THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Carmen T. Mullen, Circuit Court Judge

Opinion No. 5807 (S.C. Ct. R. filed March 3, 2021)
Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC of whom Road, LLC is the ..... Petitioner,

v.

Beaufort County, a political subdivision of the State of South Carolina, ...Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed its Petition for Rehearing on March 18, 2021, and that the Court of Appeals denied the Petition by order dated May 14, 2021.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and fail to follow precedent governing the standard for a JNOV in holding there was no proof Road, LLC sustained $5,000,000 in damages based on a select excerpt from the testimony of Road, LLC's expert appraiser, when his testimony at trial, taken as a whole, supports the jury's verdict and there was other independent proof to support the award of $5,000,000 in damages?

2. Did the Court of Appeals err and fail to follow precedent governing the standard for a JNOV in failing to address the alternative basis of liability against the County – breach of the implied covenant of good faith and fair dealing – and in failing to consider the evidence supporting a finding that the County's purchase of the Point Tract with the admitted intent to prevent it from ever being a residential development caused the damages sustained by Road, LLC?

3. Did the Court of Appeals err and fail to follow precedent governing the standard for a JNOV in holding that the entire cause of Road, LLC's damages was the financial failure of Pinckney Point, LLC when Road, LLC's purchase of the Road Parcel was structured specifically to take into account the possible financial demise of Pinckney Point, LLC, and provide it the business opportunity to sell the Road Parcel to a subsequent residential developer of the Point Tract which the County purposely prevented?

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

No principles are more firmly embedded than the standard governing motions for judgment notwithstanding verdict (JNOV) and a litigant's right to a jury trial in civil matters at law under Article I, Section 13 of the South Carolina Constitution. Road, LLC premised its appeal to the Court of Appeals on the Circuit Court's violation of these fundamental principles in setting aside a jury verdict in the amount of $5,000,000 rendered in favor of Road, LLC against Beaufort County

(the "County") by the Beaufort County jury at the conclusion of a six-day trial.[1] The Circuit Court granted the County's Motion for JNOV even though the Circuit Court had ruled three times before that Road, LLC presented sufficient proof of liability and damages that required determination by the jury when denying similar motions by the County for summary judgment, for directed verdict at the conclusion of Road LLC's case in chief, and for directed verdict at the close of the evidence.

Road, LLC premises its Petition for a Writ of Certiorari to this Court on these same bedrock principles. In holding that there was no proof that any breach of contract by the County caused $5,000,000 in damages to Road, LLC, in Opinion No. 5807 (S.C. Ct. R. filed March 3, 2021) (the "Opinion") the Court of Appeals overlooked, improperly evaluated, and failed to even acknowledge proof that supported the jury's award. In so doing, the Court of Appeals usurped the constitutional role of the jury of County residents who determined the proof justified such a verdict even though some of them may have been taxpayers ultimately financially responsible. Both Courts viewed the record through the selective lens of the County in the light most favorable to the County rather than the established standard that requires that courts do exactly the opposite.

For these important reasons, Road, LLC hereby petitions this Court for a Writ of Certiorari and a ruling reversing the Court of Appeals that acknowledges all the evidence in the record and honors the jury's role by ultimately reinstating its verdict.

[1] The jury returned verdict for the defendant in the breach of contract claim brought by Pinckney Point, LLC.

STATEMENT OF THE CASE

This appeal arises from a jury verdict for $5,000,000 rendered on a cause of action for breach of contract asserted by Road, LLC against the County. The contract was a multi-party Settlement Agreement entered in January 2011. (**R. at pp. 1735-1785**) The parties included Road, LLC, Pinckney Point, LLC, the County, and others. As further explained below, Road, LLC asserted, among other things, that the County breached the Settlement Agreement's implied covenant of good faith and fair dealing.

The witnesses testified uniformly that one of the primary purposes of the Settlement Agreement, as stated therein, was to facilitate the residential development of a waterfront tract then owned by Pinckney Point, LLC. The County bought the property two years later specifically to make that development impossible even though it had granted approvals for that development and signed the Settlement Agreement that contemplated the property would be a residential development.

The Court of Appeals approved the Circuit Court's order granting the County's Motion for JNOV based on an erroneous impression of critical facts and a failure to recognize the basis for Road, LLC's claim for breach of the implied covenant of good faith and fair dealing, much less the abundant proof supporting it.

One of the fundamental errors in the Opinion was the Court's treatment of Pinckney Point, LLC, and Road, LLC, as one development entity. The proof at trial showed exactly the opposite. Pinckney Point, LLC, is a single purpose limited liability company established for the development of a large waterfront acreage tract in Beaufort County known as Pinckney Point, referred to as the "Point Tract," that it purchased in 2006. Road, LLC, is an entirely different single purpose limited liability company that was established in 2010 to purchase the isthmus property (the "Road

Parcel") that provides the sole road access to the Point Tract as part of an overall settlement with the County. Despite these fundamental differences between the two entities, the Court of Appeals mistakenly treats them as one and labels them as the "Developers" throughout the Opinion.

Road, LLC had nothing to do with the development of the Point Tract. Road, LLC was an investor in real estate not a developer of real estate. **(R. at pp. 885, 888)**. The Court's mistake that Pinckney Point, LLC and Road, LLC were joined at the hip permeates the Opinion and is one of the fundamental misunderstandings on which the Court of Appeals premised its ruling.[2] What also permeates the Opinion is the Court's failure to consider all of the proof pertinent to Road, LLC's allegations of the County's breach of the implied covenant of good faith and fair dealing. Because this Petition turns on the evidence at trial, its consideration requires further elaboration on the particular facts.

The Point Tract is a 229-acre undeveloped parcel at the confluence of the Okatie and Colleton Rivers (that at one time was a working farm) that is zoned for residential development. **(R. at pp. 430:5-7; 492:18-20; 867:21-24)**. The only vehicular access to the Point Tract is over an unimproved dirt road on the .85-acre Road Parcel. **(R. at p. 1981)**. As described at trial, the Point Tract is the head of the tennis racquet and the Road Parcel the throat of the racquet. **(R. at pp. 429, 494, 652, 1058).**

Pinckney Point sought to develop the Point Tract into 76 high-end waterfront lots. **(R. at pp. 430:5-7).** The seller of the Point Tract initially sought $15,500,000 but ultimately reduced the purchase price by approximately $5,000,000 because of ongoing litigation over whether the Road

[2] Nothing could be more representative of this basic misunderstanding by the Court of Appeals than the first sentence of the Opinion: "In this breach of contract action, Road, LLC and Pinckney Point, LC (Pinckney)(collectively "Developers") appeal the trial court's order granting Beaufort County's (County's) motion for judgment notwithstanding verdict (JNOV)." **Pinckney Point, LLC did <u>not</u> appeal the jury's verdict.**

Parcel could be used as access to a private residential development on the Point Tract. **(R. at pp. 495:9-13: 505:21-506:2; 652:12-653:7; 691:20-24; 953:19-954:8).** As a result of this uncertainty over legal access, Pinckney Point, LLC closed on the purchase of the Point Tract for the reduced purchase price of $10,600,000 and became a party to the then pending litigation in which the County was also a party. **(R. at pp. 505:1-5; 508:2-7; 1883-1891).**

Pinckney Point, LLC invested millions of dollars towards the residential development of the Point Tract, obtaining various permits and variances for its development as well as conditional approval from the County of its concept plan for development that contained 76 lots, most of them being high value marsh or creekfront lots. **(R. at pp. 509-510; 914:19-916:5; 1047).**

Because litigation over the legal access to the Point Tract had dragged on for many years without a final determination by the trial court, Pinckney Point, LLC undertook to forge a settlement. A critical component of the settlement was the purchase of the Road Parcel from its then-owner, John David Pinckney, the antagonist who contested public access across his property. At that time Pinckney Point, LLC was not current on its loan and its lender refused to loan the $1,300,000 needed to purchase the Road Parcel. **(R. at pp. 654:22-655:5).**

An entirely separate ownership group backed by Arendale Holdings agreed to put up the $1,300,000 to purchase the Road Parcel. **(R. at pp. 649:12-16; 884:11-888:4).** The investor conditioned the purchase on having its entity, Road, LLC, **not** Pinckney Point, LLC, own and control the Road Parcel and on having other protections in place to make sure that the road was private and the Point Tract could not be developed as a residential development without the purchase of the Road Parcel from it. **(Id.)** The County's development ordinances prohibited the Point Tract from being developed into more than five lots unless there was a right of way of 50 feet with an improved road. **(R. at pp. 701:10-19; 1119:15-24).** No one could develop the Point

Tract without purchasing the Road Parcel or obtaining Road, LLC's permission to do the needed improvements.

In January of 2011, multiple parties, including the County, Road, LLC, and Pinckney Point, LLC entered into the global Settlement Agreement to end over five years of litigation over the road and other litigation between Pinckney Point and the County over a variance Pinckney Point sought to allow it place an access driveway through a river buffer established by County ordinance. (the "Settlement Agreement"). **(R. at pp. 1065:12-21; 1745-1785).** The witnesses at trial including those of the County agreed that one purpose of the Settlement Agreement was to allow Pinckney Point, LLC's permitting process with the County to continue for the Point Tract to be entitled as a residential development. **(R. at pp. 1369:17-1371:20)** (Josh Gruber of the County discussing that the settlement language contemplated the development of the Point as a residential development); **(R. at pp. 571:14-16; 593:18-594:1; 594:18-24; 883:14-24)** (John Kunkel explaining that the Settlement Agreement allowed the development to "get outside of the logjam of the litigation," establish "undisputed legal access to the Pinckney Point tract," and enable them "to proceed forward to develop it"); **(R. at pp. 1747-1748); (R. at pp. 1232:25-1234:1)** (Gary Kubic, administrator of the County, testifying that he was aware when he signed the Settlement Agreement that the goal was to develop the Point Tract and that following the settlement Pinckney Point, LLC continued to pursue approvals for the purpose of a residential development). **(R. at p. 571:14-16)** (Q: "What was the settlement to do?" A. "[Taylor Bush] It was to resolve everything necessary for us to develop the property.").

To carry out the settlement, Road, LLC bought the Road parcel for $1,300,000 on the date of the Settlement Agreement. **(R. at pp. 1889-1892).** Road, LLC paid the $1,300,000 to acquire the Road Parcel based on the protections in the Settlement Agreement. For example, the settlement

terms included the obligation of Pinckney Point, LLC to later buy the Road Parcel from Road, LLC to obtain the fifty-foot right-of-way to the Point Tract necessary for it to be subdivided into residential lots under the County's ordinances. See **(R. at p. 1738)** ("Road, LLC. . .has agreed to convey either the Road Parcel to PPLLC or an easement for right-of-way not less than fifty feed wide to PPLLC upon payment of certain consideration described in said Road Agreement."). At the time of the settlement, Road, LLC and Pinckney Point, LLC entered the separate road purchase agreement for Pinckney Point to later purchase the Road Parcel for $5,000,000 referenced in the Settlement Agreement. **(R. at pp. 1738; 1984-1990).**

Another critical component of the Settlement Agreement was the parties' agreement that the road over the Road Parcel was private. (**R. at pp. 576:3-7;. 1737).** They memorialized this commitment a second time in a consent order dismissing the road litigation wherein the parties, including the County, specified that "the unpaved portion of Pinckney Point Road is a private road." **(R. at pp. 1928-1931).** This stipulation insured that no one developing the Point Tract could assert a right to use the road for access on the basis that the road was public.

Road, LLC made the $1,300,000 investment in the Road Parcel because any development of Point Tract would require the then-owner of the Point Tract to purchase the Road Parcel from Road, LLC. **(R. at pp. 885:2-23; 888:21-889:1) (R. at pp. 888:21-889:1; 889:5-8)** ("Literally, all roads go over Road, LLC's, property, and any acquirer of the Pinckney tract would need to purchase or acquire the right-of-way across the Road, LLC, tract.") **(R. at pp. 951:20-952:20)** (Q. "[I]t was structured such that, if you wanted to develop that property at the end of the tennis racket there, the Pinckney Point property, you would have to buy an easement or some kind of road access from Road, LLC?" A. "That's correct.").

Because of the years of delay caused by the litigation, Pinckney Point, LLC encountered financial trouble and ultimately had to convey the Point Tract through a deed in lieu to an entity known as Equity Resource Partners, III, LLC ("ERP") that acquired Pinckney Point's loan from its original lender. **(R. at pp. 587:15-588:1); (R. at p. 588:13-22); (R. at pp. 588:23-590:2); (R. at p. 891:1-24); (R. at p. 891:9-24); (R. at pp. 1796-1846 & 1903-1932).** Pinckney Point, LLC entered a number of agreements with ERP that included an option to repurchase the Point Tract and ongoing commitment to continue to seek approvals for the residential development that were assigned to ERP. **(R. at pp 1786-1837).** ERP insisted as a condition of extending the option again that it receive a new easement that expanded the 20-foot existing easement to a "size, use, and maintenance that would allow an owner of our land to fully develop it in accordance with your current development plans." **(R. at pp 635:18-636:5).** Pinckney Point paid ERP a total of $500,000 for the original option and an extension of its term through February 28, 2013. **(R. at pp. 591:5-592:24; 624:24-625:2).**

What later came to light is the County had other plans that it did not disclose to Road, LLC. It wanted to acquire the Point Tract to keep it from ever being developed. During the time of Pinckney Point, LLC's option, the County, through its agent, the Beaufort County Open Land Trust, began inspecting the Point Tract in November 2012 for possible purchase by the County as a park. **(R. at pp. 788:21-789:1; 790:25-791:4; 1234:13-1236:7).** Garrett Budds, the Land Trust representative who did the inspection, concluded the Point Tract was suitable for conservation; in his estimation it was "replete with natural resource value" and located in an "important watershed" "within the Okatie River." **(R. at pp. 789:2-791:17).**

Pinckney Point's option to purchase the Point Tract expired on February 28, 2013, although ERP gave it until March 11, 2013, to close. **(R. at p. 644:4-7).** Budds presented the proposal for acquisition of the Point Tract to the County's Rural and Critical Land Board three days later on March 14, 2013. Budds told the Board that the County's proposed purchase of Pinckney Point "removes development threat – 70+ residences," commenting that "the County has approved master plans for development of the property." **(Pls. Exs. 36 & 105; R. at pp. 1658-1663 & 1961-1966).** Budds also noted that the purchase could provide for "restoring a natural resource" and "building a regional recreational amenity" or "regional park" **(Pls. Exs. 36 & 105; R. at pp. 1658-1663 & 1961-1966) (R. at pp. 796:4-806:25).** The County Rural and Critical Land Board approved the County's purchase of the Point Tract for $6,950,000. **(R. at p. 806:18-25).** The minutes of the Board's meeting did not refer to the parcel by name or location but only by alphabetical letter, in order to keep its identity a secret. **(R. at pp. 1237:5-1238:7).**

A similar presentation was made in executive session to the Natural Resources Committee of County Council on April 1, 2013. **(Pls. Ex. 107, R. at pp. 1967-1973).** After receiving information in executive session, County Council approved the purchase one week later on April 8, 2013. **(R. at pp. 1236:21-1238:19) (Pl. Ex. 109, R. at pp. 1974-1977).**

The County openly admitted at trial that it purchased the Point Tract for the specific intent of preventing it from ever being a residential development as contemplated by the Settlement Agreement. **(R. at p. 1248:3-4)** (Beaufort County Administrator Gary Kubic testifying that in acquiring the Point "the primary use we wanted was to prevent the development of the property"). The County's actions on the heels of the expiration of Pinckney Point, LLC's option ensured the Road Parcel would become valueless as a gateway to a residential development stunned those involved. A reasonable inference from the proof is that the County would have had no reason to

purchase the Point Tract immediately after the option of its counterparty to the Settlement Agreement expired, if there was not a reasonable likelihood that another developer would have purchased the Point Tract that was entitled for the development of 76 residential lots.[3]

Walter Nester, the lawyer for Road, LLC, who drafted most of the 2011 settlement documents and learned of the sale through a newspaper article was "flabbergasted, shocked, extremely surprised." He even met with County representatives to explain that County could not use the Point Tract for its intended uses given the restrictions on the access imposed by the Settlement Agreement. **(R. at pp. 1105:24-1106:24; 1106:19-1107:11); (R. at pp. 1108:1-1109:1).** After the meeting, he sent a letter dated April 17, 2013, to Josh Gruber of the Beaufort County Legal Department, explaining that the County's proposed action was in conflict with the Settlement Agreement because ". . . the parties in the 4-Party Settlement Agreement agreed that Pinckney Colony Road is private" and "[i]n reliance upon that 4-Party Settlement Agreement, and for the specific purpose of making the road private, Road, LLC acquired the Road Parcel . . . it was never contemplated that Beaufort County would be a potential purchaser of the Point Tract." **(Pls. Ex. 32, R. at pp. 1655-1657).** Nester even specifically warned that "given the history of the litigation regarding access and the settlement" the County's attempt to acquire the Point Tract for conservation may be a breach of the Settlement Agreement. **(Pls. Ex. 32, R. at pp. 1655-1657).**

The Court of Appeals failed to consider any of these material facts about Road, LLC's purchase of the Road Parcel, the reasons for that purchase, and the protections it embedded in the Settlement Agreement. Instead, the Court of Appeals premised its decision on its incorrect

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[3] The County granted Pinckney Point, LLC approval of its concept plan for 76 lots on August 23, 2011. **(R. at pp. 597:18-599:3)** The County's approval of the site-specific development plan created a vested right in Pinckney Point, LLC for a two-year term, subject to five annual one-year extensions. S.C. Code Ann. §6-29-1530(A). The County purchased the Point Tract within the initial two-year term of the vested right.

suppositions that, for all intents and purposes, Pinckney Point, LLC and Road, LCC were one and the same; that Road, LLC's investment depended entirely on whether Pinckney Point, LLC was the developer of the Point Tract (even though the proof was just the opposite – that Road, LLC bought the parcel instead of loaning money to Pinckney Point, LLC to buy it because there was the potential Pinckney Point, LLC, might not be the ultimate developer); and that Road, LLC's only claim of breach of the Settlement Agreement against the County was that it failed to keep its obligation that the road was private.

The Court of Appeals looked only at the Road, LLC's allegations the County breached the express provision in the Settlement Agreement that the road be forever private, holding that "the jury was presented with no evidence Road, LLC was damaged by the County treating [the Road Parcel] as public." **(Opinion at p. 9).** According to the Court of Appeals a "potential breach of the private road clause did not render Developers unable to develop the Point Tract, which Road, LLC asserted caused the $5 million in damages" and "there was no evidence Road, LLC suffered $5 million in damages due to the County's breach of the private road clause." **(Opinion at p. 9).** Continued to interpret the evidence presented at trial, the Court of Appeals found:

> the evidence presented at trial showed Road, LLC did not suffer $5 million in damages because Road, LLC's expert testified that the property was still worth $5 million after the County purchased the Point Tract. Thus, the evidence presented at trial indicated the value of the property did not change.

(Opinion at p. 9). The Court of Appeals limited its holding to the proof of Road, LLC's damages and stated that it is "inconsequential" whether the Settlement Agreement was breached. **(Opinion at p. 10)** (". . . whether the County breached is inconsequential for the disposition of this case.").

The Court of Appeals is correct that Road, LLC asserted that the County's actions breached its express obligation in the Settlement Agreement that the road be forever private, but Court of

Appeals did not consider the inherent jury issue as to whether the County's conduct also violated the County's covenant of good faith and fair dealing implied into the Settlement Agreement. By its very nature, this claim based on an *implied* covenant does not depend on an express provision in the contract that prohibited the County from buying the Point Tract. Nor does this claim depend on the fact that ERP was free to sell the Point Tract to whomever it wanted after Pinckney Point, LLC's option expired. The question is whether the purchase by the County, *rather than a non-party to the Settlement Agreement*, violated the implied covenant of good faith and fair dealing owed by the County, as a party, to Road, LLC under all the circumstances. This inherently factual determination was for the jury based on the proof and reasonable inferences therefrom.

The Court of Appeals also incorrectly held there was no evidence from which a jury could conclude that Road, LLC suffered damages in the amount of $5,000,000 from the County's conduct in purchasing the Point Parcel to make a regional park and keep it from ever being residential development. The County's purchase permanently prevented Road, LLC from selling the Road Parcel to a new residential developer as allowed by the Settlement Agreement. In fact, there were three separate bases of proof to support the $5,000,000 verdict: (1) the 2006 reduction in the amount of the purchase price because of contested access; (2) the January 2011 road purchase agreement between Pinckney Point, LCC and Road, LLC, and (3) the expert testimony of Thomas F. Hartnett, Road, LLC's appraiser. The amount of the jury verdict was well grounded in the proof and not speculative.

APPLICABLE LEGAL STANDARD

"When reviewing the trial court's ruling on a motion for directed verdict or a JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." RFT Mgmt. Co. v. Tinsley &

Adams L.L.P.. 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." Id. (emphasis added). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The appellate court will reverse the trial court only when there is no evidence to support the ruling below. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). "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." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. R. 2000) (citations omitted). In fact, when considering a JNOV, the trial court or appellate court is concerned with the existence of evidence, not its weight. Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh'g denied* (July 13, 2016) (finding that the trial court correctly refused to grant JNOV of an Unfair Trade Practices Cause of Action because evidence existed that could support the verdict).A jury's verdict will not be overturned if **any evidence** exists that sustains the factual findings implicit in its decision. Id.

In the context of a breach of contract case, a trial court order granting JNOV must be reversed when there is any proof that the defendant's actions hampered the plaintiff's efforts to complete their purpose of entering into the contract. See Burns v. Universal Health Services, Inc., 361 S.C. 221, 603 S.E.2d 605 (Ct. R. 2004) (reversing trial court order granting JNOV in case in a claim for breach of the implied covenant of good faith when the evidence presented a jury issue). As explained below, both the Circuit Court and Court of Appeals violated this fundamental standard established by an unbroken line of precedent.

ARGUMENT

I. The Court of Appeals erred and failed to follow precedent in holding that that there was no proof submitted at trial that Road, LLC sustained $5,000,000 in damages based on a select excerpt from the testimony of Road, LLC's expert appraiser, when his testimony taken as a whole supported the jury's verdict and there was other independent proof to support the verdict.

The Court of Appeals usurped the jury's role in basing its holding on the Court's interpretation of one answer by Hartnett to one question. The Court held that the only inference from the testimony of Thomas F. Hartnett was that the Road Parcel was still worth $5,000,000, and, therefore, there was no proof to sustain the amount of damages. In so doing, the Court failed to abide by the long-standing rules that the jury was free to consider the answer in the context of the entirety of that expert's testimony and to disregard that answer if it wanted.

Hartnett, whose qualifications as a real estate appraiser were not contested by the County, testified that the "highest and best use" of the Road Parcel was as the exclusive access to "a proposed ***residential development***" and that "it was worth at least $5 million" if used in that manner. **(R. at pp. 1184:3-5; 1177:11-1178:8)** (double emphasis added). In this portion of his testimony, Hartnett opined the Road Parcel ***was*** worth that amount, not that it still is worth that amount. Hartnett based his valuation of the Road Parcel's highest and best use upon: (1) his own valuation that because of its unique location and essential need as access to a residential development, the Road Parcel was worth at least $5,000,000 to any developer of the Point Tract, **(R. at pp. 1180:24-1182:17)** ("it is the -- it is the bridge to, it is the key to the lock, it is the front door of an incredibly beautiful piece of property that, according to all preformers (sic) I had seen, was going to be worth a lot of money when it was developed."), **(R. at pp. 1184:3-1185:10)**; (2) Pinckney Point, LLC's agreement with Road, LLC to pay $5,000,000 for the purchase of the access for its development of the Point Tract, **(R. at pp. 1178:9-1179:7)**; and (3) that during previous

contract negotiations there had been a $5,000,000 discount for the purchase of the Point Tract when the prospective purchaser was unable to obtain access via the Road Parcel. **(R. at pp. 1183:2-1184:2).** It is clear from Hartnett's testimony that his $5,000,000 valuation is premised upon the Road Parcel *being used as access to a residential development*, which the County first agreed to and then prevented from ever happening.

Even the Court of Appeals admitted this supposition as the basis for Hartnett's opinion on value: "Thomas Hartnett, an expert in land appraisals, testified the Road Parcel was worth $5 million at its highest and best use, which was as an access point ***to a residential development***." **(Opinion at p. 5)** (double emphasis added). It was plainly evident and reasonable for the jury to find that if the County purchased the Point Parcel for a park to prevent it ***from ever being a residential development*** that the County's actions caused $5,000,000 in damages to Road, LLC because the highest and best use will never be realized.

Moreover, it was the province of the jury to determine the meaning of Hartnett's testimony that the Road Parcel was still worth $5,000,000 today in light of his entire testimony. The jury could reject the Court of Appeals' interpretation and even disregard the one sentence relied upon by the Court of Appeals. **(R. at pp. 1185:25-1188:6).** The jury could have looked to the remainder of his testimony that the $5,000,000 minimum value was dependent on the use of the Road Parcel as the exclusive access to a residential development. **(R. at pp. 1193:5-8; 1184:3-5)**.

Instead, the Court of Appeals found that "Road, LLC did not suffer $5 million in damages because Road, LLC's expert testified that the property was still worth $5 million after the County purchased the Point Tract." **(Opinion at p. 9).** The Court of Appeals elaborated on its view of the evidence: "the evidence presented a trial indicated the value of the property did not

change." **(Opinion at p. 9).** That judicial action of deciding what potions of testimony to believe, which ones to reject, how to interpret testimony, and what evidence to consider, violates the province of the jury and the parties' right to a jury trial on factual issues in claim at law for damages. The jury was entitled to accept or reject in whole or in part testimony of any witness, including an expert witness like Hartnett. Smith v. Safeco, 303 S.C. 131, 136, 399 S.E.2d 427, 429 (Ct. App. 1990) ("In weighing conflicting testimony, however, a jury may believe that part of the testimony which convinces it more heavily toward one view of the facts as opposed to another view. The jury is also free to accept a portion of a witness's testimony and reject a portion.").

Furthermore, the decision that the only reasonable inference from Hartnett's testimony is that the Road Parcel is still worth $5,000,000 today is illogical given the balance of Hartnett's testimony and the other evidence presented at trial. Hartnett's testimony that the Road Parcel is still worth $5,000,000 clearly means, or at the very least could have reasonably be construed by the jury to mean, that had the County not breached the Settlement Agreement by purchasing the Road Parcel for a park, it would still be worth $5,000,000. See **(R. at p. 1193:5-8)** (the value of the highest and best use can be realized only if there is "demand" for that highest and best use.).

While the Court of Appeals referred to the precedent that it is entirely up to a jury to weigh a witness's testimony, and that the jury can decide which portions to believe, **(Opinion at p. 9),** the Court of Appeals ignored that precedent and decided to impose its own interpretation on one answer by Hartnett, ignore the rest of this testimony that puts his answer in context, and disregard other testimony outside of Hartnett that supported the amount of the verdict discussed below that the Court of Appeals does not mention, much less address.

Having improperly interpreted and rejected the expert testimony as if it were the jury, the Court of Appeals compounded its error in concluding that "even if the jury ignored Hartnett's

testimony about the Road Parcel's current value, there was no other evidence presented regarding the value of the Road Parcel after the County purchased the Point tract." **(Opinion at p. 10).**[4] In making this erroneous finding, the Court of Appeals ignored the remainder of Hartnett's testimony, discussed above, as well as two entirely separate evidentiary bases for its verdict of $5,000,000 as explained below.

i. The evidence showed when Pinckney Point, LLC purchased the Point Tract in March of 2006, the parties to that sale valued the right of access over the Road Parcel to a waterfront development on the Point Tract at approximately $5,000,000.

At trial, Taylor Bush, a member of Pinckney Point, LLC testified that when Pinckney Point, LLC acquired the Point Tract, the purchase price was reduced by approximately $5,000,000 to account for the risks associated with pending litigation over the available access to the Point Tract via the Road Parcel. See **(R. at pp. 505-506:21-2); (Pls. Ex. 84, R. at pp. 1883-1891)** (Q: "As a result of this controversy over that access . . . was there an adjustment to the purchase price that you all were going to pay for Pinckney Point?" A: "Yes." Q: "And what was that adjustment?" A: "It was approximately five million dollars.") The jury could have inferred and found that Road, LLC's damages were $5,000,000 because in an arm's length sale of the Point Tract, the parties valued the ability to use the Road Parcel as access to a future waterfront residential development of the Point Tract at $5,000,000. The Court of Appeals was required to determine whether "there is any evidence to sustain the factual findings implicit in the jury's verdict . . . ." Hobgood v. Pennington, 300 S.C. 309, 313, 387 S.E.2d 690, 692 (Ct. R. 1989) (emphasis added). The

[4] It is worth noting that the Court of Appeals held there was no proof of ***any*** damages being suffered by Road, LLC, not even in the amount of the $1,300,000 paid by Road, LLC for the Road Parcel for its use as the exclusive access to a high-end waterfront residential development.

reduction in purchase of $5,000,000 constituted such evidence and was not addressed at all in the Opinion.

ii. The purchase contract between Pinckney Point, LLC and Road, LLC, introduced by the County into evidence, called for Pinckney Point, LLC to pay $5,000,000 to Road, LLC to purchase the Road Parcel to provide the 50-foot right of way required by the County for a residential development of 76 lots on the Point Tract.

The jury could have also determined the value of the Road Parcel as the sole access to a residential development, and thereby the damages awarded, based upon the purchase and sale contract entered between Road, LLC and Pinckney Point, LLC on January 14, 2011. **(R. at pp. 1994-2001).** Pinckney Point, LLC agreed to pay $5,000,000 for the Road Parcel at such time as it had all the needed approvals in hand and proceeded with the development of the 76 entitled lots on the Point Tract. **(R. at p. 887:4-22**). Testimony at trial made clear that the Road Parcel was valued at $5,000,000 under this purchase and sale agreement if (and only if) it was used as the sole access to a residential development on the Point Tract – as the parties intended. **(R. at p. 886-887: 24-3).** The Court of Appeals completely overlooked this other alternative evidence that the jury may well have considered in calculating Road, LLC's damages at $5,000,000.

In sum, the jury had multiple evidentiary bases for determining that use of the Road Parcel as the sole access to a 76-lot waterfront development that the County purposely thwarted was worth at least $5,000,000. The jury also had an evidentiary basis for finding that the Road Parcel had nothing more than nominal value after the County's purchase of the Point Tract for a park. The County put up proof and made the argument at trial that it and the public had unlimited vehicular access to the Point Tract as a park under a previously existing 20-foot easement over the unimproved dirt road as well as a prescriptive easement. **(R. at pp. 755:17-756:22; 816:25-820:5; 1146:20-1147:21; 1148:17-1151:2; 1360:15-1364:23).**

The jury was not "left to speculate as to what damages Road, LLC suffered," as held by the Court of Appeals. **(Opinion. at p. 10).** To the contrary, the jury was presented with ample evidence, by way of testimony and exhibits, to determine that Road, LLC suffered $5,000,000 in damages as a result of the County's intentional conduct to prevent the Point Tract from ever being a residential development.

II. The Court of Appeals committed error by failing to follow precedent when it failed to address the principal argument of Road, LLC that the County breached the covenant of good faith and fair dealing implied in the Settlement Agreement by purchasing the Point Tract for the specific purpose of permanently preventing its residential development.

The Court of Appeals treated the express provision in the Settlement Agreement that the road be permanently private as the sole basis for Road, LLC's action for breach of contract. **(Opinion at p. 9).** The Court of Appeals erred in failing to consider the proof before the jury that the County breached the implied covenant of good faith and fair dealing in acquiring the Point Tract to prevent the exact development that was contemplated by the Settlement Agreement and the damages ensuing to Road, LLC from this deliberate action. Without any objection from the County, the Circuit Court charged the jury on this basis of liability. **(R. at p. 1540:9-20).**

The Court of Appeals went so far as to selectively quote from Road, LLC's counsel's introductory remarks in his closing argument explaining one aspect of Road, LLC's claim was that the County had breached its promise that the road would be a private road by treating it like a public road:

> In their closing argument, Developers asserted: "[T]he settlement agreement clearly required that the road was private. Everybody agreed it was private; no dedication; no public use. Judge Dukes entered a court order; we looked at it two times; this road is private. And the County has not treated it as private." They further argued:
>
> > As to Road, LLC, what is the breach there? Well, it's that the County is treating it like it's a public road, and the private property is public property, they're contending. They haven't gated it. Their testimony

> was they had not gated it. The testimony was there were no signs saying you cannot come here. The testimony was that they treat it like a public road.

(Opinion at pp. 5-6).

The Court of Appeals completely omitted any reference to counsel's next comment to the jury immediately after the first of the above two quotes:

> The second thing [as to the claims of Road, LLC] is the same thing as to Pinckney Point, and that is that the County went out and negotiated and purchased the Point parcel, thereby, ***preventing this two-tenths of a mile from being an access to a residential subdivision as contemplated in the settlement agreement.***

(R. at p. 1462) (double emphasis added).

The Court of Appeals erred in failing to address not just the claim but all the evidence supporting it discussed above. In so doing, the Court of Appeals violated settled principles that the proof and the reasonable inferences therefrom are to be considered in the light most favorable to the plaintiff in considering a defendant's motion for JNOV.

III. The Court of Appeals erred in displacing the jury and finding that Road, LLC's damages, if any, were the result of Pinckney Point, LLC's inability to close on the re-purchase of the Point Tract, when there was abundant evidence that Road, LLC would likely have had the opportunity to sell the Road Parcel to another residential developer for at least $5,000,000 if the County had not intentionally purchased the Point Tract for a park to keep that from ever happening.

As discussed, the Court of Appeals conflated the claims of Pinckney Point, LLC and Road, LLC treating Road, LLC as the developer, when it was not, and treating the $5,000,000 value of the Road Parcel as entirely dependent on Pinckney Point's development of the Point Tract, when it was not.

Road, LLC's purchase of the Road Parcel as part of the overall settlement with the County was structured to place it in the position where *any* developer of the Point Tract would need to buy the Road Parcel, not just Pinckney Point, LLC. Road, LLC did this to protect it in the event of Pinckney Point, LLC's financial failure because it was then in default on its mortgage payments.

(R. at pp. 883:24-884:2; 885:2-23; 886:15-887:3; 888:21-889:1); (R. at pp. 888:21-889:1; 889:5-8). Any development of the Point Tract would require a 50-foot improved right of way instead of the existing 20-foot easement over an unimproved dirt road:

> Q. Would this arrangement have given Road, LLC, any leverage or bargaining strength over another owner of the Point parcel?
> A. Yes, it would.
> Q. Did that work to Road's benefit?
> A. It should have.
> Q. If there were another purchaser who desired to develop the Point parcel as a residential subdivision, what would you expect that they would do, have to do?
> A. Literally, all roads go over Road, LLC's, property, and any acquirer of the Pinckney tract would need to purchase or acquire the right-of-way across the Road, LLC, tract.

(R. at pp. 888:21-889:1-8)

The evidence supported the reasonable inference that even ERP believed the Point Tract very well would be developed by an entity other than Pinckney Point, LLC, by requiring Pinckney Point, LLC to assign it all the development permits and approvals, to update ERP periodically on the status of the permits and approvals, and to sign a new assignment to ERP if a new development permit were obtained. **(R. at pp. 1799-1800, 1817, and 1820-1826**; see also **(R. at pp. 1657; 694; 752:2-22; 2099).** This evidence supports the reasonable inference that ERP was planning to sell the Point Tract to a residential developer if the County had not immediately stepped in to buy the Point Tract for a park; otherwise, it would not have gone to such great lengths to make sure it held all the approvals and permits for the residential development of the Point. Testimony that the development of the Point Tract would render $55 million to $56 million in gross sales revenues was further proof the jury could consider in finding that it would be an attractive target for another

residential developer who would have paid $5,000,000 for the Road Parcel to obtain the needed 50-foot right of way. **(R. at p. 1183).**

Moreover, the jury was entitled to consider the County's purchase was designed to prevent a development, even after Pinckney Point, LLC no longer owned Point Tract, as further evidence of the reasonable likelihood the Point Tract would have been developed by another development entity if not for the County's preemptive purchase. Otherwise, the County would not have decided the only way it could stop a development was to buy it immediately. The internal presentations that were made to the County showing that development entitlements had been obtained also support the finding that the Point Tract would have ultimately ended up in the hands of a residential developer who would have had to purchase the Road Parcel to meet County development standards. **(R. at pp. 1658-1663; 1967-1973).**

While Road, LLC would have been able to realize the highest and best use of the Road Tract if *anyone* developed the Point Tract, the County ensured that would never happen when it acquired the Point Tract for the purpose of preventing that from happening. There was substantial evidence in the record that to support the finding by the jury that the County's actions were a breach of the covenant of good faith and fair dealing and Road, LLC's damages were suffered as a result of that breach.

There is no dispute that the purpose of the Settlement Agreement was to facilitate the development of the Point Tract—the Settlement Agreement and its many exhibits are replete with other explicit references to the residential development of the Point and how the settlement would help accomplish this development. See **(Pls. Ex. 78, R. at pp. 1747-1748)**; **(Pls. Ex. 78, at Ex. B, ¶4, R. at p. 1758) (Pls. Ex. 78, Ex. E, R. at pp. 1766-1771)**. Further, *the County's own representatives* agreed at trial one of the purposes of the settlement was for the County to facilitate

the residential development of the Point and the County's later purchase of the Point for a park frustrated that purpose. See **(R. at pp. 1369:17-1371:20); (R. at pp. 1232:25-1234:1); (R. at pp. 1371:20-1372:1).** The evidence to this effect was overwhelming as demonstrated from the note from the jury during its deliberation that "The settlement agreement, Number 78, is with the County and PPLLC, and Road, LLC, et. al. [] with the purpose of developing the land." **(R. at p. 1552:2-12); see also, (Ct. Ex. 5, R. at pp. 1626-1627).**

The law implies and imposes obligations on the parties not to frustrate the purpose of the contract, not to impede the performance of the contract, and to do those things that according to reason and justice should be done to carry out the purpose for which a contract was made. See generally, Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 485, 544 S.E.2d 279, 284 (Ct. R. 2000), aff'd as modified sub nom., 352 S.C. 437, 574 S.E.2d 726, (2002) (quoting 17A C.J.S. Contracts § 328, pages 282-284); Columbia East Associates v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct. R. 1989); Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966); see also, **(R. at pp. 1540:23-1541:25)** (Circuit Court's jury charge on breach of contract); **(R. at p. 1540:9-20)** (Circuit Court's jury charge on implied covenant of good faith and fair dealing). Yet, the County did just that – it bought the Point to keep it from ever being developed.

The Opinion never recognizes the evidence that Road, LLC's realization of the highest and best use of the Road Parcel through sale to a residential developer did not depend entirely on Pinckney Point, LLC's developing the Point Tract. **(Opinion at p. 7)** (explaining that the Circuit Court, which it affirmed, "held the loss of profit was too speculative because Road, LLC's profit was dependent on Pinckney acquiring an investor to repurchase the Point Tract."). There is abundant proof for the jury to have found that the County breached the implied covenant of good

faith and fair dealing by purchasing the Point Tract to prevent it from ever being a residential development and that this action caused a $5,000,000 financial loss to Road, LLC.

CONCLUSION

Because of these fundamental errors in the decision of the Court of Appeals, including its failure to consider all the evidence and bases of liability in the light most favorable to Road, LLC when considering the Motion for JNOV, as required by settled precedent, Road, LLC respectfully requests this Court grant its Petition.

WALKER GRESSETTE FREEMAN LINTON, LLC

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June 14, 2021
Charleston, South Carolina

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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

Carmen T. Mullen, Circuit Court Judge
Case No. 2013-CP-07-01341

Appeal Case No. 2017-001736

Road, LLC and Pinckney Point, LLC
of whom Road, LLC is the ..... Petitioner,

v.

Beaufort County, a political subdivision of the State of South Carolina,.....
.....Respondent.

PROOF OF SERVICE

I certify that on **June 14, 2021**, I have served **ROAD LLC'S PETITION FOR WRIT OF CERTIORARI AND PROOF OF SERVICE**, by electronic mail, in accordance with the May 29, 2020, order of the Supreme Court, Appellate Case No. 2020-000447 at § (g)(3) on counsel of record as follows:

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Cc:	Trenholm Walker; John Linton, Jr.
Bcc:	Nancy Jane Dennis
Subject:	Road LLC v Beaufort County
Date:	Monday, June 14, 2021 6:07:00 PM
Attachments:	06-14-21 Petition for Writ.pdf 06-14-21 LT Clerk Sup Ct.pdf 06-14-21 Proof of Servce.pdf

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Attached please find Petition for Writ of Certiorari and Proof of Service by electronic mail only.

Nancy Jane Dennis
Paralegal

WALKER
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June 14, 2021

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Hon. Daniel E. Shearouse
Clerk of Court for S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Road, LLC v. Beaufort County
Appellate Case No. 2017-001736
WGFL File 7087.001

Dear Mr. Shearouse:

We are filing and serving Appellant's Petition for Writ of Certiorari and Proof of Service by electronic mail only, with a copy to the Court of Appeals. Pursuant to the Court's Amended Order of May 29, 2021 regarding operation of the Appellate Courts during the Coronavirus Emergency, we will not be filing an Appendix unless requested by the Court.

Enclosed with this correspondence is the filing fee of $250.

Thank you very much for your courtesies in this matter

Sincerely,

WALKER GRESSETTE FREEMAN & LINTON, LLC

John P. Linton, Jr.

Enclosure (Check)
c: Hon. Jenny Abbott Kitchings
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Allen Mattison Bogan, Esq.
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