURT: All right. Thank you.

7 Good luck to y'all.

8

9 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Marlboro County, South Carolina, on the 20th day of April, 2023.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 10th, 2023

A handwritten signature in cursive script that reads "Pamela E. Green". The signature is written in dark ink and is positioned above a solid horizontal line.

PAMELA E. GREEN, Court Reporter

State of South Carolina
County of Marlboro

In Common Pleas Court

Todd Provencher,

Plaintiff,

V.

2021-CP-34-00163

Ronald David Kirby, Jr.,

Defendant.

Deposition of: Ronald David Kirby, Jr.

Location: 248 W. Evans Street
Florence, South Carolina

Date: Wednesday, December 22, 2021

Time: 10:01 a.m. - 11:34 a.m.

Court Reporter: Ashley Rogers

The deposition is taken pursuant to notice and/or agreement, in the above-entitled cause pending in the above-named court and pursuant to the South Carolina Rules of Civil Procedure.

Q & A Court Reporting Services
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A P P E A R A N C E S

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Also Present: Angela Kirby

I N D E X

Examination by Mr. Willcox 3

E X H I B I T S

Pg/ln	Ex.	Description
Premarked	A	R.E. purchase contract, 12/8/20
Premarked	B	R.E. purchase contract, Chavis Rd
Premarked	C	Settlement statement, Chavis Rd
Premarked	D	Settlement statement, lots 4-8
54/2	E	Title to R.E., lot 5 & 6
56/25	F	Title to R.E., lot 7 & 8
60/3	G	Proposed \$10,000 deal
61/1	H	Copy of check to McAlpine
61/19	I	Letter from McAlpine
63/14	J	Title to R.E., lot 4

** uh-huh = affirmative
 huh-uh = negative

1 S T I P U L A T I O N S

2 It is stipulated between Counsel that this
3 deposition is being taken pursuant to the South
4 Carolina Rules of Civil Procedure; and that all
5 objections, except as to the form of the question,
6 are reserved until the time of trial.

7 It is also stipulated between Counsel for
8 the respective parties and the deponent that the
9 deponent will exercise the right to read and sign
10 this transcript.

11 Thereupon,

12 (Exhibit numbers A-D
13 premarked for identification.)

14 Ronald David Kirby, Jr.,
15 being first duly sworn by the Court Reporter, as
16 hereinafter certified, testified as follows:

17 E X A M I N A T I O N

18 By MR. WILLCOX:

19 Q Mr. Kirby, good morning. We met off
20 the record. My name is Lloyd Willcox. I
21 represent Mr. Provencher, P-R-O-V-E-N-C-H-E-R, in
22 this litigation that we brought against you.
23 We're here to take your deposition. You obviously
24 just sworn -- you're under oath. There are some
25 rules that Jeff and I have to live by and I -- and

1 I'm required to go over them very briefly and I
2 will do that. If -- if you don't understand a
3 question that I ask or if I ask three in one,
4 which I am very capable of doing, please, ask me
5 to rephrase it, explain it or break it down.
6 Okay?

7 A Yes, sir.

8 Q If I -- if you answer me, I'm gonna
9 take the position, valid or not, that I am -- that
10 you understood the question. Okay?

11 A Yes, sir.

12 Q You've also given verbal responses on
13 the two questions that I've asked and -- and I
14 thank you for that and I would ask you to continue
15 to do that as opposed to head nods. Okay --

16 A Yes, sir. Yes, sir.

17 Q All right. And we'll take as many
18 breaks as we need, as you need, as I need, as
19 Ms. Kirby needs, as -- as Jeff needs. I may need
20 some 'cause I've got a terrible cold. Had it for
21 a month. And -- but during the breaks, I would
22 ask that you not talk to Jeff about the case. He
23 probably has already advised you to do that.
24 Because if you talk about the case, I think -- and
25 I could be wrong, but I think that I would be

1 entitled to ask you what y'all talked about.

2 Okay?

3 A Okay.

4 Q Does that make sense?

5 A Yes, sir.

6 Q So talk about the weather, talk about
7 last night's -- Gamecocks won, whatever, but stay
8 away from the case. Fair enough?

9 A Yes, sir.

10 Q Okay. Thanks so much. What's your
11 full name?

12 A Ronald David Kirby, Junior.

13 Q Date of birth?

14 A 6/3/71.

15 Q Where do you live?

16 A 2059 Mays Road, Bennettsville, South
17 Carolina 29512.

18 Q Is that near lots four, five, six,
19 seven and eight on Mays Road?

20 A Correct.

21 Q Is it a little neighborhood?

22 A Yeah.

23 Q And you live in it?

24 A Yes, sir.

25 Q All right. How long have you lived

1 there?

2 A I'm gonna say 12 years, give or take.

3 Q All right. If you'll give me the last
4 four digits of your social security number, I'm
5 not gonna use 'em for anything other than this --
6 this deposition and this litigation?

7 A 4849.

8 Q Are you driving?

9 A Do I drive?

10 Q Yes, sir.

11 A Yes.

12 Q Do you know your driver's license
13 number?

14 A 101093609 --

15 Q Thank you. Thank you. And how far did
16 you go in school?

17 A Twelfth grade.

18 Q Where did you graduate?

19 A I got a G.E.D.

20 Q Where did you go through twelfth
21 grade --

22 A It's -- Alamance County College.

23 Q Where's -- where's Alamance County?

24 A An--- I want to say it's Anderson,
25 North Carolina.

1 Q North Carolina. I couldn't remember if
2 it's North Carolina or --

3 A Yeah.

4 Q All right. Do you have any grown
5 children?

6 A Yes.

7 Q Do they live in Marlboro County?

8 A Yes.

9 Q All right. What -- is their last name
10 Kirby?

11 A Yes.

12 Q All right. Do you have any other
13 relatives other than -- with a name other than
14 Kirby that live in Marlboro County?

15 A No, sir.

16 Q All right. And I believe your wife is
17 here with you today?

18 A Yes.

19 Q What is her name?

20 A Angela Kir---

21 Q What was her --

22 A Kirby.

23 Q What was her maiden name?

24 A Angela Lambert.

25 Q Do any Lamberts live in Marlboro

1 County?

2 A No, sir.

3 Q Have you ever been married before?

4 A Yes.

5 Q And where does your ex-wife live?

6 A Charlotte.

7 Q We won't worry about her. All right.

8 Do you have a criminal record?

9 A It's old, but, yes.

10 Q What -- what is it?

11 A A bunch of different misdemeanor stuff.

12 There was one felony. It was a possession of
13 stolen goods, set of golf clubs. That's been
14 about 30 years ago.

15 Q And you either were found guilty or
16 pled guilty?

17 A I pled guilty. I took a plea bargain
18 like a dummy.

19 Q And that was about 30 years ago?

20 A Yeah.

21 Q So you were a kid?

22 A Yes, sir.

23 Q What were the misdemeanors, just bri---
24 just in general?

25 A There was an assault, a trespassing,

1 Micky Mouse stuff like that.

2 Q And did you either plead or were you
3 found guilty of the assault?

4 A I -- I -- gah, I can't remember. I
5 don't know.

6 Q All right. And where were these
7 arrests and or convictions?

8 A Charlotte.

9 Q What county is that?

10 A Mecklenburg.

11 Q Yeah. And how long have you -- you --
12 you've been at your house for 12 years. Is that
13 how long you've lived in Marl--- in Bennettsville?

14 A I think it's closer to about 18 years
15 in -- in -- in South Carolina. At first we lived
16 in Ruby, South Carolina.

17 Q Where's that? I've heard of it, but --

18 A That's Chesterfield County. And then
19 we moved over here to Marlboro County.

20 Q Any criminal problems in South
21 Carolina?

22 A I've had no convictions of any kind
23 other than a traffic violation or something down
24 here.

25 Q All right. Any arrests?

1 A Yeah.

2 Q For...

3 A We were involved in a shooting slash
4 assault situation where some people shot at us at
5 a cook-out and we got in to a fist fight
6 afterwards with 'em.

7 Q And when was that?

8 A Ten years ago, I guess, about seven or
9 eight years ago.

10 Q Twenty-three?

11 A I'm terrible with dates and stuff like
12 that --

13 Q So am I.

14 A -- but I'm -- I'm guessing it was --

15 Q I'm terrible with math.

16 A -- about seven or eight years ago.

17 Q And I -- I just talked over you. One
18 of the rules that I'm sure Jeff went over with
19 you, let me finish the question before you answer
20 it --

21 A Yes, sir.

22 Q And I'll try to do the same courtesy to
23 you.

24 A Yes, sir --

25 Q Again, I'm -- I'm bad -- I shouldn't be

1 bad 'cause I do depositions, but I'm bad about
2 talking over people. Okay?

3 A Yes, sir.

4 Q And I'll try not to. Thank you. All
5 right. And there was an arrest as a result of
6 that -- that fight?

7 A Yes.

8 Q And there was no conviction?

9 A No.

10 Q Was the other person convicted of
11 anything as far as you know?

12 A The -- the opposing parties?

13 Q Yeah.

14 A No, they were never charged with
15 anything.

16 Q Okay. Any lawsuits resulting from
17 that?

18 A No.

19 Q Any lawsuits other than this one that
20 you've been involved in in South Carolina?

21 A Right. Now, I have two pending. One
22 against the South Carolina D.O.T. for stealing
23 property off of mine and a friend's location. And
24 there's another -- it -- it isn't really against
25 me I would say. It's against the county of

1 Marlboro. I bought the -- bad as my luck is, the
2 shop that I bought with -- with some of the monies
3 from this situation, I bought another property.
4 It was a tax sale. And now they're going back
5 from two years ago trying to say that the tax sale
6 was done improperly and trying to overturn the
7 sale.

8 Q So you're a named defendant and
9 somebody's trying to -- to get the title straight
10 and get it out of your name?

11 A Yeah, I'm the third owner since the tax
12 sale.

13 Q Okay. And on the D.O.T. case, we're
14 not on the other side are we?

15 A I'm -- I'm the plaintiff in that one.

16 Q Yeah, we're not on the other side are
17 we?

18 A What does that mean?

19 Q Who's the defense lawyer?

20 A I don't know who that is.

21 Q We -- the reason I ask is 'cause we do
22 a lot of D.O.T. work.

23 A Yeah, Jason Luck is handling that for
24 me out of Bennettsville.

25 Q I know Jason.

1 A He's -- he's my neighbor actually. He
2 lives there in the Sandhill Rec area, too.

3 Q Okay. Gotcha. Gotcha. He and I have
4 a case --

5 A Yeah.

6 Q -- right now totally unrelated to this,
7 but, anyway, I was asking you -- thank you. All
8 right.

9 A Yeah.

10 Q Any other criminal problems while in
11 South Carolina?

12 A No.

13 Q Any other lawsuits while in South
14 Carolina?

15 A No, sir.

16 Q Any lawsuits that got filed against you
17 by you that have since been settled or ended?

18 A No, sir.

19 Q All right. Do you own the home you
20 live in?

21 A Yes.

22 Q And are you working for yourself?

23 A Yes.

24 Q What do you do?

25 A I own a gas station.

1 Q How long have you done that?

2 A Since January.

3 Q Of?

4 A This year.

5 Q What did you do before then?

6 A Had a auto repair shop.

7 Q How long did you do that?

8 A Eight years.

9 Q And what was it called?

10 A Kirby's Automotive.

11 Q What happened to that?

12 A It just went under when one of the
13 presidents, no name, got in office and the economy
14 took a dump.

15 Q All right. And before the auto repair
16 shop, what did you do?

17 A I drove a truck.

18 Q Who did you work for?

19 A Eddie Carpenter.

20 Q Did y'all part -- part on good terms?

21 A Well, he's deceased now.

22 Q Did -- is that why you left 'cause he
23 died?

24 A He -- no, I -- I quit before that when
25 I got the -- I bought the auto repair shop that

1 we're having this deposition over --

2 Q Yeah.

3 A -- work and when I bought it, I quit
4 Eddie Carpenter.

5 Q So it sounds like y'all left -- you
6 left him under pretty good terms --

7 A Yeah, it wasn't -- it wasn't...

8 Q Have you ever been fired from a job?

9 A I guess when I was a kid, I probably
10 did, probably from not showing up. Had girls and
11 things like that on my mind.

12 Q Absolutely. Have you ever been in the
13 military?

14 A No, I have not.

15 Q All right. You don't want to just give
16 this guy his money back?

17 A No.

18 Q Why not --

19 A Well --- well, the reason I have is
20 because the guy in my opinion, and I'm just saying
21 this out loud, is a moron. Because if I gave you
22 the kind of money he gave me, I'd be pretty damn
23 sure I was gonna buy what I was buying. And I
24 wouldn't back out. And if I gave you that kind of
25 money, you would think, all right, I'm gonna trust

1 this guy. He's gonna give me all this money, so I
2 made arrangements to move out of the building, pay
3 people to help me, buy another property to put the
4 equipment in. I actually paid for the closing on
5 another property, lots five and six, to buy those
6 properties to sell them to Mr. Provencher on the
7 15th. And he backed out the day of the closing
8 with Goldberg Easterling on the 12th. So I -- I
9 was pretty upset that he backed out on me and
10 stuck me like he did after I done spent most of
11 the money on these other things counting on him.

12 Q He's telling me Easterling's office
13 told him you didn't have clear title.

14 A He knew everything going on.
15 Everything. He knew --

16 Q Well --

17 A He knew -- when I went down there, I
18 told him from day one that I was buying two of
19 those properties from the McAlpines. He knew it
20 from day one. He knew I didn't own it. I told
21 him when I -- when I sold him the property, lots
22 five and six, I'm in the process of buying. So if
23 you buy this, I can give you four, which I
24 currently own, five, six and my son will sign off
25 on seven and eight. It was already worked out.

1 He knew it. When we took the properties all
2 together to Goldberg Easterling, Goldberg
3 Easterling did a title search and they said they
4 did not feel comfortable with doing the Sandhills
5 Rec lots five and six because they were
6 incorporated some kind of way in that rec club and
7 they didn't feel good giving title to it because
8 there was no named whoever over -- you know,
9 person that could make decisions to sell it. I
10 had already bought lots seven and eight. And they
11 were at one point part of that same piece of land.
12 Ingram did that closing. So I went back to
13 Ingram. I told them -- I told Provencher then --
14 this was weeks before the closing. I said, look,
15 if Goldberg don't want to do it, we can go back to
16 Easterling and Easterling will do the closing on
17 lots five and six. And then --

18 Q Yeah, but hold on --

19 A -- it'll be ready --

20 Q Did you hear yourself? You said that
21 if Goldberg didn't want to do it, Easterling...

22 A I'm sorry. I said it backwards.

23 Q Yeah.

24 A If Goldberg Easterling didn't want to
25 do lots five and six, Ingram would.

1 Q Okay.

2 A Because he had done lots seven and
3 eight for me already right next door to 'em. Todd
4 agreed to that. We took the paperwork over there
5 to him. I did most of the leg work because I live
6 here. He lives way up north somewhere. So I took
7 the paperwork to Ingram, they prepared the
8 paperwork. I bought the land, penned in the
9 closing on the 15th from McAlpine so I would have
10 it in my possession. I also had them draw up
11 papers with my son, Donovan. Donovan signed off
12 on the property giving it back to me so I could
13 also have it free and clear to sell on the 15th at
14 closing.

15 The day of our closing, Todd comes down
16 to the property. He brings a subject I've never
17 seen before, which was his brother. His brother
18 evidently had -- he told me was partner in this
19 deal and had never seen any one of the properties.
20 He was on go street, all the way up until this
21 point. His brother comes down with him that
22 morning. He gave me a call at 8:00. He says,
23 Mr. Kirby, who is the power company with because
24 I'm going to them this morning to get the power
25 turned on so we'll have power before the closing

1 at the attorney's office at 9:30? I said it's
2 Marlboro Electric. So he hung up the phone with
3 me. Said I'll see you at 9:30. Between the time
4 of 8:00 and 9:30 when he pulled up in front of
5 Goldberg Easterling, something changed. And he
6 said it was his brother. He said his brother
7 didn't want to go in halves on the deal and that he
8 didn't feel comfortable because there wasn't a
9 title search, there wasn't a survey, there wasn't
10 a -- a perc test done on the land and he didn't
11 want to buy in to it.

12 Q Easterling -- my file reflects that --
13 that at least part of what you said we would agree
14 on that -- that Mr. Easterling's firm didn't feel
15 comfortable certifying title.

16 A Yeah, that's right because the
17 Sandhills Rec was incorporated or something in
18 there and there was no named -- I'm gonna say
19 leader. I don't know what the technical name --
20 the -- the person authorized to sell, buy, you
21 know, anything with that rec club. Because it was
22 incorporated and there was no named person over
23 it, he didn't feel comfortable, you know, giving
24 title.

25 Q My file also reflects -- and my file is

1 information my client's giving me and information
2 Jeff's given me, information that Ingram's given
3 me and information that Easterling's given me. My
4 file also reflects that Ingram doesn't check
5 title.

6 A He -- he never requested title to be
7 checked.

8 Q Who in the world would buy property
9 without getting the title checked --

10 A Your client.

11 Q Okay. All right. He said he insisted
12 on it from the get-go.

13 A No, he did not.

14 Q Okay. Doesn't the contract require it?

15 A Does the contract require it?

16 Q Yep.

17 A I don't know. He draw the contract up
18 off of some Mickey Mouse website on the internet.

19 Q Well, that was one of my questions.
20 Where did that contract come from?

21 A He did it.

22 Q Okay. That's -- you didn't present it
23 to him?

24 A No.

25 Q Okay. All right. And I got a copy of

1 it. We're gonna talk about it. All right.

2 A He actually e-mailed me those
3 contracts. And I've got those e-mails.

4 Q On the day -- well, I haven't gotten
5 that. That would help.

6 A Well, it's the same thing you got.

7 Q Okay. Well, I mean, when it was
8 presented to you. That would help for me to know
9 that. No, that's -- don't worry about it right
10 now. Jeff and I'll talk about that later.

11 A Okay.

12 Q On the day of the clo--- the -- the
13 proposed closing, did you own all these lots?

14 A Yes.

15 Q All right. If the courthouse says the
16 -- the -- the deeds were filed after this date,
17 how would anybody know that you owned those lots?

18 A Because the paperwork was sitting at
19 the lawyer's office with clear title sitting in my
20 name.

21 Q What lawyer's office?

22 A The -- the -- what do you mean?

23 Q Ingram or Easterling --

24 A All the lots -- lots -- Ingram.

25 Q Okay --

1 A See, Todd --

2 Q Who won't -- who won't check title?

3 A Yeah, well, he -- he wasn't requested
4 to.

5 Q Okay.

6 A And see at first and -- and I believe
7 you can check this out with Goldberg and
8 Easterling, for quite some time while they were
9 preparing title for -- for this place, there was
10 never a request from the beginning. And I'll
11 believe they'll verify that, to do title work, you
12 know, title search. It was done about a week or
13 two before and that actually was gonna prolong
14 things just a little bit. And -- and that's why
15 it took a little longer for Goldberg and
16 Easterling to do the paperwork. Because at first,
17 there wasn't any title search ordered by anybody.
18 As a matter of fact, your defendant checked off
19 that he didn't even want an inspection, termite
20 inspection, appraisal, anything done on any of it.
21 It's on the contract with his initials.

22 Q Well, we -- and we're gonna go over the
23 contract. I just never heard of a lawyer -- the
24 first thing a lawyer does when they get a -- a
25 real estate contract is go check title.

1 A Yeah --

2 Q That's the first thing they do.

3 A Yep.

4 Q And -- and Ingram doesn't do that?

5 A Yep. He -- he does not in Marlboro
6 County.

7 Q Didn't you recommend Ingram?

8 A I did.

9 Q Okay --

10 A He had done title -- title work before
11 for me and title searches in Marlboro County, but
12 his health has faded a little bit recently, not
13 giving any personal information, that's why they
14 no longer do it in Marlboro County.

15 Q And -- and why did we end up having two
16 lawyers involved?

17 A Because Ingram was gonna do the
18 paperwork as is out the door and he was gonna
19 handle all of it, all four lots, two -- two
20 belonging to my son, two belonging to McAlpine and
21 have it all ready to go and sign over to your
22 client, Mr. Provencher.

23 Q And why didn't that happen?

24 A Because on the 12th, your -- after I
25 talked to your client at 8:00 that morning, he was

1 going to the power -- he was still on go street,
2 buddy. He went to the -- to the power company to
3 get the power turned on and something clicked
4 between there and there and his brother got in his
5 ear. He pulled up in front of the attorney's
6 office at Goldberg Easterling and said, hey, bud,
7 my brother don't like this deal. I'm backing out
8 of it. I said, well, you do know that if you
9 forfeit this deal, you're gonna put me in a
10 situation and I'm not giving you your money back.

11 Q Did you say, fuck you, sue me?

12 A No, I didn't. You know what I did tell
13 him? I said I've dealt with Goldberg Easterling
14 before, let's walk in here because I don't want
15 him pissed off at me for backing out of this deal
16 that he spent time on. And I want you to tell the
17 paralegal in there out of your own mouth that
18 you're backing out. And he said, I sure will. He
19 was pissed off. He walked in there and he said,
20 hey, I'm backing out of this deal and I want my
21 money back. And she said, well, I don't think
22 you're gonna get your money back if you back out.
23 You're forfeiting.

24 Q And -- and what -- what's her name?

25 A It's -- I -- I don't know her name.

1 It's the lady -- the only secretary at Goldberg
2 Easterling.

3 Q All right. There's a Rosalind.

4 A Yep, that sounds familiar.

5 Q Would it surprise you to learn that we
6 believe she's going to testify that she told
7 Mr. Provencher you didn't have clear title?

8 A I don't care what she said. She don't
9 know what Ingram and them had going on. See,
10 Provencher came down that weekend. He was
11 supposed to stay in the cabin, which is why he was
12 turning the power on so he'd have electricity
13 there. And he was gonna stay 'til Monday to do
14 the closing at Ingram. Something happened on
15 Friday with his brother and him to where he backed
16 out.

17 Q Okay.

18 A Up until that time, hey, buddy, he knew
19 there wasn't a title search. He knew Ingram and
20 them were taking care of the paperwork, that
21 they'd been preparing for two weeks. He also knew
22 that -- that the -- that there had been no
23 inspection. He checked off on that and he was
24 still on go street. Something happened with his
25 brother and him the morning of the closing. He

1 was gonna go get the power turned on. He was
2 still on go street. And then something happened
3 between that ride from 8:00 to the lawyer's office
4 at 9:30. He backed out.

5 Q Couldn't that something be that the
6 lawyer advised him you didn't have clear title?

7 A No.

8 Q Why not?

9 A Because they would have known that
10 weeks before. That's why it went to Ingram.
11 Weeks before it was told by Goldberg that we're
12 not gonna do the title work. You know as well as
13 I do if he -- if they would have told him on the
14 12th, Ingram would have not had time to get the
15 paperwork and prepare it by Monday.

16 Q I -- I don't know that. But I --

17 A Well, they wouldn't do a title search
18 or not a title search, but they wouldn't do
19 paperwork from Friday morning to Monday and have
20 four pieces of parcels ready to go.

21 Q Well, if they don't have to do the
22 title search, why not?

23 A Because they would have had to sign it
24 from those people to me. I would have had to pay
25 McAlpine. If you look at the closings, you'll see

1 that McAlpine's closing was done weeks before
2 because I had to get the stuff in line for Ingram
3 to do all the closings together.

4 Q All right. Well -- and we're gonna go
5 over the deeds because I -- I don't think the
6 deeds were filed before this alleged closing --
7 proposed closing --

8 A I don't know when they were filed. I
9 know they were sitting on Ingram's desk and we got
10 the paperwork showing that they were ready to go
11 the day of closing.

12 Q All right --

13 A For me and Todd.

14 MR. PAYNE: And you're -- you're
15 talking about...

16 MR. WILLCOX: I'm talking about the
17 four lots.

18 MR. PAYNE: Okay. There you go. I'm
19 sorry.

20 MR. WILLCOX: I'm sorry. I -- I should
21 be clear.

22 By MR. WILLCOX:

23 Q So did you own all four lots on the day
24 of the closing -- of the proposed closing --

25 A Yes. Yes.

1 Q Even though I've got deeds that show
2 the deeds were filed after that.

3 A They were bought and paid for. My son
4 signed it over to me days before the closing.
5 Everything was ready to go and typed up and ready
6 for Mr. Provencher.

7 Q Would a member of the public or a
8 lawyer who went and checked the title on that day
9 find that you owned the property?

10 A I don't know anything about those
11 legalities, so I can't answer that.

12 Q All right. Fair enough. All right.
13 Why did Provencher write you the money instead of
14 putting it in an escrow account?

15 A I don't know. He tried to give me all
16 of it in cash and was saying that the less money
17 he showed to the I.R.S. because of his business,
18 the better off he would be with the I.R.S.

19 Q Shouldn't you have put this money in an
20 escrow account?

21 A That's what I told him.

22 Q Didn't you put this money in an escrow
23 account --

24 A No. He tried to give the rest of it to
25 me in cash. He mentions that in the police

1 report.

2 Q Do you still have the 37,000?

3 A Nope, I spent it on the building, I
4 spent it on paying Mr. McAlpine for that land,
5 attorney fees. I did everything I was supposed to
6 do to get my ducks in a row for the closing on the
7 15th at Ingram's. I followed through with my side
8 of it.

9 Q Five, six, seven and eight, McAlpine's
10 group owned two of 'em?

11 A Yep.

12 Q Your --

13 A Five and six.

14 Q Your son owned the other two?

15 A Yes, sir. I owned four outright, the
16 one the cabin's on. Lot four, there's a cabin on.

17 Q So that was included in the purchase?

18 A Yes, sir.

19 Q All right --

20 A Lots four -- lot four, there's a cabin
21 on it. He declined getting any kind of
22 inspection, termite inspection, survey, anything
23 done to any of the properties. He -- he just
24 declined. It's all in the contract. He signed
25 off on declining all of it. Lot four, I owned

1 for, I don't know, a couple of years before this.
2 So I owned it outright. To connect seven and
3 eight, which are on the peninsula of the property
4 there, 'cause there's a road on both sides. I had
5 to get the two adjacent lots, which are five and
6 six from McAlpine. I was already in the process
7 of doing that because I was gonna give it all at
8 one point to my son. He already had seven and
9 eight titled to him. So to get five and six would
10 have connected all the properties to the point of
11 the road down there together. When Todd asked me
12 if I had anymore land that I could turn loose with
13 the cabin, I said I can probably make this happen.
14 He knew I had to buy it from McAlpine from day
15 one. He already knew all of that. So I bought
16 those properties. I got my son to sign seven and
17 eight back off to me and I had 'em all on Monday
18 morning sitting at Ingram's office ready to be
19 signed over to McAl--- I mean, to Provencher.

20 Q But it is not your testimony that there
21 were filed deeds at the courthouse showing that
22 you owned this property?

23 A No, they were -- they were -- I -- I
24 don't know. I don't know what they did with 'em
25 after I signed. I know I had been to the lawyer's

1 office and signed off on the paperwork and bought
2 it from Mr. McAlpine, paid him in full for it, had
3 receipt of that, so, yes, I owned it. And my son
4 gave me the other properties back, so, yes, I
5 owned 'em. Yes, I did.

6 Q And -- and -- so it's your testimony
7 that anybody going to the courthouse to check the
8 title would see that you owned it on that day --

9 A I don't know. What are lawyers for?
10 Because I think that when a lawyer does something,
11 they've got a certified piece of paper there that
12 they certify as title, then, yes, I own that.

13 Q I haven't seen anybody -- any such
14 piece of paper. My understanding is that
15 Mr. Easter--- Easterling would not do that and
16 that Mr. Ingram does not do that.

17 A What do you mean? I've got --

18 Q You just --

19 A I've got a title --

20 Q You just said there was a title --
21 there was a certified title --

22 MR. PAYNE: Let's -- let's --

23 THE DEPONENT: Well, I don't know --

24 MR. PAYNE: I object to the form --

25 THE DEPONENT: I -- I've got a title --

1 MR. PAYNE: Hold on -- sorry -- sorry
2 -- sorry to interrupt. Object to the form.

3 MR. WILLCOX: Thank you.

4 MR. PAYNE: Your -- your -- the word
5 title is getting back and forth as opposed to
6 deed. You're talking title search and -- and the
7 terms are getting confusing.

8 MR. WILLCOX: Okay. And he's testified
9 that -- that he doesn't know what the lawyers have
10 done or had not done. I -- I think that's his
11 testimony --

12 THE DEPONENT: Can -- can I interject
13 this? In layman's terms, somebody don't know the
14 law as well as you guys, I own those properties.
15 I paid for the two, five and six before Monday's
16 closing. They were mine. I had every right to
17 sell 'em or throw 'em in the air.

18 By MR. WILLCOX:

19 Q And -- and my question is a little
20 different. If I or Jeff or you went and looked at
21 the title records at the courthouse on that day,
22 is it your testimony that someone would see that
23 you own that property?

24 A I don't know if they filed it.

25 Q Thank you.

1 A So I don't know. But I know this, if
2 you buy a car from me and you pay me ten grand for
3 it and you've got the title signed by me, whose
4 car is it? You've got the car and the title.
5 Whose car is it?

6 Q And my question back to them --

7 A Yeah.

8 Q -- would be if I checked the department
9 of transportation's records, what would it show?

10 A Yeah. It's still your car. Is
11 somebody gonna come take it from you when you got
12 the paperwork and the car in your possession?

13 Q I have no idea.

14 A They'd have to do it illegally.

15 Q All right. What was the contract sales
16 price on the lots?

17 A Can I see the paperwork?

18 Q Sure. I'm -- I'm gonna show you all
19 the paperwork. If you don't know, you don't know.

20 A I'd -- I'd like -- I'd like to see it
21 'cause I don't know the exact numbers right off my
22 head.

23 Q All right. What was the contract sales
24 price on the -- is it the shop?

25 A Yeah, I guess it is.

1 Q What was -- what was that?

2 A I don't know that either --

3 Q Okay.

4 A -- without looking at it.

5 Q All right. Provencher's complaining
6 that he didn't get a DeWalt air compressor and
7 some vehicle lifts. Was that part of the deal or
8 not?

9 A No.

10 Q That was not part of the deal?

11 A No. And it's not in any paperwork
12 showing it. I've already looked through it.

13 Q In fact there is no signed contract
14 between you and Provencher on the shop.

15 A No.

16 Q Is there?

17 A That's because he sent me one
18 initially. If he'd show you all his paperwork,
19 that tried to include all fixtures, appliances,
20 equipment, blah, blah, blah, and I refused to sign
21 it. But I've got the revised version that he sent
22 me, which is the ones you guys have.

23 Q And you never signed it?

24 A No.

25 Q So there is no contract we can enforce

1 -- either side can enforce there --

2 A No. That's right because I refused to
3 sign it giving any equipment away.

4 Q Let's talk about a contract. Just let
5 me know when you're -- you've familiarized
6 yourself with it. I tried to get the clearest
7 version I could. You ready?

8 A Yeah.

9 MR. WILLCOX: Okay. Madam Clerk, I
10 have marked as Exhibit A a real estate purchase
11 contract I believe to be dated December the 8th,
12 2020.

13 By MR. WILLCOX:

14 Q Mr. Kirby, would you agree with --
15 with -- that that's the correct date?

16 A Yeah.

17 Q And did you sign this contract?

18 A Sure did.

19 Q And earlier you testified that he had
20 presented you with a contract. Is this indeed the
21 contract he presented you with?

22 A This is one of 'em.

23 Q This is one of 'em. Is it the final
24 one or was there one after this?

25 A This is the one to the Mays Road

1 properties.

2 Q One to the Mays Road properties. Very
3 good --

4 A Yes.

5 Q All right. So it shows on page one
6 that the buyer is Todd Provencher, correct, top of
7 the page?

8 A Yes.

9 Q Shows that the seller is Ronald David
10 Kirby, Junior.

11 A Yes, sir.

12 Q Even under your version of what
13 happened, isn't -- aren't the sellers actually
14 Ronald David Kirby and Angela Kirby?

15 A I don't know. I don't think so.

16 Q Those -- those deeds that you and I
17 have been talking about, they weren't in the both
18 of y'all --

19 A I don't know.

20 Q Well, I'm -- I'm gonna show 'em to you.

21 A Okay.

22 Q If you don't know, you don't know. All
23 right. And you've already testified that this
24 covers lots four through eight, Mays Road or Mays
25 Pond.

1 A Yes, sir.

2 Q Correct?

3 A Yes, sir.

4 Q All right. And in the middle of the

5 first page, it says, a 7,000 dollar -- well, it

6 says a purchase price of 45,000, right?

7 A Yes, sir.

8 Q And it says buyer has made the

9 following deposit of 7,000 dollars, correct?

10 A Yes, sir, it does --

11 Q Did -- did that in fact happen?

12 A Yes.

13 Q All right. Did he deposit additional

14 money?

15 A There was money later given to me. He

16 tried -- he actually tried to pay me in full for

17 both properties at a later date than this and I

18 don't know exactly what date it was. But he tried

19 to pay me in full for all properties and I told

20 him we could not do that.

21 Q All right. Didn't you receive another

22 deposit, though?

23 A Yes.

24 Q How much?

25 A I want to say it was 30,000 dollars.

1 Q Yeah, I -- I agree with you. All
2 right. And that's under section four of Exhibit
3 A, correct? Not -- not the 30, but the seven.

4 Page one --

5 A Yeah. Yeah.

6 Q Page one?

7 A Yes --

8 Q All right. At the top of page two, it
9 looks like it gives the property address and I'm
10 sorry it's so hard to read. But again, lots four
11 through eight, Mays Road.

12 A Yep.

13 Q And that's page two of five, correct?

14 A Yes.

15 Q All right. And then the worst -- the
16 hardest part to read, page three at the top, can
17 you read that at all?

18 A It says adjacent lots four through
19 eight, 2094 Mays Road, Bennettsville.

20 Q And under section nine, what does that
21 say, other conditions? And I'll -- I'm telling
22 you, it's hard to read.

23 A Some --

24 Q It's hard for me to read.

25 A Something closing to be within -- or

1 money to -- what does that say? Something to be
2 -- 38,000 to be paid within 60 days. Closing to
3 take place within 60 days. Property to be free of
4 any lien, judgment or mortgage.

5 Q Okay. And did the closing take place
6 within 20 days of December the 8th, 2020?

7 A December the 8th...

8 MR. PAYNE: I object to the form.
9 Twenty days.

10 MR. WILLCOX: I'm sorry. Did I say 20
11 -- did --

12 MR. PAYNE: Yeah.

13 By MR. WILLCOX:

14 Q Let me re--- let me redo the question
15 -- say the question again. Did the closing take
16 place within 60 days of December the 8th, 2020?

17 A I don't know without looking at the
18 date.

19 Q And -- and of course no closing took
20 place, so, again, let me rephrase the question.
21 Did the proposed closing take -- take place within
22 60 days of the -- 20--- 12/20 -- 12/8/20?

23 A It would have, but in the middle of the
24 whole thing, your client went back to Goldberg and
25 Easterling and ordered a title search at a later

1 date, which prolonged it past the closing, the
2 60-day period.

3 Q Doesn't this contract give him the
4 right to do that?

5 A I don't know. I don't know. He pulled
6 this thing off the internet. I don't know what he
7 -- what it gives him the right to do.

8 Q And -- well, have you read it?

9 A I've read over it. I've breezed over
10 it. I know it was Mickey Mouse off the internet.

11 Q Okay. Gives him the right to inspect
12 it?

13 A Yep. I didn't have a problem with him
14 giving a title search. It was free and clear. I
15 didn't owe anything on the -- on the cabin and I
16 was already purchasing the other property and my
17 son was giving me the other to give to him. So I
18 didn't have a problem with any title search being
19 done.

20 Q But it sounds like the Easterling Law
21 Firm did?

22 A They had a problem with giving him
23 title because of the -- because of the Sandhill
24 Rec organization being incorporated and they
25 didn't feel comfortable with no named person

1 authorized to sign off on it. So they declined
2 doing it. So --

3 Q Doesn't that give him the right to back
4 out of the contract?

5 A No.

6 Q Why not?

7 A Because I still got title done for him
8 at Ingram's. And he was okay with it still,
9 friend.

10 Q But doesn't --

11 A Up to that point --

12 Q I'm sorry. I -- I'm interrupting.
13 Doesn't Ingram not do title searches in Marlboro
14 County?

15 A No.

16 Q Then how can -- how could we -- how
17 could you or I assert that Ingram was gonna
18 protect him?

19 A He wasn't. And -- and Todd knew that.
20 Todd knew that the paperwork was going over here
21 and that it was gonna be done. He had an
22 appointment the morning of. It was already
23 confirmed with the people at Ingram's. He knew
24 all about it. He was still okay with it until the
25 morning of the 12th.

1 Q Well, couldn't it be that he -- he
2 wasn't gonna go forward because Easterling said I
3 can't certify title?

4 A No.

5 Q Why not --

6 A 'Cause he knew about that weeks before.

7 Q So what?

8 A It -- it --

9 Q If you have -- if you have a lawyer
10 check it, then you've confirmed what you were
11 worried about, right --

12 A No, that's not right.

13 Q That's not right?

14 A No.

15 Q That's not --

16 A If -- if he would have wanted his money
17 back, why didn't he ask for it weeks ago when
18 Easterling said that he couldn't get title? He
19 was still on go street. All he wanted -- that's
20 why he signed off on -- I don't want an
21 inspection. I don't want this, that and the
22 other. I just want it in my name. That's what he
23 told me.

24 Q All right.

25 A So in the middle of the whole thing, he

1 orders this title search, which prolonged the
2 whole deal. It backed it off past the 60 days.
3 Then when Ingram and them came back with the --
4 with the -- the -- or not Ingram, Easterling and
5 them came back and said we're not gonna certify
6 title because it's incorporated, there's no named
7 person in charge, we can't certify this. Okay.
8 We don't feel comfortable --

9 Q And who told you that was their reason?

10 A That's -- that's what they told us all.
11 The lady at the office there.

12 Q Would it surprise you to say that
13 Provencher said she said you don't own any of the
14 property, you -- except for --

15 A Everybody --

16 Q -- except for --

17 A -- involved including that attorney's
18 office knew that I was buying the -- from day one.
19 Now, if your client's retarded, he knows that from
20 day one, I was buying the five and six property
21 from the Sandhill Rec people. Seven and eight
22 were in my son's name. I explained to him they
23 would be signed back over. He was okay with all
24 of it. He knew it all from day one. He was okay
25 with it all the way up until an hour and a half

1 before the closing at -- at Easterling's. He knew
2 weeks before that Easterling had found the issue
3 with the title --

4 Q And -- but couldn't he have expected
5 you to get this all straightened out before the
6 closing date?

7 A It was.

8 Q Well, I'm gonna show you the deeds that
9 are gonna -- that are gonna show you --

10 A Lots five --

11 Q -- that you didn't own the property --

12 A Lot --

13 Q -- on the date of the closing.

14 A Yes, I did. Lots five and six were
15 paid in full with money from this situation right
16 here that I was in my possession of. I paid for
17 lots five and six with Warren McAlpine and lot
18 seven and eight were signed over to me and I paid
19 Ingram attorney fees on all four properties.

20 Q And no deeds were filed?

21 A I don't think they were filed. I don't
22 know if they were or not. I'm not a lawyer's
23 office.

24 Q Isn't the -- isn't the public entitled
25 to rely on the -- on the records at Marlboro

1 County?

2 A They're also entitled to rely on the
3 honesty and integrity of an attorney's office.
4 That's what you guys are hired for. When you guys
5 hand me a piece of paper that says, here, here's
6 your paperwork. This is everything to your
7 property. I'm gonna believe you 'cause you know
8 why? You're licensed to do that.

9 Q Isn't -- isn't Mr. Provencher entitled
10 to rely on Mr. Easterling saying he doesn't have
11 clear title?

12 A Guess what? He knew that two weeks
13 before and was still on go street.

14 Q Doesn't this contract, A, govern the
15 rights of the parties?

16 A I don't know what that means.

17 Q All right. You signed the contract.

18 A Yep.

19 Q You expected him to do certain things.

20 A Yep.

21 Q He expected you to do certain things.

22 A Yep.

23 Q Doesn't this contract govern the
24 relationship between the two of you?

25 A It should.

1 Q Okay. So if it says he's entitled to a
2 title search, he's entitled to a title search --

3 A Sure he is. I have no problem with
4 that. I owned all the land outright.

5 Q All right. And if the courthouse
6 records disagree with you, a -- a --

7 A The day of the closing, I had every
8 legal right to sign that property over to him. It
9 was mine.

10 Q If someone went and looked at the
11 courthouse records, would they see that?

12 A All right. Here -- here's a question
13 back at you.

14 Q I'm -- I'm not gonna answer it if --

15 A Okay. If you guys were legally binding
16 to make those paperwork legal for the courts and
17 we had all of 'em stacked here to go to the
18 courts, wouldn't it be legal that I could sell it
19 to him?

20 Q I have no idea.

21 A That's right.

22 Q That's such a general question --

23 A Then the question is relevant, then,
24 isn't it --

25 Q That -- that's all -- that's all --

1 such a general question --

2 A Well, you're ans--- you're asking me
3 the question about the paperwork. I'm asking you
4 if I paid for it and it's got my signature, the
5 attorney's on it...

6 MR. PAYNE: Just -- just -- just answer
7 the questions...

8 By MR. WILLCOX:

9 Q Now, I -- I -- specifically on that, I
10 would think it would have to have the person who
11 owned the property selling it to you, it would
12 require their signature.

13 A It was on there.

14 Q Wasn't filed.

15 A It was on there.

16 Q Okay. All right. Let's see. I'm
17 looking for my B. All right. I'm gonna show you
18 what I've marked as Exhibit B, which is a proposed
19 real estate contract. Again, I think it's between
20 the two of you. I think it's been signed by
21 Provencher, but not you.

22 A That's right.

23 Q All right.

24 A Well, let me ask you this. Before we
25 get started on this. If I didn't sign this, what

1 -- what cause does it have pertaining to me at
2 all? I don't have a signature on it. It ain't
3 got nothing to do with me.

4 Q Okay. Let -- let me just ask you about
5 that then. Have you ever seen it before?

6 A Yep.

7 Q Did you decline to sign it?

8 A Sure did.

9 Q Does it govern the 2801 Chavis Road?

10 A It was in reference to that property,
11 yep.

12 Q Okay. And the total purchase pri---
13 proposed total purchase price was 50,000.

14 A All right. I'm looking at it. That's
15 what it says.

16 Q And you declined to sign it?

17 A Yes, sir.

18 Q Okay. That's all I need to ask then.

19 All right. Let me show you what I've got marked
20 as Exhibit C, which is a settlement statement, I
21 believe, created by -- let's see, I think it's
22 Easterling. Make sure I get 'em right.

23 MR. WILLCOX: Settlement statement,
24 yeah, created by Easterling, marked Exhibit C,
25 Madam Clerk.

1 By MR. WILLCOX:

2 Q Let me get you to look at that,
3 Mr. Kirby. Oh, are you finished?

4 A Yeah.

5 Q All right. Have you ever seen that
6 document?

7 A No.

8 Q Okay. We'll move on. Let me show you
9 D.

10 MR. WILLCOX: Madam Clerk -- Madam
11 Court Reporter, D is a different settlement
12 statement just for our record dated February 15th,
13 2021.

14 By MR. WILLCOX:

15 Q You ready?

16 A Yep.

17 Q Have you ever seen that document?

18 A No.

19 Q Would you agree with me that it lists
20 the contract price as 10,000 dollars?

21 A Yep, that's what it says.

22 Q Was there ever any deal between you and
23 Provencher showing a contract sales price of
24 10,000 dollars --

25 A Nope.

1 Q -- on any property --

2 A On any property, nope.

3 Q And any idea where the Ingram firm
4 would get that?

5 A I -- I don't know.

6 Q All right.

7 A I guess that's what we agreed to tell
8 them that the sales price was.

9 Q We being?

10 A We being Todd and I.

11 Q We -- you agreed to tell the lawyer
12 that the sales price was other than it was?

13 A Yep, that's right. He wanted the -- he
14 wanted as much money as he could hide because of
15 his business.

16 Q Okay --

17 A That's what he told me, to be under the
18 table.

19 Q All right --

20 A He actually tried to tra--- to pay me
21 the remaining balance in cash.

22 Q Why would you agree to that?

23 A I didn't.

24 Q Okay. Back to C --

25 A That's part of the reason why I didn't

1 sign this other thing, too.

2 Q Okay. Back to C, would you agree with
3 me that the listed contract price is 20,000
4 dollars?

5 A Yeah, that's what it says.

6 Q And is that -- was there ever any deal
7 between you and Mr. Provencher on --

8 A Nope.

9 Q -- a 20,000 dollar deal?

10 A Nope.

11 Q All right. Do you have any idea where
12 the Easterling firm would get that figure?

13 A Those also were gave by both him and I.

14 Q So you and Mr. Provencher --

15 A Uh-huh.

16 Q -- gave incorrect contract prices to
17 the Ingram firm and to Easterling?

18 A Yeah, because Todd wanted to hide as
19 much money as he could because of his business.
20 That's what he told me.

21 Q But you did that as well?

22 A I was in on it, yep.

23 Q Okay.

24 A Sure was.

25 Q And just to be on -- on D, there's some

1 paid out closing figures on the second page. I
2 think those got paid, so the -- the --

3 A All the fees to the lawyers got paid by
4 every--- by both of us.

5 Q Okay. So the lawyers got paid for
6 whatever work they did?

7 A Yeah. Sure did.

8 Q All right.

9 A Yeah, your client absolutely knew of
10 the closing stuff there.

11 Q As did you?

12 A Yep, sure did. And I told him -- I
13 said -- and when he tried to pay me in cash for
14 the rest of it, I said, dude, you can't do that.
15 You've got to go to the lawyers with money on --
16 on the thing. So that's what we did.

17 Q But where you and I disagree is that I
18 would say you also have to go to lawyers for title
19 searches.

20 A Yeah, well, I would agree to that, too.
21 And I had no problem with him doing that.

22 Q Okay. Even if the title search showed
23 that you did not own the property?

24 A I did own the property.

25 Q Even if the title search showed that

1 you did not own the property?

2 A I did own the property. I had legal
3 right to sell that property. That's what
4 everything was -- was getting done was
5 transferring it over to me to be sold to him.
6 And, guess what, he knew all of it from the
7 beginning and was okay from day one.

8 Q But the contract that you did sign
9 governs the rights of the parties.

10 A He was okay all the way up until 8:00
11 that day when he was going to get the power turned
12 on on the 12th.

13 MR. WILLCOX: All right. I need to
14 make some copies of some new exhibits. Let's go
15 off the record.

16 (Off the record.)

17 By MR. WILLCOX:

18 Q Mr. Kirby, just so you know what I've
19 been doing. I've been looking through
20 Mr. Ingram's file and pulling out parts of it, but
21 I just want to -- it'll take me longer to put 'em
22 together than it will to ask you about 'em. Let's
23 start with the first one.

24 MR. WILLCOX: Madam Clerk, I have not
25 premarked these. What are we on? E?

1 THE COURT REPORTER: E, uh-huh.

2 (Exhibit number E
3 marked for identification.)

4 By MR. WILLCOX:

5 Q Take a look at that E, Mr. Kirby?

6 A Yep.

7 Q All right. It looks to be a -- what
8 I've been calling a deed, but it's called a title
9 to real estate, which are the same thing. Would
10 you agree with that?

11 A Yes.

12 Q And -- and at the top right, it says,
13 title not abstracted. Would you agree with that?

14 A Yep.

15 Q It is signed by Mr. McAlpine at the
16 bottom?

17 A Yes.

18 Q And it appears to me whether or not you
19 realize it that it is filed at the Marlboro County
20 Clerk of Court's office, the bottom left
21 information in that little --

22 A Yes.

23 Q -- typed stuff. Okay. And it governs
24 -- I believe it governs lot six -- five and six.

25 A Yes.

1 Q All right. And it is dated the 10th of
2 February.

3 A Yes, sir.

4 Q All right. So on the 10th of February,
5 Sandhill's Recreation Club deeded to you lots five
6 and six.

7 A Yes.

8 Q And it is filed February 19th.

9 A Okay.

10 Q Do you -- do you agree with that or do
11 you...

12 A Where's that at?

13 Q That's in the front small -- again, the
14 bottom left corner --

15 A Bottom left? Yes.

16 Q Okay. All right. Have you since sold
17 that property?

18 A Have I did what, now?

19 Q Sold it?

20 A No, I gave it to my son.

21 Q Okay --

22 A I gave it back to my son along with
23 lots seven and eight.

24 Q But now remember this is from Sandhill,
25 so you gave it to your son?

1 A Yes.

2 Q Okay. All right.

3 A Once this deal fell through, yes.

4 Q Okay. And one other thing, at the top
5 it says, Marlboro County Assessor's I.D. February
6 23rd, 2021. Just for your information, I believe
7 that to be when -- when the assessor assigned it a
8 tax I.D. number or confirmed the tax I.D. number.
9 Would you -- would you have any information about
10 that?

11 A I don't know anything about that --

12 Q Okay. All right. And it shows 4,000
13 dollars as the consideration -- what we call
14 consideration --

15 A Yes, sir --

16 Q Is that what you paid for it?

17 A Yes, sir.

18 Q And I think I've got a copy of your
19 check in here, but we'll go over that very briefly
20 as well. But do you have any reason to question
21 any of these dates?

22 A Nope.

23 Q All right. Let's talk about this one.

24 MR. WILLCOX: F, Madam Clerk.

25 (Exhibit number F

1 marked for identification.)

2 By MR. WILLCOX:

3 Q You want to take a look at F. All
4 right. Let me know when you're ready.

5 A I'm ready.

6 Q All right. F, I believe to be another
7 deed or title to real estate. Would you agree
8 with that?

9 A Yes.

10 Q Dated the 8th of February.

11 A Yes.

12 Q Signed by Donovan Kirby --

13 A Yes.

14 Q Who is your son?

15 A Yes.

16 Q And I believe it purports to govern
17 lots seven and eight.

18 A Yes, sir.

19 Q Okay. I don't see a -- a filing
20 information. Do you know whether or not this deed
21 was ever filed?

22 A I do not.

23 Q Do you know that it was not filed?

24 A I do not.

25 Q Okay. To your knowledge --

1 A Now, let me ask you, is this the one --

2 Q This is --

3 A 'Cause I don't know a lot about it. Is
4 this the one where Donovan signed it to me?

5 Q That's what I believe it to be, yes.
6 But I -- but I want you to tell me whether you
7 agree with that?

8 A Yeah. Okay. So Donovan did sign it to
9 me.

10 Q Yeah.

11 A And probably why it was not recorded is
12 because after Mr. Provencher backed out, it was
13 easier to leave it alone than leave it in
14 Donovan's name, lot seven and eight, than it was
15 to file it and turn around and redo it.

16 Q Leave it in Donovan's name.

17 A Yeah.

18 Q So it was never in your name?

19 A It was in my name, but it wasn't filed
20 because Provencher backed out -- out.

21 Q And you don't think he would have the
22 right to do that?

23 A No.

24 Q Okay. All right. Let's move on. Let
25 me ask you about this. Your lawyer subpoenaed

1 Mr. Ingram's records. Have you seen that -- this
2 -- and I got a copy of it, have you seen that?

3 A I don't know what it is.

4 Q That's -- that's everything we -- we --
5 Jeff and I believe it to be everything in Ingram's
6 file.

7 A Okay.

8 Q Have you seen it?

9 A I -- I went over the Ingram file with
10 -- with Jeff, yes.

11 Q There's a -- I'm not gonna make 'em all
12 exhibits unless you and I need to. There's a
13 blank unsigned deed for 10,000 dollars, but it's
14 already been your testimony that that was never
15 any deed.

16 A It never happened because on the 12th,
17 Todd backed out of the deal at Easterling's.

18 Q Well, I'm talking about the amount of
19 10,000. Is -- was that ever anybody's --

20 A I -- I -- we -- we didn't sign
21 anything. I -- I -- without looking at it, I
22 wouldn't --

23 Q Well, I'm not trying to hide anything
24 from you, I'm just --

25 A No, I know that --

1 Q I was just trying to go fast. I'll --
2 I'll show it to you right now.

3 (Exhibit number G
4 marked for identification.)

5 THE DEPONENT: Yeah, this deal never
6 happened at all.

7 By MR. WILLCOX:

8 Q But was there ever a 10,000 dollar
9 agreement?

10 A Yes.

11 Q Okay.

12 A It -- well, there was 10,000 dollars
13 that Todd wanted to show on paper.

14 Q Okay. And that would govern -- it
15 looks -- according to this unsigned, unrecorded
16 document that would govern lot seven and eight?

17 A Yes, sir.

18 Q And five and six?

19 A And five and six and the cabin.

20 Q Okay.

21 A Four -- four, five, six, seven, eight.

22 Q All right. Oh, they have a ca--- yeah,
23 there -- there was a deed later on down here. All
24 right. Let's see. I think we talked about this
25 one. Talked about the unsigned one.

1 (Exhibit number H
2 marked for identification.)

3 By MR. WILLCOX:

4 Q H, take a look at H.

5 A Yes, sir.

6 Q That is your check for 4,000 dollars to
7 McAlpine. That's purchasing -- just remind me,
8 which -- which ones is that purchasing?

9 A That's -- that's five and six.

10 Q Five and six. And that's dated
11 February the 10th, 2021?

12 A Yeah, that's the ones that the contract
13 refers to as the adjacent two lots.

14 Q Okay.

15 A That I had to purchase.

16 Q This is a -- a letter we found or
17 Mr. Ingram provided us in his -- in his subpoena.

18 MR. WILLCOX: I, Madam Clerk.

19 (Exhibit number I
20 marked for identification.)

21 By MR. WILLCOX:

22 Q Take a look at that. You may have
23 never seen it before. I just want to ask you --

24 A Never have.

25 Q I looks to be a letter from

1 Mr. McAlpine to the lawyer, Mr. Ingram.

2 A Yes, sir.

3 Q And it sort of -- at least initially is
4 an outline of the history of the property. Is
5 that --

6 A Yes.

7 Q Is that what it says --

8 A It's what it looks like.

9 Q And -- and then there's an indication
10 that you want to buy the property and then there's
11 a note to you dated May 24th, 2019 on the second
12 page.

13 A Yes, sir.

14 Q Did you get that on or about or just
15 after May 24th, 2019?

16 A Get what?

17 Q If I were to read this, I would think
18 that he -- that he had sent you a copy of the
19 whole thing.

20 A It -- it -- I believe it was an e-mail
21 if I'm not mistaken. I -- I never got anything in
22 writing like this.

23 Q Okay. All right. It may be an e-mail.
24 I don't know.

25 A It -- it may have been. I -- I -- I --

1 seems like we were corresponding with e-mail and
2 the phone.

3 Q All right. And so is it fair to say
4 that you were talking to McAlpine back in June of
5 2019?

6 A I was talking to him about buying the
7 entire Sandhills Rec Club, all of it, the pond,
8 everything.

9 Q And did that happen?

10 A No. We were off on the -- the figures,
11 the money, the buying. I offered him a certain
12 amount. He wanted more.

13 Q Fair enough. All right. This is J.
14 (Exhibit number J
15 marked for identification.)

16 By MR. WILLCOX:

17 Q All right. Take a look at that. That
18 -- that's a rather -- a -- a much more dated one.

19 A Okay. All right.

20 Q I believe this to be the deed when you
21 bought the property, number four, lot four. Would
22 you agree with that?

23 A Yes.

24 Q Okay.

25 MR. PAYNE: Wait a minute. Wait a

1 minute. Wait a minute. I got -- I got a
2 different one.

3 MR. WILLCOX: Oh, I'm sorry.

4 MR. PAYNE: This is somebody Townsend.

5 MR. WILLCOX: Yeah, that's it.

6 MR. PAYNE: Well, mine's got 157 on the
7 bottom.

8 MR. WILLCOX: I beg your pardon, here
9 you go. All right. J. Does everybody have J,
10 which is -- starts at Ingram0088.

11 MR. PAYNE: Gotcha.

12 MR. WILLCOX: And goes through 0091.

13 By MR. WILLCOX:

14 Q All right. Again, Mr. Kirby, I think
15 this -- I think this is when you bought lot four.
16 Would you agree with that?

17 A Yes.

18 Q I note that there is no reference to
19 the title not being checked at the top. On some
20 of the other exhibits, there was -- there was an
21 indication that Mr. Ingram was not checking the
22 title. Do you remember whether or not he checked
23 the title, the records, on this one?

24 A I want to say that we did a title
25 search on this property.

1 Q So at that time, at least it's your
2 belief that Mr. Ingram was -- was willing to check
3 title in Marlboro County --

4 A Until his health faded, yes, sir. I
5 know that to be a fact 'cause I know him a little
6 bit on a personal level as far as that he's had
7 some medical problems recently.

8 Q Okay. And y'all paid 8,000?

9 A Yes, sir.

10 Q And -- and this happened in -- let's
11 see. When was this? 2019?

12 A Sounds about right.

13 Q Yeah, the -- the notary says first day
14 of August, 2019. Does that sound about right?

15 A Yes, sir.

16 Q Okay. All right. I don't think we
17 need this. That's -- that's the deed behind this
18 one. All right. Let me very briefly -- won't
19 take me nearly as long 'cause Mr. Easterling's
20 file is a lot -- a little smaller and I think I've
21 asked you everything I want to ask you about that
22 file anyway. But let me go through it real quick.
23 We can go off the record.

24 (Off the record.)

25

1 By MR. WILLCOX:

2 Q Mr. Kirby, I've been through
3 Mr. Easterling's file, which he responded to a
4 subpoena and I will represent to you that most of
5 this has to do with the other piece of property,
6 2801 Chavis Road.

7 A Okay.

8 Q That -- again, that deal was never
9 made.

10 A That's right.

11 Q That's correct. All right. And he
12 does list the contract sales price as 20,000. Was
13 that ever agreed upon?

14 A Todd and I discussed cash money. He
15 was trying to give me cash money. I don't recall
16 all the amounts now because we had a lot of
17 conversations back and forth.

18 Q Well, did you ever represent to the
19 Easterling firm that the purchase price was gonna
20 be 20,000 dollars --

21 A Not to my knowledge.

22 Q Okay. All right. Did the Easterling
23 firm ever contact you about the issues with the
24 lots that they found on a title search?

25 A Yes.

1 Q Okay. All right. And did you get back
2 to them?

3 A What do you -- what do you --

4 Q I'm -- I'm looking at an e-mail from
5 Rosalind to Mr. Provencher?

6 A Okay. All I know is -- is that they
7 said there was an issue with that place being
8 incorporated. And that Mr. Easterling did not
9 feel comfortable giving title because there was
10 nobody over it that...

11 Q I'll represent to you that her e-mail
12 indicates that at least at some point in this
13 process, early February, they were still trying to
14 work it out. Do you remember that being the
15 case --

16 A Yep, sure was. And then Todd threw in
17 the let's-do-a-title-search thing right in the
18 middle of it. And it extended it past the 60-day
19 period. At that point, when they come back with
20 the title search stuff, that's when I told him, I
21 said, well, look, these people did lots seven and
22 eight for me right next door. I'm sure they'll do
23 five and six. So that's how Ingram got involved.
24 Up to that point, Ingram wasn't even talked about.

25 Q Okay.

1 A So Ingram had about two weeks that Todd
2 could have backed out to get the paperwork ready
3 for lots four, five, six, seven and eight to go in
4 to his name. I was in the middle of buying it all
5 from McAlpine so I could get it legally mine to
6 sell to him. I was in the middle of doing my part
7 like we had agreed. He knew what was going on.
8 And that's what we did.

9 Q Now, you mentioned that -- almost half
10 joking, you said why don't you give him his money
11 back and you said you -- you -- you had put the
12 money elsewhere, you used for other things.

13 A Yes, sir.

14 Q Okay. Did you ever have to pay your
15 son for any of that property?

16 A No.

17 Q Okay. So we're talking about the money
18 paid to -- to McAlpine.

19 A I paid attorney fees for all four --
20 five -- five properties.

21 Q Yeah.

22 A I paid for the new shop that I bought,
23 which is a lot smaller than the one I was selling
24 him. I paid a moving crew to get the equipment
25 moved from one location to the other, which took a

1 week. I paid a deposit to the power company and
2 signed a two-year contract with them. I paid for
3 A.D.T. to come put a security system in and signed
4 a two-year contract with them. There was a lot of
5 money I paid out.

6 Q Any idea what it totals?

7 A Probably 20,000 dollars total.

8 Q You don't want to pay him the
9 difference back?

10 A You know what I would do to just try to
11 do something similar to just get this guy to go
12 the hell on, I'll give him 5,000 dollars.

13 Q All right. Well, Jeff and I will talk
14 about that. And -- and I -- and I apologize for
15 getting us off the -- the --

16 A It's all right.

17 Q No. No. You and I are way too
18 comfortable with one another --

19 A No. You asked. I answered.

20 Q You did -- you did. You absolutely
21 did. Okay. Now, Mr. Provencher is telling me he
22 paid you all this money that he believed it was
23 going into escrow. Do you disagree with that
24 statement?

25 A No, I -- he -- he did -- he tried to

1 give me cash. I'll say it again.

2 Q Even if -- even if he gave you cash,
3 though, if he says it was -- he believe it was
4 going into escrow, do you disagree with that?

5 A I disagree.

6 Q Okay --

7 A He knew that that money was gonna be
8 not reported.

9 Q All right --

10 A He was the one suggesting it and I
11 asked him why. I said why do you not want -- he
12 said, dude, I own a company up here, the least
13 things that I can show in cash somewhere, the
14 better off I'm gonna be.

15 Q Even -- even if the contract says it
16 was supposed to be a deposit, do you disagree that
17 it was a deposit?

18 A It was a deposit.

19 Q Do you -- do you believe that there's
20 something different between an escrowed amount and
21 a deposit?

22 A I -- I don't know what -- what...

23 Q That -- that -- that's a fair response,
24 'cause I -- it was an unclear question. We think
25 the money should have been held by a third party

1 like Easterling or Ingram. I believe it to be
2 your testimony that he was simply paying you the
3 purchase price.

4 A Here's my argument with that.

5 Q Well -- well -- well --

6 A He -- he paid 7,000 dollars to Ingram
7 about a week or so according to his testimony on
8 the paperwork that I've read before the closing.
9 He actually was refunded that 7,000 dollars that
10 was in escrow at -- not Ingram's -- Easterling's.

11 Q Yeah.

12 A When he backed out, he got his, 7,000
13 dollars back from them.

14 Q But that's --

15 A If he wanted it to go into escrow, why
16 wouldn't he have done that from the beginning?

17 Q That -- that's my question to you. Why
18 -- why are you accepting this money directly?

19 A Well, why wouldn't I? Hell, if you
20 give me 30,000 dollars, I'll take it, too.

21 Q All right. And you don't -- you don't
22 believe you have any obligation to return it?

23 A No, sir, he backed out on me. I did
24 everything I was supposed to. I got the lawyer
25 lined up with the -- with the -- I bought the

1 property like I told him I was going to from the
2 McAlpines. I had it ready to go. I got my son to
3 sign off on the other. I paid the lawyer fees. I
4 paid the moving fees. I bought another building
5 to put everything in. I've got classic cars that
6 I didn't want in the weather. So I moved 'em from
7 the other shop to the other shop so he could have
8 possession of his building on the day he wanted
9 it.

10 Q All right. I -- I think I got an
11 answer somewhere in there to my question, but --

12 A Okay.

13 Q -- my question may have been unclear.

14 A If you want to repeat --

15 Q And that's my fault --

16 A -- then I'll answer with --

17 Q -- and I should --

18 A -- a yes or a no.

19 Q All right.. No, I -- I want you to be
20 able to explain your answers because --

21 A Yes, sir.

22 Q I don't want you to, you know, at the
23 trial say that I -- I boxed you in --

24 A No, sir.

25 Q -- on an --

1 A I -- I don't feel that way at all. I
2 don't.

3 Q Why wasn't this money escrowed? Why
4 wasn't the money that he paid you escrowed?

5 A He gave it personally to me. We did
6 not meet at an attorney's office with that money.
7 He gave it to me directly.

8 Q Doesn't the contract require it to be
9 escrowed?

10 A I don't know what the contract requires
11 it to be.

12 Q Okay.

13 A But it -- it -- being that Todd
14 Provencher pulled the contract and presented me
15 with the contract, if he knew that, wouldn't he
16 put it in escrow?

17 Q It'll be his testimony that you -- he
18 -- he -- you told him that you were giving it to
19 the lawyer.

20 A Okay.

21 Q Why is it Mr. Provencher's problem
22 whatever you end up doing with the money?

23 A What -- what do you mean?

24 Q You spent the money.

25 A I -- yes, on -- my obligation, A, to

1 him to buy the property that I told him I would
2 sell him.

3 Q Yeah.

4 A I paid for that. I paid the attorney's
5 fees for lots four, five, six, seven and eight. I
6 did everything I said I was gonna do to have that
7 ready to go on the 15th. Also made arrangements
8 to move everything out of the building so he could
9 have his building. I also bought a property --

10 Q Why is that his problem that you bought
11 a piece of property --

12 A It's not --

13 Q Okay.

14 A But -- well, I explained to him that
15 when I -- and you know what? Now that you said
16 that, it does ring a bell. And he'll have to
17 admit this unless he's a blatant liar. I told
18 him, I said, you know, man, I'm not gonna have
19 anywhere to put any of my stuff. I'm gonna have
20 to buy this other building I know about. So that
21 -- he did know I was gonna do that.

22 Q So -- but why is that his problem?

23 A It's not. It's not -- it's not my
24 problem that he backed out on me either.

25 Q Well, do you think it's fair that he

1 paid you 37,000 dollars and he's got nothing?

2 A No, I don't think he -- he did it to
3 hissself. I don't. I wouldn't have done it. I
4 promise you this, if I gave you 37,000 dollars and
5 said I'd be back to pay you, if I was that sure to
6 give you that kind of money, I would have paid
7 you. We would have been -- we would have been on
8 go street. I wouldn't give you 300 dollars unless
9 I knowed I was gonna come back and fulfill my
10 obligation.

11 Q Who owned the shop at the time that
12 y'all were talking about buying it?

13 A I owned it.

14 Q You owned it?

15 A Yeah --

16 Q You still own it?

17 A Yes, sir. He can still buy it if he
18 wants to.

19 Q I'll certainly present that to him.
20 All right. Have you got any judgments against
21 you?

22 A No.

23 Q I found 20 real property records, but
24 that could be the same piece of property over and
25 over again. About how many pieces of real estate

1 do you own?

2 A So I got a mortgage on one property on
3 Hickory Grove -- well, actually two properties on
4 Hickory Grove. I own the shop that's in question.
5 I've got my home that I live in with two -- two
6 properties there. The new shop that I've got and
7 then the convenience store.

8 Q And you own those all in -- in -- most
9 -- most everything I've seen and I -- I showed it
10 to you, but I didn't ask you about it, shows
11 things going into both y'all's names.

12 A I -- I -- well, you know, we've always
13 been that way. I married this girl right here
14 when we were kids ourself.

15 Q Yeah.

16 A And anything we've accomplished
17 together, we -- we do together.

18 Q Okay.

19 A So it's --

20 Q Well, now, you said you had an ex-wife.

21 A I did. I married --

22 Q Even younger?

23 A I married in junior high school --

24 Q You're making that up?

25 A I got a girl pregnant.

1 Q I'm jumping -- I'm jumping on your
2 answers. I'm sorry --

3 A No, my -- my mom was a Pentecostal
4 Christian lady and she told me when I got that
5 girl pregnant I was gonna marry her and do the
6 right thing for my kid. So we tried and it didn't
7 work. It just, you know...

8 Q Young. Young.

9 A Yes, sir.

10 Q I showed you my best copy of the
11 contract that y'all did sign. We've also talked
12 very briefly about the contract that y'all did not
13 sign. Are you aware of any other written
14 contracts between you and Todd Provencher?

15 A No, sir.

16 MR. WILLCOX: Okay. Thank you very
17 much. I appreciate it.

18 THE DEPONENT: Yes, sir --

19 MR. WILLCOX: Jeff might want to clear
20 up some things that I asked or screwed up.

21 MR. PAYNE: No questions.

22 (Deponent excused.)

23 (Whereupon, at 11:34 a.m., the
24 taking of the foregoing
25 deposition was concluded.)

1 CERTIFICATE OF REPORTER

2 State of South Carolina

3 County of Florence

4 I, Ashley Rogers, Court Reporter and Notary
5 Public for the State of South Carolina, do hereby
6 certify that the deponent in the foregoing
7 deposition was, by me, first duly sworn to testify
8 to the truth, the whole truth and nothing but the
9 truth; that said deposition transcript was taken
10 via stenomask with backup; that the foregoing
11 transcript contains a true record of the
12 deposition of said deponent.

13 Before completion of the deposition, review
14 of the transcript was requested by the deponent,
15 and any changes made by the deponent after the
16 period allowed shall be appended hereto.

17 I further certify that I am neither attorney
18 nor counsel for, nor related to or employed by any
19 of the parties connected to the action, nor am I
20 financially interested in the action.

21 Witness my hand at Florence, South Carolina,
22 this the 7th day of January, 2022.

23

Ashley Rogers

24

Notary Public for South Carolina
25 My Commission Expires: March 15, 2022

1 State of South Carolina
2 County of _____
3

4 I hereby certify that I have read the
5 foregoing deposition by me given and that the
6 statements contained therein are true and correct
7 (as stated) (as corrected), to the best of my
8 knowledge and belief.

9
10 _____
11 Ronald David Kirby, Jr.
12
13

14 Sworn to and subscribed before me,
15 this _____ day of _____, 2022.
16
17

18 _____
19 Notary Public State of South Carolina
20 My Commission Expires:
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1	ERRATA SHEET		
2	Page/Line #	Correction	Reason
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