THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC, Plaintiffs

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

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly grant judgment notwithstanding the verdict as to Beaufort County's liability on the ground that the County did not breach the Settlement Agreement?

II. Did the trial court properly grant judgment notwithstanding the verdict regarding damages on the ground that no evidence supported the jury's $5,000,000 damages award to Appellant Road, LLC?

III. Did the trial court properly find that the jury's verdict against Pinckney Point, LLC was a rejection of its allegations that the County interfered with its abilities to obtain permits, and did the trial court properly find that parts of the Settlement Agreement were unenforceable?

STATEMENT OF THE CASE

Appellant Road, LLC and its co-plaintiff, Pinckney Point, LLC (collectively, "Plaintiffs"), filed this action on May 21, 2013 seeking declaratory and injunctive relief against Beaufort County (the "County"). (*See* Compl. at 8–11, R. 29–32.) At the time the Complaint was filed, the County had entered into a contract with Equity Resource Partners, III, LLC ("Equity Resource Partners") to purchase approximately 229 acres of land known as Pinckney Point (the "Point Tract"). (Compl. at 1, 8–9, R. 22, 29–30.) Plaintiffs sought a declaration that the County's intended use of an adjacent property known as the Road Parcel violated a 2011 global settlement agreement between all the parties (the "Settlement Agreement") which provided that the Road Parcel would remain private. (Compl. at 8, R. 29.)

The County closed with Equity Resource Partners on May 28, 2013, after which Road, LLC and Pinckney Point, LLC voluntarily dismissed Equity Resource Partners as a defendant. (*See* May 28, 2013 Limited Warranty Deed, R. 2102; July 31, 2013 Voluntary Dismissal, R. 21.) Plaintiffs then filed an amended complaint asserting an additional cause of action for breach of the Settlement Agreement. (*See* Am. Compl., R. 41.)

The trial of the case began on April 25, 2016, before Judge Carmen T. Mullen. (Tr. 1, 4, R. 300, 303.) All equitable causes of action were tried before Judge Mullen and only Plaintiffs' breach of contract claim was tried to the jury. (*See generally* Tr., R. 300–1563.) The jury returned a verdict for the County on Pinckney Point, LLC's cause of action for breach of contract. (Pinckney Point, LLC Verdict Form, R. 1565; Tr. 1262:8–13, R. 1561.) However, on Road, LLC's breach of contract claim, the jury returned a verdict for Road, LLC and awarded $5,000,000 in damages. (Road, LLC Verdict Form, R. 1566; Tr. 1262:14–19, R. 1561.) Judge Mullen took the equitable causes of action under advisement. (*See* Tr. 977–81, R. 1276–80.)

On May 12, 2016, the County filed a motion for judgment notwithstanding the verdict ("JNOV") on Road, LLC's breach of contract claim. (JNOV Mot. 5/12/16, R. 238.) Road, LLC filed a Memorandum in Opposition, and Judge Mullen held a hearing on the JNOV motion on August 9, 2016. (Memo. in Opp. to JNOV Mot. 5/26/16, R. 282, 1567.) Following the hearing, Judge Mullen entered an order granting the County's motion and entering judgment for the County on Road, LLC's breach of contract claim (the "Order"). (Order dated 7/18/17, R. 1.) Road, LLC filed its Notice of Appeal on August 17, 2017. Road, LLC is the sole appellant.

STATEMENT OF FACTS

The Point Tract

The Point Tract purchased by Beaufort County, which spans approximately 229 acres in the County, is surrounded on three sides by water. (Am. Compl. ¶ 5, R. 42.) The only vehicular access to the Point Tract is via a dirt road, which crosses an adjoining parcel of land. (*Id.*) The Point Tract was originally used as a sod farm, owned and operated by the Pinckney family through PPF, LLC. (Tr. 193:15–19; 194:18–20; 569:21–24, R. 492–93, 868.) In February 2005, Pinckney Point, LLC—which is not affiliated with the Pinckney family—contracted with PPF, LLC to purchase the Point Tract with the intent that it would develop a residential community on the land.

(Tr. 194; 197–98; 204:16–18; 207, R. 493, 496–97, 503, 506.) At that time, the dirt road leading up to the Point Tract, which crosses a different parcel of land (the "Road Parcel") was owned by John David Pinckney. (*See* Tr. 135:24–136:1; 157:10, R. 434–35, 456.) Shortly after Pinckney Point, LLC contracted to purchase the property, Mr. Pinckney erected fence posts across the Road Parcel to block access to the Point Tract. (Tr. 132:13–18; 134:25–135:1; 141:8–9; 203:9–14, R. 431, 433–34, 440, 502.)

The Road Case

Pinckney Point, LLC contacted the County for assistance in having the fence posts removed and, as a result, the County filed a lawsuit in November 2005 against Mr. Pinckney and other property owners along the Road Parcel seeking a declaration that the Road Parcel was a public road that Mr. Pinckney was not entitled to block (hereinafter referred to as the "Road Case"). (Tr. 202:24–205:17, R. 501–04; Road Case Compl., R. 1933.) Pinckney Point, LLC closed on the purchase of the Point Tract on March 31, 2006, for the price of $10,600,000. (Deed from PPF, LLC to Pinckney Point, LLC, R. 1883; *see also* Tr. 354:24–355:7, R. 653–54.) Pinckney Point, LLC put down $5,700,000 of its own funds and financed the remaining balance through an acquisition and development loan from BB&T. (Tr. 581:25–582:13, R. 880–81.) As a result of its purchase of the Point Tract, Pinckney Point, LLC became a party to the Road Case, along with the County and the other property owners of adjoining lands. (Tr. 207:1–5, R. 506.) The County and Pinckney Point, LLC took the position in the Road Case that the road was public. (Tr. 383:12–384:3, R. 682–83.) Pinckney Point, LLC also believed the County had a prescriptive easement over the road in the Road Case. (Tr. 383:24–384:3; 384:17–18, R. 682–83.)

In 2008, the Road Case proceeded to trial before a master in equity. (*See* Tr. 245:11–17; 246:2–3, R. 544, 545.) Rather than issuing a ruling immediately after trial, at the master's urging, the parties began settlement negotiations. (Tr. 246:6–8; 247:7–10; 654:24, R. 545, 546, 953.)

Loan Problems on the Point Tract for Pinckney Point, LLC

In early 2010, BB&T's acquisition and development loan for the Point Tract came due and, when Pinckney Point, LLC was unable to pay, the bank initiated foreclosure proceedings. (Tr. 289:15–290:12; 662:3–5, R. 588–89, 961.) However, before the foreclosure was completed, BB&T sold the note and mortgage to Equity Resource Partners. (Tr. 290:13–22, R. 589.) Pinckney Point, LLC sent representatives to meet with Equity Resource Partners soon thereafter to initiate discussions regarding the loan now held by Equity Resource Partners. (Tr. 290:13–291:1, R. 589–90.)

The Variance Case

Meanwhile, in addition to the Road Case, Pinckney Point, LLC became involved in another lawsuit.[1] In particular, Pinckney Point, LLC was seeking to move the driveway to the Point Tract, all 1,700 feet of which then sat on a river buffer, to a parallel location so that only a small portion of the road would cross the river buffer. (Tr. 231:9–13; 231:24–232:1; 232:20–233:8, R. 530–532.) Before Pinckney Point, LLC could develop the property, it was required to obtain a variance to move the driveway and to install utility lines under the new driveway. (Tr. 242:21–244:21, R. 541–43.) Pinckney Point, LLC appealed the Beaufort County Zoning Board of Appeals' denial of its application for a variance (the "Variance case"). (Tr. 236:12–237:4; 273:12–13, R. 535–36; 572.) Ultimately, the governmental parties in the Variance Case agreed that it was good for the

[1] An additional separate dock permit dispute also arose but was not part of the Settlement Agreement involved on appeal.

environment for the variance to be granted and the allowance of this variance became part of the global settlement of the Variance Case and the Road Case. (Settlement Agreement, Exhibit B, R. 67.)

Settlement Actions Regarding the Road Case

With regard to the Road Case, in August 2010, Pinckney Point, LLC reached an agreement with Dorothy Gnann, one of the owners whose property abuts the Road Parcel and the Point Tract, and executed a settlement under which Gnann agreed to sell thirty feet of the frontage of her property bordering the Road Parcel to Pinckney Point, LLC for $215,087. (Settlement Agr. between Gnann and Pinckney Point, LLC, R. 1724; *see also* Tr. 212:21–213:8; 264:13–16; 264:20–265:1; 266:3–267:7; 268:20–22, R. 511–12, 563, 563–64, 565–66, 567.) Agnes Pinckney, acting on behalf of her husband John David Pinckney, also agreed to settle with Pinckney Point, LLC in November 2009. (Settlement Agr. between Agnes Pinckney and Pinckney Point, LLC, R. 1697; Tr. 258:18–21; 259:6–12; 259:15–22, R. 557, 558.) Pinckney Point, LLC agreed to pay $1,300,000—in addition to certain concessions regarding its intended development—to Agnes Pinckney in exchange for a fifty-foot-wide easement over the Road Parcel allowing access to the Point Tract. (Tr. 259:10–12; 259:15–20; 260:20–23; 262:5–6; 263:20–264:1, R. 558, 559, 560, 561, 562–63.)

Road, LLC

At the time Pinckney Point, LLC settled with Agnes Pinckney, it did not have sufficient funds to pay the $1,300,000 for the easement over the Road Parcel. (Tr. 270:16–20; 356:22–357:9; 585:10–586:2, R. 569, 655–56, 884–85.) Pinckney Point, LLC eventually had an investor willing to put up the money, but not on the terms originally negotiated with Agnes Pinckney. (Tr. 587:2–18, R. 886.) This investor invested funds admittedly with knowledge that Pinckney Point, LLC

was in foreclosure proceedings on the Point Tract. (Tr. 652:24–653:6, R. 951–52.) The investor required that the Settlement Agreement be amended so that the Road Parcel would be purchased outright—rather than merely obtaining an easement—for $1,300,000 by ***Appellant Road, LLC***, a new entity created by the investor to hold title to the Road Parcel. (Tr. 284:22–285:11; 587:16–18, R. 583–85, 886.) In an effort to protect its investment, Road, LLC insisted it would only grant Pinckney Point, LLC an easement to the *twenty-foot* dirt road across the Road Parcel to ensure that Pinckney Point, LLC would have to purchase the Road Parcel before it could proceed with its development, which required a *fifty-foot* improved right-of-way pursuant to Beaufort County development standards. (Tr. 588:15–589:3; 821:15–24; 1005:13–16, R. 887–88, 1120, 1304.)

Further, Road, LLC entered into a Purchase and Sale Agreement under which Pinckney Point, LLC was to purchase the Road Parcel from Road, LLC for $5,000,000 to secure the residential access to the property. (Purchase and Sale Agreement, R. 1994; Tr. 589:4–22, R. 888.) The Purchase and Sale Agreement required Pinckney Point, LLC to pay a deposit of $10.00 and provided, in the event that Pinckney Point, LLC breached the contract and failed to purchase the Road Parcel, "the deposit paid by [Pinckney Point, LLC] shall be retained by [Road, LLC] as liquidated damages, *and as an estimate of* [Road, LLC's] *actual damages as* [Road, LLC's] *sole remedy*." (Purchase and Sale Agreement, R. 1994, 1996 (emphasis added).)

Global Settlement Reached

On January 14, 2011, the parties to the Road Case and the Variance Case executed the Settlement Agreement—a global settlement that ended litigation in both the Road Case and the Variance Case. (Settlement Agreement, R. 55; Am. Compl. ¶ 7, R. 42.) Road, LLC was not a party to either the Road Case or the Variance Case, but nonetheless was a signatory on the Settlement Agreement. (Settlement Agreement, R. 55.) As such, Road, LLC was fully aware that

the County was a party to the Settlement Agreement. Under the terms of the Settlement Agreement, the County had two obligations: 1) to grant Pinckney Point, LLC a variance to move the roadway and install the utility lines; and 2) to agree the Road Parcel would remain a private, rather than public, roadway. (*See* Settlement Agreement, R. 56–57; Tr. 401:11–402:1, R. 700–01.) The Settlement Agreement also incorporated Pinckney Point, LLC's settlements with Gnann and Agnes Pinckney. (Settlement Agreement, R. 57–58.) Additionally, Road, LLC agreed to grant Pinckney Point, LLC and the owners of the adjoining properties a limited twenty-foot access easement along the dirt road on the Road Parcel. (Access Easement Agreement, R. 116; *see also* Settlement Agreement, R. 57–58; Tr. 780:11–19, R. 1079.) Road, LLC agreed that such easement would be appurtenant to the land and would continue on for the benefit of the "successors" and "assigns" of Pinckney Point, LLC. (*Id.*) After the parties executed the Settlement Agreement, dismissal of the litigation occurred. (Consent Order, R. 134; Tr. 288:7–14, R. 587.)

In its appeal brief, Road, LLC takes the position that the parties to the Settlement Agreement all contemplated that the Point Tract would be developed into a residential development by Pinckney Point, LLC. "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 to complete the residential development of the Point Tract." (App. Br. at 10.) However, this specific "intent and effect" is not found in words of the Settlement Agreement. Moreover, the Settlement Agreement contains, at paragraph 10, a provision entitled "No Admission of Liability" in which it is agreed that "this Agreement shall not be construed as . . . a statement of any kind on any matters not specifically addressed in this document." (Settlement Agreement, R. 60.) Further, the Settlement Agreement contains, at paragraph 15, a provision entitled "Complete Understanding" in which it is agreed that "there are no oral or implied

agreements or understandings which are not specifically set forth in this Agreement or in the exhibits hereto" and which further provides:

> Each party acknowledges that no party, or agent or attorney of any other party or any person, firm, corporation, or any other entity has made any promise, representation, or warranty whatsoever, express, implied or statutory, not contained herein concerning the subject matter hereof to induce the execution of this Agreement.

(Settlement Agreement, R. 61–62.)

Pinckney Point, LLC did continue working to obtain the permits and approvals to move forward with its development plans. (*See* Tr. 595:8–19, R. 894.) Further, in August 2011, the County sent Pinckney Point, LLC notice that its preliminary conceptual plan had been approved. (Tr. 373:4–7, R. 672.) As can be seen by Road, LLC's appeal brief, Pinckney Point, LLC raised various complaints about the County's alleged acts or omissions with respect to final approval, but such alleged wrongful acts were rejected by the jury in its general verdict against Pinckney Point, LLC and by the trial court specifically in its JNOV Order. (Order pp. 6–9, R. 6–9.)

Pinckney Point, LLC's Deed to Equity Resource Partners with Option to Repurchase

Nearly a year after the Settlement Agreement, in December 2011, Pinckney Point, LLC reached an agreement to deed the Point Tract to Equity Resource Partners in lieu of foreclosure and pay $125,000 to purchase an exclusive option to buy back the property for $6,500,000. (Option Agreement, R. 1796; *see also* Tr. 290:23–291:7; 291:16–292:2; 292:7–11; 294:12–15; 593:1–24, R. 589–90, 590–91, 593, 892.) Hence, as of late 2011, Equity Resource Partners owned title to the Point Tract but Pinckney Point, LLC had an exclusive option to buy back the Point Tract from Equity Resource Partners. Further, at this point, Equity Resource Partners, as a "successor" and "assign" of Pinckney Point, LLC, became the owner of the above-described twenty-foot easement over the roadway. The option to repurchase was set to expire on August 31,

2012, at which time Pinckney Point, LLC could extend the option until February 28, 2013, for an additional $375,000. (Option Agreement, R. 1796–97; Tr. 593:9–24, R. 892.)

Pinckney Point, LLC Fails to Exercise its Option to Repurchase

Pinckney Point, LLC failed to find additional investment money in time to fund the repurchase of the Point Tract from Equity Resource Partners. (*See* Tr. 598:3–8, R. 897.) The Road, LLC investor did not provide Pinckney Point, LLC with any money to fund the repurchase. (*Id.*) In early 2013, Equity Resource Partners notified Pinckney Point, LLC that it would extend the option until March 11, 2013, but Pinckney Point, LLC did not have the funds necessary to complete the purchase by the extended deadline, and the option expired. (Tr. 345:5–346:7; 595:14–15; 807:17–23, R. 644, 1106.) Again, as seen by Road, LLC's brief, Pinckney Point, LLC blamed its failure to obtain investors and failure to obtain an additional option on alleged misdeeds by the County, all of which were rejected by the jury's general verdict in favor of the County and against Pinckney Point, LLC, and by the trial court specifically in its JNOV Order. (Order pp. 6–9, R. 6–9)

Meanwhile, in November 2012, the Beaufort County Open Land Trust (the "Land Trust") sent an inspector to the Point Tract on behalf of the County's Rural and Critical Land acquisition program. (Tr. 490:21–491:1; 492:25–493:4, R. 789–90, 791–92.) Because the Point Tract is located on a watershed of the Okatie River and contains numerous natural resources, the inspector determined the property should be conserved. (Tr. 493:5–24; 504:24–505:4; 510:11–25, R. 792, 803–04, 809.)

After The Option to Repurchase Expires, the County Buys the Point Tract

On March 14, 2013—*after* Pinckney Point, LLC's option to repurchase the Point Tract had *expired*—the inspector presented a proposal for the acquisition of the Point Tract to the Rural and

Critical Land Board, noting the land could be used as a regional conservation park. (Tr. 498:4–508:17, R. 797–807.) Following the presentation, the Board approved the purchase of the Point Tract from Equity Resource Partners for $6,950,000. (Tr. 500:12–15; 508:18–25, R. 799, 807.) The Land Trust then presented the idea to the Natural Resources Committee of the Beaufort County Council, which approved the proposal on April 8, 2013. (Tr. 924:13–15; 928:1–2; 938:13–939:4; 940:8–19, R. 1223, 1227, 1237–38, 1239.) A few weeks later, the County contracted with Equity Resource Partners for the purchase of the Point Tract, and it closed on the property on May 28, 2013. (May 28, 2013 Limited Warranty Deed, R. 2102.) At this point, the County owned both the Point Tract and the easement over the roadway to get to the Point Tract, having purchased them from Equity Resource Partners, which had in turn obtained the same from Pinckney Point, LLC. No party has claimed that the sale by Equity Resource Partners to the County was a breach of any contract. Equity Resource Partners was dismissed as a party to this action. Instead, Pinckney Point, LLC and Road, LLC sought a declaration that the County's intended use of the Road Parcel violated the Settlement Agreement which provided that the Road Parcel would remain private. (Compl. at 8, R. 29.) As stated, a jury issued its verdict against the claims of Pinckney Point, LLC. There is no appeal by it. The trial court granted JNOV in favor of the County as to Road, LLC's claims, and it appeals.

STANDARD OF REVIEW

A trial court should grant a JNOV motion when the evidence presented is insufficient to support the jury's verdict. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005). "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). An appellate court must apply the same standard of review as the trial court. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012).

ARGUMENT

I. The trial court properly granted the County's JNOV motion on the ground that there was no evidence the County breached the Settlement Agreement.

The central issue in this case is essentially whether the County breached the Settlement Agreement by purchasing the Point Tract, because Road, LLC's position on appeal is that by purchasing the Point Tract, the County will necessarily be converting the Road Parcel into a public road, in violation of the Settlement Agreement. Not so, as is explained below.

The express terms of the Settlement Agreement do not address ownership of the Point Tract or impose any specific type of development of the Point Tract, let alone prohibit its purchase by the County or any other individual or entity. (*See* Settlement Agreement, R. 55.) As part of the forbearance agreement in lieu of foreclosure, Pinckney Point, LLC paid $500,000 to Equity Resource Partners for an exclusive option to repurchase the Point Tract. (Option Agreement, R. 1796; Forbearance Agreement, R. 2002; Tr. 291:2–292:11; 294:12–21, R. 590–91, 592.) Pinckney Point, LLC originally purchased the option because it could not afford to pay off its loan or complete the purchase of the Point Tract but wanted to protect its opportunity to develop the property. (*See* Tr. 294:25–295:5, R. 593–94.) Moreover, Pinckney Point, LLC was fully aware that its agreement with Equity Resource Partners provided for the extension of the option only until February 28, 2013. (Tr. 593:7–22, R. 892.) Nevertheless, Pinckney Point, LLC did not repurchase the Point Tract, nor did Road, LLC provide funds for Pinckney Point, LLC to repurchase the Point Tract, apparently gambling on its belief that Equity Resource Partners would be willing to offer it an additional extension. (Tr. 595:8–19, R. 894.). Instead, the option expired.

Road, LLC cannot blame the County for Pinckney Point, LLC's or Road, LLC's mistakes in judgment. Nor can the Court save them from poor business decisions. *See Mitchum v. Mitchum*, 183 S.C. 75, 190 S.E. 104, 113 (1937) ("It is not the business of Courts to protect parties from the

consequences of bad contracts . . . ."); *Continental Ins. Co. v. Boykin*, 25 S.C. 323, 327 (1886) ("This contract may have been an unwise and improvident one, but still the defendants made it, and as was said by Judge Hudson in his decree: 'It being so explicit, the court is prevented from any effort to relieve the parties from the full consequences thereof.'"); *Jennings v. Teague*, 14 S.C. 229, 233 (1880) ("[T]he unwise exercise of his judgment is not sufficient authority for the court to set aside his acts . . . .").

A. The express terms of the Settlement Agreement do not restrict the use of the Point Tract to only residential development.

Road, LLC asserts that by purchasing the Point Tract, the County breached a requirement of the Settlement Agreement that the property be used only for residential development to be developed by Pinckney Point, LLC, because its purchase would necessarily convert the Road Parcel to a public road. (App. Br. at 29, 31–32.) There is no provision in the Settlement Agreement expressly restricting the use of the Point Tract to residential development, or to one created by Pinckney Point, LLC. (*See* Settlement Agreement, R. 55; Tr. 661:1–15, 676:9–17, R. 960, 975.) Road, LLC concedes it "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.'" (App. Br. at 31; *see also* App. Br. at 32 ("[T]he question is not whether the Settlement Agreement included an express covenant restricting the Point Tract to residential development.").) Indeed, as stated in the trial court's JNOV order, Mr. John Kunkel, a representative of Road, LLC, testified that he did not believe the Settlement Agreement required the property to only be used as a residential development. (Order p. 2, R. 2.)

In an effort to get around the lack of any express contractual term limiting the use of the Point Tract to residential development, Road, LLC relies on repeated references to the

"surrounding circumstances" when the Settlement Agreement was executed and the jury's notes during deliberation[2]—to argue the parties all understood the implied terms of the contract to require that the land be used for residential purposes and that the County could not purchase the land for another use. (*See* App. Br. at 31–32, 34–35.) However, South Carolina courts have long prohibited extrinsic evidence from altering the express, unambiguous terms of a written contract under the parol evidence rule.[3] *See, e.g.*, *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Thus, because the County did not breach any express term of the Settlement Agreement, the trial court properly granted its motion for JNOV.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions *as determined by the contract language.*" *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (emphasis added). The parol evidence rule prohibits consideration of "extrinsic evidence of agreements or understandings contemporaneous with or prior to the execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *Rodarte v. Univ. of S.C.*, 419

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[2] When reviewing a grant of JNOV, an appellate court is limited to considering the evidence in the record. *See RFT Mgmt. Co.*, 399 S.C. at 331–32, 732 S.E.2d at 171. Because a jury's notes and questions to the court during their deliberation are not evidence, it is not proper to consider those in determining the propriety of the trial court's grant of JNOV. *See id.*

[3] Although the trial court originally ruled—over the County's objection—that the Settlement Agreement contained a "latent ambiguity" and allowed the plaintiffs to present parol evidence during trial, (Tr. 67:19–68:2, R. 366–67), it ultimately—and correctly—determined there is no latent ambiguity in the contract and did not consider the parol evidence in ruling on the County's JNOV motion. *See Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."). Instead, the trial court considered only the unambiguous terms of the Settlement Agreement and properly ruled the contract did not restrict the use of the property to residential development. (Order p. 3, R. 3 ("Importantly, the Settlement Agreement does not bind the property to be forever used as a residential development. This is a term that Road, LLC has alleged to be a latent ambiguity. There is no reasonable reading of the terms of this agreement which would support this assertion by Road, LLC.").)

S.C. 592, 603, 799 S.E.2d 912, 917 (2017) (quoting *Gilliland*, 301 S.C. at 302, 391 S.E.2d at 581); *see also Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."). Thus, when the terms of a contract are plain and unambiguous, "'the court's only function is to interpret [their] lawful meaning and the intent of the parties *as found within the agreement.*'" *Id.* (quoting *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 600 (2014)); *see also Duncan v. Little*, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009) ("Where a contract is unambiguous, the matter becomes one of law and the parties' intent as clearly set forth in their agreement must be given effect."). Moreover, when a contract is clear on its face it must be enforced "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

Further, the *express* "Complete Understanding" and "Admission of Liability" provisions of the Settlement Agreement, set forth above in the Statement of Facts, bar Road, LLC's efforts to read into or implicate understandings and terms that do not exist expressly in the Settlement Agreement. (Settlement Agreement, R. 60–62; Tr. 589:4–22, R. 888.) It is axiomatic that supposed "implied terms" from circumstances cannot override expressly agreed upon terms by the parties to the Settlement Agreement. Thus, JNOV was correctly granted.

Although the Settlement Agreement does not expressly restrict the use of the Point Tract to residential development, Road, LLC argues the County nevertheless frustrated the purpose of the Settlement Agreement by purchasing the Point Tract (and thereby somehow converting the Road Parcel to a public road) contrary to the parties' understanding at the time the contract was created. (App. Br. at 30–31, 34.) This is exactly the type of evidence the parol evidence rule

prohibits. *See Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917 (quoting *Gilliland*, 301 S.C. at 302, 391 S.E.2d at 581) (excluding evidence of "understandings contemporaneous with or prior to the execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument"). Furthermore, if the Court were to consider Road, LLC's assertions about the "circumstances" surrounding the Settlement Agreement, it "would be tantamount to permitting a party to convert an unambiguous contract into an ambiguous one based on little more than the subjective, after-the-fact meaning one party assigns to it." *Id.* at 604, 799 S.E.2d at 918 (internal quotations omitted). Road, LLC's hope that the Point Tract would someday be used for residential development does not create an implied contractual term prohibiting the County from buying the land and using it for conservation, a park, or any other purpose. *See Progressive Max Ins. Co.*, 405 S.C. at 46, 747 S.E.2d at 184 (noting "the court is not at liberty to consider [the parties'] secret intentions" at the time of formation).

The County had only two express obligations under the Settlement Agreement: (1) grant a road variance for Pinckney Point, LLC and (2) agree that the Road Parcel would remain private. (*See* Settlement Agreement, R. 56–57.) Plaintiffs at trial did not present evidence that the County breached either of its obligations. (Tr. 400:22–401:10, R. 699–700.) Therefore, the record does not support Road, LLC's claim that the County breached the Settlement Agreement, and the trial court properly granted JNOV in favor of the County.

Finally, the law regarding the frustration of purpose doctrine does not accord with Road, LLC's arguments. Under the frustration doctrine, performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration *or a practically total destruction of the expected value of the performance*." 30 S.C. Jur. *Contracts* § 63 (emphasis added). Further, for the doctrine of frustration of purpose to apply, "[t]he frustration must be so

severe that it is not fairly to be regarded as within the risks that he assumed under the contract." *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 935 F.2d 267 (4th Cir. 1991) (citing Restatement (Second) of Contracts § 265, cmt. a). Here, there is no "severe" or "total destruction of value" with respect to the Settlement Agreement caused by any act of the County, and it certainly was foreseeable that the County would become a "successor" or "assign" to the Point Tract. Road, LLC cannot show frustration of purpose under the law.

B. The County has not breached the Settlement Agreement's requirement that the Road Parcel remain private.

Road, LLC also attempts to expand the parties' Settlement Agreement that the Road Parcel remain private to include an obligation to put up signs, close a gate, or otherwise take affirmative steps to restrict the public's access to the road. (App. Br. at 36, 37.)[4] However, there is no language in the Settlement Agreement requiring the owner of the Point Tract or the County in its official capacity to take affirmative steps to restrict access to the road. (*See generally* Settlement Agreement, R. 55.) There is also nothing in the Settlement Agreement requiring the Point Tract

[4] Appellant's additional contention that the County's maintenance work on the Road Parcel automatically "converted it to a public road as a matter of law" is conclusory and unsupported by any authority. (App. Br. at 39.) Therefore, the argument is abandoned and unpreserved for this Court's review. *Brouwer v. Sisters of Charity Providence Hosp.*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). Moreover, the Supreme Court's opinion in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017), which Appellant cites immediately preceding its summary contention, provides no support for Appellant's argument that county maintenance automatically transforms private roads into public roads. In that case, the Supreme Court merely held that it was unconstitutional for a county to use public funds to inspect a private road. *See id.* at 122–24, 804 S.E.2d at 861–62. Nowhere did the court even suggest the road became public as a result of the county's inspection. *See id.* Finally, under the "Grant of Right of Way and Easement Agreement," attached as an exhibit to the Settlement Agreement, Pinckney Point, LLC and its "successors and assigns" are actually "responsible" for maintenance of the easement. (R. 84.)

to be developed as residential property.[5] Indeed, the express terms of the Settlement Agreement merely provide that the parties "agree that the Road Parcel is and shall be a private road." (Settlement Agreement at 3, R. 57.) Road, LLC bore the burden of proving the County breached its obligation to keep the road private. *See, e.g., Allegro, Inc. v. Scully*, 418 S.C. 24, 34, 791 S.E.2d 140, 145 (2016) ("In an action for breach of contract, the burden is on the plaintiff to prove the contract, its breach, and the damages caused by such breach."). Road, LLC presented no evidence that the road is now public other than the lack of any signs or physical barriers on the Road Parcel. Therefore, the County has not breached the Settlement Agreement's requirement that the Road Parcel remain private, and the trial court properly granted the County's JNOV motion.[6] *See Hutto v. Tindall*, 40 S.C.L. 396, 400, 1853 WL 2912 (Ct. App. 1853) ("Public roads of any kind, can be established only by public authority; or by dedication; or by long use, which though not strictly prescription, bears so close an analogy to it, that it may be expressed by that term. Less than twenty years' use is insufficient to create either a public or a private road.").

Furthermore, the Settlement Agreement provides that, unless and until Pinckney Point, LLC performs its obligation to purchase the Road Parcel or a fifty-foot right-of-way easement across it, "said Road Parcel shall be subject to an easement for access, ingress and egress over the road (20' dirt surface) located and existing on the Road Parcel in favor of the *owners of all property*

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[5] There were no restrictions on the identity of a class of purchasers with respect to the Point Tract. Further, an individual could have purchased the tract and preserved it in its natural state. The result with respect to Road, LLC's hopes in such an instance would have been the same. While restrictions could have been offered as to the Point Tract, none were made terms to the Settlement Agreement.

[6] To the extent Appellant contends the trial court erred by ruling the Settlement Agreement permits public access and use of the Road Parcel, this argument mischaracterizes the trial court's ruling. (App. Br. at 35–36.) The trial court did not find that the Settlement Agreement allows public use of the Road Parcel; rather, it simply found the County had not breached the requirement that the road remain private. (Order p. 4, R. 4.)

accessed by such road, their heirs, *successors and assigns*." (Settlement Agreement at 4, R. 58 (emphasis added).) It is undisputed that Pinckney Point, LLC did not purchase the Road Parcel from Road, LLC. (*See* App. Br. at 46, 48; Tr. 879:23–25, R. 1178.) Therefore, the County—as the new owner of the Point Tract—is entitled to the *same* easement as a "successor" or "assign." Additionally, under the Settlement Agreement, Pinckney Point, LLC was given the right to "assign its rights and obligations hereunder in its sole discretion." (*See* Settlement Agreement at 8, R. 62.) Those rights and obligations were in fact assigned to Equity Resource Partners, which in turn assigned the same to the County when the County purchased the Point Tract.

Courts favor appurtenant easements and "an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." *Rhett v. Gray*, 401 S.C. 478, 492, 736 S.E.2d 873, 880 (Ct. App. 2012) (internal quotations omitted). In order to establish an easement appurtenant, the easement must "inhere[] in the land, concern[] the premises, ha[ve] one terminus on the land of the party claiming it, and [be] essentially necessary to the enjoyment thereof." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009) (quoting *Tupper v. Dorchester Cty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)). Once an appurtenant easement has been created, it attaches to the benefitted property and passes with it upon conveyance. *Id.*

In this case, the requirements for an appurtenant easement are easily met.[7] The easement clearly inheres in and concerns the Road Parcel because it permits the grantee, all occupants[8] of

[7] The word "appurtenant" is used when describing the easement in the "Grant of Right of Way and Easement Agreement," an exhibit to the Settlement Agreement. (R. 83.)

[8] Appellant's suggestion that the easement's reference to "occupants" of the Point Tract demonstrates the parties' intent that the property be used for residential purposes is absurd. (App. Br. at 36.) Appellant's argument ignores the other individuals listed in the easement as having a right-of-way across the Road Parcel, including "customers" and "employees." (Access Easement Agreement, R. 116.) Moreover, the definition of "occupant" is merely "one who occupies a particular place." Merriam-Webster, https://www.merriam-webster.com/dictionary/occupant. Thus, the term "occupant" is not limited only to those who are residentially occupying a space; it

the grantee's benefitted property, and the grantee's "respective subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors, and assigns" to enter and pass through the Road Parcel in order to access the Point Tract. (Access Easement Agreement, R. 116.) The Road Parcel also borders the Point Tract and therefore has a terminus on the Point Tract. (*See* Tr. 750:13–23, 759:8–11, R. 1049, 1058.) Finally, it is well-established and undisputed that the Road Parcel is the only way to enter the Point Tract from land. (*See* Tr. 591:5–8, R. 890 ("Literally, all roads go over [Road, LLC's] property, and any acquirer of the [Point] tract would need to purchase or acquire the right-of-way across the Road [Parcel].").) Therefore, the twenty-foot easement Road, LLC granted to Pinckney Point, LLC and the other adjoining-property owners is an appurtenant easement, which passed through the subsequent conveyances to the County. Moreover, Road, LLC agreed that this appurtenant easement would exist in favor of all of Pinckney Point, LLC's "successors" and "assigns"—using these terms which were unrestricted in definition and certainly could include a County—as part of the signed Settlement Agreement (with the County as a party).

Additionally, the fact that the County is a public entity has no effect upon the County's rights under the easement or the nature of the Road Parcel as a private road. *See Leydon v. Town of Greenwich*, 777 A.2d 552, 559 (Conn. 2001) ("The town holds an easement over a private road on the driftway that provides the only means by which a person seeking to enter Greenwich Point on land may do so."); *Avaunt v. Town of Gray*, 634 A.2d 1258, 1259–61 (Me. 1993) (affirming a holding that a road was not a town road but a private road with a public easement); *Stonegate*

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includes any user of the property—including businesses, legal persons, or government entities. *See Wolfe v. Herlihy*, 218 S.C. 90, 61 S.E.2d 764 (1950) (regarding occupancy of businesses). Additionally, the word "occupants" is not used when describing the easement in the "Grant of Right of Way and Easement Agreement," an exhibit to the Settlement Agreement. (R. 83.)

Family Holdings, Inc. v. Revolutionary Trails, Inc., 900 N.Y.S.2d 494 (N.Y. App. Div. 2010) ("[W]e note that the State is using and permitting access over the [private road] right-of-way not in its governmental or municipal capacity, but as a private holder of the right-of-way and an interest in the land."); *Feather v. Donaldson*, 481 So. 2d 937, 938 (Fla. Dist. Ct. App. 1985) (noting a person may grant to a county "an exclusive easement for private road purposes"); *Armstrong v. Onondaga Cty., for and on behalf of Onondaga Cty. Water Dist.*, 446 N.Y.S.2d 793, 794 (N.Y. App. Div. 1981) (recognizing a county had valid easement over a private road). Analyzing similar facts, the court in *Stonegate Family Holdings* explained,

> Here, the clear intent of the 1959 agreement was to create for the parties a right of ingress and egress to their respective properties and, in our view, to preclude any party thereto from making the "private" road a "public" road in the legal sense. . . . We simply cannot agree with plaintiff's contention that, by allowing the general public to traverse the roadway in order to gain access to the property, defendants have impermissibly converted the private right-of-way into a public right-of-way. . . . The language in the agreement that the roadway over which the right-of-way was granted "shall be and remain a private road" "does not restrict the nature or frequency of [the State's] use by . . . its employees, invitees and licensees." In that regard, we note that the State is using and permitting access over the right-of-way not in its governmental or municipal capacity, but as a private holder of the right-of-way and an interest in the land.
>
> Any other construction of the challenged easement would prohibit the other easement holders from allowing *any* member of the general public—including their licensees and invitees—to use the right-of-way to gain access to that party's own property. Such an interpretation is "unnecessarily restrictive and contrary to its apparent meaning as evidenced by the conduct of the respective owners over the years." . . . Thus, we conclude that members of the public, as invitees of the State through its . . . easement, can permissibly use the right-of-way to access the Boy Scouts' property without violating the spirit and intent of the 1959 agreement.

900 N.Y.S.2d at 500 (citations omitted).

Similarly, in this case, the Settlement Agreement's provision that the road was to remain private has no impact on the adjoining-property owners'—including the County's—easement

rights to use the road. The right-of-way Road, LLC granted over the Road Parcel expressly contemplates use, not solely by the owners of the dominant tenements, but also by their respective invitees, licensees, and customers. (Access Easement Agreement, R. 116; *see also* Settlement Agreement Exhibit F, R. 83.) By arguing the County has converted the Road Parcel into a public road simply because a member of the general public might use the road as an invitee of the County, Road, LLC is necessarily suggesting the other adjoining-property owners with easements over the Road Parcel are likewise prohibited from allowing any members of the general public other than themselves to use the road to access their properties. *See Stonegate Family Holdings*, 900 N.Y.S.2d at 500. Road, LLC's argument is illogical and contravenes the express terms of the easement agreement. (*See* Settlement Agreement at 4 and Exhibit F, R. 58, 83; Access Easement Agreement, R. 116.) Hence, the trial court's JNOV order should be affirmed.

The trial court properly ruled that the County's use of the Road Parcel was within its rights under the easement and did not affect the nature of the parcel as a private road. In addition, Plaintiffs presented no evidence that the County has finally decided what it will do with the Point Tract, let alone that it will be opened up for use by the general public. Further, Plaintiffs failed to put into evidence facts showing that members of the public have been using the Road Parcel to access the Point Tract. Therefore, this additional failure of proof means the judgment below must be affirmed. Hence, also because there is no evidence the County's use of the Road Parcel breached the Settlement Agreement, the trial court properly granted the County's motion for JNOV.

C. Because the County did not breach the Settlement Agreement, it cannot be liable, as a matter of law, for allegedly breaching the implied covenant of good faith and fair dealing.

Under South Carolina law, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *RoTec Servs., Inc. v.*

Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). "Rather, the cause of action for breach of the implied covenant of good faith and fair dealing is subsumed under the breach of contract claim." *Skinner v. Gateway Mortg. Grp., LLC*, Civil Action No. 3:13-02924-MGL, 2017 WL 4776455, at *5 (D.S.C. Oct. 23, 2017) (citing *RoTec Servs.*, 359 S.C. at 473, 597 S.E.2d at 883). Moreover, "[t]here is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do." *First Fed. Savings & Loan Ass'n of S.C. v. Dangerfield*, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (Ct. App. 1992). Accordingly, where there has been no breach of the express terms of a contract, there can be no breach of the implied covenant of good faith and fair dealing. *See RoTec Servs.*, 359 S.C. at 470–73, 597 S.E.2d at 883–84.

As discussed above, Road, LLC failed to produce any evidence that the County breached the terms of the Settlement Agreement. Instead, Road, LLC's only argument is that the purpose of the Settlement Agreement was to enable residential development on the Point Tract by Pinckney Point, LLC and that the County's actions were inconsistent with and frustrated that purpose. However, the Settlement Agreement does not expressly restrict the use of the Point Tract to residential development or development by Pinckney Point, LLC, and the parol evidence rule (as well as the "Complete Understanding" and "Admission of Liability" provisions of the Settlement Agreement) prohibits consideration of any contrary or additional understanding of the terms of the contract Road, LLC may have had at the time it was executed. (Settlement Agreement, R. 60–62.) Road, LLC failed to establish that the County breached the Settlement Agreement terms and, therefore, failed to prove that the County breached the implied covenant of good faith and fair dealing. *See RoTec Servs.*, 359 S.C. at 470–73, 597 S.E.2d at 883–84. Thus, the trial court

properly granted the County's motion for JNOV on Road, LLC's claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

II. In the alternative, the trial court properly granted the County's motion for JNOV with respect to damages.

The trial court also should be affirmed on its ruling granting the County JNOV due to the failure of Road, LLC to prove any damages. First, there is no evidence Road, LLC suffered any damages. Second, the award of $5,000,000 for lost profits was entirely speculative. Therefore, the trial court properly granted the County's motion for JNOV as to damages.

Road, LLC argues that the "highest and best use" of the Road Parcel is as the exclusive access to a residential development. (*See, e.g.*, App. Br. at 41.) However, even assuming *arguendo* this to be true, the Settlement Agreement does not address what the "highest and best use" of the Road Parcel might be, nor does it restrict the Point Tract to use only as a residential development. (*See* Settlement Agreement, R. 55.) Therefore, any understanding Road, LLC had as to the value of the Road Parcel is extrinsic to the contract and irrelevant to the issue before the Court—whether Road, LLC has suffered any damages caused by the County's alleged breach of the Settlement Agreement. *See Rodarte*, 419 S.C. at 603, 799 S.E.2d at 917 (noting the parol evidence rule prohibits consideration of "extrinsic evidence of agreements or understandings contemporaneous with or prior to the execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument" (quoting *Gilliland*, 301 S.C. at 302, 391 S.E.2d at 581)); *Ellis*, 316 S.C. at 248, 449 S.E.2d at 488 (explaining when a contract is clear on its face, it must be enforced "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully"); *Mitchum*, 183 S.C. 75, 190 S.E. at 113 ("It is not the business of Courts to protect parties from the consequences of bad contracts . . . .").

Road, LLC presented testimony from its expert appraiser, Thomas F. Hartnett, as to the value of the Road Parcel. Road, LLC paid $1.3 million for the Road Parcel, encumbered by the easement discussed herein. Mr. Hartnett testified that the Road Parcel would be worth $5 million as the access to a residential development, but he also conceded that the property is worth the same amount even after the County purchased the Point Tract. (Tr. 878:11–879:8, 885:3–5, R. 1177–78, 1184.) Thus, according to Road, LLC's own expert, the County's alleged breach in purchasing the Point Tract has had no impact on the value of the Road Parcel. Therefore, the record does not support Road, LLC's claim for damages.

Furthermore, even if Mr. Hartnett's testimony were sufficient to establish that Road, LLC has suffered some amount of lost profits as a result of the County's purchase of the Point Tract, the amount of those damages is based on pure speculation. "In a breach of contract action, the 'measure of damages is the loss actually suffered by the contractee as the result of the breach.'" *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E.2d 332, 333–34 (2004) (quoting *S.C. Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 114, 113 S.E.2d 329, 335–36 (1960)); *see also Int'l Safety Access Corp. v. Integrity Worldwide, Inc.*, Civil Action No. 0:09-00315-MBS, 2011 WL 6826855 at *5 (D.S.C. Dec. 28, 2011) ("The purpose of an award of damages in a breach of contract action is to place the non-breaching party in as good a position as it would have been in if the contract had been performed."). Before a plaintiff can recover any damages, it must present sufficient evidence to "enable the jury to determine the amount of damages with reasonable certainty or accuracy." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 374, 725 S.E.2d 112, 126 (Ct. App. 2012). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) (quoting *Gray*

v. S. Facilities, Inc., 256 S.C. 558, 570–71, 183 S.E.2d 438, 444 (1971)); *see also Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968) ("It is, of course, true that the existence or amount of damages cannot be left to conjecture, guess or speculation."); *S.C. Fin. Corp.*, 236 S.C. at 114, 113 S.E.2d at 336 ("[D]amages may not be based wholly upon speculation or conjecture . . . ."); *Welsh v. Western Union Tel. Co.*, 207 S.C. 102, 109, 34 S.E.2d 398, 400 (1945) ("There is likewise no evidence whatever as to any expense to which respondent was put out. It follows that any award thereon would be speculative.").

The trial court found Road, LLC's alleged "lost profits" depended on an assumption that Pinckney Point, LLC would have been able to get back into a financial position to purchase the Point Tract, begin development on the property, and purchase the Road Parcel from Road, LLC. (Order p. 11, 12, R. 11, 12.) As the trial court correctly found, there is no evidence in the record that Pinckney Point, LLC would have been able to do so. To the contrary, despite holding an exclusive option to purchase the Point Tract for more than a year, Pinckney Point, LLC never had sufficient funds to complete the purchase, which caused its exclusive option to lapse, which in turn freed Equity Resource Partners to sell the Point Tract to the County. The trial court elsewhere properly held that other supposed evidence of "lost profits" damages was purely speculative.

Further, Road, LLC was not guaranteed any amount of profits on the Road Parcel under the terms of the Settlement Agreement. In fact, Road, LLC freely invested in its purchase of the Road Parcel understanding that: 1) Pinckney Point, LLC was being foreclosed on at the time by BB&T with respect to the Point Tract; 2) the Road Parcel was subject to an appurtenant easement in favor of Pinckney Point, LLC *and* its successors and assigns; and 3) if Pinckney Point, LLC did not pay Road, LLC $5 million for the road parcel under the Purchase and Sale Agreement, it would only have $10 of liquidated damages as a result. (Purchase and Sale Agreement, R. 1796; Tr.

589:4–22, R. 888.) Moreover, Mr. Hartnett explained that the Road Parcel is still worth $5 million by its mere existence because it is the sole access to the Point Tract, regardless of how that property is used or developed. (Tr. 887–889, R. 1186–88.) Therefore, any damages Road, LLC may have suffered due to the County's purchase of the Point Tract are too speculative to support the jury's verdict and JNOV was proper.[9]

Finally, what Road, LLC would have this Court sanction as a result in this matter is absurd. Having paid $1.3 million for the Road Parcel, Road, LLC would have the Court uphold a jury award of lost profits damages of $5 million (***the total value*** of the Road Parcel, according to Road, LLC's expert), plus leave Road, LLC with ownership of the Road Parcel (with the ability, according to its expert, to sell it for an additional $5 million). Road, LLC's claims should be rejected and the trial court affirmed.

III. The trial court properly found that the jury's verdict against Pinckney Point, LLC was a rejection of interference by the County in Pinckney Point, LLC's seeking of permits and that aspects of the Settlement Agreement were unenforceable.

Accusing the trial court of "ignoring" that there were more than two parties to the Settlement Agreement, "among other errors," Road, LLC also says the Court erroneously held the Settlement Agreement to be a nullity and that since there were no special interrogatories answered by the jury, "a court has no way to determine the basis for the jury's decision" with regard to the verdict against Pinckney Point, LLC. The trial court obviously knew there were multiple parties

[9] To the extent Appellant now contends that it could have sold the Road Parcel to *any* developer (not just Pinckney Point, LLC) for five million dollars if the Point Tract were converted into a residential development, and the County is in breach of the Settlement Agreement by virtue of the County's purchase of the Point Tract not permitting *any* residential development, this argument is unpreserved for this Court's review. (App. Br. at 41–42.) The trial court's order granting the County's JNOV motions does not address this argument, and Appellant did not file a Rule 59(e) motion. *Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) ("A party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on.").

to the Settlement Agreement, since it mentioned them in its Order. Further, Road, LLC is wrong on its other criticisms of the trial court.

It is well-settled that the government cannot contract away its police power, which includes the power of eminent domain. *Stone v. State of Mississippi*, 101 U.S. 814, 817–18 (1879); *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977); *see also Pima Gro Sys., Inc. v. Bd. of Supervisors of King George Cty.*, 52 Va. Cir. 241 (2000) ("A local government must exercise its police power to serve the common good and general welfare, and may not surrender it or bargain it away."). This is known as the "reserved powers doctrine." *See Matsuda v. City & Cty. of Honolulu*, 378 F. Supp. 2d 1249, 1256 (D. Haw. 2005), *vacated in part*, 512 F.3d 1148 (9th Cir. 2008) ("The [United States] Supreme Court's long line of precedent on the subject also shows that the reserved powers doctrine applies equally to protect the right of eminent domain from contractual infringement when that right has been delegated to a municipality." (citing *Contributors to Pennsylvania Hosp. v. City of Philadelphia*, 245 U.S. 20, 23–24 (1917))). Courts in California, for example, have interpreted the reserved powers doctrine to be "implicit in all government contracts." *108 Holdings, Ltd. v. City of Rohnert Park*, 38 Cal. Rptr. 3d 589, 597 (Cal. Ct. App. 2006) Therefore, "private parties take their rights subject to that reservation," and "it is presumed that parties contract in contemplation of state's inherent right to unhampered exercise of police power." *Id.*

Moreover, the U.S. Supreme Court has held "if there can be no right to restrain by contract the power of eminent domain, it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power." *Contributors to Pennsylvania Hosp.*, 245 U.S. at 23. In that case, the city of Philadelphia entered into a contract with a hospital in which it agreed not to appropriate any land on the hospital's grounds for streets

or alleys without the hospital's consent. *Id.* at 21. The Supreme Court upheld the decision by Pennsylvania state courts to invalidate the contract on the ground that the city of Philadelphia could not renounce its police power. *Id.* at 23.

Thus, the Settlement Agreement cannot bar the County from condemning the road or taking it for public use via its power of eminent domain in any event. However, the County has not taken any steps to do this. The County has done nothing to covert the public road to a private one. There has been no breach of the Settlement Agreement. Yet, even if the County chose to so convert the road, Road, LLC could not prevent that by trying to specifically enforce this provision of the Settlement Agreement.

Finally, contrary to Road, LLC's arguments, the trial court correctly held that the jury's verdict against Pinckney Point, LLC in effect determines all of the factual defenses raised by the County to be valid, and all of Pinckney Point, LLC's factual claims against the County to be invalid. There is no need for a special verdict or special interrogatory in this regard. The general verdict against Pinckney Point, LLC and in favor of the County creates all of this by implication as a matter of law. *See* C.J.S. *Appeal and Error* § 904 (2007) ("Under the general verdict rule, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury has found every issue in favor of the prevailing party.")

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the trial court granting the County's JNOV motion with respect to liability and damages.

Signature Page Attached

Respectfully submitted,

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May 21, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC, Plaintiffs

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

v.

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

CERTIFICATE OF COUNSEL

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

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Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC, ... Appellants,

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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