THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2010-CP-22-1233

Appellate Case No. 2012-213524

First South Bank.....Respondent,

v.

South Causeway, LLC.....Appellant.

RESPONDENT'S INITIAL BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS[1]

I. The South Causeway Commercial Acquisition and Development Loan

On June 25, 2008, Respondent First South Bank ("First South") made a commercial acquisition and development loan to Appellant South Causeway, LLC, ("South Causeway") in relation to a 19.22 tract of land in Pawley's Island, South Carolina (the "South Causeway Property"). (Pl.'s Ex. 2) Peggy Wheeler-Cribb was the sole member of South Causeway.

At the closing, Wheeler-Cribb executed the South Causeway Loan Agreement, a Universal Security Agreement and Note, and the Mortgage on behalf of South Causeway. (Pl.'s Exs. 2, 3, & 4). Wheeler-Cribb and her son, Darwin Wheeler, executed personal guaranty agreements for the full amount of the South Causeway Loan. (Pl.'s Exs. 8 &7) Wheeler also pledged a parcel of beach front property, Lot 4 at 334 Myrtle Avenue ("Lot 4"), as additional collateral to secure the South Causeway Loan. (Pl.'s Ex. 14)

[1] In addition to the factual recitation presented here, where pertinent, facts will be cited within the arguments that follow.

At the closing, South Causeway, Wheeler-Cribb, and Wheeler were represented by their counsel. (Pl.'s Ex. 10) The proceeding was carried out in accordance with South Carolina law. (Pl.'s Ex. 10) During the closing, Wheeler-Cribb executed a Borrower's Closing Statement and a Guarantor's Closing Statement. These documents represented and warranted that:

- the Loan Documents were accurate;
- Wheeler-Cribb had adequate opportunity to have the Loan Documents reviewed by an attorney;
- Wheeler-Cribb understood the terms of the Loan Documents; and
- Wheeler-Cribb executed them voluntarily.

(Pl.s Exs. 5 & 9)

At the time of the closing, the South Causeway tract was encumbered by a prior acquisition loan from First Palmetto Bank to Wheeler-Cribb for approximately $3.6 million. (Pl.'s Ex. 1 p.2) This loan was scheduled to mature in October 2008 — over four months after the closing. Lot 4 was also encumbered by a prior $550,000 loan from First South at the time of the South Causeway loan closing. (Pl.'s Ex. 1 p.2)

The subject transaction provided First South would lend up to $6.5 million dollars in separate advancements pursuant to the terms of the Loan Agreement. (Pl.'s Ex. 2, p.1 §1.1) The initial advancement of funds at closing totaled $4,769,725.23. (Def.'s Ex. 1) This amount satisfied the outstanding loan from First Palmetto Bank and the outstanding loan from First South Bank secured by Lot 4. (Pl.'s Ex. 2, pp.7-8 §4.4) Three Hundred Thousand Dollars ($300,000.00) of the initial advancement was deposited into a restricted access demand deposit account to fund monthly interest payments and closing costs. (Id. at p.8, §4.4) All subsequent advancements were to be made "from time to time as construction of the improvements progresses" and "shall be based upon percentage completion of the Improvements, subject, in each case, however to the provisions of this Article IV." (Pl.'s Ex. 2, p.8 §4.4)

Article IV of the Loan Agreement provided the conditions precedent to and use of advances of the funds. (Pl.'s Ex. 2, p.3) Specifically, Section 4.2 and its subsections articulated specific conditions precedent for "each subsequent advance." (Pl.'s Ex. 2, p.6 §4.2) The conditions precedent included: an executed construction

contract; that no event of default has occurred; and a request for advance shall be furnished to the bank. (Pl.'s Ex. 2, pp.6-7 §4.2(1), (2), (7), & (10)) Section 4.5(4) further provided that each request for advance implicitly included a certification by South Causeway that no event of default "has occurred and is continuing." (Id. at p.9)

Further, the Loan Agreement clearly stated First South "shall have no obligation to lend if at the time of any requested Advance there shall have occurred an Event of Default hereunder" (Pl.'s Ex. 2, p.9 §4.6(4)) and permits First South to "terminate all obligations of [First South] to [South Causeway], including all obligations to lend money under this Agreement." (Id. at p.15 §7.2) Article VII of the Loan Agreement identified numerous events of default, which included South Causeway "abandon[ing] construction of the Improvements with intent not to resume construction for a period of 5 consecutive days." (Id. at p.15 §7.1(13))

The Loan Agreement followed a Commitment Letter to Wheeler-Cribb and Wheeler, dated May 30, 2008. (Pl.'s Ex. 1) The Commitment Letter outlined that "[a]n additional $550,000.00 of the proceeds of the loan shall" be disbursed into the interest reserve account "upon the

earlier to occur of completion of the infrastructure **and** six (6) months from the date of Loan closing." (Pl.'s Ex. 1 at p.2 (emphasis added))

The Commitment Letter further provided the parties "shall enter at closing a loan agreement setting forth certain of the obligations, warranties, covenants, and agreements of [South Causeway], events of default, and certain rights and remedies of [First South]" and that the loan agreement will "set forth the requirements for the initial and subsequent advances upon the Loan." (Pl.'s Ex. 1 at p.5-6)

While incorporated into the Loan Agreement, both the Commitment Letter and the Loan Agreement provided that the terms of the Loan Agreement control any conflict or inconsistencies between the Commitment Letter and the Loan Agreement. (Pl.'s Ex. 1 p.11, Pl.'s Ex. 2 p. 18 §9.10)

Neither South Causeway nor its attorney raised any issue with the two tier funding structure at the closing of the Loan Agreement.

At trial, there was extensive testimony about the provision in the Commitment Letter concerning the subsequent advancement of $550,000.00 into the Interest Reserve Account in the context of this commercial acquisition and development loan. The president of First

South Bank, W.C. "Chip" Lyerly III, unequivocally testified the additional advancement was contingent upon both the construction of the infrastructure **and** the passage of six months beyond the closing of the loan. (Tr. Trans. 521-22, 824-25)

As well, South Causeway's own expert in commercial banking initially testified that he believed the additional advancement of the $550,000 "was attached to the development" (Tr. Trans. 613-614) and that a signed construction contract was required before South Causeway could obtain additional money under the loan. (Tr. Trans 606-07)

Additionally, the jury heard expert testimony that the requirement of completing the infrastructure before the additional funding into the interest reserve account kept the South Causeway loan within government mandates on loan-to-value ratios for commercial acquisition and development loans. (Tr. Trans. 852-55)

On July 2, 2008, one week after the loan closed, South Causeway informed First South that it had summarily rejected an offer totaling over $12 million dollars from Lincoln Harris Properties, LLC, stating "We would not be interested in those terms." (Pl.'s Ex. 26 [do not have

original exhibit; Bates No. FSB-SC 01128], Tr. Trans. 720) There is no evidence of any further negotiations between South Causeway and a Lincoln Harris Entity until a subsequent $4 million dollar purchase offer was made on July 2, 2010. (Def.'s Ex. 27, Tr. Trans. 713-14)

After the closing, South Causeway failed to enter into a construction agreement for building the necessary infrastructure for the South Causeway property. In fact, South Causeway did not attempt to develop the property beyond the initial clearing of the land, which primarily took place before and shortly after the closing. South Causeway was reimbursed for the cost of the clearing work as part of the initial advancement at the closing. (Def.'s Ex. 1; Pl.'s Ex. 24)

On September 30, 2008, South Causeway clearly and unequivocally informed First South that South Causeway no longer planned on developing the property and had previously begun efforts to market and sell the property. (Def.'s Ex. 13) In this same correspondence, South Causeway directly confirmed that it would not need the funds allocated for future advancements associated with developing the property: "If you want or need to do away with the construction part of the loan that is fine...." (Def.'s Ex. 13) This clearly

constituted an event of default under the Loan Agreement, ending any obligation that First South had to lend additional money under the Loan Documents. (Tr. Trans. 557-560)

During the summer of and into October 2008, South Causeway attempted to negotiate a lease agreement for the South Causeway tract with Lowe's Food. (See Def.'s Ex. 17)

Lowe's Food subsequently terminated lease negotiations with South Causeway, citing the downturn in economic conditions. (Tr. Trans. 530)

Shortly thereafter, South Causeway searched for a real estate broker to market the property, including Robbie Buice. (See Pl.'s Ex. 29) During the course of this search and without any agreement with Buice to serve as its agent, Wheeler freely disclosed that South Causeway owed $5 million on the property. (Id., Tr. Trans. 748-50)

II. After the Alteration of the South Causeway Loan

Shortly after lease negotiations between South Causeway and Lowe's Food ended in October 2008, Wheeler-Cribb began searching for a loan to cover personal expenses and offered an interest in a separate piece of property as collateral. (Tr. Trans. 371, 696-97, 752)

The proceeds of this loan were not for developing the subject property. (Tr. Trans. 752) Wheeler-Cribb eventually selected Kennedy Funding and submitted an application for a "bridge" loan. (Tr. Trans. 696-698) Kennedy Funding required a primary secured interest in Lot 4 in order to approve a loan for personal expenses. (Tr. Trans. 697) This required First South to release its mortgage on Lot 4, which was part of the collateral for the loan to South Causeway and still in effect because South Causeway had not entered into a lease with Lowe's Foods, had not developed the infrastructure, or obtained an appraisal documenting the value of the property and proposed improvements was at least $9.5 million. (Tr. Trans. 697; Def.'s Ex. 12)

First South worked with Wheeler-Cribb to come up with a way to enable First South to release its mortgage on Lot 4. (Tr. Trans. 373) Ultimately, First South presented Wheeler-Cribb with two options for the release of Lot 4. (Pl.'s Ex. 18). The difference between the two options was the amount that First South would receive for an additional interest reserve contribution towards the South Causeway loan. (Id.) First South clearly and unequivocally informed Wheeler-Cribb that by selecting option two, which required a much lower contribution for

interest reserve, would also necessitate shortening the maturity date of the South Causeway loan by one year. (Id.) After considering both options, Wheeler-Cribb chose option two and the shorter maturity date on March 11, 2009. (Pl.'s Ex. 27)

On April 10, 2009, South Causeway, Wheeler-Cribb, Wheeler, and First South entered into an agreement that altered the original terms of the South Causeway loan, including the shortened maturity date, and memorialized the selection of option 2 for the release of Lot 4. (Pl.'s Ex. 11) Wheeler-Cribb executed the agreement on behalf of South Causeway in the presence of its counsel and after an opportunity to confer with counsel. (Tr. Trans. 890, 439) The consideration for this agreement included the requirement that South Causeway, Wheeler-Cribb, and Wheeler release any and all claims they may have against First South. (Pl.'s Ex. 11, p.1) The agreement included a comprehensive release that included all claims then existing or may have based on events up until the agreement's execution. Pl.'s Ex. 11, p.2-3 ¶3)

The personal bridge loan from Kennedy Funding was closed the same day. ( ) A portion of the proceeds of that loan were transferred

to First South pursuant to the terms of the Borrower's agreement with the bank. First South thereafter marked its mortgage on Lot 4 satisfied. (Tr. Trans. 452) This arrangement afforded South Causeway additional time to try to sell the property. (Tr. Trans. 830-832) During this time period, South Causeway continued to reject offers to sell the South Causeway property and made no effort to develop the property. [cite needed]

In March 2010, Harris Investment Company #1, LLC, ("Harris Investment") approached First South about a potential purchase of the South Causeway Note and Mortgage. (Tr. Trans. 544-46) Harris Investment Company requested to view the South Causeway Loan documents to evaluate the potential purchase. (Tr. Trans. 546-47)

After First South and Harris Investment entered into a confidentiality agreement, representatives of Harris Investment met with representatives of First South at its primary office in Spartanburg. (Def.'s Ex. 25; Tr. Trans. 406-07) The point of contact with Harris Investment by First South was Lyerly. (Tr. Trans. 406-07) During this meeting, Harris Investment only reviewed the primary loan documents, such as the Loan Agreement, Note, title insurance, and an appraisal.

(Tr. Trans. 406, 417, 546-47). Harris Investment Company did not tell Lyerly that Lincoln Harris had made an offer to purchase the South Causeway property a year and a half earlier in July 2008. (Tr. Trans. 546) Ultimately, First South declined an offer from Harris Investment to purchase the South Causeway loan.

At trial, South Causeway sought to introduce statements in e-mails from a representative of Harris Investment and Lyerly that took place after the meeting in Spartanburg and before First South declined Harris Investment's offer to purchase the South Causeway loan. (Ct. Exs. 1-3) The trial court excluded these communications as hearsay because, inter alia, the representative of Harris Investment was not called as a witness. (Tr. Trans. 477-508) Counsel for South Causeway argued the hearsay statements were admissible to show that Lyerly was aware that Harris Investment representative was communicating with third parties about the South Causeway property. (Tr. Trans. 479-481,485-86) At no point did counsel for South Causeway argue the e-mails were business records excepted by the hearsay rule.

Though it excluded the emails, the trial court permitted counsel for South Causeway to cross-examine Lyerly on whether he was aware

that the representative of Harris Investment was "shopping the property" and then introduce the e-mails to impeach Lyerly if he denied the communications. (Tr. Trans. 483-86) During the trial, counsel for South Causeway asked Lyerly about these exact issues and Lyerly admitted to having notice. (Tr. Trans. 834-36)

III. First South's Call to Vintage Estates Realty and the Auction on June 1, 2010

After rejecting multiple offers to purchase the South Causeway property, Wheeler-Cribb decided to attempt to sell the property through a reserve style auction. (Def.'s Ex. 2, p.1)

On April 12, 2010, South Causeway retained Vintage Estates Realty to conduct the auction. (Id.) On May 15, 2010, due to previous indications from Wheeler-Cribb that auctions were scheduled but did not take place, First South Senior Vice President Wayne Lovelace called Don Thomas at Vintage Estates to confirm the auction would actually take place. (Tr. Tans. 382-83) During this call, it became clear to Lovelace that South Causeway had not informed Vintage Estates of the amount that First South would require to release the property or that First South would not agree to partial releases for portions of the

property. (Tr. Trans. 384-85) As a result, Lovelace disclosed to Vintage Estates -- as the agent of South Causeway -- the amount due on the South Causeway loan, that the bank would not accept partial payment on the loan, the maturity date of the loan, and that First South would not renew the loan. (Tr. Trans. 300-02, 384-86, 392, 402). South Causeway's own expert at trial would not testify this disclosure violated any standard in the banking industry. (Tr. Trans. 622)

Vintage Estates did not disclose this information to anyone outside of the company. (Tr. Trans. 309)

South Causeway could have still set the reserve at any price it wanted. (Tr. Trans. 313) However, the reserve price was eventually changed to an amount sufficient to satisfy the balance of the South Causeway loan. (Tr. Trans. 704-05)

The reserve price was not disclosed to any potential bidders and South Causeway could have accepted or rejected any offer that did not meet the reserve price. (Tr. Trans. 307)

The auction went forward on June 1, 2010. There were no bids on the entire property or individual parcels. (See Tr. Trans. 307-309, 418-19)

The broker in charge at Vintage Estates testified at trial that the disclosure from Lovelace did not make any difference on the attempt to sell the property because there were never any bids. (Tr. Trans 319, 418-19).

Over a month after the auction -- on July 2, 2010 -- Lincoln Harris made a second offer to purchase the South Causeway property for $4 million. (Def.'s Ex. 27) First South was unaware that Lincoln Harris would make this offer. (T.) South Causeway rejected this offer. (Tr. Trans. 661-62) There were no ongoing negotiations between South Causeway and Lincoln Harris between the initial offer in 2008 and the second offer in 2010. Plaintiff's own experts in commercial banking testified the economic recession caused the decrease in the value of property (Tr. Trans. 670)

Ultimately, the South Causeway loan matured on July 5, 2010. After South Causeway was unable to satisfy its obligations to repay the Loan, First South initiated the underlying foreclosure action.

STATEMENT OF THE CASE

The instant case is a commercial foreclosure action, which First South filed in the Court of Common Pleas for Georgetown County. South Causeway timely answered and asserted several counterclaims concerning various events and actions pertaining to the subject loan agreement, which South Causeway maintained entitled it to relief. These counterclaims included: breach of contract, tortious interference with contract, violation of the South Carolina Unfair Trade Practices Act, breach of contract accompanied by fraudulent act, fraud, breach of fiduciary duty, negligent misrepresentation, and tortious interference with prospective contract

The matter was tried before a jury in Georgetown County in September 2012. The circuit judge bifurcated the trial by first submitting South Causeway's counterclaims to the jury and then ruling on the foreclosure action following discharge of the jury.

During the trial of the counterclaims, the judge granted a directed verdict to First South on a cause of actions sounding in. The causes of action for breach of contract, tortious interference with contract, and violation of the South Carolina Unfair Trade Practices Act were

submitted to the jury. The jury returned a verdict in favor of First South on all counts submitted to them.

The Circuit Court thereafter entered judgment in favor of First South in the foreclosure action.

South Causeway filed several post-trial motions, which the circuit judge denied. The court then entered a Supplemental Judgment of Foreclosure in the amount of $5,694,334.89.

This appeal follows.

LAW/ANALYSIS

I. The Circuit Court Correctly Granted a Directed Verdict to First South as to the Tortious Interference with Prospective Contract Cause of Action

In the case at bar, South Causeway avers the circuit judge erred by granting First South's motion for directed verdict on the cause of action for tortious interference with prospective contact. South Causeway is incorrect.

A. Standard of Review

In North America Rescue Products, Inc. v. Richardson, 396 S.C. 124, 131, 720 S.E.2d 53, 57 (Ct. App. 2011), the Court of Appeals

enunciated the proper standard of review with regard to directed verdict in the civil arena:

> When considering a directed verdict motion, the circuit court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (citing Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)). "If more than one reasonable inference can be drawn ... the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965) (citing Mahon v. Spartanburg Cnty., 205 S.C. 441, 449, 32 S.E.2d 368, 371 (1944)). The circuit court should be "concerned only with the existence or nonexistence of evidence," not its credibility or weight. Jones v. Gen. Elec. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (citing Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992)). An appellate court will only reverse the circuit court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Steinke, 336 S.C. at 386, 520 S.E.2d at 148.

Id. at 131, 720 S.E.2d at 57 (Ct. App. 2011).

B. Tortious Interference with Prospective Contract in South Carolina

Prosecution of this cause of action in the case sub judice required a showing by South Causeway of the following:

(1) First South's intentional interference with South Causeway's prospective contractual relations;

(2) for an improper purpose or by improper methods; and

(3) resulting injury to South Causeway.

See S. Contracting, Inc. v. H.C. Brown Const. Co., Inc., 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994) (citing Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990)).

South Causeway failed to offer any evidence upon which the jury could find that First South tortuously interfered with South Causeway's prospective contractual relations.

C. Grant of Directed Verdict in the Instant Case

The Circuit Court was correct in its grant of directed verdict on this count because South Causeway did not demonstrate evidence to support the elements of this cause of action. Simply stated, First South did not intentionally interfere with any prospective contract between South Causeway and a potential purchaser of the property. Further, First South's contact with Vintage Estates was not done for an improper purpose or via any improper method. Moreover, First South's contact with Vintage Estates did not result in any colorable or demonstrable injury or damage to South Causeway.

As outlined within the recitation of the facts of this case, the record reveals the following as it pertains to South Causeway, First South, and Vintage Estates:

- When it learned that South Causeway had elected to conduct a reserve auction the subject property, First South also learned South Causeway had not informed Vintage Estates, the auctioneer, of the amount First South would require to release the property or that First South would not agree to partial releases for portions of the property. (Tr. Trans. 384-85)

- In order to protect its contractual interests, First South disclosed to Vintage Estates, an agent of South Causeway, the amount due on the South Causeway loan, that the bank would not accept partial payment on the loan, the maturity date of the loan, and that First South would not renew the loan. (Tr. Trans. 300-02, 384-86, 392, 402).

- South Causeway's own expert refused to testify at trial this disclosure did not violate any standard in the banking industry. (Tr. Trans. 622)

- Vintage Estates did not disclose this information—which was necessary for a successful sale—to anyone outside of the company. (Tr. Trans. 309)

- South Causeway was able to set the reserve at any price it wanted. (Tr. Trans. 313) However, the reserve price was eventually changed to an amount sufficient to satisfy the balance of the South Causeway loan. (Tr. Trans. 704-05)

- The reserve price was not disclosed to any potential bidders and South Causeway could have accepted or rejected any offer that did not meet the reserve price. (Tr. Trans. 307)

- The auction went forward. (See Tr. Trans. 307-309, 418-19); and

- The broker in charge at Vintage Estates testified at trial that the disclosure from First South did not make any difference on the attempt to sell the property because there were never any bids. (Tr. Trans 319, 418-19).

There is no evidence to suggest any improper purpose or motive by First South other than the proper pursuit of protecting its substantial financial interests relating to the subject property under the loan documents. See id. at 102, 450 S.E.2d at 606 (affirming grant of summary judgment on tortious inference with prospective contract cause of action, holding defendant insurer did not initially interfere with subcontractor's prospective contractual relations when it enforced contractual provision requiring general contractor to require major subcontractors to furnish payment and performance bonds). First South had an absolute right to insist upon proper performance by South Causeway and its agent, Vintage Estates, regarding satisfaction of South Causeway's indebtedness to First South. See id. It was

uncontroverted that South Causeway had not provided Vintage Estates with the information necessary to protect First South's contractual rights with relation to the sale of the property. Providing Vintage Estates with the information necessary to protect its contractual rights under the loan documents cannot support an action for tortious interference with prospective contractual relations in South Carolina. See Eldeco, Inc. v. Charleston County School Dist., 372 S.C. 470, 482, 642 S.E.2d 726, 732 (2007) (upholding directed verdict dismissing an action for interference with prospective contractual relations where the defendant acted in pursuit of its own contractual rights).

South Causeway's attempt to establish a claim for intentional interference with prospective contractual relations based on the offers from Lincoln Harris also fails as a matter of law. As negotiable instruments, First South had the legal right to sell the Note and Mortgage to a third party. [Cite] When Harris Investment approached First South about a potential purchase of the South Causeway loan in 2010, Harris Investment requested to see the Loan Documents as part of its due diligence to evaluate a potential purchase, which is routine activity in this type of transaction. [Cite] After First South and Harris

Investment entered a confidentiality agreement, First South permitted Harris Investment to view the Loan Documents in its pursuit of its right to sale the South Causeway loan. Under South Carolina law, these legitimate actions cannot support an action for intentional interference with prospective contract. See id. at Eldeco, at 482, 642 S.E.2d at 732.

The trial court's grant of directed verdict on this claim was also correct because there was no evidence that any prospective buyer was "chilled" or any sale of the lots did not take place due to First South's contacting Vintage Estates or any disclosure to Harris Investment.

South Carolina law requires "that the plaintiff must demonstrate that he had a truly prospective or potential contract with a third party; that the agreement was a close certainty; and that the contract was not speculative." Santoro v. Schulthess, 384 S.C. 250, 263, 681 S.E.2d 897, 904 (Ct. App. 2009) (citing United Educ. Distrib., LLC v. Educ. Testing Serv., 350 S.C. 7, 564 S.E.2d 324 (Ct.App.2002)). This requires evidence that an identifiable prospective buyer that was affected by the actions of the defendant and cannot rest of mere speculation. Id. First South's mere unsupported speculation that a sale did not take place cannot support its claim for interference with

prospective contractual relations. The evidence conclusively showed that no one outside of Vintage Estates received the information about the South Causeway Loan or the reserve price. Not one prospective purchaser was called at trial to offer evidence of why a potential purchase of the property did not take place or why no bid was placed at the auction.

Further, the testimony of Don Thomas as the representative of Vintage Estates does not support South Causeway's claim that the evidence could support the finding First South's contact with Vintage Estates had any adverse effect on a prospective purchase of the property. During South Causeway's case in chief, Don Thomas testified the auction went forward and the only potential effect of the disclosure was that the starting bid price of the individual parcels may have been higher, but it did not dictate the reserve price because South Causeway always retained the right to establish any reserve price it wanted. (Tr. Trans. 312-13). Further, there were **no** bids at the auction and the bidding could have been at an amount below the reserve price because South Causeway had the "right to accept or reject any offer that it did not meet the reserve price." (Tr. Trans. 307-08)

The trial court correctly found that the evidence could not support a reasonable finding in favor of South Causeway's action for interference with prospective contracts. Consequently, the directed verdict in favor of First South on this claim should be upheld.

II. The Circuit Court Did Not Err by Refusing to Admit Email Correspondence

A. Standard of Review

South Causeway asserts the trial court erred by refusing to admit certain emails into evidence and this alleged error necessitates reversal. South Causeway is incorrect in its asseveration.

The admission of evidence is within the trial court's discretion, and the trial court's decision will not be reversed on appeal absent an abuse of discretion. See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 360, 725 S.E.2d 112, 119 (Ct. App. 2012) & Pope v. Heritage Communities, Inc., 395 S.C. 404, 427, 717 S.E.2d 765, 777 (Ct. App. 2011) (both citing Whaley v. CSX Transportation, Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005).

B. The Circuit Court's Exclusion of the First South/Lincoln Harris Emails Was Appropriate

1. The Subject Emails Were Hearsay

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. At trial, South Causeway attempted to admit a series of e-mails from Greg Currie at Lincoln Harris to Lyerly at First South Bank. Neither Currie nor any other representative of Lincoln Harris were called to testify at trial. The trial court properly excluded these e-mails as hearsay. As part of the ruling, the Court informed counsel for South Causeway that she could ask Lyerly about the content of the e-mails and then use them to impeach his testimony if Lyerly denied having notice of the information conveyed by Currie. (Tr. Trans. 483-486)

South Causeway sought to admit a March 27, 2010, e-mail from Currie concerning a potential purchase of the South Causeway loan. South Causeway contended this e-mail was relevant to show the jury Currie's statements that Lincoln Harris was comfortable getting interest payments before the loan matured four months later and had been

obtaining commitments from potential tenants for the property. (Ct. Ex. 1, Tr. Trans. 479-80) Counsel for South Causeway conceded at trial that the effort to admit these statements were to establish the truth of those matters. (Tr. Trans. 480) Accordingly, this e-mail was clearly hearsay and properly excluded from evidence.

South Causeway also sought to introduce an e-mail written by Mr. Currie on May 24, 2010, which post-dated both the meeting between Harris Investment at First South to review the loan documents and First South contacting Vintage Estates on May 15, 2010. (Ct. Ex. 1). South Causeway sought to admit this into evidence to show that Lyerly had notice of the fact Lincoln Harris was meeting with county officials and this somehow showed that First South failed to force Lincoln Harris to fulfill its obligations under the Confidentiality Agreement. South Causeway also attempted to admit this into evidence to support finding First South had a motive to call Vintage Real Estate. (Tr. Trans. 486) However, there was no evidence to establish that anything in Currie's statements constituted a violation of the Confidentiality Agreement. Further, because the e-mail came after First South contacted Vintage Estates, it cannot establish a motive for that

contact. In short, this e-mail was wholly irrelevant to show notice or motive and could only be offered to establish the truth of Currie's statements. (Tr. Trans. 486-490) As such, these communications were properly excluded as inadmissible hearsay.

2. South Causeway Failed to Argue the Subject Emails' Admissibility Via the Business Records Exception

In its briefing to this Court, South Causeway asserts the subject emails were admissible via the business records exception found in Rule 803(6) of South Carolina Rules Evidence. South Causeway's argument falls short on appeal due to its failure to articulate such an argument at trial.

Review of the record reveals, however, that South Causeway did not assert the business records exception as a basis for admissibility at trial. Furthermore, South Causeway did not obtain a ruling as it pertained to the business records exception. As a result, South Causeway is precluded from arguing such an exception in the appeal of this matter. The case law in this jurisdiction is legion as it pertains to issue preservation at the trial level being a prerequisite for appellate

review. Murphy v. Jefferson Pilot Communications Co., 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005).

C. Alternatively, No Error Was Created Because South Causeway Elicited the Emails' Purported Substance in Cross Examination of Lyerly

1. The Law Concerning Alleged Evidentiary Error in South Carolina

In order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Associates, Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001) (citing Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); see also Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (holding that to justify reversal based upon improper admission of evidence, appellant must show prejudice and that jury was likely influenced thereby). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence

or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

2. Application of the Legal Standard Requiring Prejudice to the Scenario in the Case at Bar

As noted, above the trial court informed counsel for South Causeway that the use of the Currie e-mails to impeach Lyerly if he denied having notice of the fact that Lincoln Harris was a developer and attempting to "shop" the property. (Tr. Trans. 483) At trial, counsel for South Causeway was permitted to ask those questions and received responses to the same:

> Q. I would like to ask you about the Lincoln-Harris loan sale. When Lincoln-Harris approached you about purchasing the loan agreement from your bank and asked to review the file of South Caseway, LLC, you were aware at that time that Lincoln-Harris was a development company weren't you?
>
> A. Yes, I was....
>
> (Tr. Trans. 834, lines 11-18)
>
> ....
>
> Q. Prior to the auction Lincoln-Harris, and I mean the auction that Miss Peggy attempted to conduct in June of 2010, prior to the auction you were aware, were you not, that Lincoln-Harris was consulting zoning officials about this property?

A. I mean, to be honest with you, I don't know that I was aware. I mean, I don't know they told me that. They may have. Subsequent to our meeting in Spartanburg, I don't know when they would have met with zoning officials. We obviously wouldn't have anything to do with that.

Q. You were aware, weren't you, prior to the auction, that Lincoln-Harris was seeking commitments for tenants and anchor tenants. Is that correct?

A. That was my understanding, they were seeking to see what interest there would be in the property.

Q. So you were aware that at the same time South Causeway and Miss Peggy were attempting to conduct an auction, that Lincoln-Harris was actually out trying to develop the property?

A. Well, I don't know they were out trying to develop. They obviously didn't develop the property because they didn't own or buy it but it is not unusual for prospective developers of property to talk with some of their prior, you know, contacts, tenants, to see if there would be interest. I have been a developer but that is my understanding of how, you know, typically these things work.

Q. So you knew that Lincoln-Harris' intent was not to buy the note, but develop the property?

A. Well, they were going to buy the note and what they did after that would have been between them and Miss Wheeler-Cribb.

(Tr. Trans. 835 line 8 to 836 line 18)

At no point during Lyerly's testimony on these issues did counsel for South Causeway seek to impeach Lyerly's testimony with the e-mails from Currie.

Assuming, arguendo, the Currie e-mails were relevant and admissible, the fact counsel for South Causeway was permitted to elicit testimony showing that First South had notice of the content of Currie's statements precludes any possible finding that the exclusion of the e-mails prejudiced South Causeway. See Smith v. Winningham, 252 S.C. 462, 467, 166 S.E.2d 825, 827 (1969) ("Alleged error in the exclusion of offered testimony is of no avail if the same testimony or testimony to the same effect had been or was afterwards allowed to be given by the witness.") The record cannot support concluding that there was a reasonable probability that the jury's verdict was influenced by the exclusion of the e-mails and does not permit reversing the jury's verdict in favor of First South. Fields, 363 S.C. 19, 26, 609 S.E.2d 506, 509.

III. The Circuit Court's Denial of South Causeway's Motion for Judgment Notwithstanding the Verdict, or in the alternative, Motion for New Trial was Proper

South Causeway maintains the Circuit Court impermissibly erred by denying its motions for JNOV and new trial. First South argues the court was correct in its rulings.

A. Standard of Review

1. Motion for Judgment Notwithstanding the Verdict and Motion for New Trial

a. Motion for Judgment Notwithstanding the Verdict

In ruling on a motion for judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. Bass v. S.C. Dep't of Soc. Servs., 403 S.C. 184, 190, 742 S.E.2d 667, 670 (Ct. App. 2013) (quoting Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994)). The trial court can only be reversed by this Court when there is no evidence to support the ruling below. Id. (quoting Jinks v. Richland Cnty., 355

S.C. 341, 345, 585 S.E.2d 281, 283 (2003)). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), aff'd as modified sub nom., 352 S.C. 437, 574 S.E.2d 726 (2002) (citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)).

b. Motion for New Trial

The standard of review applicable to an order denying a motion for a new trial is similar to that applicable to a JNOV motion. "Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Youmans ex rel. Elmore v. S.C. Dept. of Transp., 380 S.C. 263, 271, 670 S.E.2d 1, 4 (Ct. App. 2008) (internal quotation marks and citations omitted). The review of an order denying a motion for a new trial "'is limited to consideration of whether evidence exists to support the trial court's order.'" Norton v. Norfolk So. Ry. Co., 350 S.C. 473, 478-79, 567

S.E.2d 851, 854 (2002) (quoting Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). Where there is conflicting evidence presented at trial, the trial court's decision should not be disturbed. See Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990).

2. The Evidence at Trial supported the Jury's Verdict in Favor of First South Bank on the Breach of Contract Counterclaim

A "jury's verdict will not be overturned if *any evidence* exists that sustains the factual findings implicit in its decision." Boddie-Noel Props., 344 S.C. at 482, 544 S.E.2d at 283 (emphasis added and citation omitted). At the trial of the present case, there was extensive evidence that supports the jury's verdict in favor of First South on South Causeway's breach of contract claim. Consequently, the trial court properly denied South Causeway's JNOV motion and motion for a new trial pursuant to the thirteenth juror doctrine.

South Causeway asks this Court to set aside the jury verdict through isolating a single sentence in the Commitment Letter and disregarding the multitude of evidence that supports the jury's verdict in favor of First South on the breach of contract counterclaim. The sentence upon which South Causeway relies is a provision in the

Commitment Letter that provided for a future, additional funding of the interest reserve account "upon the earlier to occur of completion of the infrastructure *and* six (6) months from the date of Loan Closing." (Pl.'s Ex. 1, p.2 ¶F) This argument impermissibly omits the provisions in the Loan Agreement clearly establishing the conditions for future advances and that the terms of the Loan Agreement control any conflict or discrepancies between the Commitment Letter and the Loan Agreement. (Pl.'s Ex. 1 p.11, Pl.'s Ex. 2 p. 18 §9.10) It also impermissibly extracts the terms of the Loan Agreement from the context of the transaction as an acquisition and development loan. When construing a single sentence in the Commitment Letter in the context of the actual transaction, the jury could have and did reach the reasonable conclusion that First South did not breach any contract with South Causeway.

South Causeway's argument relies almost exclusively on the principle that an ambiguity in a contract is construed against the drafting party. This rule, however, does not eliminate other well-established and fundamental legal principles that the contract is to be interpreted in a manner that will give effect to the intent of the parties.

based on the "contents of the entire document and not from any particular provision within the contract." Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (citing Litchfield Co. of S.C., Inc. v. Kiriakides, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct.App.1986)). Further, "Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." Id. (citing Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975)). The jury determines the intent of the parties and the proper construction of ambiguous language. Here, the jury determined the proper construction of the terms of the Loan documents and found that First South did not breach the contract with South Causeway.

At trial, the trial court thoroughly charged the jury on South Carolina law governing breach of contract actions. Neither party objected to these charges, which included each of the principles for construing contracts that are described above, including the affirmative defenses of waiver and of release. (Tr. Trans. 1043-1060, 1082).

There was a significant amount of evidence admitted at trial that supported the jury's verdict in favor of First South. Multiple witnesses testified about the funding of the Interest Reserve Account under the Commitment Letter and the Loan Agreement. This evidence included testimony by fact witnesses and experts that future advancements, including additional funding of the Interest Reserve Account, depended upon the completion of the infrastructure. (Tr. Trans. 521-23, 557-60, 614, 824 853-55). This interpretation is supported by the multitude of provisions in the Loan Agreement and other loan documents that made advances contingent upon the progress of developing the property. (E.g., Pl.'s Ex.1, p. 5 ¶6; Pl.'s Ex. 2, p. 6 §§4.2 & 4.4)

It was undisputed that South Causeway did not build the infrastructure and notified First South that it had abandoned any plan to do so three months after the closing. (Def.'s Ex. 13) This evidence alone is sufficient to support a interpreting the terms of the Loan Documents to reflect the parties' intent that the second funding of the Interest Reserve Account contingent upon "completion of the infrastructure and six (6) months from the date of Loan Closing."

Under this reasonable interpretation, First South did not breach the contract because both conditions were not met.

Even if the provision in the Loan Agreement is construed in the manner that South Causeway demands, the evidence still supports the jury's verdict. The evidence established that South Causeway defaulted on the loan no later than three months after the closing when it abandoned developing the property on September 30, 2008. (Def.'s Ex. 13; Pl.'s Ex. 2, p. 15 §7.1(13)) This event of default terminated any obligation that First South had to lend any money under the Loan documents. (Pl.'s Ex. 2, p. 15 §7.2, Tr. Trans. 521-23, 557-60, 614, 824 853-55) Accordingly, the evidence supports a reasonable finding that South Causeway's default precluded First South from having any obligation to fund the $550,000 into the Interest Reserve Account after six months had passed from the date of the loan closing.

The evidence also supported a finding in favor of First South based on the affirmative defenses of waiver or release. Under the terms of the agreement relating to the release of Lot 4, South Causeway released any claims that it may have against First South as of April 10, 2009. The evidence that South Causeway assented to this agreement

can support a reasonable finding that South Causeway either waived or released any claim for breach of contract. This evidence alone is sufficient to support the jury's unanimous finding that First South is not liable to South Causeway for breach of contract.

South Causeway also summarily contends that the jury's verdict cannot stand because First South breached the Loan Agreement when it reduced the amount of available principle and breached the implied duty of good faith and fair dealing by permitting Harris Investment to review the loan documents. Each of these arguments is not the sole conclusions that can be reached based on the evidence at trial and are unavailing.

At trial, Lyerly testified that First South terminated the remaining unfunded balance that could be advanced under the Loan Agreement in December 2008. (Tr. Trans. 523-25) This took place after South Causeway abandoned its plan to develop the property, relieving any duty First South had to loan additional funds under the Loan. (Id.) These events also took place before South Causeway executed the agreement containing the release of any claims it may have against First South. Therefore, the evidence at trial supports the jury's verdict.

Lastly, the evidence created a dispute as to whether Harris Investment's review of the Loan documents caused any damage to South Causeway, which is fundamental to the claim for breach of contract. South Causeway rejected the offer from Lincoln Harris in July 2010. (Tr. Trans. 662) There was evidence to support finding that the decrease in the amounts offered for the property were due to the drastic downturn in the real estate market between July 2008 and July 2010. (Tr. Trans. 624, 670) South Causeway did not present any evidence to show that the meeting between Harris Investment and First South had to cause any damage to South Causeway. This factual dispute regarding causation alone is sufficient to uphold the jury's verdict.

The same facts and evidence that supported the jury's verdict in favor of First South are also sufficient to uphold the trial court's denial of South Causeway's motion for a new trial under the thirteenth juror doctrine. Therefore, South Causeway cursory argument that the trial court erred in denying the motion for a new trial fails and the trial court's judgment must be upheld.

CONCLUSION

In the case at bar, the result reached at the trial level was right one. First South was entitled to prevail in this dispute. South Causeway is incorrect in its arguments that reversal is warranted. Specifically—to sum up—based on the issues on appeal delineated by South Causeway, the record supports the following conclusions by this Court:

- The Circuit Court correctly held First South Was entitled to directed verdict as to the tortious interference with prospective contract cause of action;

- The Circuit Court's refusal to admit email correspondence between First South and a third party was correct and did not resulted in prejudice to South Causeway; and

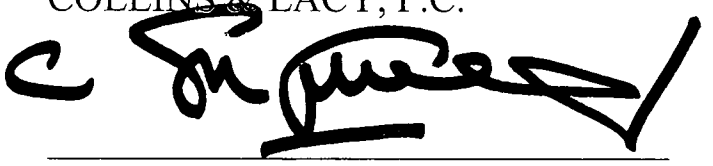
- The Circuit Court's Denial of South Causeway's Motion for Judgment Notwithstanding the Verdict, or in the alternative, Motion for New Trial was Proper?

Accordingly, for the reasons asserted therein, First Court respectfully seeks an opinion of this Court, affirming the Circuit Court's judgment in the instant matter.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

COLLINS & LACY, P.C.



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October 22, 2013

RESPONDENT'S INITIAL BRIEF