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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellant Case No. 2022-000867
Case No. 2017-CP-07-01057

Bittmint, LLC and Harbour Town Surf Shop, LLC, ... Appellants,

v.

Lynda H. Johnson, Charles S. Giannone, and Sea Pines Resort, LLC,..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This case arises from a contract for the purchase and sale of commercial real estate within Sea Pines Plantation on Hilton Head Island. Appellant Bittmint, LLC ("Appellant" or "Bittmint"), entered into a real estate contract to purchase two commercial units owned by Respondents Lynda H. Johnson and Charles S. Giannone within Harbour Town, the heart of Sea Pines resort. After Bittmint offered to sell it the commercial units on the same terms, Respondent Sea Pines Resort, LLC ("Sea Pines") exercised its right of first refusal under applicable covenants and purchased them.

In the Complaint filed on May 26, 2017, Bittmint demanded a bench trial and alleged three causes of action titled as follows: (1) Breach of Contract against Johnson and Giannone; (2) Interference with Contractual Relationship against Sea Pines; and (3) "Set Aside Deed" against all Respondents. **(Complaint).** The Respondents answered the Complaint on July 27, 2017. **(Answer of Sea Pines); (Answer of Johnson and Giannone).**

The circuit court referred the nonjury case to the master in equity, by order dated June 20, 2018. **(Order dated 6-20-2018).** Bittmint then amended the Complaint on October 31, 2018, to add a second plaintiff, Harbor Town Surf Shop, LLC (the "Surf Shop"),[1] and assert the following new purported causes of action, bringing the total to seven: (4) "Violation of the Common Law Rule against Perpetuities against [Sea Pines]"; (5) "Invalid [A]ssignment of Rights against [Sea Pines]"; (6) "Third Party Beneficiary by [Surf Shop] against [Respondents]"; and (7) "Violation of the Statute of Repose against [Sea Pines]". **(Am. Compl.).**

Six months later, on December 19, 2018, Bittmint and the Surf Shop LLC amended their Complaint yet again, adding an eighth cause of action against Sea Pines, for "Intentional Interference with Prospective Contractual Relations." **(Second Am. Compl.); (Order dated 12-17-2018).** They filed a jury demand eight days later, on December 26, 2018. **(Demand for Jury Trial).** After the Respondents timely answered the second amended complaint, the Master in Equity vacated the reference and transferred the case to the circuit court's jury roster by order

[1] The Surf Shop is listed as an appellant. However, the brief of the Appellants does not contain any arguments regarding the claims of the Surf Shop. Therefore, the appeal has been abandoned as to the claims of the Surf Shop. See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (explaining an issue is abandoned on appeal if not raised in a brief and supported by authority). To the extent the Surf Shop is considered an appellant, even though it has abandoned all claims on appeal, references herein to Bittmint are to both Appellants.

dated February 6, 2019. **(Sea Pines' Answer to Second Am. Compl.); (Johnson and Giannone Answer to Second Am. Compl.); (Order dated 2-6-2019).**

The parties filed cross motions for summary judgment. The Plaintiffs filed their motion for summary judgment on June 27, 2019 **(Pls. Mot. Summ. J.)**; the Defendants' motion, and supporting affidavit of Sea Pines' President, Steven Birdwell, were filed on July 15, 2019. **(Mot. for Summ. J.); (Aff. Birdwell)**. The circuit court denied both motions by Form 4 order dated January 13, 2020. **(Form 4 Order dated 1-13-2020 denying Plaintiffs' motion for summary judgement); (Form 4 Order dated 1-13-2020 denying Defendants' motion for summary judgement).**

With leave of court, the Respondents filed amended answers on June 6, 2021, to clarify relief that had already been requested and to assert the statutory cap on punitive damages as an additional affirmative defense. **(Form 4 Order dated 1-27-21); (Sea Pines' Amended Answer); (Johnson and Giannone's Amended Answer).**

After Bittmint conceded in a court filing that three of its so-called "causes of action" (for violation of common law rule against perpetuities, invalid assignment of rights, and violation of statute of repose) "may not be actionable claims under South Carolina law," **(Pls. Mem. Of Points and Authorities filed Nov. 20, 2019, at fn. 6)**, the Appellants filed a motion for partial summary judgment. **(Mot. for Partial Summ. J.).** That motion was denied by Form 4 order dated January 20, 2022. **(Form 4 order dated 1-20-22).**

The case proceeded to trial on Monday, February 28, 2022. Bittmint and the Surf Shop rested their case on Wednesday, March 2, 2022. Respondents moved for a directed verdict on multiple grounds. The Court granted the motion as to all claims. **(Trial Tr. 341:20-350:16).** Bittmint and the Surf Shop filed a post-trial motion to reconsider that was denied after a hearing.

(Mot. to Recons.); (Order dated 5-24-2022); (Hr'ng Tr. 5-18-22). Johnson and Giannone filed a post-trial motion seeking an award of attorney's fees expended in their defense of Bittmint's claims. **(Motion for Fees and Costs); (Reply to Plaintiffs' Response in Opposition to Motion for Attorney's Fees and Costs).** After the hearing on post-trial motions, the Court granted the motion and awarded $96,614.25 in attorney's fees and $7,004.39 in court costs, for a total amount of $103,618.64. **(Order dated 6-6-2022).**

Appellants filed their Notice of Appeal on June 22, 2022. **(Notice of Appeal dated June 22, 2022).**

FACTS

This case concerns, in part, a challenge to Sea Pines' long established and recognized rights as the successor and assign of rights of the original developer that is identified as the "Company" under certain real property covenants. This is not the only recent case where Sea Pines' rights as the successor and assign of the Company have been challenged. In Jinks v. Sea Pines Resort, LLC, 2022 WL 3691391 (D.S.C. 2022), the United States District Court for the District of South Carolina rejected many of the arguments advanced by Bittmint in this appeal. In that case, discussed in detail below, a residential property owner challenged whether Sea Pines holds the Company's right to approve amendments to real property covenants as the successor and assign to "the Company," the original declarant. Id. at *14. In an approach that the court analogized to "throw[ing] spaghetti at the wall and see[ing] what sticks," the property owner made, and the court rejected, several of the arguments that Bittmint advances here, including that the rights of the Company were not assignable, that the rights of the Company are too indefinite to be enforceable; that the assignment violates the rule against perpetuities; and that the rights of the Company are

akin to a license or easement in gross not capable of subsequent assignment. Id. at *14-16.[2]

At issue in this appeal is a different right of the Company granted by the real property covenants – a right of first refusal. This right of first refusal of the Company, now held by Sea Pines, was established in real property covenants, titled "Commercial Use Covenants," recorded in Book 206, at page 1143, of the Beaufort County Register of Deeds. **(Pl. Trial Ex. 1)**. Lighthouse Beach Company recorded the Commercial Use Covenants in 1973. **(Pl. Trial Ex. 1 at p. 18)**. Section 19 of the Commercial Use Covenants sets forth the right of first refusal as follows:

> In the event the owner desires to sell a Commercial Property site on Hilton Head Island together with its improvements, if any, then said property shall be offered for sale to the Company at the same price at which the highest bona fide offer has been made for the property, and the said Company shall have thirty (30) days within which to exercise its option to purchase said property at this price, and should the Company fail or refuse, within thirty(30) days after receipt of written notice of the price and terms, to exercise its options to purchase said property at the offered price, then the owner of said property shall have the right to sell said property, subject, however, to all covenants and limitations herein contained, at a price not lower than that at which it was offered to the Company.

(Pl. Trial Ex. 1 at § 19). Importantly, section 19 makes clear that right of first refusal is held by the "Company," a term that the Commercial Use Covenants defines to include the successors and assigns of Lighthouse Beach Company. **(Pl. Trial Ex. 1 at p. 2)**. Bittmint admitted a copy of the Commercial Use Covenants, which contains a handwritten notation on the very first page that the repurchase option found in section 19 has been assigned to Sea Pines. **(Pl. Trial Ex. 1)**.

At trial, the evidence introduced only confirmed that Sea Pines was assigned the right of first refusal under the Commercial Use Covenants. For example, as explained in more detail herein, the president of Sea Pines testified that it held and exercised this right of first refusal under the

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[2] The district court's decision has been appealed on rulings as to claims against other defendants and certain injective relief sought by the plaintiffs in that case, but the challenges to Sea Pines' rights have all been abandoned on appeal. See Appellants' Opening Br., Jinks v. Sea Pines Resort, LLC, No. 22-2013 (4th Cir.).

Commercial Use Covenants in May 2017 to purchase Shops 6 and 8 in the Mariners Way Horizontal Property Regime (hereinafter, the "Property"), the two units that Bittmint had entered a contract to purchase from Respondents Lynda Johnson and her brother, Charles Giannone. **(Trial Tr. 321:19-322:3-17)**.

The Respondent siblings inherited the Property from their mother, Lorraine J. Giannone, who passed away in 2016. **(Trial Tr. 170:1-7)**. Johnson and Giannone signed a contract for sale of the Property to Bittmint for $580,000 (the "Contract for Sale" or "the contract"). **(Pl. Trial Ex. 11 at 1)**. Bittmint's lawyer, Michael Mogil, "personally drafted" the Contract for Sale, **(Trial Tr. 236:16-237:3)**, which is dated March 17, 2017, **(Pl. Trial Ex. 11 at 3)**. The Contract for Sale provides, as a "term and condition," that "Seller(s) shall obtain all appropriate waivers and approvals from Sea Pines . . . within thirty (30) days from the date of execution hereof." **(Pl. Trial Ex. 11 at ¶ 6)**. It also states that ". . . Seller shall deliver possession of the Property to Purchaser at Closing[,]" which was not to occur until a date *after* "all relevant waivers and approvals" were obtained. **(Pl. Trial Ex. 11 at ¶ 7)**.

Johnson handled the negotiations with Bittmint without the involvement of her brother Giannone. **(Trial Tr. 214:12-14)**. At trial, Johnson testified that she knew Sea Pines had the right of first refusal over the Property when she was negotiating with Bittmint. **(Trial Tr. 173:16-21; 183:6-11)**. Bittmint's members, Amir Bitton and Alon Mintz, also knew Sea Pines held the right of first refusal. **(Trial Tr. 122:7-123:23; 124:11-15; 222:10-20)**. Johnson testified that she and Mintz discussed Sea Pines' right of first refusal during the negotiations; she recalled that, after Mintz had negotiated the price down to $580,000, they both laughed when she quipped, "Sea Pines may take the Property for that price[.]" **(Trial Tr. 199:23-200:2)**. Mintz responded indicating that he did not think Sea Pines would exercise its right of first refusal because the sale involved

commercial property, and he did not believe Sea Pines would be interested. **(Trial Tr. 200:1-2)** (Johnson explained that Mintz said "[t]hey never take commercial property.").

Bitton and Mintz were also aware of Sea Pines' right of first refusal for an entirely separate reason: less than a year earlier, their company, Bittmint had purchased the unit adjacent to the Property where Bittmint operated a business called the general store. During that prior transaction, Bittmint requested that Sea Pines waive the very right of first refusal that Bittmint challenges in this case. **(Trial Tr. 123:1-11; 189:1-6; 277:5-17)**. In that instance, Sea Pines waived the right in response to Bittmint's request. Thus, when negotiating to buy the Property from Johnson and Giannone, Bittmint's members were aware that any sale was subject to Sea Pines' right of first refusal.

Pursuant to the Contract for Sale, the sellers, i.e., Johnson and Giannone, were supposed to obtain the waiver from Sea Pines. However, the undisputed trial testimony was that, after signing the contract on behalf of Bittmint, Mintz agreed that Bittmint would be responsible for requesting the waiver of the right of first refusal from Sea Pines. **(Trial Tr. 208:19-23)**. Accordingly, Bittmint had its lawyer, Mogil, fill out and submit a written waiver request to Sea Pines dated April 13, 2017. **(Defs. Trial Ex. 9); (Trial Tr. 160:16-161:22)**. The waiver request identifies the Property, **(Trial Tr. 161:23-162:8)**, and states: "The above referenced property is hereby offered to the company pursuant to the same terms and price contained in the current contract of sale with the bona fide purchaser (s) referenced above. **It is hereby understood by all parties that the company has thirty (30) business days from receipt of this offer in which to determine its re-purchase option." (Defs. Trial Ex. 9)** (emphasis added).

Mogil's submission of the waiver request on behalf of Bittmint marked the first time the parties to the Contract for Sale had provided written notice to Sea Pines of their contract. **(Trial**

Tr. 162:15-163:2); (Defs. Trial Ex. 9). Four days later, Mogil provided written notice of the contract's terms in accordance with Section 19 quoted above. **(Pl. Trial Ex. 11 at § 8); (Trial Tr. 147:4-5; 164:11-17).**

Sea Pines then notified Bittmint on May 2, 2017, that it had decided to exercise its right of first refusal and would be purchasing the Property. **(Trial Tr. 155:7-8; 245:24-247:12); (Pls. Trial Ex. 18).** Only then did Bittmint begin to question Sea Pines' right of first refusal. **(Trial Tr. 248:6-11) (Pls. Trial Ex. 22).** At the request of Bittmint's lawyer, Mogil, Sea Pines' lawyer, Simon Fraser, identified several sets of real property covenants, including the Commercial Use Covenants, containing rights of first refusal held by Sea Pines. **(Trial Tr. 252:17-21).**

Bittmint filed a notice of lis pendens, **(Lis Pendens) (Trial Tr. 260:25-261:1),** and later, on May 27, 2017, initiated this lawsuit. **(Complaint).** In the meantime, Sea Pines closed on its purchase of the Property on May 12, 2017. **(Trial Tr. 280:7-9).** Since closing on the Property, Sea Pines has fully honored the existing lease that the other two Respondents entered with the tenant, the Surf Shop. **(See Trial Tr. 223:15-20).**

At trial, Appellants failed to submit any proof that Sea Pines does not the hold the right of first refusal in the Commercial Use Covenants that it exercised to purchase the Property. In fact, the only evidence at the trial was that Sea Pines held the right of first refusal and exercised it to purchase the Property. The testimony of Steven Birdwell and Robert Bender was uncontroverted. There was also no evidence that Sea Pines exercised the right of first refusal in any manner that was unlawful or untimely. The only evidence showed that Sea Pines acted timely in exercising its right of first refusal, upon receiving from Bittmint written notice of the contract terms. There was no evidence that Sea Pines' actions were not the proper exercise of a legal right and fully justified.

Additionally, Bittmint did not present any evidence at trial that Johnson and Giannone breached the Contract for Sale. The only evidence was that they sold the Property to Sea Pines pursuant to its exercise of its right of first refusal, which Bittmint recognized at the time it signed the contract with them and later when Bittmint agreed to request the waiver of the right of first refusal from Sea Pines.

Further, Bittmint failed at trial to submit any testimony or other evidence of damages that was not speculative. Bitton testified that Bittmint's plan after purchasing the Property was to continue leasing it to the current tenant, the Surf Shop, **(Trial Tr. 110:19-111:5)**, which Bitton and Mintz also own. The Surf Shop operates a store at the Property and has done so since 2010. **(Trial Tr. 80:7-22).** To finance the purchase of the Property, Bitton testified that Bittmint intended to take out a mortgage. Bitton stated that Bittmint then planned to lease the Property to the Surf Shop, charging it $500 more than "what the expenses are, if it's like, you know, base rent, triple net, taxes, insurance, cam, whatever," **(Trial Tr. 110:19-111:5).** At trial, Bitton agreed that the formula that Bittmint intended to us was: "So the mortgage is X dollars and X, Y and Z, and then you add $500 on top of it, that's how much (inaudible)?" **(Trial Tr. 111:6-8).** Bittmint offered no evidence as to what the payments would have been other than this speculative non-formula.

Bittmint also failed to introduce evidence regarding the value of the Property at the time of the purported breach. Bitton testified that the general store was appraised at some point for $553 per square foot. **(Trial Tans. 111:19-25).** But the general store is not the Property at issue. Moreover, Bittmint had failed to produce the appraisal report of the general store during discovery, the report was not entered into evidence at trial, and the jury was instructed to disregard all

testimony regarding it. **(Trial Tr. 113:1-114:5).**[3] Accordingly, the jury could only speculate whether the contract price was different than the fair market value of the Property at the time of the alleged breach.

After Bittmint rested its case without putting up any evidence to substantiate all the elements of their claims, Respondents moved for a directed verdict on all causes of action **(Trial Tr. 341:20-350:16)**, which the trial court granted. The court later denied the Respondents' motion to reconsider, **(Order dated May 24, 2022)**, and awarded attorney's fees to Johnson and Giannone, as prevailing parties in the litigation, pursuant to the terms of the contract of purchase and sale providing for an award of attorney's fees and costs to the prevailing party in any litigation over the contract. **(Order dated Jun. 6, 2022)**. This appeal followed. For all the reasons explained herein, the trial court's decision should be affirmed in its entirety.

SUMMARY OF THE ARGUMENT

While the Second Amended Complaint asserted a total of eight claims, Bittmint's opening brief addresses only half of them: breach of contract, intentional interference with contractual relations, violation of the common law rule against perpetuities, and invalid assignment of rights. The opening brief does not mention the other four claims, much less argue that the trial court erred in directing the verdict as to them. Accordingly, Bittmint has abandoned the appeal as to the claims ignored in its brief, which were: Set Aside Deed against Defendants, **(2d Am. Compl. at ¶¶ 45-49)**; Third Party Beneficiary by [Surf Shop] against Defendants, **(id. at ¶¶ 50-57)**; Violation of the Statute of Repose against [Sea Pines], **(id. at ¶¶58-61)**; and Intentional Interference with Prospective Contractual Relations against [Sea Pines], **(id. at ¶¶62-66).** See State v. Lindsey, 394

[3] Bittmint has not appealed the Court's instruction to the jury to disregard the testimony regarding the appraisal.

S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (explaining an issue is abandoned on appeal if not raised in a brief and supported by authority).

The four claims that Bittmint takes up on appeal are as follows: (1) breach of contract against the sellers, Johnson and Giannone; (2) intentional interference with contractual relations against Sea Pines; (3) violation of the common law rule against perpetuities against Sea Pines; and (4) invalid assignment of rights against Sea Pines. Bittmint has not shown that the trial court erred in directing the verdict as to any of those four claims.

The first two claims, for breach of contract and intentional interference with contractual relations, are premised on Bittmint's theory that Sea Pines does not hold the right of first refusal under the Commercial Use Covenants. Bittmint argues that the sellers, Respondents Johnson and Giannone, breached the Contract for Sale with Bittmint when they conveyed the Property to Sea Pines and that Sea Pines intentionally interfered with the contract by exercising the right of first refusal.

The uncontroverted evidence at trial showed that Johnson and Giannone did not breach the Contract for Sale when they transferred the Property to Sea Pines but instead that Sea Pines timely exercised the right of first refusal and purchased the Property, after receiving a waiver request and a copy of the contract from Bittmint. With Bittmint resting its case without submitting any proof that Johnson and Giannone breached the Contract for Sale, the trial court was correct to direct the verdict on the breach of contract claim.

The alleged breach of the Contract for Sale was a necessary element to the claim against Sea Pines for alleged intentional interference with Bittmint's contractual relationship with Johnson and Giannone. Accordingly, as a necessary consequence of Bittmint failing to introduce evidence of a contractual breach at trial, it was also proper for the trial court to direct the verdict as to the

intentional interference claim. Moreover, when Bittmint rested its case, the only evidence showed that, as the holder of the right of first refusal, Sea Pines purchased the Property upon exercising a contractual right at the invitation of none other than Bittmint. Thus, even assuming *arguendo* that Johnson and Giannone breached the Contract for Sale, a reasonably jury could not have found that Sea Pines intentionally procured a breach of the Contract for Sale or was unjustified in exercising the right of first refusal. For these reasons, the trial court properly directed the verdict in Sea Pines' favor on the intentional interference claim.

It was also proper for the trial court to dispatch the claims for an alleged violation of the common law rule against perpetuities and invalid assignment of the right of first refusal. For starters, neither of these claims, for which Bittmint sought money damages, is cognizable under the law. Bittmint even admitted this fatal deficiency as to these claims in an earlier court filing. Furthermore, as to the claim for an alleged violation of the common law rule against perpetuities, the South Carolina General Assembly did away with the common law rule against perpetuities when it enacted the Uniform Statutory Rule Against Perpetuities that expressly supersedes the common law rule. The "invalid assignment" claim was equally flawed. As a matter of law, Sea Pines cannot be liable to Bittmint for being assigned the right of first refusal.[4] Additionally, the right of first refusal is a contractual right and, therefore, freely assignable under South Carolina

[4] The right of first refusal under the Commercial Use Covenants is held by the "Company," a term defined to include Lighthouse Beach Company, its successors and assigns. **(Pls.' Trial Ex. 1).** Lighthouse Beach Company's right was assigned to Sea Pines Plantation Company, as documented in an instrument recorded in 1977. **(Pl. Trial Ex. 2).** The subsequent instruments, agreements, and court orders showing the transfer of the right of first refusal to Sea Pines can be found as attachments to Steve Birdwell's affidavit, which was previously submitted to the trial court. **(Aff. of S. Birdwell, filed July 15, 2019).** The specific trail of assignment was not an issue at trial and Bittmint did not admit those documents into evidence or challenge their validity.

law. Thus, for multiple reasons, it was proper for the trial court to direct the verdict as to these claims that Bittmint invented.

Finally, as discussed below, all four of the claims addressed by Bittmint in the Initial Brief sought money damages only. However, Bittmint failed to submit proof at trial from which a jury could have determined damages with reasonable certainty or accuracy. Instead, Bittmint left the amount up to conjecture, guess, or speculation. For this reason alone, the trial court's decision to direct verdict on the claims, which all sought damages, was proper and should be affirmed.

STANDARD OF REVIEW

"A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability." Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). "When reviewing a directed verdict, [the appellate] court will view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Thomas v. Dootson, 377 S.C. 293, 296, 659 S.E.2d 253, 255 (Ct. App. 2008). The court "cannot ignore facts unfavorable to . . . [the nonmoving] party and . . . must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

The circuit court's ruling on a directed verdict motion will be reversed "only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Turner v. Med. Univ. of S.C., 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020); Hennes v. Shaw, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2012) ("Moreover, in reviewing a circuit court's grant or denial of a motion for directed verdict . . . this court reverses only when there is no evidence to support the ruling or when the ruling is governed by an error of law."). "On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no

evidence on any one element of the alleged cause of action." Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010).

ARGUMENT

I. The trial court properly granted the directed verdict as to Bittmint's breach of contract claim, asserted against Johnson and Giannone, and its intentional interference with contractual relations claim, asserted against Sea Pines, because the evidence at trial was insufficient for a jury to find that Johnson and Giannone breached the Contract for Sale, that Sea Pines unjustifiably exercised its right of first refusal, or that Sea Pines did so in an untimely manner.

i. Bittmint failed to introduce any evidence at trial showing the sellers, Johnson and Giannone, breached the Contract for Sale.

Bittmint alleged in this case that Johnson and Giannone breached the Contract for Sale by conveying the Property to Sea Pines rather than to Bittmint. See **(2d Am. Compl. at ¶¶ 21-22)**. To prove a breach of contract claim, a plaintiff must show that he or she suffered direct and proximate damages resulting from the defendant's breach or unjustifiable failure to perform a binding contract. Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000), cert. dis., 350 S.C. 498, 567 S.E.2d 862 (2002).

At trial, Bittmint failed to introduce any evidence showing that Johnson or Giannone breached the Contract for Sale. This Contract acknowledged the right of first refusal by requiring the sellers (Johnson and Giannone), and by a subsequent understanding, the purchaser (Bittmint), to obtain all "appropriate waivers" from Sea Pines. **(Pl. Trial Ex. 11 at § 6)**. Steve Birdwell, the President of Sea Pines, testified that Sea Pines had the right to purchase the Property based on the right of first refusal found in the Commercial Use Covenants, **(Trial Tr. 321:19-322:10)**. These covenants "run with the land" and are enforceable by the Company, namely Lighthouse Beach

Company and "its successors and assigns." **(Pl. Trial Ex. 1 at §§ 1, 19)**. A second witness, Robert Bender, who had worked for Sea Pines since 1993, when it was Sea Pines Associates, **(Trial Tr. 129:4-25)**, similarly testified that Sea Pines held the right of first refusal if there were a bona fide purchase contract for the sale of the Property. **(Trial Tr. 159:4-12)**. While he explained that he was not well versed in real property covenants, Bender testified that Sea Pines' right of first refusal at issue in this case comes from real property covenants. **(Trial Tr. 159:4-12)**. None of the other evidence at trial contradicted the testimony of Birdwell or Bender that Sea Pines holds the right of first refusal and had the right to exercise it to purchase the Property.

Additionally, as mentioned above, Bitton and Mintz, the members of Bittmint, knew at the time of contracting that Sea Pines holds the right of first refusal, **(Trial Tr. 122:7-123:23; 124:11-15; 199:23-200:2; 222:10-20)**, as did Johnson. **(Trial Tr. 173:16-21; 183:6-11; 214:12-14)**.[5] Thus, the only evidence at trial was that Sea Pines held the right of first refusal. Bittmint failed to introduce any *evidence* to the contrary, relying entirely on its *legal argument* that the right was not assignable. No one testified that the Commercial Use Covenants do not apply to the Property or that Sea Pines did not hold the right of first refusal thereunder.[6]

The Contract for Sale conditioned closing, i.e., when Johnson and Giannone were to deliver possession of the Property to Bittmint, on Sea Pines' waiving its right of first refusal over the

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[5] When Michael Mogil, Bittmint's lawyer, testified as a fact witness at trial, he described the waiver request that he completed on behalf of Bittmint, and submitted to Sea Pines, as a "preprinted form," which his firm "used for all the residential transactions," that Sea Pines "created and circulated in the real estate closing business in Hilton Head, so everybody has it." **(Tr. Trans. 238:25-239:7)**. This testimony is additional evidence that it is generally accepted that Sea Pines holds a right of first refusal. Further, it's significant that Mogil completed the form with the information about this Property and Contract and submitted the waiver request to Sea Pines.

[6] The trial court ruled that Bittmint's lawyer, who was not identified as an expert, could not testify to his legal opinions, if he had any. **(Tr. Trans. 251:14-16; 257:18-21)**. That ruling has not been appealed.

Property. **(Pl. Trial Ex. 11 at § 7).** Of course, Sea Pines did not waive the right; instead, Sea Pines exercised the right to purchase the Property. Because the waiver could not be obtained, a material condition of the sellers' obligation to close with Bittmint under their Contract for Sale was incapable of being fulfilled, and Johnson and Giannone were not required to close with and deliver possession of the Property to Bittmint. Thus, Johnson and Giannone did not breach the contract when they conveyed the Property to Sea Pines upon Sea Pines exercising its right of first refusal.

Further, it is worth noting again that the evidence at trial showed that Bittmint was the party who submitted the written waiver request to Sea Pines on April 13, 2017, and thereby offered Sea Pines the option to step into the transaction and purchase the Property. Specifically, the waiver request – filled out and submitted by Bittmint – stated:

> The above referenced property is hereby offered to the company pursuant to the same terms and price contained in the current contract of sale with the bona fide purchaser (s) referenced above. ***It is hereby understood by all parties that the company has thirty (30) business days from receipt of this offer in which to determine its re-purchase option.***

(Defs. Trial Ex. 9) (double emphasis added). That writing constituted a separate offer – which Sea Pines accepted. The offer, and Sea Pines' acceptance, is a second, independent reason that Johnson and Giannone did not breach the contract with Bittmint.

On appeal, Bittmint argues the request for waiver that it submitted to Sea Pines is irrelevant because Bittmint used a form created by Sea Pines. That argument ignores that Bittmint' s lawyer filled in the information and submitted the completed form to Sea Pines. Bittmint is bound by its request for waiver of the right of first refusal and offer to Sea Pines to exercise its right. **(Defs. Trial Ex. 9);** See Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) ("Acts of an attorney are directly attributable to and binding upon the client.") (citations and internal quotation marks omitted).

ii. Bittmint's claim against Sea Pines for allegedly interfering with the Contract for Sale failed because Bittmint did not show that Johnson and Giannone breached the contract or that Sea Pines was unjustified in exercising the right of first refusal to purchase the Property.

Because Johnson and Giannone did not breach the contract, Bittmint's claim against Sea Pines for alleged interference with a contractual relationship necessarily fails. Breach of contract is an "essential element" to a claim for interference with a contractual relationship. State Farm Life Ins. Co. v. Murphy, 260 F. Supp. 3d 497, 503 (D.S.C. 2017); see also Camp v. Springs Mortg. Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993) (including the tortfeasor's intentional procurement of the contract's breach as element of the cause of the action). Moreover, a cause of action for tortious interference with a contract requires an *intentional* procurement of its breach and the *absence of justification*. See Broach v. Carter, 732 S.E.2d 185, 189, 399 S.C. 434. 443 (Ct. App. 2012) (reversing verdict for tortious interference with a contract because the defendant was justified in his actions). At trial, there was no evidence that Sea Pines was unjustified in accepting Bittmint's invitation to exercise its right of first refusal. See **(Defs. Trial Ex. 9).**

Ultimately, the trial court's decision to grant the motion for a directed verdict as to claims for breach of contract and intentional interference with a contractual relationship was proper because Bittmint failed to prove a breach of the Contract for Sale or that Sea Pines was unjustified in exercising its right of first refusal at the invitation of Bittmint.

iii. Bittmint's argument that Sea Pines failed to follow the procedures in the Commercial Use Covenants that govern the exercise of the right of first refusal was wholly unsupported by the evidence at trial.

On appeal, Bittmint argues that a reasonable juror could have found that Sea Pines failed to exercise the right of first refusal in accordance with its terms. **(Appellants' Initial Br. at 31).** Presumably, Bittmint is referring to an argument that it made in its Motion to Reconsider, which the trial court correctly denied, that a non-binding letter of intent signed by only one of the

individual sellers triggered the time within which Sea Pines had to exercise its right. See **(Pls. Trial Ex. 10)** (stating the letter being signed is "non binding"). Bittmint's contention makes no sense and is inconsistent with the proof at trial.

The Commercial Use Covenants set forth the below procedure, which Sea Pines followed, for exercising the right of first refusal:

> In the event the owner desires to sell a Commercial Property site on Hilton Head Island together with its improvements, if any, then ***said property shall be offered for sale to the Company at the same price at which the highest bona fide offer has been made for the property, and the said Company shall have thirty (30) days within which to exercise its option to purchase said property at this price, and should the Company fail or refuse, within thirty(30) days after receipt of written notice of the price and terms, to exercise its options to purchase said property at the offered price, then the owner of said property shall have the right to sell said property***, subject, however, to all covenants and limitations herein contained, at a price not lower than that at which it was offered to the Company.

(Pl. Trial Ex. 1 at § 19) (double emphasis added). Section 19 is clear. The property must be offered for sale to Sea Pines, and Sea Pines has 30 days from receipt of written notice of the price and terms of the sale within which to decide whether to exercise its right of first refusal.

At trial, the only evidence showed that the letter of intent, which was non-binding and signed by only one of the sellers, was not binding on the parties thereto and therefore did not trigger section 19 of the Commercial Use Covenants. In fact, Bittmint failed to introduce any evidence that Sea Pines even received a copy of the non-binding letter of intent. Instead, the evidence showed the following timeline: (a) On April 13, 2017, Sea Pines first received written notice of the price when Bittmint's lawyer, Mogil, submitted the waiver request to Sea Pines stating the sale price of $580,000, **(Defs. Trial Ex. 9)**; and (b) four days later, on April 17, 2017, Sea Pines first received written notice of the terms when Mogil submitted the Contract for Sale to Sea Pines. **(Trial Tr. 164:11-17)**. Thereafter, via email to Mogil dated May 2, 2017, Sea Pines notified Bittmint that it had decided to exercise its right of first refusal. Sea Pines then closed on

its purchase of the Property ten days later, on May 12, 2017. Accordingly, Sea Pines exercised its right to purchase the Property for $580,000, which amount was the highest bona fide offer that Johnson and Giannone received for the Property, within the period permitted by the Commercial Use Covenants – regardless of whether the clock started with Bittmint' s submission of the sale price on April 13 or the contract on April 17, 2017. The trial court was correct to reject Bittmint's argument that Sea Pines did not exercise its right in a timely manner.

II. The trial court properly granted the Respondents' Motion for Directed Verdict as to the Appellants' claim against Sea Pines for "violation of the common law rule against perpetuities" because no such cause of action exists and the right of first refusal does not violate the common law rule against perpetuities.

i. The Uniform Statutory Rule Against Perpetuities supersedes the common law rule against perpetuities in South Carolina.

South Carolina has enacted a version of the Uniform Statutory Rule Against Perpetuities, S.C. Code § 27-6-10 et seq., which provides "that a nonvested interest violates the statutory rule against perpetuities if it fails to satisfy either the common law rule against perpetuities time period or the statutory 90-year wait-and-see time period." Abrams v. Templeton, 320 S.C. 325, 328, 465 S.E.2d 117, 120 n. 5 (Ct. App. 1995); Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 628 S.E.2d 902, 917, 368 S.C. 342, 369 (Ct. App. 2006) (citing to the statutory rule); Jinks v. Sea Pines Resort, LLC, 2022 WL 3691391, at *15-16 (D.S.C. 2022) (recognizing the statutory rule provides that "any interest cannot be invalid under the rule until the expiration of the ninety-year period after the interest is created" and explaining the 90 year wait and see approach required under the statutory rule and the statutory requirement that a court reform any instrument that violates the rule).

A statute may create a private cause of action two ways: expressly or "by implication if the legislation was enacted for the special benefit of the private party." Dema v. Tenet Physician

Services-Hilton Head, Inc., 678 S.E.2d 430, 433, 383 S.C. 115, 121 (2009). However, "[i]f the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party" and a private cause of action is not implied. Id.

Here, the Uniform Statutory Rule Against Perpetuities does not expressly provide for a private cause of action. It also gives no indication that it was enacted for the special benefit of any private party. Thus, the statute does not provide a private cause of action. But it does expressly supersede the common law rule against perpetuities. Section 27-6-80 states unequivocally: "**This chapter supersedes the common law rule against perpetuities**." S.C. Code § 27-6-80 (double emphasis added). Bittmint's claim for an alleged violation of a superseded rule was destined for failure, even before the trial started.

ii. Exceptions to the statutory rule against perpetuities are not subject to the superseded common law rule against perpetuities, and real property covenants like the Commercial Use Covenants are not nondonative transfers.

Undeterred by the plain language of the statute, Bittmint argues that the common law rule against perpetuities still exists because section 27-6-50 exempts certain "nondonative transfers" from the statutory rule found in section 27-6-50. According to Bittmint, the exception breathes life back into the common law rule. This interpretation of the statute is nonsensical.

The South Carolina General Assembly was clear and unambiguous when it enacted the statutory rule. Nothing suggests that section 27-6-80 ("Effect on common law") means anything other than what it says: "This chapter [i.e., Chapter 6, the Uniform Statutory Rule Against Perpetuities] supersedes the common law rule against perpetuities." Based on this very statute, which clearly states that the common law is superseded, Bittmint suggests that the common law rule applies to exempt nondonative transfers. Yet, Bittmint offers no explanation as to why the legislature would have excepted certain nondonative transfers from the statutory rule, which

codifies the common law rule in Section 27-6-20(A), if it intended those nondonative transfers to be subject to the common law rule.

Additionally, the report of the National Conference of Commissioners on Uniform State Laws – the organization that drafted the model rule adopted by South Carolina – further exposes the fallacy in Bittmint's argument. The report confirms that statutory rule means what it says and was intended to replace the common law rule in its entirety:

- "In line with long-standing scholarly commentary, Section 4(1) [the exclusion for nondonative transfers] excludes nondonative transfers from the Statutory Rule. ***The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements*** . . . ." **(Ex. 1 to Defs.' Mem. of Law in Opp'n to Pls.' Mot. in Limine No. 2, at 11)** (double emphasis added

- "Since the Common-law Rule Against Perpetuities is superseded by this Act . . . ***a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise***." **(Ex. 1 to Defs.' Mem. of Law in Opp'n to Pls.' Mot. in Limine No. 2, at 57)** (double emphasis added).

- "Paragraph (1) [the exclusion for nondonative transfers"] is therefore inconsistent with decisions holding the Common-law Rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction. . . preemptive rights in the nature of a right of first refusal . . . ." **(Ex. 1 to Defs.' Mem. of Law in Opp'n to Pls.' Mot. in Limine No. 2, at 57)**.

There is no room for doubt that the South Carolina General Assembly meant to supersede the common law rule against perpetuities when it passed a statute expressly stating so. But even if it had not, Bittmint's argument that the common law rule against perpetuities applies to nondonative transfers exempt from the statutory rule would still fail. The right of first refusal at issue in this case is contained in the Commercial Use Covenants, which are real property covenants that run with the land and do not transfer any property. Bittmint does not cite a single case suggesting, much less holding, that real property covenants are "nondonative transfers." Thus, the

exception for certain nondonative transfers found in Section 27-6-50, upon which Bittmint premises its entire argument, does not even apply.

iii. While the common law rule does not apply, the right of first refusal at issue does not violate it.

Even assuming the common law rule against perpetuities somehow applies, no controlling law justifies finding that the right of first refusal violates the rule. Bittmint relies on the case of Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997) in support of its argument. Webb did not involve real property covenants; it involved a deed transferring property for $64 that purported to give the grantor's heirs a right into perpetuity to repurchase the same property for $64, regardless of the value of the property. Id. at 445, 485 S.E.2d at 384. The deed did not state that the property had to be purchased at the price of the proposed sale, id., unlike the Commercial Use Covenants at issue in this case.

While our appellate courts have never addressed this issue (and should not because the common law rule has been superseded), this Court stated the following in a 2006 opinion, after mentioning Webb:

> Greenwood Development cites to ***numerous cases from other jurisdictions upholding repurchase provisions similar to that in the 1981 Covenants, and rejecting application of the rule against perpetuities, where the right to repurchase the property is for the same price the owner is willing to sell to a third party***. Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir.1936), Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 542 (Colo.1985); Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903, 906–07 (1983); cf. **S.C. Code Ann. § 27–6–60(B)** (holding that under the Uniform Statutory Rule Against Perpetuities, courts must reform a disposition that was created before July 1, 1987 by inserting a savings clause that preserves the transferor's plan of distribution "within the limits of the rule against perpetuities"). We decline to resolve this issue because there is no justiciable controversy surrounding the right of first refusal provision.

Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 628 S.E.2d 902, 917, 368 S.C. 342, 369–70 (Ct. App. 2006) (emphasis and double emphasis added).

iv. The remedy would be to reform, not invalidate, the right of first refusal if it was subject to and violated the common law rule.

Even if the common law rule against perpetuities applied and was violated, the right of first refusal in the Commercial Use Covenants would not be rendered invalid. Section 27-6-60(B) states:

> If a nonvested property interest or a power of appointment was created before July 1, 1987, and is determined in a judicial proceeding, commenced on or after July 1, 1987, to violate this State's rule against perpetuities as that rule existed before July 1, 1987, a court upon the petition of an interested person shall reform the disposition by inserting a savings clause that preserves most closely the transferor's plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

S.C. Code § 27-6-60(B). Accordingly, at a minimum, the court would be required to reform the Commercial Use Covenants, such that the right of first refusal would last 90 years and not violate the rule.

Simply put, the trial court in this case correctly directed the verdict on Bittmint's claim for damages based on an alleged violation of the common law rule against perpetuities.

III. The trial court properly granted the Respondents' Motion for Directed Verdict as to Bittmint's claim against Sea Pines for "Invalid [A]ssignment of Rights" because no such cause of action exists and, separately, no evidence would support any such finding.

i. The only evidence at trial was that Sea Pines held the right of first refusal.

The only evidence at trial was that Sea Pines held the right of first refusal contained in the Commercial Use Covenants. No witness testified that Sea Pines does not hold the right of first refusal or that the right had not been properly assigned to Sea Pines. Bittmint introduced into evidence an instrument assigning the right of first refusal to Sea Pines Company ("Assignment of

Option to Repurchase"). **(Pls. Trial Ex. 2 at 2).**[7] Sea Pines' President, Steven Birdwell, testified at trial that Sea Pines now holds the right of first refusal. **(Trial Tr. 322:3-17).** Corroborating this testimony, Rob Bender similarly testified, without objection, that Sea Pines holds the right of first refusal from the covenants of Sea Pines. **(Trial Tr. 159:4-12).** Trial testimony further showed that Johnson, Bitton, and Mintz all knew Sea Pines held the right. **(Trial Tr. 122:7-123:23; 124:11-15; 173:16-21; 183:6-11; 199:23-200:2; 222:10-20).** Additionally, Bittmint's own lawyer, Mogil, recognized that Sea Pines held the right when he requested a waiver from Sea Pines and provided a copy of the contract that he had drafted, so that Sea Pines could evaluate whether to exercise its right of first refusal. **(Trial Tr. 238:14-239:10) (Defs. Trial Ex. 9).**

Ultimately, Bittmint did not submit any testimony or other evidence showing that Sea Pines does not hold the right or that any assignment was invalid. Bittmint failed to meet its burden of proof and the circuit court had no choice but to grant the Motion for Directed Verdict. See Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 433, 322 S.E.2d 474, 476 (Ct. App. 1984) (. . . [I]f there is no evidence to support an essential element of the plaintiff's cause of action, the case should not be submitted to the jury, and a verdict in the plaintiff's favor cannot be permitted to stand).

ii. Bittmint did not contend at trial that Sea Pines was required to substantiate its claim to the right of first refusal with a written legal instrument, and Bittmint failed to meet its burden of proof.

If Bittmint was to challenge the assignment of the right of first refusal to Sea Pines, it was required to do so with evidence. Having made no such challenge, Bittmint cannot argue on appeal

[7] The Assignment of Option to Repurchase states, in pertinent part, ". . . The Prospect Company, as liquidating partner of Lighthouse Beach Company, hereby transfers, sets-over, assigns and conveys unto Sea Pines Company . . . all rights, obligations, benefits, including the right to waive, all repurchase options in real property within Sea Pines Plantation on Hilton Head Island . . . ." **(Pls. Tr. Ex. 2 at 2).**

that Sea Pines was required to "substantiate" its claim. Nevertheless, disregarding the evidence at trial that Sea Pines holds the right of first refusal, and having failed to submit any contrary evidence, Bittmint argues in its opening brief that ". . . the Resort did not substantiate its claim with any legal instrument[.]" **(Appellants' Initial Br. at 36)**. To the extent Bittmint is suggesting that Sea Pines was required to establish its claim to the right of first refusal with a written legal instrument, the argument is not properly before this Court and should not be considered because Bittmint did not make the argument to the court below. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (explaining an argument advanced on appeal that is not raised and ruled on below is not preserved for appeal). Notwithstanding, the argument not only ignores the burden of proof, but also the documentary evidence at trial, namely the Commercial Use Covenants and the 1977 Assignment to Sea Pines Plantation Company, Inc. **(Pls. Trial Ex. 1 and 2).**[8]

iii. Bittmint's argument that the right of first refusal was not assignable was properly rejected by the lower court and has also now been rejected by the United States District Court in the recent case, Jinks v. Sea Pines Resort, LLC

Bittmint argues on appeal that Sea Pines could not hold the right of first refusal under the Commercial Use Covenants because the 1977 Assignment to Sea Pines Plantation Company "does not include terms authorizing subsequent assignment." **(Appellants' Initial Br. at 38)**. Bittmint ignores that the Commercial Use Covenants expressly run with the land;[9] that the "Company,"

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[8] The reason for Bittmint's failure to challenge the assignments is clear. At the summary judgment stage, Sea Pines submitted legal instruments attached to the affidavit of Steven Birdwell tracking the chain of assignments to Sea Pines Resort, LLC. See **(Aff. of S. Birdwell, filed July 15, 2019).**

[9] The Commercial Use Covenants provide:

> All covenants, restrictions, and affirmative obligations set forth in this Declaration ***shall run with the land*** and shall be binding on the parties and persons claiming under them to specifically include, but not be limited to, ***the successors and assigns, if any, of the Company . . . .***

namely Lighthouse Beach Company, its successors, and assigns, holds the right of first refusal; and that "all rights" of Lighthouse Beach Company, including the assignable right of first refusal, were assigned to Sea Pines Plantation Company in 1977. **(Pl. Trial Ex. 1 at 1-2; Ex. 2 at 2)**. The 1977 Assignment transferred nothing less than all of Lighthouse Beach Company's rights, including the assignable right of first refusal.

In Jinks v. Sea Pines Resort, LLC, 2022 WL 3691391 (D.S.C. 2022), the plaintiff tried this very argument – that words of assignability must follow the right each time it is stated. The right held by Sea Pines and at issue in that case was to call or approve a referendum to amend a separate set of covenants (the "1974 Covenants"). Id. at *15. The plaintiff argued that the right was unassignable because the operable language of the covenant provision at issue referenced the Company and not the Company and its assigns. The court rejected the argument, explaining that the 1974 Covenants specifically defined the term "Company" to include successors and assigns. Id. at *15. It also explained that "as a general rule, contract rights may be freely assigned unless there is a provision in the contract restricting assignability." Id. (citing Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277 (S.C. 2000) ("[C]ontract rights are freely assignable today, unlike in medieval times."); Auto-Owners Ins. Co. v. Potter, 242 F. App'x 94, 104 (4th Cir. 2007) ("Contracts are freely assignable in general; however, contracts that expressly state they are not assignable are an exception to that general principle."); Restatement (Second) of Contracts § 317 (1981); Am. J. Assignment § 16). "Given that the rights at issue are presumptively assignable and that the definition of 'the Company' includes assigns," the court reasoned that "the absence of the words 'and its assigns' in [the] provision at issue cannot be considered an express statement

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(Pls. Trial Ex. 1 at 15) (emphasis and double emphasis added).

intending to restrict the assignability of that right." Id. Thus, the court concluded that "[w]ithout such an express prohibition, the right is assignable." Id.

Here, in addition to the Commercial Use Covenants running with the land and the inclusion of successors and assigns in the definition of the term "Company," the right of first refusal was and remains transferable because nothing in the Commercial Use Covenants nor the 1977 Assignment expressly states that the right may not be assigned. Thus, Bittmint did not overcome the presumption of assignability, and the unrebutted evidence at trial showed the right had been assigned, or transferred, to Sea Pines.[10]

iv. The right of first refusal is not a license or an easement held in gross; rather, it is a contract right that is freely assignable.

In their brief, Bittmint argues that the right of first refusal in the Commercial Use Covenants is akin to a license and therefore unassignable. **(Appellants' Initial Br. at 37)**. This is yet another argument that the court rejected in the Jinks case. There, the plaintiff "cite[d] cases involving licenses and easements in gross to support her argument that the Company's rights under the 1974 Covenants were not capable of subsequent assignment." Id. However, the court found that the cases were not applicable, much less on point. Id. "[A] license is a 'personal, revocable, and unassignable privilege, conferred either by writing or by parole, to do one or more acts on land without possessing any interest therein." Id. (quoting Paine Gayle Props., LLC v. CSX Transp., Inc., 735 S.E.2d 528, 535, n.6 (S.C. Ct. App. 2012) (citations omitted). "'[A]n easement is a right given to a person to use the land of another for a specific purpose.'" Id. (quoting Bundy v. Shirley, 722 S.E.2d 163, 169 (S.C. 2015)).

[10] An assignment is "a transfer of property or some other right from one person to another, which confers a complete and present right in the subject matter to the assignee." 6 Am. Jur. 2d *Assignment* § 1 (2012).

The right of first refusal is not an easement or a license. See id. ("Neither the right to approve amendments nor the subsequent assignments of that right constitute a privilege to do an act on land or use the land of another for a specific purpose[.]") Thus, the cases cited by Appellants addressing licenses and easements are simply inapplicable. **(Appellants' Initial Br. at 37).**[11] As stated above, the Commercial Use Covenants specifically provide the rights can be exercised by successors and assigns. There was simply no evidence at trial that the right of first refusal is anything other than a contractual right under real property covenants and was assignable.

IV. Bittmint did not advance the argument at trial that the Right of First Refusal is an unreasonable restraint on the alienation of the Property, which it is not.

i. Bittmint failed to preserve the argument that the Right of First Refusal unreasonably restrains alienation because it did not raise the argument at trial.

For the very first time, Bittmint argues on appeal that the right of first refusal at issue is void, as a matter of law, because it purportedly constitutes an unreasonable restraint on the alienation of property. Bittmint did not raise this argument before the trial court – at any time – and did not preserve it for appeal. See Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) ("It is axiomatic that an issue cannot be raised for the

[11] Among the cases cited by Bittmint are Main v. Thomason, 535 S.E.2d 918, 342 S.C. 79 (2000) (addressing the constitutionality of a statute providing temporary license to enter private land) and Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) (addressing easements and stating the definition of a license); Proctor v. Steedley, 730 S.E.2d 357, 398 S.C. 561 (Ct. App. 2012) (inapposite easement case); Brasington v. Williams, 141 S.E. 375, 377 (1927) (inapposite easement case). Bittmint also cites AJG Holdings, LLC v. Dunn, 410 S.C. 346, 347 (2014) and references a citation in that case to Armstrong v. Roberts, 254 Ga. 15, 16, 325 S.E.2d 769, 770 (1985). Bittmint includes in their brief a partial quote and omits the following from that case: "So long as the developer owns an interest in the subdivision being developed his own economic interest will tend to cause him to exercise a right to waive restrictions in a manner which takes into account harm done to other lots in the subdivision. There is some economic restraint against arbitrary waiver. . ." While this is largely irrelevant where there is formal assignment of declarant rights, there has never been any dispute that Sea Pines has substantial economic interests remaining in the development.

first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (noting an argument advanced on appeal that is not raised and ruled on below is not preserved for review). Bittmint also failed to seek such a declaration – or assert any claim for declaratory relief – in its pleadings, which it amended multiple times.[12] See **(2d. Am. Compl.)**. For these reasons, Bittmint's argument that the right of first refusal constitutes an unreasonable restraint on the alienation of the Property is not properly before this Court and should not be considered.

ii. Notwithstanding that Bittmint failed to preserve the argument for appeal, the Right of First Refusal is not an unreasonable restraint on the alienation of the Property.

The right of first refusal in the Commercial Use Covenants at issue is not an unreasonable restraint on alienation, even if the issue were properly before this Court. Appellants rely on the case Clarke v. Fine Housing, Inc., 882 S.E.2d. 763, 438 S.C. 174 (2023), to argue the contrary. That case is inapposite. It addressed a right of first refusal that consisted of a single sentence in a lease for parking spaces on a property. Id. at 179. In its entirety, the lease stated the right of first refusal as follows: "Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell." Id. The property subsequently changed hands, twice. Id. Upon learning of the second sale after the fact, the lessee filed suit seeking title to the entire property, including a strip club located thereon, through specific performance. See id. at 179-80.

The court held that the right of first refusal set forth in the parking lease constituted an "unreasonable restraint on alienation." Id. It explained, "[t]he question of whether a right of first refusal is enforceable turns upon whether the right unreasonably restrains alienation." Id. at 181

[12] Rule 8 of the South Carolina Rules of Civil Procedure requires a pleading to include "a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), SCRCP (emphasis added).

(emphasis added). The court determined that the right of first refusal before it unreasonably restrained alienation of the property for three reasons. First, the parking lease "was unclear as to whether the Right encumber[ed] all of the Property or only the leased parking spaces." Id. at 183. Second, the right in the parking lease had "no price provisions at all." Third, the parking lease provided no procedures "whatsoever" governing the exercise of the right, a factor that the courts apply by "often examin[ing] the time period within which the right can be exercised after the owner decides to sell." Id. at 185 (citing Hare v. McClellan, 234 Conn. 581, 662 A.2d 1242, 1249 (1995). Ultimately, the Fine Housing court concluded that the right of first refusal was unenforceable in its bare bones form. See id. at 187.

Here, the Commercial Use Covenants set forth a right of first refusal in far greater detail than the parking lease at issue in the Fine Housing case. As a threshold matter, as stated numerous times in the preceding sections, it was not disputed at trial that the right of first refusal applies to the Property. See, e.g., **(Trial Trans. 124:11-15; 173:16-21; 183:6-11; 222:10-20).** Moreover, unlike the right examined in Fine Housing, which contained no pricing provision at all, the right of first refusal in this case requires Sea Pines to match the highest bona fide offer of a third party, **(Ex. 11 at § 19),**[13] which Sea Pines did when it accepted the offer to purchase the Property for $580,000. Finally, in stark contrast to the Fine Housing parking lease, which contained no procedures whatsoever, the Commercial Use Covenants set forth procedures governing the exercise of the right including a short thirty-day window to act on the right. See **(Pl. Trial Ex. 1 at § 19).**

[13] The Commercial Use Covenants contain the exact kind of price provision that the Fine Housing court viewed favorably. See Fine Housing, 438 S.C. at 184 (citing Shiver v. Benton, 251 Ga. 284, 304 S.E.2d 903, 905 (1983) ("If the Holder of the preemption right is merely entitled to meet the offer of an open market purchaser there is little clog on alienability.").

Ultimately, notwithstanding that the Appellants failed to preserve the argument for appeal, the right of first refusal contained in the Commercial Use Covenants is a reasonable restraint on the alienation of the Property recorded in the Register of Deeds, which Sea Pines' President described in his testimony as an important master planning tool that benefits both the owners and Sea Pines. See **(Trial Tr. 325:18-326:1-2; 336:18-337:15).**

V. The circuit properly granted the Respondents' Motion for Directed Verdict for an additional affirming reason that Bittmint failed to submit any nonspeculative proof of damages at trial.

As discussed above, Bittmint sought money damages for the four claims on appeal, even for the non-existent causes of action for an alleged violation of the common law rule against perpetuities and invalid transfer. The law requires proof of damages that must not be speculative. S.C. Fin. Corp. of Anderson v. W. Side Fin. Co., 236 S.C. 109, 122-23, 113 S.E.2d 329, 336 (1960) ("... required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy); Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required."). "Where a plaintiff seeks special damages in addition to his general damages, he must plead and prove both the fact of damage and the amount of damage." Jackson v. Midlands Hum. Res. Ctr., 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988) (citing Kline Iron & Steel Co. v. Superior Trucking Co., 261 S.C. 542, 201 S.E.2d 388 (1973)). "If the plaintiff's proof is speculative, uncertain, or otherwise

insufficient to permit calculation of his special damages, his claim should be denied." Id. (citing Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968)).[14]

At trial, Bittmint admitted no evidence from which a jury could have rendered a damages verdict in their favor. For example, if Johnson and Giannone had breached the Contract for Sale, the proper measure of damages would have been the difference between the contract price and the fair market value of the Property on the date of the breach. Jackson v. Midlands Hum. Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988); Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996). From the evidence at trial, a jury could not have calculated the difference, if any, between the contract price of $580,000 and the fair market value of the Property on the date of the alleged breach. While Bitton attempted to testify to the value of a different property, the general store, based on an appraisal report **(Trial Tans. 111:19-25)**, the trial court, in a ruling not challenged on appeal, instructed the jury to disregard the testimony, and the report was not entered into evidence. **(Trial Tr. 113:1-114:5)**. The jury was left to guess or speculate as to whether the fair market value of the Property was more or less than $580,000 on the date of the alleged breach and, if so, by how much. [15]

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[14] Special damages are also known as consequential damages, Capps v. Watts, 271 S.C. 276, 281, 246 S.E.2d 606, 609 (1978). "Unlike general damages, which must necessarily result from the wrongful act upon which liability is based and are implied by the law, special damages are damages for losses that are the natural and proximate—but not the necessary—result of the injury, and may be recovered only when sufficiently stated and claimed." McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 261, 768 S.E.2d 389, 396 (2015) (quoting Sheek v. Lee, 289 S.C. 327, 328–29, 345 S.E.2d 496, 497 (1986))

[15] Even their trial counsel could not tell the circuit court what Bittmint contended the value of the Property to be, much less at the time of the breach. He stated to the court: "The property is worth X dollars now. That's the benefit of our bargain." **(Tr. Trans. 114:10-11)**. Further, opposing counsel stated at trial that, "An owner is also entitled under the law to testify to the value of his property. Well, Mr. Bitton owns the general store. He's entitled to testify as the value of his property." **(Tr. Trans. 114:11-14)**. However, the general store is not the property in question, as the circuit court noted at trial, **(Tr. Trans. 114:15-16)**, and the court ultimately instructed the jury

Bittmint also failed to offer evidence sufficient to allow the jury to calculate any special damages. At trial, Bitton testified that once Bittmint purchased the Property, he and Mintz planned to enter a new lease with the current tenant, the Appellant Surf Shop, **(Trial Tr. 110:19-11:5)**, which they owned. **(Trial Tr. 80:1-6)**. According to Bitton, Bittmint's unannounced plan was to charge the Surf Shop $500 more than "what the expenses are, if it's like, you know, base rent, triple net, taxes, insurance, cam, whatever." **(Trial Tr. 110:19-111:1)**. Bittmint's trial counsel summarized the formula Bittmint allegedly intended to follow as: "So the mortgage is X dollars and X, Y and Z, and then you add $500 on top of it, that's how much (inaudible)?" **(Trial Tr. 111:6-8).** Later in the trial, Mintz attempted to testify what the mortgage would have been, but he could not testify to the interest rate that Bittmint would have been charged by a lender. **(Trial Tr. 218:20-24).** Mintz also never testified what "base rent, triple net, taxes, insurance, cam, whatever" – the X, Y, and Z of the formula that his partner said they planned to use – would have been.

Ultimately, even assuming that Bittmint would have been able to obtain the financing it needed to purchase the Property and then lease it to the Surf Shop, Bittmint left the jury to speculate as to the amount that Bittmint would have needed to charge the Surf Shop, whether the Surf Shop could have actually made the payments, and for how long. Accordingly, the Court properly granted the directed verdict on all causes of action based on Bittmint's failure to carry its burden of proof as to damages at trial.

VI. The circuit court's award of attorney's fees to Johnson and Giannone was proper and should be affirmed because they were the "prevailing parties" at trial.

Johnson and Giannone were prevailing parties at trial as to the breach of contract claim against them. As discussed above, Bittmint alleged that Johnson and Giannone breached the

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to disregard Mr. Bitton's testimony regarding the value of the general store. **(Tr. Trans.114:14-22; 116:4-21; 114:22-117:9).**

Contract for Sale with Bittmint. The contract provided in pertinent part, "[i]n the event of litigation commenced because of a default hereunder, the prevailing partie(s) in such litigation shall be entitled to recover attorneys fees and court costs from the non-prevailing partie(s)." **(Pl. Trial Ex. 11)**. The circuit court ruled at trial, Bittmint showed "no breach whatsoever" of the contract. **(Trial Tr. 374:13-16)**.

Johnson and Giannone filed a post-trial motion seeking an award of attorney's fees that they limited to those fees and costs incurred in the defense of Bittmint's claims. **(Mot. for Fees and costs); (Reply to Plaintiffs' Resp. in Opp. to Mot. for Attorney's Fees and Costs).** Bittmint filed a short opposition to the request for fees and costs. **(Pls.' Opp'n to Defs.' Mot. for Attorney's Fees and Costs, filed Mar. 28, 2022)**. However, at the hearing on the request for fees and costs, Bittmint did not advance any substantive arguments opposing the request. **(Hr'ng Tr. 5-18-22, p. 22, l. 10-p. 24, l. 6).** After the hearing on posttrial motions, the Court awarded $96,614.25 in attorney's fees and $7004.39 in court costs, for a total amount of $103,618.64. **(Order dated 6-6-2022).**

On appeal, Bittmint does not contend that the contract did not allow for the award of attorney's fees and costs or that the amount of the award was improper. Instead, Bittmint simply argues that the circuit's court award of attorney's fees and costs should be reversed because, according to Bittmint, the trial court's directed verdict was improper. **(Appellants' Initial Br. at 39-40).** However, as explained herein, the trial court's directed verdict was proper. Accordingly, for the same reasons this Court should affirm the trial court's directed verdict as to Giannone and Johnson, it too should affirm the award of attorney's fees and costs.

CONCLUSION

For the reasons stated above, the orders of the circuit court granting Respondents' motion for directed verdict and granting Respondents Giannone's and Johnson's post-trial motion for an award of attorneys' fees and costs should be affirmed in full.

Respectfully Submitted,

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