

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

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

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

v.

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

AND

William M. Bowen, Third-Party Plaintiff,

v.

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

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

SUPPLEMENTAL RECORD ON APPEAL

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State of South Carolina)
County of Beaufort }

Court of Common Pleas
14th Judicial Circuit
No.: 2014-CP-07-00052

Lady Beaufort, LLC &
Tideland Realty, Inc.,

Plaintiff(s),

vs.

Hird Island Investments,
Inc. and Sherwood N.
Fender,

Defendant(s),

HEARING

November 13, 2017

Hearing reported by Deborah S. Thomas,
Certified Verbatim Reporter and Notary Public in and
for the State of South Carolina; said hearing held
before Honorable Marvin H. Dukes, III, Beaufort
County Master in Equity and Special Circuit Court
Judge in accordance with the South Carolina Rules of
Civil Procedure at the Beaufort County Courthouse,
102 Ribaut Road, Room 212, Beaufort, South Carolina
on November 13, 2017, at the hour of 1:38 p.m.

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1 This hearing is conducted in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 JUDGE DUKES: Good afternoon.
5 We're here in 14-CP-07-00052, Lady Beaufort versus
6 Hird, et al. And I don't have a paper roster in
7 front of me, but we've got -- I think I saw a motion
8 to reconsider and a motion to void transfer. Is
9 that what we've got?

10 MR. RANNIK: Yes, sir.

11 MR. KUHN: I believe that's correct,
12 Your Honor.

13 THE JUDGE: All right. So a motion
14 to reconsider I -- well, let me ask. Is there any
15 particular order in which you all believe these
16 should be taken up in?

17 MR. BOWEN: Judge, I think you ought
18 to take the motion to reconsider because he's going
19 to be so persuasive there'll be no need for me to
20 comment.

21 THE JUDGE: Wow. There's a good
22 reason, but usually we take those up any way in a
23 situation like this. So the motion to reconsider
24 would be the order that was issued a very long time
25 ago. So I guess the motion was filed a long time

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1 ago. Let's see. What took so long, do you know,
2 for us to hear that? That should have fallen on the
3 roster --

4 MR. BOWEN: We had some -- we had
5 some ongoing, serious settlement negotiations for
6 quite some period of time.

7 THE JUDGE: Okay. Because I was
8 going to say if we dropped the ball somehow and
9 didn't hear this until now, I'm not sure what
10 happened.

11 MR. BOWEN: You did not, sir. That
12 was the reason for it.

13 THE JUDGE: Is there anything I can
14 do before I hear any of this to put you all in a
15 position to continue those settlement negotiations
16 and possibly come to some full and final resolution
17 of whatever it is you all were working on? Is there
18 any opportunity for that today.

19 MR. RANNIK: Judge, I don't think so.
20 I think before -- as you are going to hear in our
21 motion to void transfer, there's some irregularities
22 that have come up and some difficulties we've run
23 into and I think we are going to need the Court's
24 assistance to move past them.

25 THE JUDGE: Okay. Now, of course,

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1 there's a motion to reconsider the entire order, I
2 guess, right?

3 MR. BOWEN: Correct, sir.

4 THE JUDGE: And then assuming I
5 denied the motion then we would hear that. So I
6 would guess the -- I'm not a part of the settlement
7 negotiations and usually am not. But if you all
8 were able to settle this with some finality, we
9 wouldn't even need to hear that part. But you are
10 saying you all have exhausted, at least for today,
11 all possibility of settlement?

12 MR. RANNIK: I do believe so.

13 MR. BOWEN: That's a fair statement,
14 yes, sir.

15 THE JUDGE: Just any time I get human
16 beings all in the same room rather than on the
17 telephone, I think the odds of settling it go up
18 pretty significantly. But you all have thought
19 about that and moved past that so I'll --

20 MR. BOWEN: Michelle was responsible
21 for this litigation up until, what, a month ago?
22 Six weeks ago? And she and I exhausted things --
23 explored things exhaustively and just couldn't get
24 there. We got very close a couple times, but we
25 just couldn't get there.

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1 THE JUDGE: Okay. But new
2 representation you don't think will cause any kind
3 of a different angle?

4 MR. BOWEN: I don't want to speak for
5 him, but I doubt it.

6 MR. EPTING: Judge, my name is Drew
7 Epting. I've been in this from the beginning.
8 Although, I think this is the first time I've
9 appeared in front of you. Without getting too far
10 ranging, one of the possibilities here is that we're
11 concerned that assets are being disposed of. I'm
12 not saying it's true. We believe that to be true.

13 Fred's filed a motion to reconsider. It
14 may be that if we could examine Mr. Fender about
15 these transfers that perhaps we could get to a place
16 in which we might could get it resolved. But it
17 would -- and I'm suggesting in a way holding Fred's
18 motion to reconsider. Let us see what is going on
19 and just have the Court enjoin without further court
20 approval any further disposition of assets. Now,
21 that's a pretty far ranging suggestion, but it might
22 cut through an awful lot and it might ultimately
23 result in getting it resolved.

24 THE JUDGE: Okay. So with that
25 regard with this issue, would that be --

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1 MR. BOWEN: The portion of the -- the
2 portion of their motion that we do not oppose is the
3 request of supplemental proceedings. I think that
4 is appropriately under the circumstances. We
5 prepared to consent. As a matter of fact, I did
6 consent to that in my return.

7 THE JUDGE: Well, let me ask you
8 this. With regard to supplemental proceedings,
9 ordinarily the first things, you know because you
10 all have filed plenty of them, in the supplemental
11 proceedings is an order of the court to say hold
12 what you got while we figure this out. It sounds
13 like they're asking for something similar to that
14 while you all continue to negotiate if I'm
15 understanding what --

16 MR. EPTING: That's more or less it,
17 Judge. Let us have access to Mr. Fender on the
18 record about the transfers. Hold everything else in
19 abeyance except that there should be no more
20 transfers pending any further order of this Court,
21 but I think that's more or less accurate.

22 THE JUDGE: So if that -- do you all
23 want to try to -- you got a court reporter right
24 here. You got a room. You got everybody here.

25 MR. BOWEN: Well, here's the thing

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1 about it, sir. We would not want to abandon our
2 motion for reconsider.

3 THE JUDGE: Oh, I understand. You're
4 not even suggesting it.

5 MR. EPTING: I'm not. No, not at
6 all. But I'm also suggesting, Judge, for example,
7 Bill said or has suggested that perhaps we should
8 have offered some proof on our fees. It might be
9 better to hold the motion to reconsider and let us
10 take a look at these transfers. And if we really do
11 need to offer evidence on the fees, we can do all
12 that and Fred could simply renew his motion to
13 reconsider. Either he could leave this one standing
14 and amend it depending on what this Court may do in
15 the future. Or he can simply withdraw it without
16 prejudice to refile.

17 MR. BOWEN: Drew, I hadn't understood
18 about fees. I didn't raise that issue.

19 MR. EPTING: I thought you had
20 questioned whether or not it -- not in this but in
21 some previous filing you had --

22 Q. The motion to reconsider?

23 MR. EPTING: Yes.

24 MR. BOWEN: I wasn't a part of that,
25 so I stand corrected.

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1 MR. EPTING: All right. Sorry. Fred
2 did it.

3 MR. KUHN: Yes.

4 MR. BOWEN: I think as long as we,
5 Your Honor, could proceed expeditiously and not drag
6 thing this out. I don't think we could do it today
7 because we just don't have --

8 THE JUDGE: I can give you a
9 follow-up date. I can give you the date today. It
10 would realistically be -- I think we can do it in
11 December depending on how long you need but most
12 definitely in early January. You all know how tight
13 it gets this time of the year.

14 MR. BOWEN: May we have a moment to
15 discuss.

16 THE JUDGE: Absolutely. Take all the
17 time you need.

18 (BREAK 1:45-1:48)

19 THE JUDGE: So you all took a brief
20 break and as I understand -- and, again, I don't
21 usually get into the weeds of a settlement, but this
22 is more in line of the idea of a continuance. As I
23 understand, what's on the table is that the
24 Plaintiff in this case has suggested a continuance
25 of the reconsideration motion pending -- you had

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1 said an examination. And I don't know if an actual
2 examination is -- you mean I put him under oath, an
3 examination as supposed to some sort of disclosure,
4 perhaps an affidavit format about any assets and
5 perhaps a restraining order that prevents any further
6 disposition or anything like that?

7 MR. EPTING: I was suggesting an
8 examination, Judge, along the lines of supplemental
9 proceedings. And I don't think Bill has an
10 objection to that. But in the interim, yes, I was
11 suggesting that there would be no further transfers
12 without notifying the Court and us having an
13 opportunity to object to them.

14 THE JUDGE: The examination just so
15 I'll know -- probably should have gone over this
16 before they went out of the room -- but would be
17 limited to not a standard supplemental type, you
18 know, A to Z examination. But you're specifically
19 interested in specific transfers that you already
20 have identified. Is that -- and perhaps where the
21 funds went, that sort of thing?

22 MR. EPTING: Well, I was more
23 suggesting, Judge, a more full examination, but we
24 would be amenable to just making -- we want to make
25 sure we understand the asset picture clearly before

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1 we start talking any further about settlement. But,
2 yes, I was suggesting something more than just the
3 several transfers.

4 THE JUDGE: Okay. But maybe
5 something less than a full A to Z?

6 MR. EPTING: True. Right.

7 THE JUDGE: And I know you all hadn't
8 heard all that when you went out to talk. I don't
9 know if any of that -- well, what's the -- is this
10 you Fred? Or Bill?

11 MR. KUHN: We would prefer to go
12 ahead and argue and have a ruling on the motion to
13 reconsider. I think they are entitled to
14 supplemental proceeding because there is a judgment.
15 That judgment is a lien on everything Mr. Fender has
16 and everything Hird Island Investment has. So if
17 transfers -- they already have the judgment lien
18 that will follow any transfer he should make. And
19 it's a slow enough proceeding I don't the delay of a
20 month or two at this point in time is going to be
21 very helpful to either party. I think it would be
22 more helpful to us to go ahead and have a ruling on
23 the motion to reconsider as opposed to have that
24 just out there.

25 THE JUDGE: All right. So we'll go

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1 ahead. I always like to make sure everybody has an
2 opportunity to try to come up with something other
3 than whatever I might come up with, but it sounds --

4 MR. KUHN: I appreciate it, Your
5 Honor.

6 THE JUDGE: -- like that's not going
7 to work, but I thank you all for going out and
8 trying to give it a shot. So I think it probably
9 does make some sense then to go ahead and hear the
10 reconsideration motion and then we'll just deal with
11 that and then we'll move on.

12 I don't know -- let me ask you all this.
13 The reconsideration motion may be something that I
14 need to take under advisement. I don't know how
15 complicated it is. Let us assume for the moment I
16 take it under advisement. It makes some sense since
17 you all are all gathered here today to go ahead and
18 hear your motion as well. Perhaps take that under
19 advisement. It would make some sense to do that
20 pending my decision on the other one.

21 MR. EPTING: And, Judge, in a spirit
22 of full candor, of course, one of our concerns is is
23 if there's a ruling on the motion to reconsider,
24 there will be an appeal. And then all of this is
25 going to be stayed for years which is not something

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1 that we want to do either. And hence my suggestion
2 of trying to find some middle place to land.

3 THE JUDGE: Right. And of course
4 you're right. These days as we all know, this is
5 not the final word when I say something or write
6 something. It's going to end up in Columbia a good
7 bit of the time. And that just gives you all more
8 opportunity to try to settle it. And gives perhaps
9 everybody more incentive to try to end this,
10 whatever is going on. So, I agree with you.

11 All right. Well, let me see if I can find
12 the digital version of Mr. Kuhn's motion here so I
13 can follow along.

14 MR. BOWEN: Actually, I think the
15 motion was probably filed under my name, Judge.

16 THE JUDGE: I see it. Filed back May
17 19th. Does that sound right?

18 MR. KUHN: Yes, sir.

19 THE JUDGE: All right. Great. Mr.
20 Kuhn, I'm happy to hear from you, sir.

21 MR. KUHN: Please the Court, Your
22 Honor. I'm Fred Kuhn. I'm here on behalf of Hird
23 Island Investments and Sherwood Fender. As Your
24 Honor may recall, Hird Island Investments entered
25 into a contract to sell a three-acre parcel of

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1 unimproved real estate here in Beaufort County to
2 Lady Beaufort, LLC and Tideland Realty. The other
3 Plaintiff was the real estate broker.

4 The contract was dated August 19th. It
5 had a due diligence period that ended October 1st.
6 And it called for a closing date of no later than,
7 Your Honor found in his order, August -- excuse me
8 -- October 8th. The contract stressed that time
9 was of the essence. And not only did the contract
10 stress that time was of the essence, but the
11 testimony at the trial confirmed that time really
12 was of the essence. This closing needed to take
13 place in a timely manner. The closing date came and
14 went and the buyer never tendered the funds of
15 \$240,000 to purchase the property.

16 The closing attorney Mr. Gilbert had the
17 deed signed by the Seller along with the customary
18 closing papers as the seller's affidavit ready to
19 give them to the Buyer upon receiving the money. It
20 was not tendered.

21 On the face of that, it would appear that
22 the Plaintiffs breached the contract by failing to
23 close by the closing date under contract where time
24 was of the essence. But in your order, Your Honor
25 relied upon a clause in the contract that said if

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1 there are, quote, unsatisfied contingencies, closed
2 quote, that the contract extends for five business
3 days which would give it until October 15th.

4 And the unsatisfied contingencies that the
5 Buyer relies upon in extending the closing date and
6 excusing what would otherwise be their breach of the
7 contract were three items that are listed in Your
8 Honor's order.

9 The fact that Hird Island Investments, a
10 Georgia corporation, had been administratively
11 dissolved years before. The fact that there was a
12 tax lien against the Buyer. And the fact that
13 the -- the Seller rather. And the fact that the
14 Seller did not supply to the Buyer what's called a
15 certificate of compliance. That's referenced in
16 Your Honor's order.

17 I respectfully submit that none of those
18 are unsatisfied contingencies. An unsatisfied
19 contingency would be something that prevents the
20 closing from going forward. Something that, in
21 other words, prevents, precludes or makes it
22 impossible for the Seller to convey marketable title
23 to the Buyer. None of those three things prohibited
24 the Seller from conveying marketable title to the
25 Buyer. They were desires. There were wants. They

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1 were requests that the Buyer had, but they were not
2 needs.

3 The dissolution, for example, South
4 Carolina has a statute as does Georgia where this
5 corporation was incorporated that basically says if
6 you are administratively dissolved, you can continue
7 -- still can sell your assets. So that did not
8 preclude the Seller from conveying marketable title.
9 They still were authorized by the statutes of both
10 states to sell this property to the Buyer.

11 The tax lien, just like any other lien,
12 that's something that gets paid at closing. It's no
13 different from a mortgage lien. It's not something
14 that prohibited marketable title from passing.

15 Likewise a certificate of compliance, that
16 is something the buyer wanted to get extra
17 reassurance that there were no tax liens out there
18 that they did not know about. But it's not a
19 requirement to pass marketable title. It wasn't
20 necessary. The Seller was able to comply with the
21 contract without that being supplied. This was
22 something the Buyer wanted, not something that
23 prevented marketable title from being passed.

24 So none of these three things affected the
25 marketability of the title. They were all things

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1 that the Buyer wanted. None of them was required by
2 the contract. The Seller when it signs the deed, a
3 general warranty deed, which Mr. Gilbert was holding
4 in escrow pending receipt of the purchase proceeds,
5 the Seller warrants, guarantees, promises,
6 represents that I am giving you marketable good
7 title. In other words, I am warranting that I have
8 the authority under the South Carolina/Georgia
9 statute to convey this property to you even though I
10 am dissolved. I am warranting that this tax lien
11 has been paid, will be paid, and it will not follow
12 this property. I am warranting that there are no
13 unknown tax liens out there that the certificate
14 of compliance would have given you reassurance for
15 that you need to worry about. I am guaranteeing. I
16 am warranting. I am promising to you. I am
17 representing to you that I am passing to you good
18 marketable title.

19 And in fact they did that when they sold
20 it to the third-party, Inverness. They gave
21 Inverness good marketable title. None of these
22 unsatisfied contingencies prevented good title from
23 passing even though they remained, quote,
24 unsatisfied contingencies. Likewise, when Lady
25 Beaufort bought the property from Inverness, these

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1 problems, if they were problems, still existed.
2 They were not impediments to the sale. They were
3 not impediments to the marketability. These were
4 all things that the buyer wanted. They're not
5 required by the contract. They did not prevent good
6 marketable title from being passed. There were no
7 unsatisfied contingencies when the closing should
8 have taken place on the original closing date. And
9 therefore, Mr. Fender or Hird Island Investments was
10 justified in saying, contract's over with. I'm
11 going to sell it to somebody else.

12 It is the Buyer, the Plaintiff Lady
13 Beaufort that breached the contract by not tendering
14 the proceeds. Instead of suing them for breach of
15 contract or specific performance or requiring the
16 forfeiture of the earnest money, Hird Island
17 Investments mitigated their damages and sold it to
18 somebody else. They sold it to somebody else for
19 \$15,000 less than what they had been promised by
20 Lady Beaufort.

21 So it makes no sense that they would not
22 have waited a day or two to get an extra \$15,000 if
23 they thought it was coming. There was no reason
24 that the Seller could have believed, even if these
25 were unsatisfied contingencies, that the Buyer would

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1 have gone forward with the contract the day after
2 closing, two days after closing or five business
3 days after closing.

4 The position of the Buyer consistently
5 was, we've got a problem because you've been
6 administratively dissolved. We have a problem
7 because there's a tax lien. We have a problem
8 because you haven't supplied the certificate of
9 compliance. We are not going to go forward with
10 closing unless these are resolved to our mind they
11 are unsatisfied contingencies. So there's no reason
12 for him to believe, for Hird Island to believe that
13 simply by five business days passing all of a sudden
14 all these problems that this Buyer believed existed
15 would of have gone away.

16 There are only two possibilities here.
17 They either were unsatisfied contingencies. That is
18 Hird Island was unable to convey marketable title.
19 If they were unable to do it on the 8th of October,
20 they were unable to do it on the 15th of October.
21 Or there were not unsatisfied contingencies in which
22 case Lady Beaufort breached the contract by not
23 going forward with closing on the closing date, the
24 dropdead closing date.

25 Other than satisfy themselves with a

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1 breach of contract, that addresses the breach of
2 contract claim. The Plaintiffs also sued the
3 Defendants on tort theories. Phrased differently,
4 breach of contract accompanied by a fraudulent act.
5 The situation here if it is a breach of contract
6 which I believe is a breach of contract by the
7 Buyer, not the Seller, is a simple breach of
8 contract.

9 Looking through Your Honor's order with
10 all due respect, it basically concludes, I'm finding
11 that tort damages are available under these
12 circumstances. That there was a negligent
13 misrepresentation or fraud because the contract was
14 breached by the Defendant. The Defendant knew that
15 the corporation did administratively dissolve. The
16 Defendant knew or should have known that there was a
17 tax lien. The Defendant did not supply the
18 certificate of compliance. And I'm equating that
19 with fraud or a negligent misrepresentation.

20 In every breach of contract case, the
21 breach is intentional. The person who breached the
22 contract, whatever they did, caused the breach and
23 that's usually an intentional act. There's no
24 negligent misrepresentations here. There's no fraud
25 here involved in this case. It's pretty clear the

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1 Buyer raised perceived problems with closing and
2 moving forward with the closing. And the Seller,
3 once the closing date passed sold it to somebody
4 else. That's what happened. Pure and simple.
5 That's neither negligent misrepresentation nor is it
6 fraud. There's nothing to base those two claims on.
7 All these things are public record.

8 Number 1, there's no misrepresentation
9 that was made. That leads to almost all the damages
10 that the Buyer is claiming.

11 The order refers to a profit that the
12 Seller made when they sold the property to the third
13 party. The contract price with the Plaintiffs was
14 240,000. I may be wrong on that. I've been saying
15 240.

16 What was it?

17 MR. FENDER: The original price?

18 MR. BOWEN: 260.

19 MR. KUHN: 260?

20 MR. FENDER: 260.

21 MR. KUHN: That's it. The sales
22 price to the third party was 245, so it was a
23 \$15,000 shortfall. So he actually made a loss on
24 that particular property. He sold another piece of
25 property for \$60,000. And I wasn't at the trial.

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1 But I'm told he's testimony was that that property
2 was worth approximately \$100,000, but he sold it for
3 60 because he -- time was of the essence. Couldn't
4 afford to shop around. He'd been counting on this
5 other transaction to have already closed. And by
6 giving it as a discount to the third party, it was
7 an inducement to put the whole package together.

8 The attorneys fees are the bulk of the
9 damages. And there's no findings in Your Honor's
10 order as to the standard requirements for awarding
11 attorney fees. Are they reasonable? What were they
12 incurred doing? Just on the face of it from my
13 point of view -- again, I was not at the trial. My
14 knowledge is confined pretty much to the order. But
15 basically if I'm reading the order correct, the
16 Plaintiffs prepared for two closings.

17 Fifty thousand dollars for two closings is
18 a lot of money. The standard attorney fee for a
19 closing is probably around 500 bucks. So \$50,000
20 for two closings is exorbitant and I think
21 unreasonable on its face.

22 But, Your Honor, the thrust of the motion
23 to reconsider is that there were no unsatisfied
24 contingency. A contingency has to be something that
25 prevented the Seller from performing the Seller's

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1 obligations as required by the contract, not
2 something that the Buyer wanted from the Seller that
3 the Seller was unwilling to provide but something
4 that would have prevented marketable title.

5 In this case, there was nothing that
6 prevented marketable title from being transferred on
7 the required closing date. And the Seller had the
8 deed signed, the affidavit signed, in the attorneys
9 hands, and they did not show up with the money to
10 exchange deed for the purchase price. That's why
11 the closing did not take place.

12 THE JUDGE: Thank you so much. Happy
13 to hear from you.

14 MR. RANNIK: Thank you, Your Honor.
15 My name is Jaan Rannik. And I'm here on behalf of
16 the Plaintiffs today. May it please the Court.
17 Judge, the first thing that I'm going to talk about
18 is, as Mr. Kuhn correctly pointed out, unsatisfied
19 contingencies is not a term that is defined in the
20 contract. Contract interpretation is a matter for
21 the court and this Court interpreted contingencies
22 or a contingent -- unsatisfied contingencies as
23 meaning things that would prevent the closing. And
24 I think that's absolutely right.

25 Your Honor identified three items that

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1 prevented the closing. The resolution of the tax
2 lien, the provision of a certificat of tax
3 compliance, and the resolution of the legal status
4 of Hird Island. Noting that all of these prevented
5 the passage of marketable title which was a
6 requirement under the contract.

7 Judge, another requirement under the
8 contract was that the title would be passed without
9 any liens that had not been disclosed prior to this
10 -- to the closing to the Buyer. The Buyer ran a
11 title search, and it turned up nothing because
12 these -- the tax lien that we've been discussing
13 came up between when he ran the title search a week
14 before closing and the date of closing. That alone,
15 the fact that that tax lien existed on the date of
16 closing is a breach of the contract.

17 However, it is also an unsatisfied
18 contingency which extends the contract because it
19 prevents the passage of marketable title. Mr. Kuhn
20 also mentioned that the provision of the warranty
21 deed will provide the necessary guarantees of title.
22 Well, what the provisions of the warranty deed does
23 is it gives a cause of action to the Buyer should it
24 turn out that the title was not good. But it does
25 not equate the passage of marketable title which is

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1 a requirement under the contract.

2 So, Judge, in this case, we had the
3 Plaintiffs come in good faith. They were -- they
4 had secured the financing that they were going to
5 use to purchase the property. They had done their
6 due diligence. And on the day of closing,
7 additional issues were raised to them that made them
8 say, what are we getting ourselves into here. We
9 need to have these issues resolved. We have some
10 more time on the contract because we're here early.
11 The contract, if there is any unsatisfied
12 contingency, will run an additional five business
13 days which in this case would take it to October
14 15th.

15 So they figured, okay, we have some time.
16 Why don't we hammer these things out and just make
17 sure that everyone is getting what they bargained
18 for. They continued in good faith to negotiate with
19 the Seller through the Seller's attorney. All the
20 while, the Seller has turned around and is
21 negotiating with somebody else to sell the property
22 out from under them.

23 Your Honor, there -- Your Honor's order is
24 unimpeachable correct that there was a breach of
25 contract, that there were unsatisfied contingencies.

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1 And this is compounded by the bad faith of the
2 Seller.

3 Judge, as to the tort --

4 MR. BOWEN: (Inaudible) --.

5 MR. RANNIK: As to the tort, I
6 discussed the breach and where the breach came from.
7 The fraudulent act was the conveyance of the
8 property to somebody else all while representing,
9 yes, to the Buyer. Yes, we're working with you.
10 We're going to figure this out. We'll get this
11 done. Meanwhile, he's turning around and talking to
12 somebody else. In fact, sells the property out.
13 That is -- and in terms of the misrepresentation,
14 that would be the same.

15 There's also the misrepresentation that
16 title would be presented at closing without any
17 liens that this Buyer had previously agreed to and
18 was aware of. That was not the case. That's not
19 what happened. The elements of the tort are
20 satisfied.

21 In terms of the attorney fees, I think
22 Mr. Kuhn said that \$50,000 is extremely excessive
23 for two closings. While I would point out that
24 there are additional sources of the fees here.
25 There was the discovery in this case. The filing of

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1 this case, leading up to the eventual trial in this
2 case and these fees are continuing as we sit here
3 today.

4 Your Honor, if I might confer very briefly
5 with my colleague. Judge, that's all we have. So
6 on this motion, we would request that the Court take
7 this under advisement to allow as we discussed on
8 the record supplemental proceedings. I'm not trying
9 to get ahead of myself into the next motion, but
10 Your Honor's order was correct and it should be
11 affirmed.

12 THE JUDGE: Has this transcript been
13 transcribed?

14 MR. RANNIK: Yes, Your Honor.

15 THE JUDGE: I just can't -- I looked
16 back through it. It was a lengthy trial. It's been
17 a while, so I'll try to read back through and
18 refresh my memory. Mr. Kuhn, any last words on your
19 motion before we move on?

20 MR. KUHN: Yes, Your Honor, just very
21 briefly because this is the rare case where we have
22 benefit of 20/20 hindsight. We know for a fact that
23 the Seller did pass marketable title. Marketable
24 title not only that a third 30 party accepted, but
25 marketable title that the Plaintiffs themselves

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1 eventually accepted. So all of this stuff about
2 administrative dissolution, tax lien, certificate of
3 compliances, is just smoke.

4 If there were unsatisfied contingencies on
5 October 8th, 2013, as we sit here today, they
6 would still be unsatisfied contingencies that
7 prevented marketable title from passing. But we
8 know and knew as of the time of trial that
9 marketable title had been passed despite these three
10 so-called unsatisfied contingencies.

11 Again, they are not -- they were desires,
12 wishes, reassurances, extra reassurance that they
13 wanted that they were going to get marketable title.
14 And my point in emphasizing the general warranty
15 deed is one of the things they wanted, for example,
16 was something signed by Mr. Fender saying the
17 corporation is administratively dissolved and as
18 part of the winding up of the affairs, and we've
19 complied with Georgia statute and South Carolina
20 statute.

21 Well, in signing the deed that is in
22 effect what he is saying. Yes, I have the power to
23 sell this property to you under any statute you want
24 to name. This corporation has the power to do that.
25 So it's their wish list. They're not required --

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1 none of this required by the contract. And none of
2 it was necessary to pass marketable title. They
3 simply chose not to close by the closing date
4 because they were, as I see it, uncomfortable which
5 is sad because that's why we're here today.

6 But it's not a breach of contract by the
7 Seller. And I think it's worth emphasizing that the
8 Plaintiff has the burden of proof. We don't have to
9 -- the Defendant doesn't have to pop up and prove
10 that, yes, I was ready to pass marketable title to
11 you. They've got to prove that these prevented
12 marketable title from passing. And there's just no
13 proof to that effect. They have to prove the
14 negligence representation of fraud by clear and
15 convincing evidence. And at best, what they've
16 proved is when the closing date came they were
17 uncomfortable with closing and chose not to do so.

18 And the Seller who was receiving a lot of
19 red flags from them that they were not going to
20 close, yes, was keeping all his options open because
21 he needed the money. If Your Honor remember, there
22 was a mortgage -- a foreclosure pending and looming
23 on the horizon. So time was not only of the
24 essence, and I'd invite Your Honor before you rule
25 or some time to reread the first paragraph of the

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1 contract. Not only was time of the essence in the
2 contract, but time really was of the essence. He
3 could not afford to give them -- they wanted the
4 luxury of a few more days. The Buyer -- or the
5 Seller rather, did not have that luxury.

6 He was ready, willing to take their money
7 on the closing date. But they didn't show up with
8 it, so he did the best he could under the
9 circumstances.

10 THE JUDGE: I'll probably look at the
11 transcript. It sounds like you've already got it on
12 your computer and see what I can remember about the
13 testimony. All right. So the Plaintiff's motion
14 was what, again?

15 MR. RANNIK: It's to void two
16 transfers of property or for supplemental
17 proceedings.

18 THE JUDGE: All right. And let me
19 just -- I guess I ought to hear about the motion to
20 void the two transfers and then we'll move on from
21 there. Tell me about that if you would, please.

22 MR. BOWEN: My position on that is
23 pretty well stated very briefly in my return of the
24 Plaintiff's motion and that at the very least -- at
25 the most, their motion should be dismissed because

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1 they fail to name the necessary indispensable
2 parties. That is the the property to whom the
3 property was transferred. The identity to whom the
4 property was transferred. And they've really failed
5 to allege all the elements required by 27-3-10.

6 THE JUDGE: But, I mean, is this an
7 objection to even hearing the motion or is this your
8 objection, the grounds they're seeking --

9 MR. BOWEN: That's my -- and the
10 first instance was to dismiss the motion based on --
11 for those two reasons. They can re-bring it if they
12 want to, but it seems to me that how can you void a
13 transaction when the property -- when the identity
14 of the people to whom the property was conveyed are
15 not a party to the action to deal with all the
16 questions of adequate consideration, et cetera, et
17 cetera.

18 THE JUDGE: Well, let me -- I don't
19 know enough about it, yet, to form an opinion on
20 that, so I appreciate your objection to the motion
21 even being heard. But let me hear a little bit
22 about it and then I'll allow you to re-bring the --
23 that or denial or motion to dissmiss it or whatever
24 you would like. So go ahead if you would, please.

25 MR. RANNIK: Thank you, Judge.

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1 Judge, I realize I'm a young attorney seeking some
2 extraordinary relief here, but this is an
3 extraordinary circumstance. The judgment entered by
4 this Court against Mr. Fender remains unsatisfied as
5 the Court is aware.

6 Going back to the date of trial,
7 Mr. Fender represented to this Court that he lacked
8 the assets to satisfy any judgment that might be
9 entered against him. But, Judge, he made that
10 representation and on that same day he sold a piece
11 of property for \$120,000 which is greater than the
12 amount of the eventual judgment.

13 Judge, four months later Mr. Fender
14 transferred a second property this time to his son
15 for ten dollars. I have the deeds for both of these
16 transfers if I could pass them to Your Honor.

17 THE JUDGE: Thank you. Are you
18 passing these to be exhibits?

19 MR. RANNIK: Yes, and I have not
20 marked them. But the transfer on the day of trial
21 will be Exhibit No. 1. Well, it says two.

22 THE JUDGE: Put those in order. I'm
23 going to hand them back to you.

24 MR. RANNIK: Thank you, Judge.

25 THE JUDGE: Hand them to the court

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1 reporter, please. You've seen them I guess?

2 (MARKED PLAINTIFFS' EXHIBIT NUMBERS 1
3 AND 2.)

4 MR. BOWEN: I take no issues with
5 those. I mean, I stipulate that was done.

6 MR. RANNIK: Now again, Judge, both
7 of these transferred occurred -- transfers occurred
8 either immediately before or some time after Mr.
9 Fender had made representations to this Court that
10 he lacked any assets.

11 MR. BOWEN: Judge, I -- I'm sorry. I
12 better let you finish.

13 MR. RANNIK: The Statute of Elizabeth
14 at Code Section 27-23-10 empowers courts to void
15 transfers of assets that were made with the intent
16 to defraud or hinder current or potential creditors.
17 Intent to defraud can be found if certain badges of
18 fraud are present. And these have been set forth in
19 a case from the Supreme Court in the 1970s called
20 Coleman versus Daniel.

21 And among these badges of fraud are
22 gratuitous transfers, transfers between family
23 members or to people with whom the seller has a
24 close relationships. Transfers made during the
25 pendency of litigation and several others. So,

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1 Judge, here we have two transfers each wearing
2 badges of fraud. We have a writ of execution that
3 was returned by the Sheriff nolo bono and we have an
4 unsatisfied judgment. And, Judge, these two
5 transfers, again, were made after Mr. Fender
6 represented to the Court that there were no assets
7 available to satisfy any judgment that this Court
8 might enter.

9 Accordingly, Judge, we're asking that the
10 transfers be voided and the properties made
11 available to satisfy the judgment. Not to the
12 extent that we need to name additional parties. We
13 would ask the Court for leave to amend our complaint
14 to add the two parties so that they can be properly
15 heard with regard to this motion.

16 If you would just give me one moment.
17 Judge, in the interim we would again ask that Mr.
18 Fender be prohibited from transferring any
19 additional assets without the approval of this
20 Court. Thank you.

21 THE JUDGE: Thank you so much. Mr.
22 Bowen, you are on this one it sounds like?

23 MR. BOWEN: Yes, sir. First I'd like
24 to -- do not contest that the transfers were made.
25 It's a matter of public record. A matter of fact.

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1 I should have I guess asserted in the alternative to
2 a dismissal that the parties be required to name the
3 parties to whom these transfers were made. I concur
4 had that been done, this would have been properly
5 heard today. But without them here, I don't think
6 the Court can entertain what's required to -- for a
7 justful determination.

8 I also take issue with the statement that
9 Mr. Fender represented to the Court that he had no
10 assets. The transcript will bear me out on that,
11 but I do not recall that being stated in the
12 proceeding.

13 MR. RANNIK: May, Your Honor, if I
14 might quickly jump in there.

15 THE JUDGE: Well, let him finish and
16 then I'm happy to hear from you.

17 MR. BOWEN: I do not believe that
18 their allegations and the motion to void comply with
19 27-3-10 and that Section (B) of that requires a
20 showing of two or more of the following will create
21 a rebuttalable presumption. I don't think they've
22 alleged two. The statute is very specific in terms
23 of what it requires. While I note you are
24 intimately familiar with the statute on --

25 THE JUDGE: I sure haven't memorized

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1 it, but I have heard a few cases. Thanks. Anything
2 else?

3 MR. RANNIK: Judge -- and Mr. Bowen
4 perhaps will clarify. Are you referring to
5 Subsection (B) when you're saying we needed to
6 address two or more?

7 MR. BOWEN: Yes.

8 MR. RANNIK: Subsection (B) is
9 actually specific to the child support creditors,
10 and so that's not applicable to our motion.

11 MR. BOWEN: I have to look at that,
12 again.

13 THE JUDGE: Mr. Bowen, was there
14 anything else from you?

15 MR. BOWEN: No, sir.

16 THE JUDGE: The way -- I'm not saying
17 this isn't the right way to do this because, of
18 course, there are many different ways to do these
19 that I see. But the way I usually see this done is
20 an independent action that does name the
21 transferees putting them on notice and that kind of
22 thing because it's hard to disagree with the
23 proposition that the transferees are entitled to
24 some sort of notice to void it. So that would be
25 ordinarily the conclusion of the action, the

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1 transfer, something, maybe a lis pendens would be
2 filed, a separate action. You know, off we go.

3 I don't think I can just void transfers
4 without putting the transferees on notice. And
5 again, maybe Beaufort is an anomaly, but I see
6 people just bringing an independant action
7 ordinarily for Statute of Elizabeth on that kind of
8 thing. It seems to sort of make it a little easier.

9 The judgment does exist and should be an
10 impediment. I understand these transfers occurred
11 prior to the judgment it sounded like.

12 MR. RANNIK: One of them I believe
13 occurred on the day of trial, but one of them
14 occurred two months after the judgment, Your Honor.

15 THE JUDGE: Okay. So the one after
16 the judgment, of course, was transferred subject to
17 the judgment, in theory. So I guess -- so it's --
18 at least as I understand the way things work. The
19 first one, yeah, I mean it wasn't that -- very well
20 if the order holds up and isn't modified or reversed
21 on appeal or something like that. Of course, it
22 would be a classic perhaps Statute of Elizabeth case
23 which, again, I would prefer to see as the same case
24 with the transferee named since they have some risk
25 in it, of couse.

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1 So what I think -- now, your motion was
2 two-part. It was, one, to determine whether or not
3 these had been transferred. And I think it sounds
4 like you've got a stipulation and an acknowledgment
5 because they were transferred. So I don't know if
6 you even need that information anymore. It seems
7 irrefutable and is admitted. So I don't know if we
8 need part two your motion. But as to part one, I
9 think it would probably be inappropriate for me to
10 grant those grounds at this point.

11 Anything else?

12 MR. RANNIK: Well, Judge, would the
13 Court be amenable to allowing us to amend our
14 complaint to add the transferees as parties rather
15 than filing entirely separate action?

16 THE JUDGE: Let me ask Counsel --

17 MR. BOWEN: I would not oppose that.

18 THE JUDGE: Okay. Well, then I won't
19 argue with it. It's not opposed. All right.
20 Anything else for this record, what we've got before
21 us today?

22 MR. EPTING: Judge, just for example
23 to the extent that in the first sale there is a note
24 held by, I think, Mr. --

25 MR. RANNIK: I believe it's -- well,

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1 it's a tribute by Mr. Fender holding the note.

2 MR. EPTING: We would ask that
3 whatever assets that he has including the note that
4 there be no disposition unless there's notice to us
5 and this Court's involved and that essentially his
6 assets be sequestered from disposition without
7 further Court involvement.

8 THE JUDGE: Let me -- of course,
9 sequestered I guess is not really what you mean.
10 You just mean some sort of prohibition. But
11 Mr. Bowen early on said that with regard to the
12 supplemental you all were entitled to it. He didn't
13 have any objection to it. Ordinarily the
14 supplemental order includes verbiage in there that
15 sort of prevents any transfers and that kind of
16 thing.

17 So I'm assuming you all can probably reach
18 a consent order with regard to exactly what you're
19 saying.

20 MR. EPTING: All right, sir.

21 THE JUDGE: I always think of
22 sequestering as gathering and putting in one place.
23 You're not suggesting that like a receivership.
24 You're suggesting a prohibition on transfer and that
25 sort of thing. Is that --

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1 MR. EPTING: I actually, Judge, was
2 suggesting the latter, but you make perfect sense
3 and Mr. Bowen has been a pleasure and I think we can
4 come to an agreement that things aren't going to
5 disappear or be disposed of. So we need not worry
6 about that.

7 THE JUDGE: All right. Well, I'll
8 leave that to you all. And if --

9 MR. BOWEN: My only --

10 THE JUDGE: -- there's a bump in the
11 road, let me know.

12 MR. BOWEN: My only concern is it's
13 conceivable that if you should reconsider your
14 judgment to the contrary that there would be no need
15 for that.

16 THE JUDGE: Well, I don't know if I'm
17 going to get to that issue. You're correct. If I
18 were to reconsider and completely reverse everything
19 I've done -- well, then there might be an appeal on
20 the other side. Who knows? But I don't know. I've
21 got to look at the transcript. I can't promise you
22 I can do that in the next week or so.

23 MR. EPTING: Judge, we certainly have
24 no objection to moving expeditiously and trying to
25 get the supplemental done, the consent order before

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1 the Court. But we wouldn't object to setting this
2 should the case not not be resolved or should we
3 need the Courts further involvement at any time in
4 December when the Courts available.

5 THE JUDGE: Let me see what we've
6 got. I think at the very least what I may try to do
7 just to keep a fire under me is set up a conference
8 call with Counsel at some point 30 days or so if we
9 can do it. What is today? So first couple weeks of
10 December so we can discuss the reconsideration
11 motion and any issues that may or may not have come
12 up in the rest of it.

13 MR. BOWEN: Judge, I suggest that any
14 discussions with the motion to reconsider should
15 involve Mr. Kuhn and not me because he's been more
16 actively involved than I have.

17 THE JUDGE: All right. Well, let's
18 do that then. Maybe on the way out if you all don't
19 mind if you've got your schedules if you would check
20 with Heather and let's set up a conference call for
21 roughly 30 days out, call it 45 minutes to an hour
22 and kind of see where I am on this and whether or
23 not you all have been able to continue your efforts
24 towards resolving it once and for all which I would
25 love to see you do if you could do it.

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So anything else for this record? That
will conclude the record. Thank you so much.

(Whereupon, the hearing was concluded
at 2:28 p.m.)

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Certificate of Reporter

I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of Lady Beaufort, LLC, et al v. Hird Island Investments, Inc., et al, on the 13th day of November, 2017: and that the foregoing XXXXX pages constitute a true and correct transcription of the said hearing.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter delivered to JAAN G. RANNIK, ESQUIRE, Andrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina 29401.

In witness whereof, I set my hand and sealed this 27th day of November, 2017.

My Commission expires 1/4/18

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said A & K HOLDING CO., LLC, its Successors and Assigns, and SHERWOOD N. FENDER does hereby bind himself and his Heirs and Assigns, to warrant and forever defend all and singular the said Premises unto the said A & K HOLDING CO., LLC, its Successors, and Assigns as hereinabove provided against himself and his heirs and assigns, and any person or persons whomsoever lawfully claiming or to claim the same, or any part hereof.

WITNESS our hands and seals this 1 day of March, 2017.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Catherine K Swanson
Witness

SHERWOOD N. FENDER

Dalal Kody
Witness

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

PROBATE

Personally appeared before me the undersigned and made oath that s/he saw the within-named SHERWOOD N. FENDER, sign the within sign, seal and as his act and deed, deliver the within written Deed; and that s/he with the other witness witnessed the execution thereof.

Catherine K Swanson
Witness

Sworn to before me, this 1st
day of March, 2017.

Dalal Kody
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3/25/2024

Brickyard Holdings, Inc. dated February 1, 2008 and recorded with the Register of Deeds Office for Beaufort County, South Carolina in Record Book 2724 at Page 1489.

This instrument prepared by Eversole Law Firm, PC, Alysoun M. Eversole, 1509 King Street, Beaufort, SC 29902 without the benefit of title examination or opinion of title.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining:

TO HAVE AND TO HOLD, all and singular the said Premises before mentioned unto the said **ADDISON D. FENDER**, his heirs and assigns, and Grantor does hereby bind himself and his heirs and assigns to warrant and forever defend all and singular said premises unto the said **ADDISON D. FENDER**, his heirs and assigns as hereinabove provided against Grantor and his heirs and assigns and any person or persons whomsoever lawfully claiming, or to claim the same or any part thereof.

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

WITNESS my hand and seal this 30th day of May, 2017.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

[Signature]
Witness 1

[Signature]
Witness 2

[Signature]
SHERWOOD N. FENDER

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

ACKNOWLEDGEMENT

I, (Notary) Dorrah A. Rodgers do hereby certify that Sherwood N. Fender, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

SWORN TO BEFORE ME, this 30th day of May, 2017.

[Signature]
Notary Public for South Carolina
My Commission Expires: 3/25/2024

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED
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SC Court of Appeals

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

v.

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

AND

William M. Bowen, Third-Party Plaintiff,

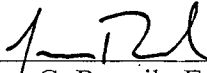
v.

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

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

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g) SCRAP, the undersigned Counsel for Respondents/Appellants certifies that the Supplemental Record on Appeal contains all supplemental material proposed to be included by the parties and not any other material.



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