IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS
HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE



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CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2018-001969

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Lady Beaufort, LLC &
Tideland Realty, Inc. — Respondents/Appellants,

vs.

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

AND

William M. Bowen, — Third-Party Plaintiff,

v.

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

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

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# INITIAL BRIEF OF APPEALLANTS/RESPONDENTS

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## QUESTIONS PRESENTED ON APPEAL

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## STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND

This action arises out of the alleged breach of an Agreement to Buy and Sell Real Estate dated August 19, 2013 wherein Lady Beaufort, LLC ("Lady Beaufort") contracted to buy and Hird Island Investments, Inc. ("Hird Island") contracted to sell a 2.99 acre parcel of unimproved real property located in Beaufort County, South Carolina (the "Property").

This action was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on January 7, 2014. The Complaint was filed on behalf of Lady Beaufort and Tideland Realty, Inc. ("Tideland Realty") against Hird Island and Inverness, LLC ("Inverness"). The Complaint contains four (4) causes of action. The first cause of action is for breach of contract against Hird Island, in which Lady Beaufort seeks damages for the alleged breach of contract and Tideland Realty seeks the payment of a real estate commission on the aborted sale. The second cause of action is against Inverness only, alleging intentional interference with the contract between Lady Beaufort and Hird Island. The third cause of action seeks to set aside the deed between Hird Island and Inverness. The fourth cause of action seeks specific performance of the contract between Lady Beaufort and Hird Island.

On May 11, 2014 Hird Island and Inverness filed their Answers and Counterclaims. In these responsive pleadings both Lady Beaufort and Inverness denied the material allegations of the Complaint.

On May 29, 2014 Lady Beaufort filed an Amended Complaint. The Amended Complaint adds allegations of fraud as part of the cause of action to set aside the deed. On June 11, 2014 Hird Island filed its Answer and Counterclaim to the Amended Complaint, again denying the material allegations of the Complaint.

On November 24, 2014 Lady Beaufort Filed its Second Amended Complaint, in which Inverness was dropped as a defendant and Sherwood N. Fender ("Fender") was added as a new defendant.

In the Second Amended Complaint causes of action are alleged for breach of contract, breach of contract accompanied by a fraudulent act, fraudulent transfer and negligent misrepresentation. On November 13, 2014 Hird Island and Fender jointly filed their Answer to the Second Amended Complaint, denying the material allegations of the Second Amended Complaint, as well as a Counterclaim alleging that Lady Beaufort breached the contract.

On November 25, 2014 this matter as referred to the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, South Carolina, for final determination.

On March 1, 2014 this matter was tried non-jury before Judge Dukes and on May 11, 2017 Judge Dukes entered an Order granting Judgment against Hird Island and Sherwood Fender in favor of Lady Beaufort in the amount of $87,578.56 and entering judgment against Hird Island and Fender in favor of Tideland Realty in the amount of $17,500.17.

On May 19, 2017 Hird Island filed its Motion to Reconsider the Order dated May 11, 2017.

On February 14, 2018 Judge Dukes filed his Order Granting in Part and Denying in Part Hird Island's Motion to Reconsider. In accordance with this Order, a hearing was held before Judge Dukes on July 23, 2018, at which time testimony was taken regarding the attorney's fees claimed by Lady Beaufort. As a result of that hearing, on October 26, 2018 Judge Dukes filed his Order amending his previous judgment, in which he reduced the prior judgment against Hird Island and Sherwood Fender in favor of Lady Beaufort from $87,578.56 to $51,511.15.

On November 6, 2018 Hird Island and Fender filed their Notice of Appeal to the South Carolina Court of Appeals.

## B. FACTUAL SUMMARY

Hird Island owned an unimproved 2.99 acre parcel of property in Beaufort County, South Carolina located at 9 Sams Point Road. Sherwood Fender, the President of Hird Island, needed to sell this property quickly because he was in dire financial straits or, as he put it, he had "gotten crosswise financially, personally." Tr., pg. 75. He was in arrears on a loan with Palmetto State Bank and feared foreclosure, plus he was in arrears with taxes owed to the Internal Revenue Service. *Id.*, pp. 76, 80, and 138. Fender approached Matt Trumps, a realtor with Tideland Realty, and asked Mr. Trumps to approach James Kerr about purchasing the parcel. Mr. Kerr was a real estate developer and the sole owner of Lady Beaufort, LLC. *Id.*, pp. 16 and 18. Mr. Kerr had previously created Lady Beaufort to acquire from Mr. Fender a .34 acre parcel of property that was adjacent to the subject property. Since Lady Beaufort already owned the adjacent property, Mr. Fender asked Mr. Trumps to approach Mr. Kerr to see if he was interested in purchasing the subject property. *Id.*, pp. 19 – 20.

Mr. Trumps subsequently approached Mr. Kerr and told him that Mr. Fender "needs to sell" the subject property. Mr. Kerr desired to purchase the property and, on August 19, 2013 he executed, on behalf of Lady Beaufort, an Agreement/Contract to Buy and Sell Real Estate which was presented to him by Mr. Trumps, which had been executed by Mr. Fender on behalf of Hird Island the day before, August 18, 2013. *Id.*, pp. 22 and Exhibit 1, Tab 1. This Contract has a purchase price of $260,000.00. It does not contain a financing contingency. *Id.*

The Contract defines its "Effective Date" as the final date upon which a party to the contract executes the contract. *Id.*, Exhibit 1, Tab 1, Section 1(D). As noted, Hird Island

executed the contract on August 18 and Lady Beaufort executed the contract on August 19, 2013. The "Effective Date" for the contract was, accordingly, August 19, 2013. Tr., pg. 33.

The Contract further provides for a "Due Diligence Period", ending no later than 30 "Business Days" after the original "Effective Date" unless the parties agreed in writing to extend the Due Diligence Period. *Id.*, Tab 1, Section 12. The Contract defines "Business Day" as "a 24 hour period starting at 10 a.m. (M/Tu/W/Th/Fr) and counted from 10 a.m. of the first business day following the effective date. Business Days shall not be begin or end on a Saturday, Sunday or a Federal legal holiday." *Id.*, Section 1(E).

The parties stipulated that October 14, 2013 and September 2, 2013 were Federal holidays (Columbus Day and Labor Day, respectively). Tr. pg. 54.

Lady Beaufort took the position that the Due Diligence Period ended on October 1, 2013. Tr., pg. 57.

When first presented with the proposed Contract, Mr. Fender questioned the need for 30 days of due diligence, stating "The man who is buying it already owns the other half. He knows more about this property than I do.", but he agreed to this clause none the less. He stressed, however, that "time has got to be of the essence" because of his pressing financial needs. *Id.*, pg. 139.

With respect to the closing deadline, the parties deviated from the standard, pre-printed form of the contract, and instead inserted the following special clause:

> "Closing **shall** take place within seven (7) days of the end of the due diligence period."

Exhibit 1, Tab 1, Section 33 (emphasis added). In recognition of the fact that the above closing deadline references simply "days" (as opposed to "Business Days" utilized in calculating the Due Diligence Period) Lady Beaufort agreed that the last day to close under a "worse case"

scenario was October 8, 2013. Tr., pg. 115. Accordingly, the closing of the transaction was scheduled for October 7, 2013. *Id.,* pg. 115 and 57.

With respect to the closing date, the contract provides for "an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party." Exhibit 1, Tab 1, ¶4. The contract does not define what constitutes an "unsatisfied contingency."

Finally, the Contract contains the following provision which is emphasized and underlined, set forth in the first paragraph on the first page of the Contract:

> "Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."

Exhibit 1, Tab 1, pg. 1, ¶1(G).

Lady Beaufort hired attorney Carl Rogers of Charleston to represent it in connection with the closing. Tr. pg. 84. Hird Island hired attorney Derek Gilbert of Beaufort to represent it.

Although the Contract contained no financing contingency clause, Lady Beaufort chose to obtain a loan to finance the transaction, dealing with Loan Officer Jan Malinowski of Palmetto State Bank. Tr., pg. 22.

On October 4th Mr. Fender, on behalf of Hird Island, signed all of the "closing documents" and delivered them to his attorney, Mr. Gilbert, in anticipation of closing on October 7th. These documents included the Deed to Lady Beaufort, the Seller's Affidavit, a 1099-S, a Corporate Resolution authorizing the sale, and a Power of Attorney authorizing Mr. Gilbert and his real estate paralegal to execute any documents on behalf of Hird Island necessary to close the transaction. *Id.,* pg. 177 to 178, Exhibit B. On that same date, these documents were forwarded by Mr. Gilbert's office to Carl Rogers email, with a short cover note stating:

> "Carl, in accordance with the contract, please find attached a signed deed and various affidavits. Our fee for the HUD Statement will be $350. Please forward a

> proposed HUD for our review **we are ready to exchange when you are**. Thanks, Christina Wilson, Real Estate Paralegal, Gilbert Law Firm, LLC."

Exhibit 2 (emphasis added).

Lady Beaufort, however, was not willing to close the transaction. In his Order of May 11, 2017 Judge Dukes recites three (3) reasons for Lady Beaufort's refusal to close, as follows:

First, Hird Island had been administratively dissolved in its state of incorporation, Georgia. Order, Finding of Fact #8.

Second, a Certificate of Tax Compliance referenced in §12-54-124 of the South Carolina Code of Laws had not been obtained. *Id.,* Finding of Fact #11.

Third, the State of South Carolina had filed a tax lien on the property on September 27, 2013. *Id.*, Finding of Fact #12.

Judge Dukes concluded that the above three (3) facts constituted "unsatisfied contingencies" within the meaning of the Contract, thereby extending the deadline for closing by five (5) business days, from October 8 to October 15, 2013. Order of May 11, 2017, pg. 4.

Sometime after the Contract was executed on August 19th, and before the scheduled closing date of October 7th, Mr. Fender was approached by Robert "Robbie" Sample of Inverness whom Mr. Fender had met once or twice before. Tr., pg. 77. Several months earlier Mr. Sample had shown an interest in purchasing this property and wanted to know if it was still available. Mr. Fender told Mr. Sample that he had "waited too late" and that it was under contract as he had already sold it to Lady Beaufort. As Mr. Fender explained:

> "He (Mr. Sample) said, man, I need that. I said, well, you waited too late. It's sold. He said, would you do me a favor? And I said what is that Robbie? He said, if it doesn't close, will you let me buy it? I said, sure. It's for sale. It always has been. And I said, but you got to be able to move in a hurry because I got financial issues I got to deal with. So you got to be ready. He said, okay. I will be ready."

Tr., pp. 78 and 143 – 144.

As the closing date approached, Mr.. Fender began to have concerns about Lady Beaufort's willingness to close the transaction. He questioned why Lady Beaufort was making an issue of the administrative dissolution, the certificate of compliance, and the recently filed relatively small tax lien. He was confused when he heard about Lady Beaufort getting a loan from Palmetto State Bank, as the contract did not call for financing and he understood Lady Beaufort was paying cash. Finally, Lady Beaufort was insisting that he personally guarantee some things, which he had refused to do. All of this, as Mr. Fender put it, started to make him feel a little "paranoid" about the closing. Tr., pp. 141, 146, 148 and 158.

As Mr. Fender feared, the closing with Lady Beaufort never took place. Mr. Kerr of Lady of Beaufort explained why:

> Q. Very good. And when was the closing between Hird Island and Lady Beaufort scheduled, do you recall?
>
> A. October 7th of 2014.
>
> Q. Okay.
>
> A. 13. 13.
>
> Q. That's correct. But the contract didn't close on that date, did it?
>
> A. Did not.
>
> Q. Okay. And why not?
>
> A. Carl (Rogers) had indicated that he was not recommending that I close because there were some issues of title. And that he could not get title insurance based on some of the things that had surfaced during that period of time. He can explain all the details about that, but he did not advise me to close.

*Id.,* pg. 24, line 19 to pg. 25, line 10. Mr. Rogers testified that by the scheduled closing date the issue regarding the administrative dissolution of Hird Island had been resolved, Tr., pp. 97 – 98,

and the tax lien could have been paid and satisfied at closing, Tr., pp. 119 – 20, but he still had an issue with the lack of a certificate of compliance Tr., pp. 99 - 101.

Mr. Fender testified that he wanted the closing with Lady Beaufort to go through, and that he wished it would have closed. As he stated:

> "I got no reason to not want to sell. . . . It served me no useful purpose to not close. As a matter of fact, I was very upset that it wouldn't."

*Id.*, pg. 140, lines 16 – 22. When it still hadn't closed by October 8th Mr. Fender let Mr. Sample of Inverness know that the closing had fallen through. Inverness was still interested in buying the property, as well as an additional piece of property and indicated it could have the money in two (2) days. On October 10th the closing with Inverness occurred, with Inverness purchasing the subject property for $245,000.00[1], as well as a second piece of property for $60,000.00 which was $40,000 to $50,000 under its market value. Tr., pp. 160, 167, 169, 170 and 175. None of the "unsatisfied contingencies referenced by Judge Dukes in his Order were impediments to the Inverness closing. Tr., pg. 145. The tax lien was resolved by simply paying it out of the sales proceeds at closing. Exhibit 5, pg. 3, line 1303. The tax lien was for $480.01, plus $34.00 in court costs. Tr., pg. 118, Tab 18.

When Lady Beaufort learned of the sale to Inverness it promptly filed a lis pendens on the subject property and commenced this lawsuit against Hird Island and Inverness. Lady Beaufort subsequently settled its claim against Inverness by purchasing the subject property from Inverness for $285,000.00. Tr. pg., 113 to 114, Tab 16.

[1] The $245,000.00 sale to Inverness did not involve a real estate commission, while the $260,000.00 contract with Lady Beaufort would have involved a $13,000.00 real estate commission being paid to Tideland Realty.

## C. STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *R & G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the Judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Judge's findings. . . . The Judge's findings are equivalent to a jury's findings in a law action." *Townes Associates v. City of Greenville*, 266 S.C. 81, 86, 221, S.E.2d 773, 775 (1976).

**I. THE MASTER IN EQUITY ERRED IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW THAT HIRD ISLAND BREACHED ITS CONTRACT WITH LADY BEAUFORT, WHERE LADY BEAUFORT REFUSED TO CLOSE THE TRANSACTION PRIOR TO THE CLOSING DATE DEADLINE.**

The Master in Equity concluded that Hird Island breached the Contract with Lady Beaufort by selling the property to a third party, Inverness, on October 10, 2013. In so finding, the Master in Equity relied upon his conclusion that the Contract with Lady Beaufort did not expire until October 15, 2015 due to the existence of unsatisfied "contingencies" as of the original closing deadline of October 8, 2013. Order of May 11, 2017, pg. 5 and Finding of Fact #20.

The Master in Equity determined that the "Effective Date" of the Contract was August 19, 2013. Noting that the Contract provided for a due diligence period of 30 "business days" to begin the day after the "Effective Date" of the Contract, the Master in Equity found that the Due Diligence Period ended on October 1, 2013. *Id.*, Finding of Fact #4. The Master in Equity then noted that the Contract provided that the closing was to occur seven (7) days after the expiration of the Due Diligence Period, with a provision allowing an automatic extension of five (5) business days for unsatisfied "contingencies." The Master concluded, accordingly, that the "drop dead" date for closing on the Contract was October 15, 2013. *Id.*, Finding of Fact #5.

In his Order, the Master in Equity never expressly sets forth his conclusion as to the deadline for closing. He simply recites that closing was to occur seven (7) days after the expiration of the Due Diligence Period, with an automatic extension of five (5) business days for unsatisfied contingencies, which results in a date of October 15, 2013. Seven (7) days after the expiration of the Due Diligence Period on October 1, 2013, mandates a deadline for closing of October 8, 2013. Five (5) business days after October 8, 2013 was October 15, 2013 (October 12 and 13 being Saturday and Sunday). The Master accordingly believed the Contract closing

deadline, in the absence of unsatisfied contingencies, to be October 8, 2013. This is consistent with the testimony at trial of Lady Beaufort's attorney, Carl Rogers, who testified that "the Contract specifies worst case scenario to the buyer's side that it (closing) would have been Tuesday, October 8th, but we had arranged to have it (closing) done on the 7th." Tr., pg. 115, lines 21 – 24. This is the position advocated by Lady Beaufort's trial counsel during the trial ("the Contract is valid through the end of the day on the 8th (of October). So it expired on the 9th."). Tr., pg. 53, lines 16 – 17.

Lady Beaufort refused to close prior to October 8th "because there was some issues of title." Tr., pg. 25, lines 4 – 8. The evidence is uncontroverted that the purchase price was never tendered by Lady Beaufort to Hird Island and, indeed, Palmetto State Bank never released the funds. Tr., pg. 116. The Master in Equity concluded, however, that there existed three (3) unsatisfied "contingencies" that prevented closing by October 8th, thereby triggering an automatic extension of five (5) business days to October 15, 2013, so that the sale on October 10th to Inverness occurred while the Contract was still in effect, thereby constituting a breach of the contract. Finding of Fact # 9, 11, 12, 13, and 20, and pg. 4. The Master in Equity found that these unsatisfied contingencies were: (1) The administrative dissolution of Hird Island, (2) The provision of a Certificate of Tax Compliance, and (3) The tax lien. *Id.*, pg. 4.

Initially, it must be noted that a "contingency" is not defined in the Contract. Exhibit 1, Tab 1, Tr., pp. 50 and 117. The Master in Equity, noting that "contingency" is not a defined term in the contract, May 11, 2017 Order, pg. 4, does not expressly set forth his definition or interpretation of what constitutes an unsatisfied "contingency." In his Order, however, the Master does note that the Contract requires the passage of marketable title, as well as compliance with all local, state and federal laws, implying that the inability to pass marketable title or the

noncompliance with a law would constitute an unsatisfied contingency. Order of May 11, 2017, pg. 5. At the hearing on the Motion to Reconsider, Lady Beaufort and Tideland Realty's counsel agreed that an unsatisfied contingency is something that would have "prevented the passage of marketable title" or "things that would prevent the closing." Transcript of November 13, 2017, pg. 24, line 20 to pg. 25, line 19. The Master in Equity concluded that Hird Island breached the Contract because the existence of the three (3) alleged unsatisfied contingencies extended the closing deadline from October 8th to October 15th , so that Hird Island's sale of the property to Inverness on October 10th breached the contract inasmuch as it was still in full force and effect. The lynchpin of the Master's conclusion that Hird Island breached the Contract, accordingly, is his conclusion that there existed an unsatisfied contingency that prevented the closing or the passage of marketable title on October 8, 2013.

An examination of each of the alleged "contingencies" identified by the Master in Equity reveals that none of these items prevented closing or the passage of marketable title.

First, the Master in Equity found that the administrative dissolution of Hird Island in its state of incorporation, Georgia, constituted an unsatisfied contingency because the title insurance company was unwilling to write a policy until this issue was remedied. Finding of Fact #8 and #9. This was error.

As previously noted, Hird Island is a Georgia corporation authorized to do business in South Carolina. Its corporate charter was administratively forfeited by the Georgia Secretary of State. Tr., pp. 87 – 88 and Tab 3. This information was publically available online. *Id.,* pg. 89, lines 15 – 17. Initially, this fact was of concern to Mr. Rogers' title insurance company. *Id.,* pg. 90, lines 16 – 22. Upon doing further research, however, Mr. Rogers and his title insurance company discovered that this was not an impediment to closing or the passage of marketable

title. Specifically, Georgia has a statute which provides that a corporation that is administratively dissolved continues its corporate existence for the purpose of any business necessary to wind up and liquidate its business and affairs. Georgia Code Ann. §14-2-1421(c). South Carolina has a nearly identical statute. See S.C. Code Ann. §33-14-210(d). According to Lady Beaufort's closing attorney, Carl Rogers, these statutes resolved this issue and satisfied the title insurance company. Tr., pp. 97 – 98.

The second unsatisfied "contingency" relied upon by the Master in Equity involved the absence of a Certificate of Tax Compliance. Noting that the Contract requires the parties to comply with all local, state and federal laws, the Master in Equity found that "pursuant to S.C. Code §12-54-124, if a piece of property constitutes more than a majority of the assets of a company, a Certificate of Tax Compliance **must** be obtained by the seller from the South Carolina Department of Revenue." Finding of Fact #11, emphasis added. Section 12-54-124, however, does not mandate the provision of a Certificate of Tax Compliance. In pertinent part, §12-54-124 provides as follows:

> "In the case of the transfer of a majority of the assets of a business . . . any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. . . . This section does not apply if the **purchaser** receives a Certificate of Compliance from the Department stating that all tax returns have been filed and all taxes generated by the business have been paid. The Certificate of Compliance is valid if it is obtained in no more than thirty days before the sale or transfer."

S.C. Code Ann. §12-54-124 (emphasis added). According to the plain language of the statute, the absence of a Certificate of Compliance does not prevent a closing or prevent the passage of marketable title. In other words, a Certificate of Compliance is not a prerequisite to the ability to convey marketable title.

Contrary to what the Master in Equity found, Attorney Derek Gilbert declined to agree that it is "customary" to obtain a Certificate of Tax Compliance, agreeing simply that it is done "quite frequently" and only "if the buyer asks for it". Significantly, he did not testify that it is the seller's responsibility to obtain it. The statute expressly states that it is not the seller, but rather the **purchaser** who receives the Certificate of Compliance from the Department. As Mr. Gilbert testified, it is the buyer who needs to ask for it, presumably from the Department as the statute expressly states.

Moreover, if a Certificate of Tax Compliance was material to Lady Beaufort, and Lady Beaufort wanted to impose the duty of obtaining a Certificate on Hird Island, it would have been very easy for Lady Beaufort to have inserted such a clause into the Contract. Lady Beaufort failed to do so.

In short, a Certificate of Compliance was not a prerequisite to the passage of marketable title nor did it prevent closing. Lady Beaufort could have tendered the purchase price, in which case Hird Island would have passed good and marketable title via the already executed General Warranty Deed to Lady Beaufort.

It is worth noting that, by executing the General Warranty Deed, Hird Island certified that it was passing good and marketable title, free of liens and encumbrances, to Lady Beaufort. "A South Carolina General Warranty Deed embraces all of the following five covenants usually inserted in fee simple conveyances by English conveyors: (1) That the seller is seized in fee; (2) That he has a right to convey; (3) That the purchaser, his heirs and assigns, shall quietly enjoy the land; (4) That the land is free from all encumbrances; and (5) For further assurances. The first and second covenants have the same effect as the third and fourth covenants." *Black v. Patel*, 352 S.C. 76, 78-79, 572 S.E.2d 295, 297 (Ct.App. 2002).

The third and final unsatisfied "contingency" relied upon by the Master in Equity was the tax lien filed by the State of South Carolina on September 27, 2013. Order of May 11, 2017, Findings of Fact #12 and #13. This lien was filed after the Contract was executed on August 19th and before the closing deadline of October 8th. The lien is for $480.01, plus court costs of $34.00. It was a matter of public record and discovered by Attorney Carl Rogers when, as a matter of routine, he checked the title prior to closing. Tr., pp. 1 – 17 to 18. This is something that would have been taken care of by simply paying it at closing out of the closing proceeds. *Id.*, pg. 119 – 120. In fact, this is what was done when the property was sold on October 10th to Inverness. Exhibit 5, pg. 3, line 1303. In short, the tax lien was handled in the same way that any other lien, such as an existing mortgage or line of credit is routinely handled, by simply satisfying it at closing.

In sum, the administrative dissolution of Hird Island did not prevent the passage of marketable title, inasmuch as the statutes of both Georgia and South Carolina expressly authorize the continued corporate existence of Hird Island for the purpose of disposing of its assets. Lady Beaufort's closing attorney expressly conceded that this issue, initially of concern, was completely resolved prior to the closing deadline.

Likewise, a Certificate of Compliance is not a requirement to the passage of marketable title. If the buyer wanted it, the buyer could have obtained it. If the buyer wanted to put the burden on the seller of obtaining it, it could have so provided in the Contract. In any event, its absence did not prevent the passage of marketable title.

Finally, the small tax lien did not prevent the passage of marketable title inasmuch as this lien, like any other lien that exists on a piece of property, is the type of lien routinely paid and

satisfied at closing, which, in fact, is what was ultimately done when the property was sold to Inverness.

The Master in Equity, accordingly, erred in finding that there were unsatisfied contingencies that prevented the closing from occurring on October 8th, thereby automatically extending the closing deadline to October 15th. Since the Contract expired under its own terms on October 8th, Hird Island did not breach the Contract when it sold the property to Inverness on October 10th when the Lady Beaufort Contract was no longer in force or effect.

**II. IN RESPONSE TO HIRD ISLAND AND FENDER'S MOTION TO RECONSIDER THE AWARD OF ATTORNEY'S FEES TO LADY BEAUFORT ON THE GROUND THAT THE AWARD OF ATTORNEY'S FEES LACKED EVIDENTIARY SUPPORT, THE MASTER IN EQUITY ERRED BY *SUA SPONTE* REOPENING THE CASE IN ORDER TO ALLOW LADY BEAUFORT TO PRESENT EVIDENCE IN SUPPORT OF ITS CLAIM FOR ATTORNEY'S FEES.**

At trial, Mr. Kerr testified that he had paid $53,924.21 in attorney's fees.[2] He did not elaborate on to whom he paid these fees, or what work these fees represented. Transcript of March 1, 2017, pg. 31, line 21 to pg. 32, line 2. Additionally, two (2) Affidavits were admitted into evidence without objection. Exhibit 2. Tr., pg. 180, line 20 to 181, line 6. In very summary fashion, these Affidavits simply recite that the total attorney's fees and costs associated with the legal services provided by Carl Rogers was $7,857.00 and the total attorney's fees and costs and associated with the legal representation provided by Michelle Endemann of the Andrew K. Epting, Jr. Law Firm was $46,067.41. Exhibit 1, Tab 2.

In his Order filed May 17, 2017, the Master in Equity made the following finding with respect to attorney's fees and costs:

> Lady Beaufort has also expended $53,924.41 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct. (See Plaintiff's Exhibit 2). Attorney's fees are provided for in the contract (See Plaintiff's Exhibit 1).

Order, pg. 8. In awarding judgment against Hird Island and Fender in favor of Lady Beaufort, the Master in Equity included this figure in the total judgment amount of $87,578.56.

In their Motion to Reconsider filed May 19, 2017, Hird Island and Fender requested that the Master in Equity reconsider the award of attorney's fees on the following ground:

> "In the event the Court does not alter or amend its findings of Defendants' liability, Defendants contest the finding of damages. (Order, pp. 8-9). Attorney's

[2] At the hearing on attorney's fees held after Hird Island and Fender's Motion to Reconsider, it was discovered that this testimony by Mr. Kerr was untrue. He had not paid $53,924.41 in attorney's fees. In truth, had only paid $17,857.00. This was one reason the judgment in favor of Lady Beaufort was reduced. See Order Amending Judgment, October 26, 2018.

> fees and costs should not be recoverable because the Court should not find in Lady Beaufort's favor. Alternatively, the amount is excessive and the Court did not make any findings of fact as to the factors in determining an award of attorney's fees. See *Blumberg v. Nealco,* 310 S.C. 492, 494, 427 S.E.2d 659, 660 ("There are six (6) factors to consider in determining an award of attorney's fees: (1) nature, extent and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained.").

Motion to Reconsider, Ground #16.

As noted above, the sum total of all evidence introduced by Lady Beaufort during the trial of this case regarding attorney's fees was Mr. Kerr's simple statement that he had paid $53,924.41 in attorney's fees, and the two (2) conclusory Affidavits from Mr. Rogers and Ms. Endemann setting forth their total attorney's fees and costs, which comprise the $53,924.41. Absolutely no evidence was introduced or proffered regarding at least five (5) of the six (6) factors enumerated in *Blumberg v. Nealco, supra.* More specifically, there was no evidence regarding a nature, extent and difficulty of the legal services rendered, there was no itemization of the time and labor devoted to the case, there was no evidence regarding the professional standing of counsel, there was no evidence regarding any contingency of compensation, and there was no evidence regarding the fee customarily charged in the locality for similar services.

Upon considering Hird Island and Fender's Motion to Reconsider, the Master in Equity agreed that "in order to award attorney's fees and costs I must consider the six (6) factors enumerated in *Blumberg v. Nealco*." Order of February 14, 2018, pg. 4. The Master in Equity likewise agreed with Hird Island and Fender that "there is currently an insufficient evidentiary basis upon which I can consider the *Blumberg v. Nealco* factors." *Id.* Rather than vacate the award of attorney's fees, however, the Master in Equity, *sua sponte*, "ordered that the record in this case should be reopened and the hearing reconvened, limited to the issue of that element of

damages claimed by the Plaintiff Lady Beaufort consisting of attorney's fees and costs in the amount of $53,924.41." *Id.*, pg. 4.

The Master in Equity erred in reopening the record, *sua sponte*, in order to allow Lady Beaufort to supply an evidentiary basis for its claimed attorney's fees and costs, particularly where Lady Beaufort had the opportunity to supply this evidentiary basis during the trial, but failed to do so.

In *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 329 S.E.2d 736 (1985) the South Carolina Supreme Court held that a trial judge cannot, *ex mero motu*, order a new trial on a ground not raised by a party. Neither Lady Beaufort, nor Hird Island and Fender, had requested that a new trial be had on the issue of attorney's fees. To the contrary, Hird Island and Fender argued that attorney's fees and costs "should not be recoverable" because the Court did not make any findings of fact as to the factors required by *Blumberg v. Nealco* in determining an award of attorney's fees. Motion to Reconsider, ¶15. It was, of course, impossible for the Court to make any such findings of fact, as there was no evidentiary basis in the record that would have supported such findings. No party had moved before the Court to reopen the record in order to allow Lady Beaufort to submit evidence which it was fully capable of submitting during the original trial. In *Southern Railway Co. v. Coltex, Inc.* the South Carolina Supreme Court stated the following:

> The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot.

*Id., Southern Railway Co. v. Coltex, Inc.,* 285 S.C. 213, 214, 329 S.E.2d 736, 737 (1985).

This is not a case where a new trial is granted based upon newly discovered evidence. The "evidence" in this case was fully available at the time of trial. See, e.g., *Spreeuw v. Barker*, 385 S.C. 45, 63, 682 S.E.2d 843, 852 (Ct. App. 2009) (a new trial on the basis of newly

discovered evidence is warranted only when the newly discovered evidence, among other things, is evidence that has been discovered since the trial and could not have been discovered before the trial.). Lady Beaufort simply chose, or failed, to introduce any evidence regarding the *Blumberg v. Nealco* factors.

In his May 17, 2013 Order the Master in Equity erred in awarding attorney's fees to Lady Beaufort without setting forth any findings of fact regarding the six (6) factors required by *Blumberg v Nealco.* In fairness to His Honor, it would have been impossible for him to set forth such findings of fact, inasmuch as Lady Beaufort failed to introduce any evidence regarding these mandatory factors. When Hird Island and Fender, in their Motion to Reconsider, brought this to the Court's attention, the Court agreed that his Order was deficient and that the award of attorney's fees was not supported by the evidence. Rather than strike the attorney's fees award, as requested by Hird Island and Fender in their Motion to Reconsider, the Court *sua sponte*, reopened the record, in effect giving Lady Beaufort a second bite at the apple which it had not requested. The Court erred as a matter of law in *ex mero motu* granting a new trial where this was not requested by either party.

**III. THE COURT ERRED IN AWARDING JUDGMENT AGAINST HIRD ISLAND IN THE AMOUNT OF $17,500.17 IN FAVOR OF TIDELAND REALTY, WHERE THIS SUM REPRESENTED THE REAL ESTATE COMMISSION PLUS PRE-JUDGMENT INTEREST PAYABLE ON THE TRANSACTION BETWEEN HIRD ISLAND AND LADY BEAUFORT, WHERE HIRD ISLAND DID NOT BREACH THE CONTRACT AND THERE IS NO EVIDENCE TO SUPPORT THIS FINDING.**

The Master in Equity found that "as a result of the Defendants' conduct, Tideland was not paid the real estate commission that it earned and which was provided for in the Contract. Accordingly, Tideland has suffered damages in the amount of $13,000.00." Order, pg. 5. The Master in Equity, accordingly, awarded judgment "against Hird Island and Sherwood Fender in the amount of $17,500.17, representing actual damages and pre-judgment interest in favor of Tideland Realty." Order, pg. 6.

As noted in Argument I, *supra*, Hird Island did not breach the contract. The deadline for closing on the Contract expired on October 8, 2017 and Lady Beaufort refused to close the transaction by the closing deadline date. Since Hird Island did not breach the contract, the Master in Equity erred in concluding that Hird Island should pay the real estate commission that otherwise would have been owed on the transaction.

Finally, there is simply no evidence that Hird Island agreed to pay a 5% commission to Tideland Realty.

**IV. THE MASTER IN EQUITY ERRED IN FINDING AND CONCLUDING THAT THE DEFENDANT FENDER OWED A REAL ESTATE COMMISISON TO TIDELAND REALTY ON THE TRANSACTION WITH LADY BEAUFORT, WHERE THIS RELIEF WAS NOT SOUGHT AGAINST FENDER, FENDER WAS NOT A PART TO THE CONTRACT, FENDER NEVER AGREED TO PAY A COMMISSION, AND THERE IS NO EVIDENCE TO SUPPORT THIS FINDING.**

As noted in Arguments I and III, *supra*, the Master in Equity awarded judgment against Sherwood Fender personally in the amount of $17,500.17, representing actual damages and pre-judgment interest in favor of Tideland Realty, based upon a $13,000.00 commission Tideland Realty allegedly would have been owed on the Contract between Hird Island and Lady Beaufort if the transaction has closed. This was error, for several reasons.

First, as previously noted, Hird Island did not breach the contract. By the time Hird Island sold the property to Inverness on October 10th, the closing deadline on the Contract with Lady Beaufort of October 8th had already expired.

Second, Fender was not a party to the contract between Hird Island and Lady Beaufort. In apparent recognition of this fact, Lady Beaufort's cause of action for breach of contract was against Hird Island only. See Complaint. The Master in Equity did not find that Fender breached any contract. See Order of May 11, 2017.

Third, the only allegation in the Second Amended Complaint regarding any commission owed to Tideland Realty is directed against Hird Island, and only Hird Island. See Second Amended Complaint, ¶13. There isn't even an allegation that Fender personally owed any commission.

Finally, there is absolutely no evidence that Fender ever personally guaranteed or promised to pay a real estate commission of any kind to Tideland Realty. The Master's Order fails to set forth an explanation or justification of any kind as to why Fender is personally responsible for payment of an alleged real estate commission on the transaction between Hird

Island and Lady Beaufort. In fact, the evidence is to the contrary, inasmuch as Fender repeatedly testified that he expressly refused to personally guarantee any of the obligations of Hird Island. Tr., pp. 146 and 158.

It was accordingly error to find that Fender was personally responsible for an alleged real estate commission.

**V. THE MASTER IN EQUITY ERRED IN ENTERING JUDGMENT IN FAVOR OF LADY BEAUFORT AGAINST HIRD ISLAND AND FENDER FOR NEGLIGENT MISREPRESENTATION WHERE LADY BEAUFORT FAILED TO PROVE BY A PERPONDERANCE OF THE EVIDENCE THE ELEMENTS OF A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION.**

To establish liability for negligent misrepresentation, the Plaintiff must show by a preponderance of the evidence: (1) The Defendant made a false representation to the Plaintiff; (2) The Defendant had a pecuniary interest in making the representation; (3) The Defendant owed a duty of care to see that he communicated truthful information to the Plaintiff; (4) The Defendant breached that duty by failing to exercise due care; (5) The Plaintiff justifiably relied on the representations; and (6) The Plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010).

Significantly, "evidence of a mere broken promise is not sufficient to prove negligent misrepresentation." *Sauner v. Public Service Authority of South Carolina,* 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003).

Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as future events. *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967).

The "mere breach of contract does not constitute fraud." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). "Evidence of mere non-performance of a promise is not sufficient to establish either fraud or a lack of intent to perform." *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct.App. 1993) (citation omitted). "An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is

coupled with other evidence." *Turner v. Milliman,* 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011).

In the case at bar, the Master in Equity concluded that Mr. Fender was responsible for negligent misrepresentation because he "represented to Plaintiffs that he was a willing seller and scheduled the closing to occur on October 7, 2013, with full knowledge of the dissolution of Hird Island and the issue it presented for the title insurance company." Order of May 11, 2017, pg. 6.

There is absolutely no evidence tending to suggest that Mr. Fender was not a "willing seller." To the contrary, he was anxious to close. It was his idea to have Mr. Trumps approach Lady Beaufort about purchasing the property. He owed money on a loan and taxes and needed the money that the sale would generate. Tr., pg. 139. He wanted to close and had every reason to want to sell. *Id.,* pg. 140. He was very upset when Lady Beaufort failed to close on the transaction. *Id.,* pg. 140.

The Master in Equity concluded that Mr. Fender's knowledge regarding the dissolution of Hird Island constituted a negligent misrepresentation. This dissolution, however, was a matter of public record, easily accessible online, and equally available to Lady Beaufort. Tr., pg. 87 – 88, Exhibit 1, Tab 3.

In any event, as previously noted herein, the administrative dissolution of Hird Island did not impede in the slightest Hird Island's ability to pass marketable title to the property to Lady Beaufort. Lady Beaufort's own closing attorney, Carl Rogers, admitted that any issue regarding this administrative dissolution had been resolved prior to the closing deadline. Tr., pg. 121 and 124. As Mr. Kerr of Lady Beaufort candidly admitted during trial, the only evidence of any "bad faith" on the part of either Hird Island or Mr. Fender was Lady Beaufort's belief (albeit erroneous) that its contract was still in full force and effect when Hird Island sold the property to

Inverness on October 10. Even if this belief were accurate, it would simply be a breach of contract and did not involve any negligent misrepresentation.

## VI. THE MASTER IN EQUITY ERRED IN ENTERING JUDGMENT AGAINST FENDER PERSONALLY IN FAVOR OF LADY BEAUFORT FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT WHERE FENDER WAS NEITHER A PARTY TO THE CONTRACT NOR COMMITTED A FRAUDULENT ACT.

The Master in Equity erred in entering judgment against Fender personally on the cause of action for breach of contract accompanied by a fraudulent act. Lady Beaufort failed to prove the essential elements of a cause of action for breach of contract accompanied by a fraudulent act.

In order to state a claim for breach of contract accompanied by a fraudulent act, the Plaintiff must plead facts establishing three (3) elements: (1) A breach of contract; (2) Fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) A fraudulent act accompanying the breach. *Harper v. Ethridge,* 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). "The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

In discussing the cause of action for breach of contract accompanied by a fraudulent act, the Master in Equity stated that "Hird Island was in breach of the contract when it failed to remedy the issues raised by Plaintiffs concerning dissolution of the corporation and tax compliance." Order of May 11, 2017, pg. 5. As previously noted, neither the dissolution of the corporation nor the tax compliance certificate were issues that needed to be "remedied," as neither impaired the marketability of the title nor prevented the closing from occurring prior to the deadline. In any event, as the Master noted, the contract was with Hird Island, not with Fender. It is legally impossible for Fender to personally breach a contract to which he is not a party. Accordingly, with respect to Mr. Fender, the breach of contract essential element of a cause for breach of contract accompanied by a fraudulent act cannot be satisfied.

A cause of action for breach of contract accompanied by a fraudulent act requires more than a simple breach of contract. As the cause of action expressly states, it must be accompanied by a fraudulent act. In finding a fraudulent act, or fraudulent intent, the Master in Equity found that the "sale of the property to Inverness while the contract was still pending and while the lawyers were still negotiating to close the transaction, constitutes dishonesty in fact and unfair dealing." Order of May 11, 2017, pg. 6. As previously noted, the sale of property to Inverness occurred after the contract had expired. Even if the contract had not expired, the sale of the property to Inverness constituted a simple breach of contract. Even if everything that Lady Beaufort claims was true, the sale to Inverness constituted a simple breach of contract, not fraud.

The Master in Equity points to the fact that the lawyers continued to negotiate a potential sale to Lady Beaufort even after the Contract expired on October 8th, ceasing negotiations only on October 10th when the sale to Inverness occurred. This is not evidence of fraud or dishonesty. As Mr. Fender testified, he never had any contract with Inverness. Tr., pg. 167. If the sale to Inverness had not gone through, or were delayed, the fact that negotiations with Lady Beaufort continued even after the Contract expired is simply evidence of Mr. Fender's willingness to go forward with the Contract if Lady Beaufort could be convinced to go forward with the closing and in the event the sale to Inverness did not occur. The fact that Mr. Fender's attorney was "still negotiating to close the transaction," as the Master in Equity found, is evidence of Mr. Fender's good faith, not bad faith, as it shows he was still attempting, even after the closing deadline had passed, to convince Lady Beaufort to move forward and close the sale with him.

**VII. THE MASTER IN EQUITY ERRED IN ENTERING JUDGMENT AGAINST HIRD ISLAND IN FAVOR OF LADY BEAUFORT FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT WHERE HIRD ISLAND DID NOT BREACH THE CONTRACT AND/OR DID NOT COMMIT A FRAUDULENT ACT.**

The Master in Equity erred in entering judgment against Hird Island on the cause of action for breach of contract accompanied by a fraudulent act. As noted earlier in Argument I, *supra*, Hird Island did not breach the contract. Additionally, any alleged breach of contract was not accompanied by a fraudulent act.

In order to state a claim for breach of contract accompanied by a fraudulent act, the Plaintiff must plead facts establishing three (3) elements: (1) A breach of contract; (2) Fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) A fraudulent act accompanying the breach. *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct.App. 1986).

As noted in Argument I, *supra*, Hird Island did not breach the contract. To the contrary, Lady Beaufort breached the contract by failing and refusing to close by the closing date deadline of October 8, 2013 because it erroneously believed that a certificate of compliance was necessary in order to obtain marketable title and it believed the burden of providing the certificate was on Hird Island. When Hird Island subsequently sold the property to Inverness, the contract with Lady Beaufort had expired, and there was no breach of that contract by Hird Island. Without the breach of a contract, there can be no breach of a contract accompanied by a fraudulent act.

Additionally, even if the breach of contract element could be satisfied, the Plaintiff failed to prove the remaining elements, i.e., fraudulent intent relating to the breaching of the contract and a fraudulent act accompanying the breach. In finding a fraudulent act, or fraudulent intent, the Master in Equity concluded that the "sale of the property to Inverness while the Contract was still pending and while the lawyers were still negotiating to close the transaction, constitutes

dishonesty in fact and unfair dealing." Order of May 11, 2017, pg. 6. Even if, as the Master found, the Contract with Lady Beaufort was still alive and well at the time of the sale of the property to Inverness, this act does not equate to a fraudulent act or fraudulent intent. At best, it is simply the act which constitutes the breach of contract. There was no fraud involved.

## CONCLUSION

It is, accordingly, respectfully requested that the Orders of the Beaufort County Master in Equity be reversed, and that judgment be entered in favor of the Appellants/Respondents, Hird Island Investments, Inc. and Sherwood N. Fender.

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By: _____

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Attorneys for the Appellants/Respondents

Beaufort, South Carolina
December 28, 2018

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS



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APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

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CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2018-001969

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Lady Beaufort, LLC &
Tideland Realty, Inc. — Respondents/Appellants,

vs.

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

AND

William M. Bowen, — Third-Party Plaintiff,

v.

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

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

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## CERTIFICATE OF SERVICE

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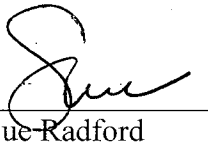
Undersigned certifies that the Initial Brief of Appellants/Respondents, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by

depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
46A State Street
Charleston, South Carolina 29401
Attorneys for the Respondent
Lady of Beaufort, LLC

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on December 28, 2018.

By: 
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December 28, 2018



Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Lady Beaufort, LLC & Tideland Realty, Inc. v. Hird Island Investments, et al.
Case No.: 2014-CP-07-0052
Appellate Case No.: 2018-001969

Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of Appellants/Respondents and Designation of Matter to be Included in Record on Appeal together with a Certificate of Service. Please file the originals and return stamped copies to me in the enclosed self-addressed stamped envelope.

With kindest regards, I am

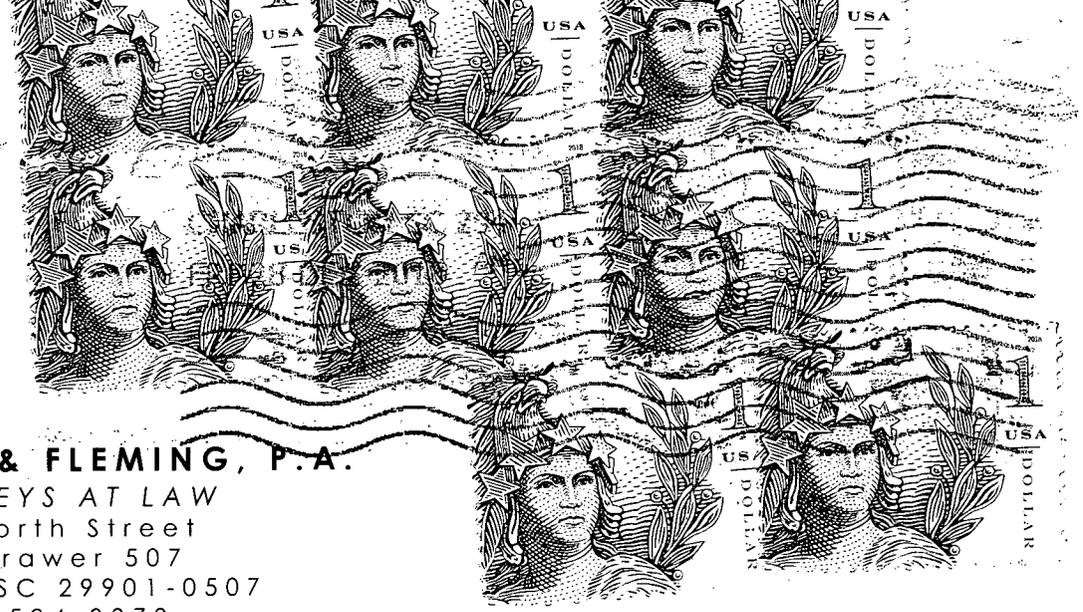
Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: Andrew K. Epting, Jr., Esquire (w/enclosure)
Jaan G. Rannik, Esquire (w/enclosures)



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