

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

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SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT

May 21, 2018

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John P. Linton, Jr. (SC Bar # 79130)
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INTRODUCTION

Respondent, Beaufort County (“Respondent” or “the County”), fails to address the evidence at trial highlighted by Appellant, Road, LLC (“Appellant” or “Road, LLC”), in its brief that supports the verdict in favor of Road, LLC against the County for \$5,000,000. By weeding out the proof clearly supporting the verdict, the County hopes to circumvent the well-established standard of review for an appeal of a JNOV. 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). As explained below, and in Appellant’s brief, the County’s arguments should be rejected, the circuit court reversed, and the jury verdict reinstated.

I. **Substantial evidence at trial supported the verdict that the County breached the Settlement Agreement by purchasing the Point Tract with the express purpose of preventing its development.**

The County argues, and the lower court ruled in granting the County’s motion for JNOV, that the County did not breach the Settlement Agreement when it purchased the Point Tract for the purpose of preventing development because the Settlement Agreement did not impose an express restriction on the Point Tract that it could be used only for a residential development nor explicitly prohibit the County from purchasing the Point Tract. (**Res. Br., 7, 11, 12**). The County also argues, and the circuit court incorrectly ruled, that the County had only two obligations under the Settlement Agreement—grant a road variance for Pinckney Point, LLC and agree that the road would remain private. (**Res. Br., 15**). Under the County’s argument and the circuit court’s order, the County could take any action, no matter how much it inhibited the purposes of the Settlement Agreement, with complete

impunity, provided the County granted a variance for the relocation of the driveway on the Point Tract and did nothing to alter the private nature of the unimproved right of way across the Road Tract.

The County's argument and the lower court ruling adopting it after the verdict are completely at odds with the law of South Carolina and the uncontested jury charge described below and in Appellant's opening brief. South Carolina law holds that a party can be held liable for breach a contract without breaching an express provision. Additionally, as discussed in more detail in the next section of this brief, there was ample proof from which a jury could conclude the County also breached the express provision that the road would be forever private.

- A. The evidence established that a primary purpose of the Settlement Agreement was to facilitate the residential development of the Point Tract and the sale of the Road Parcel by Road, LLC to the residential developer. The County breached the Settlement Agreement by purchasing the Point Tract for the express purpose of preventing that development and the sale by Road, LLC, from ever occurring.

The County omits three critical facts from its brief. First, the County purchased the Point Tract *with the express purpose of preventing 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"); **(R. pp. 1371:20-1372:1)** (Josh Gruber, the County Attorney testifying that if the County purchased the Point Tract it would have frustrated any developer's ability to develop the tract).

Second, the Settlement Agreement is permeated by provisions that demonstrate one of its primary purposes was to facilitate the residential development of the Point Tract. **(Appellant's Br. 12-14, 33-35).**

Third, the County neglects to mention that Road, LLC, joined in the settlement and paid \$1,300,000 to buy the Road Parcel from Agnes Pinckney based on the express terms of the Settlement Agreement that it would provide only rudimentary access to Pinckney Point until it later sold the Road Parcel to the residential developer of the Point Tract. After purchase, the residential developer, then Pinckney Point, LLC, would expand and improve the right of way to meet the requirements of the County's development ordinances for vehicular access to the planned residential subdivision on the Point Tract. (**Pls. Ex. 78. ¶4(a), R. pp. 1747-1748**). If Pinckney Point, LLC was that developer, as originally planned, then Road, LLC was going to sell the Road Parcel to it for \$5,000,000 pursuant to the contract of sale mentioned by the County in its brief. (**Def. Ex. 3, R. pp. 1994-2001**).

Pursuant to the Settlement Agreement, the County agreed to the variance because the relocation of the road and residential development would further the County's goals of protecting and enhancing environmentally sensitive areas. (**Pls. Ex. 78, Ex. B, R. p. 1758**) ("The improvement and perpetuation of the road in its current location in the River Buffer/River Setback thwarts, rather than advances, the County's policy of protecting and preserving these environmentally sensitive areas. . . .[and] the grant of a variance serves to accomplish considerably greater protection of this environmentally important area and is more in keeping with the County's comprehensive plan."). Granting the variance would accomplish these environmental improvements because the existing 1700' driveway on the Point Tract would be removed from the river buffer, the existing driveway in the buffer would be re-vegetated as part of the residential development, and the storm water plan that would be implemented as part of the residential development would drastically reduce runoff of agricultural chemicals into the marsh. See (**Pls. Ex. 78, Ex. B, R. pp. 1757-1758**) ("The

proposed revised routing shall reduce the existing road impact to the River Buffer/River Setback by greater than ninety-five percent (95%) To restore the environmental health and stability of the River Buffer/River Setback and the natural resources protected thereby, PPLLC further shall restore the natural grade and provide a re-vegetation plan for the area from which the road is to be relocated”); (**Pls. Ex. 78, Ex. B, R. p. 1758**) (explaining that “[t]he proposed relocation of the road includes the construction of storm water drainage facilities that virtually eliminate storm water runoff . . . into the critical area and marshes”).

The County incorrectly argues that extrinsic evidence was the only evidence suggesting the purpose of the Settlement Agreement was to facilitate a residential development of the Point Tract and the Court was required to ignore the extrinsic evidence. (**Res. Br., 12-13**). Ironically, while stressing that Settlement Agreement included a standard term stating that it constituted the “Complete Understanding” of the parties, the County omits any discussion of the portions of the Settlement Agreement that are inconsistent with its case—its arguments are based upon an *incomplete* recitation of the “Complete Understanding” as defined by the Settlement Agreement. (**Res. Br., 14**) (discussing the “Complete Understanding” and Admission of Liability” terms of the Settlement Agreement).

In so arguing, the County misrepresents Appellant’s arguments and refuses to mention the multiple references in the Settlement Agreement to the residential development of the Point Tract. See (**Appellant’s Br. 12-14, 33-35**) (full discussion of the express language of the Settlement Agreement showing the intention of the parties to that agreement that the Point Tract be developed for residential purposes). Realizing that there is no way to get around this proof of the parties’ intent in the Settlement Agreement itself, the County

decides in its brief to pretend the proof does not exist and persists in contending the only proof supporting the purposes of the Settlement Agreement was outside its four corners. Not so.

In addition to refusing to acknowledge the explicit references in the Settlement Agreement that demonstrate a primary purpose of the Settlement Agreement was to facilitate the development of the Point Tract, the County also completely overlooks its own officials' testimony that they understood the Settlement Agreement's language contemplated the development of the Point Tract as a residential development. **(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). Taylor Bush of Pinckney Point, LLC had the same understanding as the County of the purpose of the Settlement Agreement, based upon the clear and unambiguous terms. See **(R. p. 667:13-20)** ("... contained within that settlement agreement was a clear understanding that this was going to be a residential neighborhood, and that the County was going to do all in their power to facilitate the approvals necessary to make that happen.").

Thus, not only do the terms of the Settlement Agreement repeatedly discuss the residential development of the Point Tract but the witnesses on both sides testified they understood that facilitating this residential development was a primary purpose of the Settlement Agreement. It was up to the jury to decide the intent of the parties, just as the

lower court instructed them to do.¹ The was overwhelming evidence to support findings by the jury that the primary purposes of the Settlement Agreement included furthering the residential development of the Point Tract and facilitating the later sale of the Road Parcel to the residential developer.²

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

At trial, the circuit court explained in its charge to the jury that a party breaches a contract by “the doing of something inconsistent with its existence” and further explained 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

¹ The lower court’s charge to the jury, without objection from the County, on determining the intent of the parties to a contract included the following statement of settled law in South Carolina: “Settlement agreements are considered contracts .. [W]hen a contract is in writing, you must determine the intention of the parties primarily from the contents of the written document. The intention of the parties must be determined from the entire agreement, and not from any particular clause or provision.... Where the language of the contract has more than one meaning, you may consider the circumstances surrounding the making of the contract to help you determine the real intention of the parties.” **R. pp. 1540-1541.**

² Respondent argues that this Court should not consider the jury’s notes to the court during their deliberation because the jury notes are not evidence in the case. However, our courts have looked to notes during jury deliberations to evaluate a verdict on an appeal of post-trial motions. See Dillon v. Frazer, 383 S.C. 59, 64, 678 S.E.2d 251, 253 (2009) (questions from the jury about collateral sources combined with low verdict for the plaintiff show that the jury did not follow the court’s directive not to consider those collateral sources); Sullivan v. Davis, 317 S.C. 462, 467, 454 S.E.2d 907, 911 (Ct. App. 1995) (Finding that jurors did not follow the court’s instructions to disregard insurance, and granting a new trial absolute where the jury sent questions to the trial judge inquiring as to what medical expenses had been covered by insurance and returned a \$20,000 verdict despite the plaintiff’s medical bills totaling roughly \$130,000).

the contract was made.”³ (**R. pp. 1540:23-1541:25; 1540:9-20**). No party objected to this jury instruction that it is fully supported by the law. See (**R. p. 1549:9-13**); 17A Am. Jur. 2d Contracts § 669; Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 485, 544 S.E.2d 279,284 (Ct.App. 2000), *affd as modified sub nom.*, 352 S.C. 437,574 S.E.2d 726, (2002); Restatement (Second) of Contracts §205; South Carolina Juris., Contracts § 46; 23 Williston on Contracts § 63:22; Columbia East Associates v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); Commercial Credit Corp. v. Nelson Motors, Inc. 247 S.C. 360, 147 S.E.2d 481 (1966).

Further, because there was no objection to nor appeal of this jury charge, the law it expressed has become the law of the case. See Berberich v. Jack, 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); Dreher v. S.C. Dept. of Health and Env'tl. Control, 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). Under the law of the case doctrine, the County is bound by the legal determination of the lower court in its jury charge that a party can be liable for breach of contract for undertaking action that thwarts the purpose for the contract.

Instead of addressing the jury instructions and the authorities consistent therewith, the County argues the circuit court decision should be affirmed because “the law regarding frustration of purpose doctrine does not accord with Road, LLC’s arguments.” (**Res. Br.**,

³ The County argues that it did not breach the Settlement Agreement and therefore, it cannot be found to have breached the implied covenant of good faith and fair dealing. (**Res. Br., 21-22**).

15). The County cites one case and a South Carolina Jurisprudence section concerning the circumstances wherein a party to a contract may be excused from performance because a fortuitous event has destroyed the expected value of performance. (**Res. Br., 15**). Road, LLC has never argued it or the County was excused from performance by a fortuitous event outside the control of the parties. The County's argument regarding this doctrine is inapposite and unresponsive to the legal authority that a party to a contract can be liable for breach of contract for taking actions that defeat the purpose of a contract and cause damages to the other party. Road, LLC entered proof the County breached the Settlement Agreement by purchasing the Point Tract with the specific intent of preventing the residential development of the Point Tract which was a primary purpose of the Settlement Agreement. (**Appellant's Br., 25-34**).

With respect to the implied covenant of good faith and fair dealing, the County argues that there can be no breach of the implied covenant of good faith without another breach of the terms of the contract. (**Res. Br., 21-22**). In so arguing, Respondent misstates South Carolina law. "[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract [;]" it is subsumed under a claim for breach of contract. RoTEC Servs, Inc. v. Encompass Servs, Inc., 597 S.E.2d 881, 884 (Ct. App. 2004). This is not because a breach of the implied covenant of good faith and fair dealing depends on the breach of a separate term of the contract, but rather because the implied covenant of good faith and fair dealing is "another term of the contract at issue" and is "implied in every contract." Id.; see also, In & Out Welders, Inc. v. Sunbelt Rentals, Inc., CV 7:16-04021-MGL, 2017 WL 2255780, at *3 (D.S.C. May 23, 2017); Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002) (holding

“[the defendant] breached the express provisions of the purchase agreement as well as the implied covenant of good faith and fair dealing.”). A party to a contract may be liable for breach of the implied covenant of good faith and fair dealing even though the party did not breach an express provision of the contract. Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996) (“... *[W]e decline to make breach of an express contractual provision a prerequisite to bringing the action*” for breach of the implied covenant of good faith and fair dealing)(double emphasis added)).

In other words, a breach of the implied covenant of good faith and fair dealing that causes damages, without more, is an actionable breach of contract. If another breach were also required, there would be no need for the implied covenant of good faith and fair dealing. The non-breaching party would simply sue for breach of the express provision of the contract. The whole reason the law implies the covenant of good faith and fair dealing is to grant a party recourse against the other party to the contract in instances where the other party abides by the express terms but engages in conduct that undermines the contract.

The County is correct that our case law provides there can be no breach of an implied covenant of good faith and fair dealing where a party to a contract does what provisions of the contract expressly give him the right to do. However, the Settlement Agreement did not contain an express term granting the County the right to purchase the Point Tract, much less the right to purchase it for a regional park or a use other than residential development. Even though the Settlement Agreement did not prevent others from purchasing the Point Tract as mentioned by the County in its brief, the difference here is that the County was not just any purchaser. It was bound by the express and implied terms of the Settlement Agreement, unlike a third person who was not a party to the contract.

Finally, surprisingly, the County argues that “it certainly was foreseeable that the County would become a ‘successor’ or ‘assign’ to the Point Tract.” (**Res. Br., 16**). In other words, the County takes the position that Road, LLC should have known that while the parties to the Settlement Agreement entered it for the purposes of advancing the residential development of the Point Tract and later sale of the Road Parcel to the residential developer, the County may double cross Road, LLC and acquire the Point Tract for the express purpose of preventing that development and sale of the Road Parcel. This is a textbook case of a breach of the implied covenant of good faith and fair dealing and contract law prohibiting parties to a contract from doing of something inconsistent with the existence of the contract. Finally, the actual proof at trial from the County’s own employee contradicts the County’s recent argument that the parties should have foreseen when they entered the Settlement Agreement that the County would acquire the Point Tract. See (R. p. 1371:17-20) (County Attorney Josh Gruber testifying that the Settlement Agreement did not contemplate that the County would purchase the Point Tract). There can be no better additional repudiation of the County’s unsupported assertion than the letter of attorney Walter Nester dated April 17, 2013, warning the County before it entered the contract to buy the Point Tract that the County’s purchase of it was never considered and would violate of the Settlement Agreement. (**Pls. Ex. 32, R. pp. 1655-1657**) (“As we discussed, it was never contemplated that Beaufort County would be a potential purchaser of the Point Tract.”)

II. There was circumstantial and direct evidence at trial that the County breached the provision in the Settlement Agreement that the road over the Road Parcel shall forever be private.

In arguing that the County did not breach the Settlement Agreement provision requiring the road remain private nor violate the court order to that same effect, see (Order

dated 7/18/17, R. p. 6) (Pls. Ex. 3, R. p. 1629, Ex. 78, pp. 1745-1795; Ex. 97, pp. 1938-1941), the County mentions only a portion of the evidence at trial supporting a determination by the jury that the road remain private. There was other evidence that also supported a jury's finding that the County breached its obligation that it treat the road as private as required by Settlement Agreement. See (R. p. 1246: 14-18) (County Administrator testifying that any member of the public could use the road); (R. p. 1247:3-5) (County Administrator testifying that the County has not restricted access to the Point Tract in any way); (R. pp. 940:5-13; 1360:7-11) (County Attorney testifying that the difference between a public road and a private road is who is responsible for maintain the road); (R. p. 1380:1-20) (County Attorney Gruber testifying that County has done repairs to the roadway, although he attempted to distinguish "repairs" from "maintenance"); (R. pp. 1397:14-1398:8) (County Administrator Kubic testifying that the County does not maintain private roads but here the County may have done repairs to the road); see also, (Appellant's Br., 35-39).

Proof that the County had repaired and maintained the road, left the gate to the Point Tract open for free passage by the public, and purchased the property for a regional park was all circumstantial proof of the County's treatment of the right of way across Road, LLC's land as a public road. When ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn from it, i.e., the circumstantial evidence, in the light most favorable to the nonmoving party; this Court will only reverse the trial court when no evidence supports the verdict. Wright v. Craft, 372 S.C. 1, 32, 640 S.E.2d 486, 503 (Ct. App. 2006).

Road, LLC, has never disputed that after the its purchase of the Point Tract, the County became the successor-in-title to rights under the 20-foot private *unimproved* access easement that was within the Easement Access Agreement previously granted by Road,

LLC.⁴ (Pl. Ex. 81, R. pp. 1848-1865). However, as explained in detail in Appellant's opening brief, the 20-foot easement is expressly limited to "occupants" of the Point Tract and their "respective subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors, and assigns" and the easement was "not intended to, and should not be construed to, dedicate the Easement Area to the general public." (Pls. Ex. 81, ¶¶2 and 4, R. pp. 1848-1849).

In its brief the County advances the flimsy argument that the reference in the Access Easement Agreement to "occupants" along with the "subtenants, and "mortgagees" neatly fits the County. (Res. Br., 18, n.8) (Pls. Ex. 81, ¶2, R. p. 1848). But, the evidence plainly supported the contrary inference that "occupants" was intended to mean the owner occupants of a residential subdivision. The terms of the Settlement Agreement totally refute the County's interpretation and lead to the sole conclusion that the intent was that the right of way be used as access to a residential subdivision. Referring right-of-way in the Easement Agreement, the Settlement Agreement provides that: "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 Land Development Standards Ordinance ('ZDSO')." (Pls. Ex. 78, R. p. 1748).

For these reasons and those stated in the Appellant's earlier brief, there was evidence at trial to support a finding by the jury the County breached the Settlement Agreement by greatly exceeding the limitations of the easement and by treating the unimproved right of way across the land of Road, LLC, as a public road. The Appellant submits this Court should

⁴ This is the same easement that contains the restriction the County promptly violated: "Grantee [County] is not permitted to make any improvements or perform any work on and to the Easement Area without prior approval from Grantor." Pls. Ex. 81, R. p. 1849, ¶3.

reject the County's argument and the ruling of the lower court after the verdict that there was absolutely no direct or circumstantial evidence the County treated the right of way as a public road.

The County cites to several out-of-state opinions for the proposition that the mere fact that the County is a public entity does not convert the right of way into public road by virtue of its purchase of the Point Tract. As just discussed, Road, LLC, is not relying on its ownership of the Point Tract as the sole proof of public use; there was other ample direct and circumstantial proof.

Nonetheless, the County is correct that its status as a governmental entity does not automatically convert the road to a public road. As explained above and in Appellant's opening brief, the County as the holder of a very limited access easement reserved for "occupants" of the Point Tract and their "respective subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors, and assigns," far exceeded the permissible uses and converted the road to a public road by maintaining it and opening it up to the general public, when the easement prohibited such broad use of the road. None of the cases cited by Respondent involved, an instance where a governmental entity violated the terms of its easement, maintained the "private" right of way with public funds and opened up the right of way to the general public, all in the face of an agreement, easement, and court order that prohibited such actions as happened in this case. None of the cited cases involves an instance where the public entity professed that the purchased property was to become a regional recreational park open to the general public. See Stonegate Fam. Holdings, Inc. v. Revolutionary Trails, Inc., 73 A.D.3d 1257, 1261–62, 900 N.Y.S.2d 494, 500 (N.Y. App. Div. 3d Dept. 2010) (specifically noting that the language of the access agreement in that

case “does not restrict the nature or frequency of [the State’s] use by ... its employees, invitees and licensees”); Leydon v. Town of Greenwich, 257 Conn. 318, 354, 777 A.2d 552, 577 (2001) (rejecting a contention that an access easement was entered into limiting to residences of the town and their guest and finding that a prior easement that was not so limited was the effective easement); Avaunt v. Town of Gray, 634 A.2d 1258, 1261 (Me. 1993) (scope of easement not at issue); Feather v. Donaldson, 481 So. 2d 937, 938, 11 Fla. L. Weekly 33 (Fla. 5th Dist. App. 1985) (explaining that when a public entity owns or holds a permanent easement for “public road purposes,” all members of the public have the right to use the land for road purposes and noting that “‘public’ is necessarily the antithesis of an ‘exclusive’ easement.”); Armstrong v. Onondaga County, For and on Behalf of Onondaga County Water Dist., 85 A.D.2d 906, 907, 446 N.Y.S.2d 793, 795 (N.Y. App. Div. 4th Dept. 1981) (scope of easement not at issue except whether the parties to “the grant of an easement to the county over a private road, intended that the county was to maintain the road in the event it abandons the easement.”).

Finally, the County incorrectly contends that “[b]y 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.” (**Res. Br., 21**). Road, LLC has never argued that Ms. Gnann, who owns a property adjacent to the Road Parcel, was prohibited from using that right of way. She is a private owner who uses the right of way over the land of Road, LLC, for her private purposes. Nothing about her use is in the nature of a public use. She has not invited the general public

to her property nor taken actions to maintain the dirt right of way with public funds against the terms of the easement.

It was up to the jury to interpret the evidence and find the facts. The proof at trial would fully support a finding by the jury that the County violated its express obligation to keep the road private and that this violation caused damages to Road, LLC. Therefore, the circuit court should be reversed and the verdict reinstated for this alternative reason.

III. Substantial evidence at trial supported the damages awarded by the jury.

The County disagrees with the jury's verdict and thinks the jury should have weighed the evidence differently. However, the inquiry is only whether evidence admitted at trial could support the verdict for breach of contract and the amount of the verdict. See Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), reh'g denied (July 13, 2016); 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."). Lost profits are recoverable in a breach of contract action so long as evidence is admitted from which a jury could find with reasonable certainty, as opposed to speculative or conjectural, the amount of the lost profits. See South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 122-123, 113 S.E.2d 329, 335-336 (1960). Here, the verdict and amount were fully supported by evidence at trial. As fully explained in Appellant's opening brief, substantial evidence at trial supported the jury's verdict in favor of Road, LLC. See (Appellant's Br., 40-43).

- A. The amount of the jury's verdict in favor of Road, LLC was not based on speculation; it was supported by evidence showing contracting parties had twice valued the access to the Point Tract at \$5,000,000.

The County argues the circuit court should be affirmed because, according to the County, Road, LLC did not prove any damages. See (Res. Br., 23). The County argues, that the evidence presented at trial should be disregarded because any understanding Road, LLC, had as to the value of the Road Parcel is extrinsic to the Settlement Agreement and should be excluded under the parol evidence rule. See (Res. Br., 23). Presumably, the County is arguing that the parol evidence rule prohibited the jury from determining 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. See (R. pp. 495:9-13; 505:21-506:2; 652:12-653:7; 691:20-24; 953:19-954:8) (five-million-dollar reduction in purchase price of Point Tract due to dispute with John David Pinckney concerning access); **(Def. Ex. 3, R. pp. 1994-2001)** (Pinckney Point, LLC agreement buy the Road Parcel from Road, LLC for \$5,000,000); **(R. pp. 722:4-11; 887:4-888:4)**.

The parol evidence rule is simply not applicable. The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. See Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000). Neither the \$5,000,000 price reduction due to the dispute of the access to the Point Tract, nor the \$5,000,000 that Pinckney Point, LLC agreed to pay

Road, LLC for vehicular access were offered into evidence to contradict or vary the terms of the Settlement Agreement. Both were offered to show the damages suffered as a result of the County's breach of the Settlement Agreement.

Furthermore, there is no dispute that these two separate instances of testimony supporting a valuation of \$5 million for the use of the Road Parcel as the exclusive means of ingress and egress from a residential development on the Point Tract were offered into evidence without objection and the County has not appealed the admission of either. Therefore, the County has waived any argument that the jury should not have considered this evidence. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (stating "an unappealed ruling, right or wrong, is the law of the case"). This proof alone would support the jury's verdict on damage without regard to the additional proof from Appellant's expert appraiser, discussed next.

B. The amount of the jury's verdict in favor of Road, LLC was also supported by the expert testimony of Thomas F. Hartnett.

Mr. Hartnett testified that the Road Tract was worth at least \$5,000,000 as the sole access to a residential development on the Point Tract, its highest and best use. As has been fully explained, the Settlement Agreement contemplated the Point Tract would be developed as a residential development and Road, LLC would sell the Road Parcel to that developer for at least \$5,000,000. The County bought the Point Tract to prevent that development and sale from ever happening. The County's purchase prevented the Road Parcel from ever recognizing its highest and best use.

The County, and the circuit court, make much of Mr. Hartnett's comment that the Road Parcel is still worth \$5,000,000 today. See (Res. Br., 25-26); (Order, R. pp. 10-11). However, when viewed in context of his entire testimony and the other evidence at trial, it

is clear Mr. Hartnett did not in any way suggest that Road, LLC had not been damaged. The jury was entitled to qualify his answer by inferring that he meant the Road Parcel is still worth \$5,000,000 today as the exclusive access to and from a residential development on the Point Tract. In fact, that is the only reasonable inference when the remainder of his testimony and the other proof is considered. Moreover, even if a jury were to impose the County's and the lower court's implausible interpretation of this answer, the jury was free to disregard it and rely on the other proof that supported a finding that Road, LLC suffered \$5,000,000 in damages when the County purchased the Point Tract to eliminate forever the possibility of its being a residential development.

Hartnett was clear that the County's actions damaged Road, LLC in the amount of \$5,000,000 by taking a parcel that is worth that amount if used as the road to a residential development and converting it into a public road for which the County pays nothing. See (R. pp. 1184:3-5; 1177:11-1178:8) (testifying 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. p. 1193:5-8) (testifying that the highest and best use can be realized only if there is "demand" for that highest and best use). While the County and the circuit court interpret this isolated remark of Hartnett one way, it was up to the jury to impose its own interpretation or simply disregard it and rely on other evidence of damages of \$5,000,000. As has been stated, the inquiry on a motion for JNOV is whether evidence exists to support the jury's verdict and the verdict must not be overturned if there is any evidence to sustain the factual findings implicit in the jury's verdict. Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), reh'g denied (July 13, 2016); Hobgood v. Pennington, 300 S.C. 309, 313, 387 S.E.2d 690,692 (Ct. App.1989).

C. The jury's verdict in favor of Road, LLC was not based upon a speculative claim for lost profits.

The County argues that the circuit court correctly granted JNOV because “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 in turn freed Equity Resource Partners to sell the Point Tract to the County.” (**Res. Br., 25**). This argument incorrectly assumes that Pinckney Point, LLC would not have raised sufficient funds to purchase the Point Tract from Equity Resource Partners had the County not purchased the Point Tract to prevent the development.⁵ Evidence at trial would have supported a finding that the County’s breach of the Settlement Agreement prevented Pinckney Point, LLC from being able to re-acquire the Point Tract and later perform on its agreement to buy the Road Parcel. Appellant’s opening brief discussed this evidence, including John Kunkel’s testimony 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 and the evidence that supports a finding that were it not for the County’s actions Equity Resource Partners would have allowed an additional extension. See (**Appellant’s Br., 46-47**); (**R. pp. 896:9-898:9**) (Kunkel testifying that with an additional 120 day extension Pinckney Point, LLC could have obtained funds to purchase the Point Tract “Because, once again, we heard yesterday in testimony, our engineers had indicated we were 95 percent complete with all engineering in December of 2012, and the engineering was the last component, just to get

⁵ The County notes in its brief that it closed on the purchase *after* Pinckney Point, LLC’s option expired. (**Res. Br., 9**). The County omits that it was working diligently, in secret, toward the purchase well in advance of the end of the option. See (**Appellant’s Br., 15-16**).

the final plans in order for presentment for that final site plan approval.”); (Pl. Ex. 55, R. pp. 1687-1690); (R. pp. 642:9-23; 691:1-10).

But, the far more important point is that the County is also incorrect in asserting that Road, LLC’s damages depend upon an assumption that Pinckney Point, LLC would have been able to purchase the Point Tract and the Road Parcel. See (Res. Br., 25). As explained in Appellant’s opening brief, by only granting 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 such that any purchaser⁶ of the Point Tract would need the Road Parcel for sufficient access for any development. See (R. pp. 888:21-889:1; 889:5-8); See also, (R. pp. 951:19-952:2) (“Q. All right. And to protect Road, LLC’s, investment, it was structured such that, if you wanted to develop that

⁶ In a footnote, Respondent argues that Road, LLC’s contention that any purchaser of the Point Tract would need the Road Parcel for sufficient access for any development is unpreserved for this Court’s review. Respondent is incorrect. Appellant advanced the argument below. See (8/9/16 Tr., R. p. 1599) (“if Pinckney Point couldn’t, it had the sole road and any other developer who wanted to develop it would have to come back to Road, LLC, to buy the road.”); (8/9/16 Tr., R. p. 1599:8-12) (“... set it up so that anybody who bought the Point tract as a residential development would have to deal with Road, LLC, and buy it.”); (8/9/16 Tr., R. pp. 1600:15-1601:2); (**Appellant’s Memorandum in Opposition of the County’s Motion for JNOV**, R. p. 292) (arguing that there is evidence in the record that the County’s breaches caused Road, LLC to lose the benefit of its bargain in selling to another developer). The circuit court rejected the argument in its Order and held that Road, LLC would only be paid pursuant to the settlement agreement if Pinckney Point was able to find an investor. See (Order, R. p. 11) (erroneously stating that Road, LLC admitted as much). In fact, Respondent admits the circuit court ruled on this argument in its brief. See (Res. Br., 25). Clearly, the issue is preserved for appeal. See S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.”) (*quoting* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))).

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."); (**R. p. 952:17-20**) ("Q. . . it was purposely done, so that no one could develop Pinckney Point, LLC, unless they paid Road for an access easement. A. Yes.").

As the County emphasizes in its brief, Road, LLC, knew that the lender had initiated foreclosure of Pinckney Point, LLC's mortgage on the Point Tract at the time it entered the Settlement Agreement. As Kunkel testified, the transaction was purposely structured as it was in the Settlement Agreement to put Road, LLC in a position to sell the Road Parcel to a new residential developer of the Point Tract if Pinckney Point, LLC lost the land in the foreclosure. Road, LLC set up the transaction so that it could be in an advantageous position that would require either Pinckney Point, LLC *or* some another future owner of the Point Tract to purchase the Road Parcel in order to meet the County's right of way and access requirements for the residential development of the Point Tract.

Additionally, there was no evidence that Equity Resource Partners was interested in anything other than receiving top dollar for the Point Tract, which would only be paid by a purchaser seeking to develop the Point Tract. See (Appellant's Br., 45-46).

Therefore, because evidence at trial supported a finding that either the County's breach of the Settlement Agreement prevented Pinckney Point, LLC from being able to reacquire the Point Tract and later perform on its agreement to buy the Road Parcel, or a finding that Road, LLC would have realized its return on investment in the Road Parcel by selling the Road Parcel to another residential developer, or both, the circuit court's Order should be reversed and the verdict reinstated.

D. The County's claim that the result was "absurd" must be rejected.

The County asserts for the first time on appeal that because Road, LLC purchased the Road Parcel for \$1,300,000, the jury's verdict of \$5,000,000 was absurd. As previously stated, the verdict of the jury was not absurd, it was based on evidence in the record of the value of the Road Parcel if it were the sole access to and from a residential development on the Point Tract.

Essentially what the County seems to be arguing is that the verdict amount was excessive. If the County believed the verdict was excessive, it could have and should have moved for new trial nisi remittitur and asked the trial court to reduce it. See e.g., O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993). If the County believed the verdict was totally unsupported and the product of passion, caprice, prejudice, or some other influence, it could have and should have moved for new trial absolute. See e.g., Proctor v. Dept. of Health and Env'tl. Control, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006) (“If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.”) (quotation marks and citation omitted)); Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct.App.2000) (“[T]o warrant a new trial absolute, the verdict reached must be so ‘grossly excessive’ as to clearly indicate the influence of an improper motive on the jury.”). The County did neither. The County has only argued, and the trial court has only ruled, that there was insufficient evidence to support the verdict in favor of Road, LLC. Therefore, the County's argument that the verdict is “excessive” is not properly before this Court.

The County also asserts the verdict amount is absurd because Road, LLC, still owns the Road Parcel and can still seek to limit the County's use. (**Res. Br., 26**). The County is wrong. As explained to the trial court, the verdict is a legal remedy for all the damages suffered by Road, LLC as a result of the County's breach of the Settlement Agreement including its treatment of Road, LLC's right of way as a public road. See (8/9/16 Tr., R. pp. 1604:6-1605:7). Because Road, LLC has an adequate remedy at law, it cannot invoke the equitable remedies sought in its other causes of action if the verdict is sustained. See Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (noting that equitable relief is available only when no adequate remedy at law exists); See also, PCS Nitrogen, Inc. v. Ross Dev. Corp., 2:09-CV-03171-MBS, 2014 WL 5503369, at *4 (D.S.C. Oct. 29, 2014), *order vacated in part by*, 126 F. Supp. 3d 611 (D.S.C. 2015) ("Because of the jury verdict for [Plaintiff]. . . , [Plaintiff] has an adequate remedy at law precluding equitable proceedings . . ."). Road, LLC cannot have its cake and eat it too. It is the County's argument that is absurd.

IV. The verdict in favor of the County on Pinckney Point LLC's claim is not conclusive as to Road, LLC.

The County argues that the circuit court was correct in overturning the jury's verdict because the general verdict against Pinckney Point, LLC creates an implication that all factual defense raised by the County regarding Pinckney Point, LLC's claims were adopted by the jury. (**Res. Br., 26-28**). Therefore, according to the County, it is implied that the Road, LLC's damages were speculative. (**Res. Br., 26-28**). The County cites C.J.S. *Appeal and Error* §904 (2007) as the legal basis⁷ for its argument that the verdict against Road, LLC

⁷ The County also spends an entire page of its brief citing cases regarding the government's power to condemn property and asserting that the constitutional power of eminent domain

was properly overturned because all issues implicated in another plaintiff's claim are deemed to have been decided against it and Road, LLC. The County forgets to mention that the bases for liability, causation, and damages for the two Plaintiffs were largely different and that the jury's deciding that Pinckney Point, LLC, failed to prove just one element of its claim would result in a defense verdict as to its claim. Further, if the County intended to argue estoppel from the jury's verdict, it was incumbent upon it to request special interrogatories setting forth the jury's findings, which it did not do. Harleysville Group Ins. v. Heritage Communities, Inc., 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (party must obtain special verdict form or special interrogatories if it intends to parse findings of the jury).

In a parenthetical, the County quotes one sentence of the C.J.S. section and implies that because the jury rendered a verdict against Pinckney Point, LLC any overlap in proof between Pinckney Point and Road, LLC must be interpreted in the County's favor: "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."⁸ (**Res. Br., 28**).⁹ The next sentence of the C.J.S. explained that "Thus, in a case in which the general verdict rule operates, if any ground for the verdict is

cannot be restrained or renounced by contract. (**Res. Br., 27-28**). However, as acknowledged by the County "the County has not taken any steps to do this." (**Res. Br., 28**). Therefore, these cases and the County's argument are not implicated in this case and should be disregarded.

⁸ The only case cited by C.J.S. for this proposition is a Connecticut case, Vertex v. City of Waterbury, 278 Conn. 557, 898 A.2d 178 (2006). This case did not involve a defendant asserting that a verdict in its favor as to one defendant's claims was factually conclusive as to all issues such that a general verdict in favor of another defendant should be overturned.

⁹ It is worth noting that if the County's spin on the general verdict rule were correct, that a general verdict provides a basis for collateral estoppel against other parties to the extent any arguments overlap, the verdict in favor of Road, LLC, would provide a basis for Pinckney Point, LLC to require judgment in its favor.

proper, the verdict must stand, and only if every ground is improper does the verdict fall.” C.J.S. *Appeal and Error* §904. Clearly, the excerpt from C.J.S. relied on by the County does not support its argument that a general verdict against one defendant is collateral estoppel as to all issues implicated in a general verdict in favor of another defendant. Instead, the source provides additional support for Road, LLC’s argument that because evidence at trial supports the verdict in its favor, the circuit court erred in granting the motion for JNOV. See C.J.S. *Appeal and Error* §904 (stating that it will be presumed that a general verdict has been based on that theory or ground supported by the evidence which properly sustains the verdict); see also, Gold Kist, Inc. v. Citizens and S. Nat. Bank of S.C., 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (“The appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict. Specifically, where a jury returns a general verdict in a case involving two or more issues or defenses and its verdict is supported as to at least one issue or defense, the verdict will not be reversed.”)

CONCLUSION

For the foregoing reasons, and all the reasons in Appellant’s opening brief, the evidence and the applicable law support the jury’s verdict in favor of Road, LLC and 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,



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



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