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

RECEIVED
MAY 23 2018
SC Court of Appeals

Appeal Case No. 2017-001736

Road, LLC and Pinckney Point, LLC

of whom Road, LLC is the ....Appellant,

v.

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

BRIEF OF APPELLANT

May 21, 2018

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Appellant, Road, LLC

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 ....Appellant,

v.

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

BRIEF OF APPELLANT

May 21, 2018

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Appellant, Road, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in holding there was insufficient evidence, even when taken in the light most favorable to Appellant, to sustain the jury's verdict of breach of contract in favor of Appellant when the evidence showed, among other things, that Beaufort County's actions frustrated the express purpose of the parties' written contract?

II. Did the circuit court err in holding there was insufficient evidence, even when taken in the light most favorable to Appellant, to sustain the jury's award of $5,000,000 in damages where the circuit court relied solely on an isolated answer of Appellant's expert taken out of context and ignored the other significant record evidence sustaining the amount of the award?

III. Did the circuit court err in overturning the jury's damages verdict as "too speculative" when evidence at trial showed that the damages amount was reasonably certain and the damages were reasonably certain to be suffered as a result of Beaufort County's breach of contract?

IV. Did the circuit court err in overturning the jury's verdict for the alternative ground that the contract at issue was a "nullity," without any supporting legal authority or evidentiary basis for this conclusion?

STATEMENT OF THE CASE

Appellant, Road, LLC, along with Plaintiff Pinckney Point, LLC filed this action on May 21, 2013, asserting several causes of action seeking declaratory and injunctive relief against Beaufort County ("Respondent" or "County"). Road, LLC and Pinckney Point, LLC challenged the County's pending purchase of approximately 229 acres previously owned by Pinckney Point, LLC, known as Pinckney Point (the "Point Tract") that Pinckney Point, LLC intended to develop as a low density residential community. **(Compl., R. pp. 22-32).** They also sought a determination that the County's intended use of a private dirt road on land owned by Road, LLC (the "Road Parcel"), that is the sole vehicular access to the Point Tract, violated a settlement agreement they entered in 2011 with the County and other parties as well as a court order decreeing that the road was private. **(Compl. R. pp. 22-32; R. p. 492:5-6)**. The Complaint also named as a defendant

Equity Resource Partners, III, LLC ("ERP"), the then-owner of the Point Tract that had recently entered a contract to sell the Point Tract to the County.

The County answered on May 31, 2013, asserting multiple defenses. **(Answer, R. pp. 33-40)**. After the County acquired the development property from ERP on May 28, 2013, Road, LLC and Pinckney Point, LLC voluntarily dismissed ERP as a Defendant. See **(Def. Ex. 23, R. pp. 2102-2115)**; **(Voluntary Dismissal dated 7/31/2013, R. p. 21).**

Road, LLC and Pinckney Point, LLC filed an Amended Complaint on July 25, 2014, to assert their separate damages claims against the County for breach of the 2011 settlement agreement and requesting a jury trial. **(Am. Compl., Fifth Cause of Action, R. pp. 50-52).** The County Answered the Amended Complaint on August 19, 2014, asserting multiple defenses including statute of limitations, absence of standing, and the South Carolina Tort Claims Act. **(Answer to Am. Compl., R. pp. 155-163).**

The case proceeded to trial before the Honorable Carmen T. Mullen, Circuit Judge. The sole cause of action tried to the jury was the fifth cause of action seeking damages by both Pinckney Point, LLC and Road, LLC for breach of contract; the remaining causes of action for equitable relief were tried to the Court.

At the conclusion of the trial on May 2, 2016, the jury returned a verdict for $5,000,000 against the County on Road, LLC's cause of action for breach of contract. **(Verdict Form 5/2/16, R. p. 1566).** The jury ruled against Pinckney Point, LLC, returning a verdict in favor of the County on Pinckney Point, LLC's cause of action for breach of contract. **(Verdict Form 5/2/16, R. pp. 238-248)**. The circuit court did not rule on the equitable causes of action at the end of the trial and took them under advisement.

On May 12, 2016, the County filed a Motion for Judgment Notwithstanding the Verdict. **(Mot. JNOV 5/12/16, R. pp. 282-299)**. On May 26, 2016, Appellant filed its Memorandum in Opposition to the County's motion. **(Memo. Opp. Mot. JNOV 5/26/16, R. pp. 1-15)**. The circuit court held a hearing on the County's post-trial motion on August 9, 2016. Eleven months later the circuit court entered an Order granting the County's motion on July 18, 2017 (the "Order"). **(Order dated 7/18/17, R. pp. 1-15)**. Appellant timely served and filed a Notice of Appeal on August 17, 2017.

STATEMENT OF FACTS

OVERVIEW

Road, LLC appeals the Order and seeks to have this Court reinstate its jury verdict against the County for breach of contract awarding damages of $5,000,000.

The Road Parcel, owned by Road, LLC, is a .85-acre tract on an isthmus serving as the sole vehicular access to the Point Tract, a prime, 229-acre development parcel located at the confluence of the Okatie and Colleton Rivers in Beaufort County. See **(Pls. Ex. 114, R. p. 1981)** (Aerial Photograph). This unpaved vehicular access across the Road Parcel is the final .2 mile of Pinckney Colony Road leading to the Point Tract. See **(Pls. Ex. 87, R. p. 1892).**

Road, LLC bought the Road Parcel in 2011 as a part of a multiparty settlement that ended many years of litigation and permitting disputes related to Pinckney Point, LLC's intended development of the Point Tract. It funded the settlement by paying $1,300,000 to acquire the Road Parcel based on assurances, conditions, and protections in the written multiparty settlement agreement (the "Settlement Agreement"). These important settlement terms included the obligation of Pinckney Point, LLC (the then-owner and intended developer of the Point Tract) to later buy the Road Parcel from Road, LLC for $5,000,000 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. Road, LLC and the other parties to the Settlement Agreement structured its terms in a manner that would require *any* future developer of the Point Tract, not just Pinckney Point, LLC, to purchase the Road Parcel for a similar amount. The County, Road, LLC, and Pinckney Point, LLC were signatories to the Settlement Agreement along with other parties.

The purpose of the Settlement Agreement was to remove the principal impediments to obtaining the necessary approvals and permits for the development of the Point Tract into residential lots and to facilitate the later sale of the Road Parcel to the residential developer. Rather than honor the purpose of the Settlement Agreement, County Council voted to enter a contract to purchase the Point Tract from ERP for a public park facility and county park headquarters as soon as Pinckney Point had to forego its contractual rights to the Point Tract for economic reasons. The County openly admits it purchased the Point Tract for the express purpose of preventing the Point Tract from ever being a residential development as contemplated by the Settlement Agreement.

Upon learning of the County's intent to acquire the Road Parcel, the attorney for Road, LLC, immediately warned the County in an in-person meeting, followed by a letter, that the Settlement Agreement prohibited the County's intended use of the Road Parcel and that its actions could violate the terms of the Settlement Agreement. Instead of refraining from the transaction, the County barreled ahead, entered a purchase contract with ERP, and then closed, all within 50 days of approving the purchase. The County proceeded even in the face of this action that was filed a week before the closing.

The County's purposeful actions to stifle the residential development of the Point Tract, which the Settlement Agreement with the County was entered to facilitate, prevented Road, LLC from ever realizing the benefit of its bargain in entering the Settlement Agreement. Evidence at trial valued the Road Parcel as worth at least $5 million – in its highest and best use as the sole access to the planned residential development on the Point Tract.

As described below, the evidence and law fully support the jury's verdict of $5,000,000. The unanimous verdict of the twelve Beaufort County jurors against their County should be reinstated.

THE EVIDENCE AT TRIAL

In February 2005, Pinckney Point, LLC entered a contract with PPF, LLC, the then-owner of the Point Tract, to purchase the Point Tract, for the purpose of developing the Point Tract as an upscale, low-impact, low-density residential community of one unit per every three acres. **(R. pp. 506:6-13; 509:10-24; 867:16-24; 1046:11-19); (Pls. Ex. 84, R. pp. 1883-1891).** PPF, LLC had used the Point Tract over recent years as a sod farm. **(R. pp. 492:18-20; 867:21-24).**

Pinckney Point, LLC's troubles started soon after it entered the contract of sale. John David Pinckney, a Pinckney family member, who then owned the Road Parcel, placed fence posts across the dirt road, blocking the vehicular access to the Point Tract. In response, the County brought a lawsuit on November 22, 2005, against him and owners along the dirt road seeking a determination that the dirt road across the Road Parcel was a public road (the "Road Case"). **(R. pp. 496:15-504:25; Pls. Ex. 94, R. pp. 1933-1937).**

PPF, LLC, the seller, initially sought $15,500,000 for the Point Tract, but ultimately reduced the purchase price by approximately $5,000,000 because of the dispute over entitlement to use the dirt road across the Road Parcel as vehicular access for the residential development to be on the Point Tract. **(R. pp. 495:9-13: 505:21-506:2; 652:12-653:7; 691:20-24; 953:19-954:8).**

After obtaining this reduction in the purchase price, Pinckney Point, LLC closed on the purchase of the Point Tract on March 31, 2006, for $10,600,000. **(R. p. 508:2-7); (Pls. Ex. 84, R.**

pp. 1883-1891). Pinckney Point, LLC paid $5,700,000 of its own funds at closing towards the purchase price and funded the balance with a portion of an acquisition and development loan of approximately $8,500,000 from BB&T. **(R. pp. 879: 25-880:13).** After closing, Pinckney Point, LLC became a party to the Road Case. **(R. p. 505:1-5).**

At the same time as it was litigating its right to access in the Road Case, Pinckney Point, LLC proceeded to seek all permits and approvals necessary to develop the Point Tract into 76 high end lots. **(R. pp. 510:5-6; 1047:3-21).** Pinckney Point, LLC also became embroiled in two other lawsuits involving the County that impaired its ability to develop the Point Tract.

The two legal proceedings were (i) an appeal by Pinckney Point, LLC to the circuit court of the denial of a variance by the Beaufort County Zoning Board of Appeals ("ZBOA") (the "Variance Appeal") and (ii) the County's appeal to the Administrative Law Court ("ALC") of dock permits issued by DHEC to Pinckney Point, LLC for the future lots on the Point Tract (the "Dock Appeal").

The Variance Appeal arose in 2007 from Pinckney Point, LLC's plan to move the driveway on the Point Tract from its existing location where it ran parallel to the marsh through more than 3483 feet of the river buffer to the family's old homesite to a new location that would cross the river buffer for only 130 feet. **(Pls. Ex. 78, R. p. 1758).** Pinckney Point, LLC intended to re-vegetate the existing entrance driveway in river buffer once the newly located entrance driveway was established. **(Pls. Ex. 78, R. p. 1758).** A variance was required to allow the new location of the entrance driveway even though it would diminish the penetration of the river buffer by 95%. **(Pls. Ex. 9, R. p. 1633; Ex. 10, R. p. 1634; Ex. 78, R. p. 1758; Ex. 112, R. p. 1979 & Ex. 113, R. p. 1930).** The ZBOA denied the variance request causing Pinckney Point, LLC to appeal the decision to the circuit court. **(R. pp. 528:21-534:20).**

Even though the County's ZBOA had denied the variance request, the County insisted as a condition of Pinckney Point, LLC's proceeding with the development that it both obtain the variance for the installation of the utilities as well as the driveway's new location in the river buffer and obtain a 50-foot access easement across the Road Parcel to insure access ***to*** the Point Tract. **(R. pp. 540:21-543:10; Pls. Ex. 11, R. p. 1635; Def. Ex. 2, R. pp. 1991-1993).**

In the Dock Appeal, the County challenged Pinckney Point, LLC's dock permits. The ALC upheld the dock permits subject to certain modifications and ruled, among other things, that the County did not have standing to contest Pinckney Point, LLC's dock permits. The County appealed the ALC's ruling to the South Carolina Court of Appeals **(R. pp. 545:13-17; 546:18-547:6; 556:4-9; 584:6-19) (Pls. Ex. 14, R. pp. 1636-1646).**

Meanwhile, the trial of the Road Case occurred in 2008 before the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County. Instead of immediately ruling, Judge Dukes encouraged the parties to settle the dispute. **(R. pp. 543:11-545:10).** Pinckney Point, LLC negotiated with Agnes Pinckney, the wife and custodian of John David Pinckney, the owner of the Road Parcel, finally reaching a settlement in 2009. **(R. pp. 556:16-558:5) (Pls. Ex. 74, R. pp. 1697-1723).** Under the terms of that settlement agreement, Pinckney Point, LLC agreed to pay $1,300,000 to John David Pinckney for a 50-foot-wide easement over the existing dirt road that would allow the residential development of the Point Tract, and made some concessions with regard to the specifics of the residential development. **(R. pp. 561:25-562:12; 558:16-23; 560:5-6; 559:21-23)** (the number of community docks in the proposed development limited to four); **(R. pp. 560:24-561:2)** (development would be a gated community); **(R. p. 561:5-9)** (no off-site gravity sewer would be utilized for the development); **(R. p. 561:10-12)** (Beaufort-Jasper to supply water); **(R. p. 561:13-19)** (storm water); **(Pls. Ex. 74, R. pp. 1697-1723).**

On August 2, 2010, Pinckney Point, LLC entered a separate settlement of the Road Action with Dorothy "Dot" Gnann, whose property abutted the Road Parcel adjacent to the Point Tract. **(Pls. Ex. 75, R. pp. 1724-1735).** Pinckney Point, LLC agreed to pay Gnann $215,087 in the future in exchange for 30 feet of her frontage abutting the Road Parcel. **(Pls. Ex. 75, R. pp. 1724-1735).** Pinckney Point, LLC desired the additional land from Gnann to have more room for the widening of the new road and other improvements it planned to build over the Road Parcel, thereby avoiding having to build a bulkhead against the marsh side of the road. **(R. p. 564:3-12) (Pls. Ex. 75, R. pp. 1724-1735).** Payment was not due Gnann until the earlier of the closing of a loan by Pinckney Point, LLC for the development of the Point Tract or four (4) years from the date of the settlement. **(Pls. Ex. 75, R. pp. 1724-1735).** The settlement with Gnann also required Pinckney Point, LLC to locate the entrance gate so that her lot was behind it and to provide her a boat slip at the first community dock it constructed. **(Pls. Ex. 75, R. pp. 1724-1725); (R. p. 567:7-25).**

Pinckney Point, LLC did not have $1,300,000 on hand to fund the settlement to acquire the access easement across the Road Parcel. **(R. p. 568:16-20).** BB&T refused to lend Pinckney Point, LLC the money to buy the easement and accomplish the settlement, forcing it to look for other sources to make the payment. **(R. pp. 654:22-655:9; 883:10-884:2).**

Pinckney Point, LLC ultimately found an investor willing to make the payment but unwilling to make it on the terms negotiated with Agnes and David Pinckney and unwilling to secure the investment with the property of Pinckney Point, LLC in light of the risk of possible foreclosure by BB&T. **(R. p. 885:4-23).** The investor would make the payment only if the Road Parcel was conveyed to it and if there was an array of other protective terms that included limiting the scope and width of Pinckney Point, LLC's easement to a 20-foot unimproved dirt road so that Pinckney Point, LLC or any other developer of the Point Tract could not proceed with the residential development of the Point Tract, which required a 50-foot improved right of way, without purchasing the Road Parcel. **(R. pp. 886:15-887:3).** The investor created Road, LLC to make the payment and hold title to the Road Parcel until Road, LLC sold it to the developer of the Point Tract. **(R. p. 885:16-18).**

As part of the deal structure that would assure the purchase of the Road Parcel at the time the Point Tract was developed, Road, LLC entered into a Purchase and Sale Agreement for Pinckney Point, LLC to purchase the Road Parcel from Road, LLC for $5,000,000 to assure the needed vehicular access when it was ready to proceed with the actual development. **(Def. Ex. 3, R. pp. 1994-2001); (R. p. 887:4-22**). Road, LLC structured the transaction in this manner for it to be in an advantageous position regardless of who ultimately developed the Point Tract. **(R. 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. 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."). Road, LLC's investment was premised upon the dirt road being private and the Point Tract being developed as a residential development, as stated in the Settlement Agreement. **(R. pp. 885:2-23**; **888:21-889:1).**

Because of the terms and conditions imposed by Road, LLC, Pinckney Point, LLC had to amend its settlement agreement with Agnes and John David Pinckney from specifying a 50 foot easement across the Road Parcel to requiring its outright sale. (**Pls. Ex. 76, R. pp. 1736-1744; R. pp. 582:22-583:11**).

As a result of Road, LLC's willingness to purchase the Road Parcel on these terms and conditions, Pinckney Point, LLC, Agnes and John David Pinckney, Gnann, and the County were able to reach a global settlement to end all litigation in a manner that would allow the development to continue through the permitting process. In January of 2011, the litigants, including the County, and Road, LLC entered into the written global Settlement Agreement to end over five years of litigation. See **(Pls. Ex. 78, R. pp. 1745-1795); (R. p. 1065:12-21).** The County's breach of the inclusive Settlement Agreement is the basis for Road, LLC's damages claim decided by the jury. **(Pls. Ex. 78, R. pp. 1745-1795).**

In addition to incorporating the two separate settlements entered by Pinckney Point, LLC with Gnann and Agnes and David Pinckney, respectively, the Settlement Agreement contained the terms of the settlement between the County and all the other parties. **(Pls. Ex. 78, R. pp. 1745-1795).** Among other things, the Settlement Agreement provided for the resolution of the Road Case and the Variance Appeal on terms favorable to Pinckney Point, LLC and Road, LLC. Simultaneously with the execution of the Settlement Agreement, the County and Pinckney Point, LLC, also entered a separate settlement agreement resolving the Dock Appeal. That settlement included Pinckney Point, LLC's agreement to vacate the order holding the County did not have standing to challenge the dock permit, which the County had appealed and was very interested in setting aside so that it would not be prevented from challenging other dock permits in the future. **(Pls. Ex. 14, R. pp. 1634-1646; Def. Ex. 5, R. pp. 2042-2085) (R. p. 668:12-25).**

The intent and the effect of the Settlement Agreement were to end all litigation and allow Pinckney Point, LLC to complete the permitting process with the County for the residential development of the Point Tract. **(R. pp. 571:14-16; 593:18-594:1; 594:18-24; 883:14-24)** (Kunkel explaining that it would have made sense for BB&T to loan the $1,300,000 to acquire the

Road Parcel as part of the Settlement Agreement because the development would "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. p. 1108:7-11)** (Nester stating that he was "surprised" that the County contracted to purchase the Point Tract "after the negotiations that we had undertaken to have the property developed"). The settlement of the Road Case was structured around the parties' agreement that the unpaved portion of Pinckney Colony Road on the Road Parcel was deemed by agreement and court order to be private and that the public would have no rights of use. **(R. pp. 587:1-14; 885:19-23); (Pls. Exs. 78 & 97; R. pp. 1745-1795 & 1938-1941)**. Also, critical to the settlement was the sale of the Road Parcel by Agnes Pinckney (as conservator of John David Pinckney) to Road, LLC for $1,300,000. <u>See</u> **(Pls. Ex. 74, R. pp. 1697-1723; Ex. 88, pp. 1893-1898; & Ex. 89, pp. 1899-1902) (R. pp. 1072:17-1073:22)** (Nester discussing deeds from Pinckney to Road, LLC).

Road, LLC, in turn, agreed to grant a limited 20-foot unimproved access easement to the adjoining owners and Pinckney Point, LLC. *See* **(Pls. Ex. 81, R. pp. 1848-1865)** (Access Easement Agreement between Pinckney Point, LLC and Road, LLC, LLC); **(R. pp. 1078:11-19; 1079:2-9).** The unimproved 20-foot access easement was insufficient access for a residential development. Under the County's development standards, the subdivision and residential development of the Point Tract required a 50-foot improved right-of-way. **(R. p. 1119:15-24; 1303:13-16).** John Kunkel explained the reasons Road, LLC insisted the terms of Settlement Agreement provide that Road, LLC grant only an unimproved 20-foot easement to Pinckney Point, LLC for access to the Point Tract at the time of settlement:

> Q What was worked out with respect to an easement?
>
> A There remained a twenty-foot easement across the property, which will allow legal access to the Pinckney Point tract.

Q Was it sufficient to allow the development of the Point parcel for the 76 lots?

A No, it was not. And the intention was, once Pinckney Point, LLC, received the remaining permits and approvals to develop the site, that, at that time, Pinckney Point, LLC, would pay Road, LLC;, and acquire the road parcel, combining it back with Pinckney, and then, have sufficient access, which was -- fifty feet is necessary for the intended improvements for Pinckney Point's project.

(R. pp. 886:15-887:3).

The Settlement Agreement entered by the County specifically referred to Road, LLC's later sale of the Road Parcel to Pinckney Point, LLC: "Road, LLC, by a separate agreement with PPLLC (the "Road Agreement"), has agreed to convey either the Road Parcel to PPLLC [Pinckney Point, LLC] or an easement for right-of-way not less than fifty feet (50') wide to PPLLC upon payment of certain consideration described in said Road Agreement." **(Pls. Ex. 78, R. p. 1748)**. The County entered into evidence the agreement by Pinckney Point, LLC to buy the Road Parcel from Road, LLC for $5,000,000. <u>See</u> **(Def. Ex. 3, R. pp. 1994-2001).**

In the Settlement Agreement, the County agreed not only to grant the requested variance and to eliminate the need for any additional variances for the future improvements to the Road Parcel but also that these concessions were specifically to further the development of the Point Tract as contemplated in the Settlement Agreement:

> To the extent a variance shall be required from the river buffer and river setback requirements of Section 106-1845 of the ZDSO for the construction of the Road Parcel **and utility infrastructure for the development of the Point Tract as contemplated herein**, Beaufort County hereby agrees that such variance is hereby approved . . . so long as any encroachment into the Buffer or Setback is minimized to the extent reasonably possible.
>
> * * *
>
> Beaufort County agrees that said Right-of-Way provides sufficient access to and from the Point Tract **for the development thereof** in accordance with the Beaufort County Zoning and Development Standards Ordinance ("ZDSO"). PPLLC agrees that such Right-of-

> Way **is required for the development of the Point Tract <u>as contemplated herein.</u>**

(Pls. Ex. 78, R. p. 1747-1748) (emphasis and double emphasis added). <u>See</u> <u>also</u>, **(Pls. Ex. 78 at Ex. B, R. pp. 1759)** ("PPLLC shall not be required to install the infrastructure described herein and shall have the right to use Pinckney Colony Road in its condition as of the date of the Agreement to access the Point Tract for and until such time as the construction of the subdivision infrastructure, including but not limited to roads, lakes, utility infrastructure and amenity areas is completed, it being understood that there is only one point of access to the Point Tract for motor vehicles, being Pinckney Colony Road. . . ."); **(R. pp. 1369:17-1371:20)** (Josh Gruber of the County discussing that the settlement language contemplated the development of the Point Tract as a residential development); **(R. 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. 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.).

Additionally, the Limited Warranty Deed and Quitclaim Deed conveying the Road Parcel to Road, LLC that were exhibits to the Settlement Agreement imposed an explicit deed restriction limiting use of the road to those uses associated with a private residential community:

> AND ALSO SUBJECT TO a restriction that the property conveyed herein may be used only as a right of way or other purpose associated therewith including but not limited to landscaping, parking, drainage, installation of utilities except, however, no gravity sewers, or any other purpose ***necessary and appropriate for an entrance area to a private residential community***.

(Pls. Ex. 78, at Ex. E, R. p. 1768) (double emphasis added). <u>See</u> <u>also</u>, **(Pls. Ex. 88 & 89, R. pp. 1883-1898 & 1899-1902)**.

In keeping with one of Road LLC's main conditions for paying $1,300,000, the County specifically agreed with the other parties that the road would forever be a private road: "Subject to the approval by Beaufort County of the plans to improve the roadway that is the subject of the Road Action and the Variance Action, ***the parties hereto agree that the Road Parcel is and shall be a private road for the use and benefit of those parties described in the Right Of Way and Easement Agreement [between Pinckney Point, LLC and Road, LLC], hereinafter defined.*** " **(Pls. Ex. 78, R. p. 1747)(double emphasis added).** Exhibit I to the Settlement Agreement was the consent order dismissing the Road Case. This consent order decrees "[t]hat the unpaved portion of Pinckney Point Road is a private road." **(Pls. Ex. 78, Ex. I, R. pp. 1786-1788).** The consent order was executed, signed by the master in equity, and filed. **(Pls. Ex. 97, R. pp. 1938-1941); (R. p. 587:7-14).**

Because of the years of delay caused by the assorted litigation, Pinckney Point, LLC's approximately $8,000,000 loan became due to BB&T. **(R. pp. 587:15-588:1).** BB&T initiated foreclosure proceedings in early 2010. **(R. pp. 588:2-12; 960:3-5).** Before the foreclosure proceedings were concluded, BB&T sold the note and mortgage to ERP. **(R. p. 588:13-22).** Taylor Bush and John Kunkel traveled to Atlanta to meet with ERP and eventually worked out an agreement that was entered in December 2011. **(R. pp. 588:23-590:2); (Pls. Ex. 79, R. pp. 1796-1846).** The agreement with ERP included a deed of the Point Tract in lieu of foreclosure, with an option for Pinckney Point, LLC to buy back the property for $6.5 million. **(Pls. Ex. 79 & 91, R. pp. 1796-1846 & 1903-1932); (R. p. 891:1-24).** Pinckney Point, LLC spent a total of $500,000 for the option and the exercises of a built-in renewal that extended it until February 28, 2013. **(R. p. 891:9-24).**

Pinckney Point, LLC was not deterred and continued to pursue the needed permits and approvals because "[i]t was our belief that, if we continued to work on the project, that Equity Resources would close with whomever was the first to be able to close, and if we found capital with Pinckney, and we got our one last entitlement, which was very close to getting site plan approval, then, we would be able to attract the necessary capital partner to invest in the project with us, and we would be able to close on the Point tract." **(R. p. 596:11-19).**

During this time Pinckney Point, LLC was working to find an investor or lender to payoff ERP. Even though Beaufort County granted *preliminary* approval of the site plan for the development in August 2011, potential investors were reluctant to commit until the County granted *final* approval of the site plan. **(R. p. 897:3-8) (Pls. Ex. 111, R. p. 1978).** Pursuit of final site plan approval was stalled for approximately nine months from May 2011 through February 2012 during which the site engineering of the project, a prerequisite for final approval, had to be postponed because of the County's insistence that Pinckney Point, LLC obtain individual septic tank approvals for each lot, even though the County had no ordinance or regulation imposing this requirement and it later dropped the demand. **(R. pp. 720:12-17; 985:14-22; 1099:9-17); (Def. Exs. 6 & 7, R. pp. 2086-2087 & 2090); (Pls. Exs. 46, R. p. 1668; Ex. 115, p. 1982; &Ex. 26, pp. 1650-1651).**[1]

[1] In the Order the lower court stated: "Importantly, these actions [i.e., the insistence on individual septic tank permits for each lot despite the absence of such regulatory requirement that caused a nine-month delay] relate to the County's alleged conduct directed at Pinckney Point, LLC. By its verdict in the County's favor as to Pinckney Point, LLC, the jury determined that there was no breach of contract or the covenant of good faith and fair dealing by the County on these grounds." **(Order dated 7/18/17, R. p. 9)**. However, no special interrogatories were submitted to the jury. Absent a special interrogatory, a court has no way to determine the basis for the jury's decision. Harrison v. Bevilacqua, 354 S.C. 129, 141, 580 S.E.2d 109, 115 (2003).

In early January 2013 ERP indicated it was willing to extend the option for another 120 days under certain conditions. **(R. pp. 635:15-636:16); (Pls. Ex. 53, R. pp. 1676-1679).** John Kunkel testified, based on decades of experience in the financing of real estate developments like this one, that with a 120-day extension of the option, a willing investor probably would have been located and Pinckney Point, LLC able to close on the Point Tract. **(R. pp. 896:20-897:9).** However, before the terms for the extension could be agreed upon, ERP informed Pinckney Point, LLC it was no longer willing to extend the option. **(R. pp. 637:7-643:11); (Pls. Exs. 54 & 55; R. pp. 1680-1686 & 1687-1690).** ERP was willing to give Pinckney Point, LLC until March 11, 2013, to close, but Pinckney Point, LLC was unable to secure the investor by then despite preparing closing statements in anticipation of a closing. **(R. pp. 643:17-644:7; 893:14-19; 1103:16-1105:23).**

Unbeknownst to Road, LLC or Pinckney Point, LLC, the Beaufort County Open Land Trust began inspecting the Point Tract for possible purchase by the County during the term of Pinckney Point's option to reacquire it. The Land Trust operates as the County's agent for purposes of the County's Rural and Critical Land acquisition program. **(R. pp. 788:21-789:1; 1234:13-1236:7).** Garrett Budds of the Land Trust inspected the property in November 2012, during Pinckney Point LLC's extension of its repurchase option. **(R. pp. 790:25-791:4).** Budds concluded from his inspection of the Point Tract it was suitable for conservation because in his estimation it was "replete with natural resource value" and located in an "important watershed" "within the Okatie River." **(R. pp. 789:2-791:17).**

Budds presented the proposal for acquisition of the Point Tract to the County's Rural and Critical Land Board on March 14, 2013, three days after the extended deadline for Pinckney Point, LLC to close on the acquisition under the option with ERP. 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. 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" where the "[h]istoric homestead could serve as a future Beaufort County Parks & Preserves headquarters, retreat, or public meeting space." **(Pls. Exs. 36 & 105; R. pp. 1658-1663 & 1961-1966)**. He concluded the Point Tract offered "a central location from which to operation [sic] a regional conservation park complex – a true eco-tourism attraction." **(Pls. Exs. 36 & 105; R. pp. 1658-1663 & 1961-1966);** see also, **(R. 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. 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, to keep its identity a secret. **(R. 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, making the same points in favor of the purchase of the Point Tract. **(Pls. Ex. 107, R. pp. 1967-1973).** After receiving information in executive session, County Council approved the purchase one week later on April 8, 2013. **(R. pp. 1236:21-1238:19) (Pl. Ex. 109, R. pp. 1974-1977).**

The County sought to purchase the Point Tract for the express purpose of preventing its residential development. See **(R. p. 1248:3-4)** (Beaufort County Administrator Gary Kubic testifying that in acquiring the Point Tract "the primary use we wanted was to prevent the development of the property").

Walter Nester—the lawyer for Road, LLC and Pinckney Point, LLC who represented Pinckney Point, LLC in the Road Case, handled development permitting and approval matters for it, and drafted most of the 2011 global settlement documents—first learned of the County's decision to purchase the Point Tract from a newspaper article the day after County Council approved the purchase. <u>See</u> **(R. pp. 1105:24-1106:24).** He was "flabbergasted, shocked, extremely surprised," and set up a meeting with County representatives right away to convey that County could not use the Point Tract for its intended uses given the restrictions on the access imposed by the Pinckney deeds and the Settlement Agreement. **(R. pp. 1106:19-1107:11).** Nester summarized his meeting with the County officials and County assistant attorney Josh Gruber:

> Q What did you tell them?
>
> A Well, when I -- when I read the article and then, read the contract, I saw, (a) in the article, that Beaufort County was proposing to use the property, the Point tract, for things that I didn't believe that it could use, based on -- well, for a variety of things.
>
> First, I was surprised that they were proposing to purchase it after the negotiations that we had undertaken to have the property developed. I was surprised that -- that -- I was surprised that they were doing that. I was honestly surprised.
>
> And so, I looked at that, and then, looked at what we had put in place, so that, Pinckney Point, LLC, could, in fact, develop the property. And that was what I wanted to convey to Attorney Gruber, is that, I didn't think that the things that were being listed in that newspaper article were things that the Point tract could be used for, ***given the limitations on access that had been imposed through the negotia -- through the documents that we had negotiated with Agnes Pinckney, through the subdivision of what I refer to as the road parcel, and the conveyance of that road parcel to a separate entity***. I didn't -- I didn't think that Beaufort County could use -- use the Point tract, if they purchased it for the things that they were proposing.

(R. pp. 1108:1-1109:1) (double emphasis added).

Nester followed up the meeting with 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. 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. pp. 1655-1657).**

Instead of heeding Nester's warnings, the County entered the purchase contract with ERP for the Point Tract on April 24, 2013, and proceeded to close on May 28, 2013, even though it could have terminated the purchase contract at any time without penalty. **(Pls. Ex. 82, ¶20(a), R. p. 1879); (Pls. Ex. 36, R. pp. 1658-1663); (Def. Ex. 23, R. pp. 2102-2115); (R. p. 1223:15-25)** (Gruber stating that after receiving Nester's warnings the County "[j]ust moved on" and closed on its purchase of the Point Tract).

Not only did the County buy the Point Tract for the express purpose of preventing its residential development, it also proceeded to use the .2 mile dirt road owned by Road, LLC for purposes that were well outside those described in the Settlement Agreement. The intended use for a future regional eco-tourism park and/or county park headquarters necessarily involves the frequent public use of the road through the Road Parcel, converting it *de facto* to a public road, which was strictly prohibited by the Settlement Agreement and the Order of Judge Dukes that it remain a private road. The deeds from the Pinckneys to Road, LLC for the Road Parcel, incorporated in the Settlement Agreement, were subject to the restriction that uses of the road be limited to those purposes "***necessary and appropriate for an entrance area to a private residential community***." **(Pls. Exs. 88 & 89, R. pp. 1893-1898 & 1899-1902)** (double emphasis added). Additionally, the recorded Access Easement Agreement from Road, LLC to Pinckney Point, LLC, dated December 29, 2011, expressly states the easement "rights granted herein [across the Road

Parcel] shall be for the benefit of Grantee and for the benefit of ***any and all other occupants of Grantee's Property***, and for its respective subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors, and assigns." **(Pls. Ex. 81, R. pp. 1848-1865)** (double emphasis added).

The County took the position at trial that the present and future use of the dirt road would be private. Nevertheless, the County acknowledged it had maintained the dirt road since buying the Point Tract even though the County Administrator testified that the County only maintains a road if it is public. **(R. pp. 1397:14-1398:6; 1360:7-11; 1359:9-15; 1380:1-20)**. The County's maintenance of the unimproved roadway without the permission of Road, LLC also is in direct violation of the Access Easement Agreement for the limited easement across the Road Parcel that prohibits the Grantee from making any improvements or performing any work on the easement area without the prior permission of Road, LLC. **(Pls. Ex. 81, ¶3, R. p. 1849).** In addition to maintaining the road, the County has done nothing to restrict public access to the Point Tract; the gate is wide open to the public; and the road has been well-maintained by the County to facilitate the public's access. **(R. pp. 1247:3-5; 939:23-940:13).**

The arguments the County presented in its Motion for JNOV had been asserted multiple times before and during the trial and rejected by the circuit court every time.

On September 25, 2013, the County filed a Motion to Dismiss or Partial Dismissal, arguing in part that "[n]o promise was made to Road, LLC in the Settlement Agreement" and that the County's purchase of the Point Tract and use of the Road Parcel to access it did not violate the parties' settlement agreement. **(Mot. to Dismiss dated 9/25/13, R. pp. 164-168).** After a hearing on January 27, 2013, Judge Mullen, who was also the trial judge, denied the motion in a written order stating that "the court determines that the Complaint does state valid claims for relief." **(Order dated 1/31/14, R. p. 20).**

On August 27, 2014, the County filed a Motion for Summary Judgment as to the Amended Complaint asserting, among other grounds, that "Plaintiffs have failed to establish any breach of the subject Settlement Agreement on behalf of Beaufort County..." **(County Mot. for Sum. J. dated 8/27/14, R. pp. 223-225).** On June 3, 2015, the County filed an Amended Motion for Summary Judgment asserting again that "there is no genuine issue of material fact that Defendant did not breach the Settlement Agreement or any other contract between Plaintiffs and Defendant...." **(County Am. Mot. for Sum. J. dated 6/3/2015, R. pp. 229-234).** Judge Mullen denied all of the Motions for Summary Judgment "on all grounds except Beaufort County's Motion on the Sixth Cause of Action for an Order of Civil Contempt as it is premature and Road, LLC's Second Cause of Action as a Beaufort County Taxpayer on its Constitutional Claim as lacking standing." **(Form 4 Order dated 7/7/2015, R. pp. 18-19).** The County moved to reconsider and Judge Mullen the circuit court again denied the County's legal arguments. **(County Mot. To Recons. dated 7/17/15, R. pp. 235-237) (Form 4 Order dated 8/12/15, R. pp. 16-17).**

The case proceeded to trial on April 25, 2016. At the close of the Plaintiffs' case, the County moved for a directed verdict on the basis that there was no breach of contract because the County had performed its two commitments in the Settlement Agreement by granting the buffer variance and keeping the road private and on the basis that the damages claimed were too speculative. **(R. pp. 1254:20-23; 1259:8-10).** After considering the County's arguments overnight, Judge Mullen denied the motion for directed verdict finding that "***I do think there was evidence from which this jury could determine that there was a breach of contract.***" **(R. p. 1285:21-23)** (double emphasis added). At the close of the County's case, the County renewed its motion for directed verdict, arguing that there was "no testimony for the jury to seek to find what the damages are" and no "evidence of breach." **(R. p. 1406:16-17, 21-22).** During the hearing on the County's renewed motion for directed verdict, the Court invited detailed arguments on Appellant's damages theory and the evidence supporting the damages. **(R. p. 1406:24-1418:4).** Counsel for Appellant specifically explained Appellant's damages theory and that the jury could return a verdict of "zero, 1.3[million], or 5 [million]." **(R. p. 1409:13)**. The circuit court again denied the motion for directed verdict "***based on the evidence for Road, LLC,***" saying, ***"We'll see what the jury will do with it"***. **(R. p. 1418:6-7)** (double emphasis added). In addition to arguing that the evidence was insufficient for the jury as to damages, the County also repeated its argument that it "fully complied with the specific terms of the contract" so no reasonable jury could find breach of contract. **(R. p. 1418:12-13).** Once again on that point, Judge Mullen rejected the County's argument and ruled "***there are facts that were testified to that this jury could conclude that there was a breach of contract***." **(R. p. 1432:8-10)** (double emphasis added).

During deliberations, the jury sent two notes to the circuit court. The first note read as follows:

> ***The settlement agreement, Number 78, is with the County and PPLLC, and Road, LLC, et. al. [] with the purpose of developing the land***. Prior to the County buying the land, it was owned by ERP, [] who are not a part of the agreement. Does ERP have to abide by the settlement agreement?

(R. p. 1552:2-12) double emphasis added); see also, **(Ct. Ex. 5, R. pp. 1626-1627)** (The Court answered the note by telling the jury that "ERP is not a party to the settlement agreement." **(R. p. 1557:19-21).** The second note read as follows:

> Is Beaufort County as the new owner are (sic) they obligated to uphold the terms of the settlement agreement. And does that mean that the County has to develop the land as residential property

(Ct. Ex. 6, R. p. 1628).

After completing their deliberations, the jury returned a verdict for the County on the claim of Plaintiff Pinckney Point, LLC and a verdict in favor of Appellant Road, LLC for breach of contract in the amount of $5,000,000. **(Verdict Form, R. p. 1566; R. p. 1560:10-19).**

In granting the County's motion for JNOV, the lower court signed the County's proposed order granting the motion for JNOV on every single ground argued by it without any modification. (**County's proposed order, R. pp. 2169-2182**). In so doing, the circuit court reversed its position on all the grounds asserted by the County that the Court had previously rejected multiple times. See **(Order dated 7/18/17, R. pp. 1-15)**. The circuit court held there was no evidence to support the jury's verdict as to Road, LLC's cause of action for breach of contract and breach of the covenant of good faith and fair dealing. **(Order dated 7/18/17, R. pp. 1-15).** The circuit court ruled that the Settlement Agreement required nothing more of the County than to grant the road variance and to agree the road was private. **(Order dated 7/18/17, R. p. 2).** The circuit court also ruled that no reading of the Settlement Agreement supported a cause of action that the County breached the contract when it purchased the Point Tract to prevent its residential development. **(Order dated 7/18/17, R. p. 4).**

With respect to the road itself, the circuit court found that there was no evidence the public was using the road or that the County had invited the public to use the road. **(Order dated 7/18/17, R. p. 4).** The circuit court also ruled, without citing any legal authority, that "by the time Beaufort County purchased the 229 acre parcel, the Settlement Agreement was a nullity given that the Pinckney Point, LLC, could no longer meet its obligations under the contract." **(Order dated 7/18/17, R. pp. 9-10).** Finally, the circuit court ruled there was no evidence to support damages of $5,000,000 and the damages were speculative. **(Order dated 7/18/17, R. pp. 10-13).**

Contrary to the circuit court's order, there was plenty of evidence to support all elements of Road, LLC's cause of action for damages for breach of contract including breach of the implied covenant of good faith and fair dealing as well as evidence supporting the damages of $5,000,000 rendered by the jury. For the reasons set forth below, this Court should reverse the lower court and reinstate the verdict of the jury that was well grounded in the proof and the governing law.

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or 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." Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 481, 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 Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)). "The trial court *must* deny the motions when the evidence yields more than one inference or its inference is in doubt." Id. (quoting Welch, at 300, 536 S.E.2d at 418) (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, at 300, 536 S.E.2d at 419 (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 Boddie-Noell, at 486-87, 544 S.E.2d at 285; See also, Burns v. Universal Health Services, Inc., 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 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).

ARGUMENT

I. <u>THE CIRCUIT COURT ERRED IN GRANTING THE COUNTY'S MOTION FOR JNOV ON THE GROUND THAT THERE WAS NO PROOF IT BREACHED THE SETTLEMENT AGREEMENT IN THE FACE OF ABUNDANT EVIDENCE THAT THE COUNTY BOUGHT THE POINT TRACT TO FRUSTRATE AND PREVENT ITS RESIDENTIAL DEVELOPMENT AS WELL AS EVIDENCE IT USED AND INTENDED TO USE ROAD, LLC'S DIRT ROAD AS A PUBLIC ROAD CONTRARY TO THE PARTIES' AGREEMENT AND COURT ORDER, ALL OF WHICH PREVENTED ROAD, LLC FROM REALIZING THE BENEFIT OF ITS BARGAIN AS EXPRESSED IN THE SETTLEMENT AGREEMENT, THEREBY CAUSING IT DAMAGES.</u>

Road, LLC's purchase of the Road Parcel was *integral* to the Settlement Agreement entered by the County and the other parties to the litigation. Without Road, LLC's participation and the $1,300,000 it paid for the Road Parcel, there would have been no settlement of the Road Case and the two related cases. The Settlement Agreement described in detail the extensive terms and conditions governing Road, LLC's purchase of the Road Parcel as well as its later sale to the residential developer of the Point Tract -- at that time Pinckney Point, LLC.

Critical to Road, LLC's willingness to buy the Road Parcel was that the road be private and that no one could develop the Point Tract without reaching an agreement with Road, LLC to purchase the Road Parcel to gain the 50-foot right-of-way needed to meet the County's access requirements for a new residential subdivision. Road, LLC agreed to pay $1,300,000 for the .85 acre Road Parcel because it was the sole access to and from the Point Tract that was in the process of being permitted for 76 lots with gross value of over $50,000,000. **(R. pp. 979:22-981:8).** At that same time, Road, LLC entered the contract with Pinckney Point, LLC, referenced in the Settlement Agreement, to sell the Road Parcel for $5,000,000, when the Point Tract was developed. **(Def. Ex. 3, R. pp. 1994-2001).**

A. Under South Carolina law a breach of contract occurs when a contracting party acts to frustrate the purpose of the contract, acts inconsistent with contract, or breaches the implied covenant of good faith and fair dealing.

At trial, the Court charged the jury as to South Carolina law of breach of contract and breach of the implied covenant of good faith and fair dealing.[2] In pertinent part, the Court charged as follows concerning breach:

> The word *breach,* as it applies to contracts, is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or ***the doing of something inconsistent with its existence***. When performance of a duty under a contract is due, any nonperformance is a breach. In other words, a party breaches a contract when he does not perform as he agreed to perform under the contract.
>
> A parties (sic) contractual duty is found in the obligation assumed by the party to the contract. a parties (sic) failure to comply with the contractual duty constitutes the breach. Nonperformance of a valid contract is a breach thereof. A breach occurs when a party refuses or neglects to perform some duty required by the terms of the contract.
>
> ***A breach may occur when a party***, without legal excuse, fails to perform any promise that is all or part of the contract, ***or knowingly prevents, hinders, or makes more costly, the other parties (sic) performance***; or in advance of the due date of his performance, repudiates his promise to perform, that is, repudiates or renounces the contract.
>
> The defendant cannot take advantage of the uncertainty created by his own wrongdoing. If it were otherwise, then, it would be virtually impossible for a plaintiff to prove a case of prevention.

(R. pp. 1540:23-1541:25) (double emphasis added). The Court also charged the jury on the implied covenant of good faith and fair dealing as follows:

---

[2] RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884, (Ct. App. 2004) (implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract). Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (the implied covenant of good faith and fair dealing is subsumed by the cause of action for breach of contract claim and is not a separate cause of action; if the covenant is violated, a plaintiff is afforded the damages recoverable on a contract claim).

> . . . there exists in every contract an unspoken, but legally enforceable promise of good faith and fair dealing. The concept behind the implied covenant of good faith and fair dealing is that ***the law will imply an agreement by the parties to do and perform those things that, according to reason and justice, they should do in order to carry out the purpose for which the contract was made.***
>
> However, there is no breach of the implied covenant where a party to a contract has done what provisions of the contract expressly gave him the right to do or by conduct which is permitted by law.

(R. p. 1540:9-20). Defendant did not object to the Court's charges and has not appealed the charges[3] that express settled South Carolina law governing breach of contract and breach of the implied warranty of good faith and fair dealing. **(R. p. 1549:9-13).**

"The word 'breach,' as applied to contracts, is defined as a failure without legal excuse to perform any promise that forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or ***a party's act that is inconsistent with its existence***." 17A Am. Jur. 2d Contracts § 669 (double emphasis added). Stated differently by this Court:

> ***A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.***
>
> In the absence of an express provision therefor, ***the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.*** * * *

---

[3] On appeal, the County cannot challenge the law stated in the quoted charges because the County did not object to the circuit court's charges or appeal the charges. <u>See</u> <u>Berberich v. Jack</u>, 392 S.C. 278, 290, 709 S.E.2d 607, 613 (2011) (finding an issue unpreserved for review where the appellant failed to object to the jury charge); S.C.R. Civ. P. 51(d)(1)(a) & (2); <u>Dreher v. S.C. Dept. of Health and Envtl. Control</u>, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015) *reh'g denied* (June 18, 2015) (under the law-of-the-case doctrine, a party is precluded from relitigating matters that were not raised on appeal, but should have been).

Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 485, 544 S.E.2d 279, 284 (Ct. App. 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) (double emphasis added). See also, Restatement (Second) of Contracts §205 (2017) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. . . A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain. . ."); South Carolina Juris., Contracts § 46 ("in the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made.").

The implied covenant of good faith and fair dealing "embraces, among other things, an implied obligation that neither party shall do anything to injure or destroy the right of the other party to receive the benefits of the agreement." 23 Williston on Contracts § 63:22 (2017). See Columbia East Associates v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989) (the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which a contract was made.); Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966). Importantly, "whether particular conduct violates . . . the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury . . . ." Williston on Contracts § 63:22.

B. <u>The circuit court erred in granting JNOV because there was evidence supporting the jury's determination that the County breached the Settlement Agreement by purchasing the Point Tract for the express purpose of preventing a residential development and thereby further preventing use of the Road Parcel as the exclusive vehicular access for a residential development, as envisioned in the Settlement Agreement.</u>

The circuit court's Order ignores the well-established law, just explained, that implies in any agreement that the parties will do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. Clearly, there was proof, if not undisputed proof, (i) that the parties to the Settlement Agreement intended by the express terms of their agreement that the Point Tract be developed for residential purposes, as the jury specifically commented in its first note during their deliberations, and (ii) that the parties further intended that Road, LLC would sell the Road Parcel to the residential developer to allow it to satisfy the County's requirements for the minimum improved access necessary for residential subdivisions. The County's purchase of the Point Tract for the professed purpose of preventing any residential development of the Point Tract is plainly contrary to "the purpose for which the contract was made." The County's actions also prevented the use of the Road Parcel from ever serving as access to that residential development.

The circuit court further erred in adopting the County's argument that Road, LLC could only prevail if there were an express restriction in the Settlement Agreement that required the Point Tract to be developed as a residential subdivision. Even though the County now argues the Settlement Agreement did not expressly prohibit it from purchasing the Point Tract, it acknowledges there was no reason for inserting such a provision because at the time the parties entered the Settlement Agreement no one envisioned the County would ever acquire the Point Tract. **(R. p. 1371:12-20); (County Memo. in Supp. of Mot. to Dismiss dated 1/24/2014, R. p. 189)** ("While the Parties to the Settlement Agreement, including Beaufort County, may not have contemplated the 229 acre parcel ever being owned by Beaufort County…"). County deputy administrator Gruber agreed nothing in the Settlement Agreement contemplated the County would buy it. **(R. p. 1371:17-20).**

According to the settled legal principles previously discussed, however, 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. In finding that Road, LLC could only prevail if it proved that there was a legal restriction prohibiting the Point Tract to be used for anything other than a residential subdivision, the circuit court engaged in the same fallacious reasoning that the Supreme Court criticized in Inlet Harbour v. South Carolina Dept. of Parks, Recreation and Tourism, 377 S.C. 86, 659 S.E.2d 151 (2008), a case where the question was the scope of an easement to a 3.56 acre tract:

> A clarifying point is instructive. A great deal of the evidence surrounding this transaction does not focus directly on the issue of access to these tracts of land, but pertains instead to how the parties intended for this land to be used. Addressing the question of how this land may be used, the Department focuses on the lack of any restrictive covenants in the deed to the 3.56-acre tract and argues that it should not be prohibited from developing the property where the deed contains no restriction prohibiting such development. But the absence of restrictions in the Department's deed is not terribly relevant, and it is at this point that we must recognize an important distinction regarding what is and what is not at issue in this appeal. ***The question presented in this case is the scope of the Department's right to access the 3.56-acre tract through a specific route, not a limitation of the Department's right to use that tract.*** The Department unquestionably has the same right to make use of its land as does any landowner. The concepts of deed warranties and restrictive covenants are thus largely irrelevant in this case.

659 S.E.2d 155 (double emphasis added).

Similarly, here the question is not whether there was an express restriction in the Settlement Agreement forbidding its use for other than a residential development, but whether the County, by purchasing the Point Tract to stifle development, frustrated the purpose of the contract. More to the point, the question is whether there was sufficient evidence in the record to support a jury finding that the County's actions frustrated and impeded the purpose of the settlement agreement.[4]

The Order also incorrectly held that the Settlement Agreement required solely two things of the County: grant the variance and agree that the road was private. **(Order dated 7/18/17, R. p. 2).** According to the circuit court, "[o]nce these actions are completed, Beaufort's County's obligations under the contract were fully executed." **(Order dated 7/18/17, R. p. 2.).** Under the Court's analysis, Beaufort County could do anything it wanted to prevent Pinckney Point, LLC from obtaining its permits for development, to prevent the Road Parcel from being used as access to a residential development, and to prevent Road, LLC from selling it to the residential developer, as specified in Settlement Agreement, as long as the County granted the variance and agreed the road was private.

The circuit court's reasoning is erroneous as a matter of law for the reasons already discussed. The obligations of a party to a contract are not simply those specific acts that the contract requires it to perform. The obligations include all the non-explicit responsibilities previously covered, not the least of which is the implied covenant of good faith and fair dealing. The circuit court's ruling eliminates these other obligations of a party to a contract.

Further, Road, LLC never argued that the written terms of the Settlement Agreement included a specific provision constituting an unconditional written guarantee by the County that the Point Tract would "be forever used as a residential development." Rather, Road, LLC, argued that the fundamental premise of the settlement was the Point Tract would be a residential development and the *County*, as a party to the Settlement Agreement, was precluded from

[4] The County's blatant use of the Road Parcel for its own purposes in plain violation of the Settlement Agreement further supports the jury's finding.

purchasing the Point Tract with the express purpose of *preventing* a residential development from *ever* being established on the Point Tract and *preventing* the Road Parcel from *ever* being used as the exclusive access to that residential development.

The circuit court further erred in finding there was no evidence upon which a reasonable jury could find that the intent of the parties to the Settlement Agreement was that the Point Tract become a residential development. <u>See</u> **(Order dated 7/18/17, R. p. 4)** ("[t]he Settlement Agreement is clear and unambiguous and there is no suggestion that it was the intent of the parties to bind this property to be forever used as a residential development"); **(Order dated 7/18/17, R. pp. 3-4)** ("the Settlement Agreement does not bind the property to be forever used as a residential development . . . .[and a]llowing reading such a term into this agreement is clearly in violation of the rules of contract interpretation."). As just stated above, the question is not whether the Settlement Agreement included an express covenant restricting the Point Tract to residential development. The question is instead whether the County's purchase on the heels of the expiration of Pinckney Point, LLC's option was an action that according to reason and justice the County should have done in order to carry out the purpose for which the Settlement Agreement was made. The purchase immediately eliminated Road, LLC's opportunity to sell the Road Parcel to a residential developer and caused it considerable damages.

In reaching its ruling, the circuit court engaged in a restricted reading of the Settlement Agreement and completely read out the express purpose of the settlement and the provisions establishing this purpose, as found by the jury and confirmed in their notes during deliberations. The circuit court's ruling deprived Road, LLC of the benefit of its bargain and the jury of the benefit of its factual findings.

The legal standard for granting a JNOV requires *no* evidence, including no reasonable inferences from the evidence, to support the jury's verdict. Here, both the express terms of the Settlement Agreement and the surrounding circumstances establish all parties knew these were primary purposes of the settlement. In addition to referring specifically to Road, LLC's future sale of the Road Parcel at the time of the Point Tract's residential development, the Settlement Agreement and its many exhibits are replete with other explicit references to the residential development of the Point Tract and how the settlement would help accomplish this development:

- To the extent a variance shall be required from the river buffer and river setback requirements of Section 106-1845 of the ZDSO for the construction of the Road, LLC Parcel **and utility infrastructure for the development of the Point Tract as contemplated herein**, Beaufort County hereby agrees that such variance is hereby approved . . . so long as any encroachment into the Buffer or Setback is minimized to the extent reasonably possible.

- Beaufort County agrees that said Right-of-Way provides sufficient access to and from the Point Tract **for the development thereof** in accordance with the Beaufort County Zoning and Development Standards Ordinance ("ZDSO"). PPLLC agrees that such Right-of-Way **is required for the development of the Point Tract <u>as contemplated herein.</u>**

- PPLLC shall not be required to install the infrastructure described herein and shall have the right to use Pinckney Colony Road, LLC in its condition as of the date of the Agreement to access the Point Tract for and until such time as **the construction of the subdivision infrastructure, including but not limited to roads, lakes, utility infrastructure and amenity areas is completed, it being understood that there is only one point of access to the Point Tract for motor vehicles, being Pinckney Colony Road, LLC.**

- AND ALSO SUBJECT TO a restriction that the property conveyed herein may be used only as a right of way or other purpose associated therewith including but not limited to landscaping, parking, drainage, installation of utilities except, however, no gravity sewers, or **any other purpose necessary and appropriate for an entrance area to a private residential community.**

(Pls. Ex. 78, R. pp. 1747-1748) (emphasis and double emphasis added); **(Pls. Ex. 78, at Ex. B, ¶4, R. p. 1758) (Pls. Ex. 78, Ex. E, R. pp. 1766-1771)** (emphasis added).

Additionally, the circumstances leading up to the settlement provide further evidence that one of the chief purposes of the settlement was to clear the obstacles to the residential development of the Point Tract. Pinckney Point, LLC had worked with the County for seven years towards developing the Point Tract, including pursuing dock permits and a variance to move the road out of the river buffer, all of which further substantiates the County's knowledge and concession that the purpose of the settlement was to further that residential development.

The circuit court chose to ignore even the uniform testimony of the County Administrator and the County Attorney that they knew a primary purpose of the settlement was to move along the residential development of the Point Tract. **(R. pp. 1369:17-1371:20)** (Josh Gruber discussing that the settlement language contemplated the development of the Point Tract as a residential development); **(R. pp. 1232:25-1234:1)** (Gary Kubic testifying that he was aware at the time of the global settlement that Pinckney Point, LLC's 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). As earlier stated, the County also recognized that while the Settlement Agreement contemplated development of the Point Tract, it in no way contemplated a purchase by the County. **(R. p. 1371:12-20)**. In fact, according to Josh Gruber, the County Attorney, if the County purchased the Point Tract it would have frustrated any developer's ability to develop the tract. **(R. pp. 1371:20-1372:1).**

The undisputed proof according to the previously described testimony of John Kunkel also showed the only reason Road, LLC partook in the settlement and put up the needed $1,300,000 was because it would be able to sell the Road Parcel when residential development ultimately occurred.

Therefore, based upon the express and implied terms of the Settlement Agreement, the surrounding circumstances, the admissions of the County officials, and the other proof at trial, the circuit court erred in granting the motion for JNOV on the ground that there was no evidence to support a jury finding the County breached the Settlement Agreement by purchasing the Point Tract immediately after Pinckney Point, LLC's option expired. In fact, there was overwhelming evidence to support a jury finding that one of the main purposes of the settlement was to advance the residential development of the Point Tract and the use and sale of the Road Parcel to accomplish that development. Further, there was plenty of proof the County's purchase of the Point Tract was with the specific intent to thwart that development and the use and sale of the Road Parcel to accomplish that development, both of which support findings by the jury of breach of the terms of the Settlement Agreement as well as the implied covenant of good faith and fair dealing.

C. <u>The circuit court erred in granting the County's Motion for JNOV on liability for the additional reason there was evidence that the County breached the term of the global settlement requiring the road to be a private road by (1) purchasing the Point Tract as a public property for future public use as a regional tourist center or County park headquarters along with not restricting the public's use of the small road over the Road, LLC Parcel and (2) maintaining the dirt road as a public road.</u>

The circuit court also erred in finding that there was no evidence that County breached the provision in the Settlement Agreement, set in stone by a court order, that the road over the Road Parcel shall forever be a private road. <u>See</u> **(Order dated 7/18/17, R. p. 6); (Pls. Ex. 3, p. 1629; Ex. 78, pp. 1745-1795; Ex. 97, pp. 1938-1941)**. The circuit court ruled, without citation to any legal authority, that the County did not breach the Settlement Agreement with respect to keeping road private because the County succeeded to the limited easement across the Road Parcel that

Road, LLC granted to Pinckney Point, LLC when the County purchased the Point Tract. **(Order dated 7/18/17, R. p. 5); (Pls. Ex. 81, R. pp. 1848-1865)**. According to the circuit court, the County was "within its rights to allow its subtenants, licensees, customers, agents, employees, invitees, mortgages, successors and assigns to access its 229 acre parcel pursuant to the access easement." **(Order dated 7/18/17, R. pp. 5-6)**.

In making this conclusory statement, the circuit court paraphrased the actual wording of the Access Easement Agreement and left out the critical introductory wording: "***The rights granted herein [across the Road Parcel] shall be for the benefit of Grantee and for the benefit of any and all other occupants of Grantee's Property, and for its respective*** subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors, and assigns." **(Pls. Ex. 81, R. pp. 1848-1865)** (double emphasis added). The inclusion of the qualifier "occupants" supports the jury's reasonable inference that the grant was intended for the occupants of a residential development and those that might be associated with that particular use. This proof supports findings by the jury that the Access Easement Agreement did not allow access across the Road Parcel for uses other than a residential development and certainly did not allow this access for use by the general public.

The proof also supports the reasonable inference the County's use of the road was much broader than that stated by the Court. The County opened Road, LLC's private road to the use of the general public. The limited easement states that it was "not intended to, and should not be construed to, dedicate the Easement Area to the general public." <u>See</u> **(Pls. Ex. 81, ¶4, R. p. 1849) The** circuit court incorrectly ruled that neither this easement, nor the Settlement Agreement, restricts use of the private road by members of the general public who had no interest in the Point Tract.

The circuit court's decision is also inconsistent with the law of easements. In determining the scope of an easement, the court's "guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance." Inlet Harbour v. S.C. Dept. of Parks, Recreation and Tourism, 377 S.C. 86, 93, 659 S.E.2d 151, 155 (2008). The easement was specifically contemplated as part of the global settlement and Road, LLC's purchase of the Road Parcel. **(R. p. 1078:11-22).** As has been discussed, the easement was incorporated into the Settlement Agreement and was crafted to provide minimal private access to the Point Tract, not public access. The fact that the parties intended the road would be forever private completely negates the circuit court's interpretation that the easement provides for public access for the County's public uses.

There was substantial evidence in the record to support a finding by the jury that the County violated its settlement obligation that the road was a private road and, hence, not for use by the general public. The proof showed the County was allowing public use of the road on the Road Parcel. Moreover, there was evidence that the Point Tract was open to the general public and the County had taken no actions to restrict the use of the Road Parcel by the general public to reach the Point Tract. Gary Kubic testified that that *any* member of the public or *any* taxpayer could use the road to access the Point Property

> Q If it's not gated to anyone, any member of the public, any taxpayer in Beaufort County, go down and walk around the property?
>
> A Yeah. They can access it by going that way or by water.
>
> * * *
>
> Q To your knowledge, then, the County has done nothing to restrict access to the Point parcel?
>
> A That's correct.

(R. pp. 1246: 14-18; 1247:3-5). John Kunkel's testimony was consistent with that of the County's:

> . . . without exception, every time that I've driven by, I've been able to drive into the Pinckney property, because the gate's wide open, and the road is being well-maintained.
>
> Q Is it in better or worse condition than when the option was lost?
>
> A It's in better condition.
>
> Q Does it appear to have been maintained?
>
> A It appears that it's well-maintained.

(R. p. 940:5-13).

The proof further showed that one of the County's stated reasons for purchasing the Point Tract was to establish a regional eco-tourism center and/or county park headquarters on the Point Tract which would cause considerably more public use of the road. See e.g., **(Pls. Ex. 36, R. pp. 1658-1663; Ex. 105, pp. 1961-1966; & Ex. 107, pp. 1967-1973)**; **(R. pp. 1238:25-1239:9)** (Gary Kubic discussing the County Attorney's suggestion that the Point Tract be a regional park). Because the Point Tract was purchased as part of the Rural and Critical Land Program in fee simple, the County can invoke a variety of other public uses, all of which would require access for the general public. **(R. pp. 1239:10-1240:19)**. Those public uses necessarily mean that the road would be used by the general public at random and, taken in the light most favorable to Appellant, raised a question for the jury whether the County's actions converted the road to a public road regardless of its private ownership under the applicable law:

> Whether a road is 'public' or 'private' is determined by the extent of the right to use it, and not by the extent to which that right is exercised or by the quantity of travel over it. A 'public road' is one that the public generally, not merely a portion of the public, is privileged to use. A public road is any road 'open to public use' regardless of whether the road is publicly or privately owned. If a road is public, then it is subject to public use; the land upon which a road lies may either be

> publicly or privately owned, and if it is privately owned, then it is a private thing subject to the public use.

39 Am. Jur. 2d Highways, Streets, and Bridges § 3.

Based on this evidence, whether the County's acquisition and uses converted the private road to a public road was an issue of fact for the jury. Under applicable law the County's current and intended uses support a finding by the jury that the County breached the obligation that Road, LLC's road was to remain private forever.

The public uses of the Point Tract were not the only evidence at trial that the County converted the road from a private road to a public road in violation of the global settlement. County officials testified that the difference between a private road and a public road is that the County maintains a public road while a private landowner maintains a private road. **(R. p. 1360:7-11)** ("Q What do you believe about a declaration of the road being private? A I believe that a declaration of a road being private goes to who is responsible for maintaining that road, not who can be on the road.); **(R. p. 1359:9-15)**. The County conceded that it had maintained the road. **(R. pp. 1397:14-1398:8)** (Kubic testifying that the County does not maintain private roads but here the County may have done repairs to the road); **(R. p. 1380:1-20)** (Gruber testifying that County has done repairs to the roadway, although he attempted to distinguish "repairs" from "maintenance").

In South Carolina Public Interest Foundation v. South Carolina Department of Transportation, 421 S.C. 110, 804 S.E.2d 854 (2017), our state Supreme Court recently held that the Department of Transportation's "inspection of ... privately owned bridges was unconstitutional because it contravened the constitutional requirement that the expenditure of public funds serve a public purpose." 804 S.E.2d at 861. In this case, the County's expenditure of the funds to maintain and repair the road owned by the Road, LLC converted it to a public road as a matter of law.

The circuit court's Order fails to mention any of this proof or these legal principles. The circuit court completely ignored the testimony that the County did not intend to restrict the general public from accessing the Point Tract via Road, LLC's private road, intended to use the Point Tract for high traffic public uses, and it in fact maintained the road. Instead, the circuit court incorrectly weighed the evidence and applied incorrect legal principles in rejecting the notion that the private road had been converted to a public road because it would be an act of "trespass" for a member of the general public to use the road to access the Point Tract. **(Order dated 7/18/17, R. p. 4).**

It was up to the jury to interpret the evidence and find the facts, not the Court. The proof at trial fully supports findings by the jury that the County violated its obligation to keep the road private and that this violation caused damages to Road, LLC. If the road is public, then Road, LLC can never sell the Road Parcel to a developer of a residential development on the Point Tract. The circuit court's Order granting a JNOV on the ground there was no evidence, or reasonable inference from the evidence, the County breached its obligation to keep the road private was erroneous and should be reversed.

II. THE CIRCUIT COURT ERRED IN GRANTING THE COUNTY'S MOTION FOR JNOV, BECAUSE THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S DAMAGE AWARD OF $5,000,000.

The circuit court held there was no proof of damages of $5,000,000, relying completely on its interpretation of one isolated portion of the testimony of Road, LLC's expert appraiser. **(Order dated 7/18/17, R. pp. 10-13).** The circuit court's conclusion cherry picks a single answer from Road, LLC's expert's testimony, ignores the balance of his testimony, ignores the context of the statement he made, and ignores the substantial other evidence supporting the jury's verdict. The circuit court's ruling on this ground violated the standard applicable to a motion for a JNOV. Instead of deciding whether there was *any* evidence to support the damages award, the circuit court set aside the damages award based on its own interpretation of one answer of one witness. See Hobgood v. Pennington, 300 S.C. 309, 313, 387 S.E.2d 690, 692 (Ct. App.1989) ("If there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm."). The circuit court's ruling violates the additional maxim that the jury, not the court, decides what weight, if any, to put on portions of an expert's testimony.

Taken as a whole, the testimony of Road, LLC's expert appraiser, Thomas F. Hartnett, fully supports the jury's award of $5,000,000 damages to Road, LLC. He 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 $5,000,000 if used in that manner. **(R. pp. 1184:3-5; 1177:11-1178:8).** Hartnett based his valuation of the Road Parcel's highest and best use upon: (1) 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. pp. 1178:9-1179:7)**; (2) 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. 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. pp. 1184:3-1185:10)**; (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. pp. 1183:2-1184:2).**

Considered in its entirety, Harnett's valuation of $5,000,000 was based on his determination of the highest and best use of the Road Parcel: "So, you had a highest and best use ***now*** (double emphasis added) of – of that road being accessed to a proposed residential development." **(R. p. 1184:3-5)**. According to Hartnett, the value of the highest and best use can be realized only if there is "demand" for that highest and best use. **(R. p. 1193:5-8)**. Of course, the County's purchase of the Point Tract to prevent its residential development forever eliminated that "demand" and prevented Road, LLC from realizing the highest and best use of the Road Parcel as access to a residential development.

After testifying to the above damages on direct examination, Hartnett explained on cross examination that the Road Parcel was still worth $5,000,000 today because it is still a private road and whoever wants to use the Point Tract must pay for that access. **(R. pp. 1185:25-1188:6)**. The circuit court found that because Hartnett testified that the property was still worth $5,000,000 that the damages award was unsupported by the evidence. The circuit court ruling ignores the balance of Mr. Hartnett's testimony where he said that the highest and best use **now** would still be access to a residential development. The jury could have found that Hartnett's answer about the current value was based on the highest and best use of the Road Parcel still being the exclusive access to a residential development on the Point Tract, which the County has prevented from ever happening.[5]

Just as important, 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

---

[5] South Carolina has long recognized the common sense notion that highest and best use is limited by what is "reasonably probable . . . within the immediate future." South Carolina State Hwy Dept. v. Westboro Weaving Co., 244 S.C. 516, 137 S.E.2d 776 (1964); South Carolina State Hwy. Dept. v. Bryant, 253 S.C. 400, 171 S.E.2d 349 (1969); Anderson's Requests to Charge, Civil, 4-12 (Discussing highest and best use: "The eventuality of these prospective uses, however, must be reasonably probable within the immediate future or a reasonable time"). The evidence obviously supported a jury finding that the highest and best use described by Mr. Hartnett was now impossible.

to another view. The jury is also free to accept a portion of a witness's testimony and reject a portion."); see also, Maull v. SC DHEC, 411 S.C. 349, 359, 768 S.E.2d 402, 408 (Ct. App. 2015) (Administrative law judge could accept only portion of expert's testimony). Even if the jury interpreted Hartnett's one answer the same way the circuit court did, the jury could disregard it and rely on his direct testimony.

Moreover, common sense dictates that because the County prevented the Point Tract from ever being a residential development. Road, LLC can no longer sell the Road Parcel for $5,000,000 as the exclusive access for a residential development, no matter what Hartnett said in that one answer. This reasonable inference is completely supported by the proof.

Finally, the record establishes two other, separate evidentiary bases that support the $5,000,000 in actual damages awarded by the jury. The jury could have determined the value of the Road Parcel as the exclusive access to a residential development based on either the $5,000,000 reduction in purchase price due to the dispute over that access when Pinckney Point, LLC purchased the Point Tract in 2006 or the $5,000,000 that Pinckney Point, LLC agreed to pay Road, LLC for the vehicular access needed to accomplish the residential subdivision of the Point Tract five years later as part of the Settlement Agreement.

These three separate evidentiary bases support the jury's determination that the County's intentional prevention of the sale of the Road Parcel as the exclusive access to a residential development caused $5,000,000 in damages to Road, LLC. The circuit court erred in weighing the evidence and ruling there was no proof of damages of $5,000,000 based on an isolated answer of the expert taken out of context.

III. THE CIRCUIT COURT ERRED IN RULING THAT ROAD, LLC'S DAMAGES WERE TOO SPECULATIVE AND DEPENDED UPON AN INVESTOR FOR PINCKNEY POINT, LLC WHEN EVIDENCE AT TRIAL SHOWED BOTH THE AMOUNT AND CAUSE OF THE DAMAGES WAS REASONABLY CERTAIN AND ROAD, LLC'S SALE OF THE ROAD PARCEL WAS NOT NECESSARILY DEPENDENT UPON PINCKNEY POINT, LLC'S DEVELOPMENT OF THE POINT TRACT BUT INSTEAD ON THE RESIDENTIAL DEVELOPMENT OF THE POINT TRACT BY ANY DEVELOPER.

The circuit court erred in finding that Road, LLC's damages were "too speculative to support the verdict of the jury." **(Order dated 7/18/17, R. p. 11).** The evidence at trial proved the damages with reasonable certainty.

"The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. And profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach." South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 122-123, 113 S.E.2d 329, 335-336 (1960) (internal citations omitted). The lost profits must be presented with reasonable certainty as opposed to speculative or conjectural profits. Id.; see also, Minter, at 528, 473 S.E.2d at 70; Bensch v. Davidson, 354 S.C. 173, 177-178, 580 S.E.2d 128, 130 (2003). Damages are also properly awarded where a plaintiff has partially performed on a contract, but was wrongfully prevented from completing a contract. Bensch, 35 at 177-178, 580 S.E.2d at 130.

As explained above, evidence at trial showed Road, LLC's damages were at least \$5,000,000. The value of the Road Parcel, if used as the exclusive access to a residential development—its highest and best use—was at least \$5,000,000 according to expert Hartnett. **(R. pp. 1178:4-1185:12).** Road, LLC's damages were incurred when the County closed on its purchase of the Point Tract to defeat the residential development of the Point Tract and forever eliminated the "demand" for the highest and best use of the Road Parcel. There is nothing speculative about Road, LLC's damages.

Hartnett, a certified real estate appraiser, specifically stated that he had sufficient information to reach his valuation and fully explained the basis for his opinion. **(R. pp. 1178:1-3; 1180:24-1182:17; 1184:3-1185:10; 1183:2-1184:2).** The County stipulated to Hartnett's qualifications as an appraiser to testify as an expert witness. **(R. p. 1174:21-23).** His valuation was not speculative.

The circuit court found, with no citation to the record that "Road, LLC admits it would only be paid pursuant to the settlement agreement if Pinckney Point was able to find an investor whose terms it would agree to and be able to purchase back the [Point Tract] from ERP." **(Order dated 7/18/18, R. p. 11).** The proof was the opposite.

Road, LLC never made an admission to this effect, and the circuit court was unable to point to any in the Order. Road, LLC's proof, consistent with Hartnett's testimony, was that its investment in the Road Parcel was not entirely dependent upon Pinckney Point, LLC's development of the Point Tract. Rather, by not granting anything other than a limited, unimproved 20 foot easement as part of the Settlement Agreement and requiring the road be private, Road, LLC structured its purchase of the Road Parcel and participation in the settlement so that ***any*** owner of the Point Tract who sought to develop it as a residential community, not just Pinckney Point, LLC, would have to acquire the Road Parcel from Road, LLC to gain the 50 foot improved right of way needed for its development **(R. 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."). Further, the proof was that ERP insisted in its agreements with Pinckney Point, LLC that it assign the permits and approvals for residential development to ERP to be held in escrow and provide tracking reports on the status of all pending applications for permits and approvals in the event that Pinckney Point, LLC was unable to reacquire the Point Tract and ERP had to sell the property to another residential developer. **(Pls. Ex. 79, ¶10, R. pp. 1799-1800; Escrow Agreement attached as Ex. D thereto, R. pp. 1820-1824); (Pls. Ex. 80, R. p. 1847); (Def. Ex. 9, R. p. 2091; Ex. 10, p. 2092 & Ex. 12; pp. 2093-2096); (R. pp. 971:4-972:4).**

The jury could also have determined that the County's actions prevented Pinckney Point, LLC from being able to re-acquire the Point Tract and later perform on its agreement to buy the Road Parcel. The jury could have found that but for the County's taking the first steps towards acquiring the Point Tract in November 2012 through its inspection of the property and its continued expression of interest in acquiring it in early 2013 before Pinckney Point, LLC's option expired, ERP would have allowed another extension of the option. Pinckney Point, LLC was willing to pay for this extension and accede to ERP's other terms for the extension. **(Pls. Ex. 55, R. pp. 1687-1690); (R. p. 642:9-23).** The evidence supported a finding by the jury that if Pinckney Point, LLC had the additional 120 days, it probably could have obtained final site plan approval as well as the funding necessary to reacquire the Point Tract from ERP. Taylor Bush, who was in charge of permitting, testified he believed the remaining necessary final approval could have been obtained during this 120 days. **(R. p. 648:10-17).** John Kunkel, who was in charge of obtaining the capital to fund the re-purchase, testified that he believed that Pinckney Point could also have obtained the money it need to close on the Point Tract within that 120 days once the last needed entitlement, i.e., final site plan approval, was obtained. **(R. pp. 896:9-897:9).**

Therefore, even if Road, LLC's opportunity to sell the Point Tract was limited to Pinckney Point, LLC being the specific entity to develop the Point Tract, even though that was not the case, there was proof to support a finding by the jury that the County's conduct in pursuing the Point Tract and closing on it in breach of the Settlement Agreement caused Road, LLC $5,000,000 in damages by preventing it from selling the Road Parcel to Pinckney Point, LLC for the needed access for its residential development.

IV. THE CIRCUIT COURT ERRED IN RULING THAT THE SETTLEMENT AGREEMENT WAS A "NULLITY" WHEN THERE WAS NO BASIS IN THE EVIDENCE OR IN THE LAW TO SUPPORT THIS CONCLUSION.

The circuit court ruled, without citation to a single case, statute, or other rule of law, that "by the time Beaufort County purchased the [Point Tract], the Settlement Agreement was a nullity given that [] Pinckney Point, LLC could no longer meet its obligations under the contract ....[and] did not have any ownership interest or active option agreement pertaining to the [Point Tract] when the County purchased the property" **(Order dated 7/18/17, R. p. 9).** Under the circuit court's holding, the settlement was unenforceable as to all parties at the time Pinckney Point, LLC ceased to have a legal or equitable interest in the Point Tract or an option to purchase the Point Tract even though there is no law to support the lower court's broadside assertion.

Both Pinckney Point, LLC and Road, LLC performed their obligations under the Settlement Agreement to the County, and have continued to do so. If the unsubstantiated statement of the circuit court about the Settlement Agreement being a nullity was based on Pinckney Point, LLC's failure to pay Gnann under the terms of her settlement agreement, the County was not a party to that separate settlement agreement and has no rights to enforce it. Further, it was the County's purchase that thwarted the Pinckney Point, LLC's performance of its executory obligations, if any, to Gnann.

Among other errors, the circuit court ignored that the Settlement Agreement was not simply between the County and Pinckney Point, LLC. It was an agreement among six parties, including Road, LLC. The County's express and implied obligations were not limited to Pinckney Point, LLC and extended to Road, LLC as well. Road, LLC did not nothing to vitiate the settlement agreement. Road, LLC lived up to all of its obligations under the Settlement Agreement and did nothing that would excuse the County's obligations, much less render the contract void.

More importantly, there is **no** law in South Carolina, that the alleged failure of one party to a multiparty contract to have an interest in real property that is the subject of the contract nullifies the contract *ab initio* as to all parties, as held by the circuit court. Further, the failure of one party to perform might give rise to a breach but it does not serve to void the contract as the circuit court held.

Here, there is no basis for asserting the Settlement Agreement was against public policy or was otherwise illegal or unenforceable at the time it was entered and the circuit court did not cite any such reason. <u>See,</u> e.g., <u>Fay v. Total Quality Logistics, LLC</u>, 419 S.C. 622, 799 S.E.2d 318, 322 (S.C. App. 2017), <u>reh'g denied</u> (May 26, 2017). It simply struck the contract. In so doing, the circuit court erred and its Order to that effect should be reversed.

<u>CONCLUSION</u>

For the foregoing reasons, the evidence and the applicable law support the jury's verdict. The circuit court's order granting JNOV should be reversed, and Road, LLC's $5,000,000 verdict against the County should be reinstated.

Respectfully submitted,

G. Trenholm Walker

G. Trenholm Walker (SC # 5777)
John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Appellant, Road, LLC

May 21, 2018
Charleston, S.C.

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

G. Trenholm Walker
Attorneys for Appellant

May 21, 2018
Charleston, South Carolina