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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No. 2017-001736

Road, LLC and Pinkney Point, LLC

of whom Road, LLC is theAppellant,

v.

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

PETITION FOR REHEARING

March 18, 2021

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INTRODUCTION AND OVERVIEW

Pursuant to Rule 221(a), SCACR, Appellant Road, LLC (“Appellant”) hereby petitions for rehearing of the Court's opinion affirming the lower court’s order granting Beaufort County’s (the “County”) motion for judgment notwithstanding the verdict. See Road, LLC and Pinckney Point, LLC v. Beaufort County, a Political Subdivision of the State of South Carolina, Op. No. 5807 (Ct. App. filed March 3, 2021) (the “Opinion”), copy attached hereto.

Rehearing is warranted because the Opinion overlooks, misapprehends, and fails to address evidence presented to the jury that the County’s breach of contract, including breach of the implied covenant of good faith and fair dealing, damaged Road, LLC in the amount of \$5,000,000. As noted by this Court in the Opinion, neither the trial court nor the appellate court may set aside a verdict if there is *any* evidence whatsoever to sustain the verdict when considering the evidence and the reasonable inferences therefrom in the light most favorable to the party obtaining the verdict. (**Opinion, p. 8**). Nonetheless, Road, LLC respectfully submits this Court failed to abide by this rigorous standard, overlooking one of Road, LLC’s primary grounds for the County’s liability and the proof supporting that liability as well as the \$5 million in damages caused by the County’s breach. The jury easily understood the basis for this claim and the ensuing damages. This Court should as well.

In sum, viewing the evidence and the reasonable inferences therefrom, the proof supports the following determinations by the jury and their verdict:

- A primary purpose of the Settlement Agreement was to facilitate the Point being developed as a residential development in accordance with the County’s zoning, by granting a variance to allow the access road within the

river buffer and determining no further variances would be necessary to develop the Point as a residential development, among other things. (**R. pp. 1745-1797**) (“Beaufort County agrees that said Right-of-Way provides sufficient access to and from the Point Tract for the development thereof in accordance with the Beaufort County Zoning and Development Standards Ordinance (‘ZDSO’). PPLLC agrees that such Right-of-Way is required for the development of the Point Tract as contemplated herein.”)(**R. p. 1747**) Further, the deed attached to the Settlement Agreement likewise referred to the Point being developed as a residential development. (**R. pp. 1767-1772**)(“AND ALSO SUBJECT TO a restriction that the property conveyed herein may be used only as a right of way or other purpose associated therewith including but not limited to landscaping, parking, drainage, installation of utilities except, however, no gravity sewers, *or any other purpose necessary and appropriate for an entrance area to a private residential community.*”) (**R.p. 1768**).

- Road, LLC. spent \$1.3 million to buy the Road Parcel that contained the only road access to the Point, as part of the overall settlement with the specific purpose and reasonable expectation based on the terms of the Settlement Agreement that it would be able to sell the Road Parcel to Pinckney Point, LLC, *or some other developer of the Point* as the sole access to the residential development on the Point. This intent was expressed in the Settlement Agreement signed by the County. (**R. p. 1748**) (“Road, LLC, by a separate agreement with PPLLC (the ‘Road Agreement’), has agreed to convey either

the Road Parcel to PPLLC or an easement for right-of-way not less than fifty feet (50') wide to PPLLC upon payment of certain consideration described in said Road Agreement.”).

- Road LLC’s appraiser, Thomas F. Hartnett, testified the highest and best use of the Road Parcel was as the sole access to a residential development on the Point and that its value was \$5 million at that highest and best use.
- There was separate proof outside of Hartnett’s testimony that Road Parcel was worth approximately \$5 million if it was available for use as the sole gateway to a private residential development on the Point.
- Knowing that Road, LLC purchased the Road Parcel and entered the Settlement Agreement with the purpose of selling the Road Parcel to the residential developer of the Point (then presumably Pinckney Point, LLC but potentially to any residential developer succeeding in title to Pinckney Point, LLC), the County purchased the Point for the express purpose of preventing the residential development of the Point and the use of the Road Parcel as the sole access to a private residential development immediately after Pinckney Point LLC’s option to purchase the Point back from ERP expired.
- The County purchased the Point with funds from its Rural and Critical Lands program for protecting and preserving lands in their natural state. The County intended to use the Point as a park or conservation knowing that such intention was contradictory to purpose and intent of the Settlement Agreement and precluded development of the Point as a residential development.

- The County breached the implied covenant of good faith and fair dealing implicit in the Settlement Agreement in purchasing the Point specifically to frustrate the purpose of Road, LLC's buying the Road Parcel and entering the Settlement Agreement with the County.
- This breach caused \$5 million in damages to Road, LLC by preventing it from ever realizing the highest and best use of the Road Parcel that was explicitly and implicitly expressed in the Settlement Agreement entered by the County, Road, LLC, and other parties.

This Court should have reversed the lower court's order granting the County's motion for JNOV because there is more than one reasonable inference in light of *all* the evidence that supports the verdict. See (Opinion, p. 8). Because the Court took its own view of the evidence, decided what weight to give particular evidence, ignored the existence of evidence that supported the verdict, and decided which portions of Road, LLC's expert testimony to consider and which portions to reject, the Court should grant this Petition for Rehearing.

FACTS¹

In January of 2011, multiple parties, including the County, and Road, LLC entered into a global Settlement Agreement to end over five years of litigation (the "Settlement Agreement"). See (Pls. Ex. 78, R. pp. 1745-1795); (R. p. 1065:12-21). As part of that settlement, Road, LLC bought a .85 acre of land known as the "Road Parcel." The Road Parcel is the final .2 mile of Pinckney Colony Road and provides the only feasible vehicular

¹ A more expansive discussion of the facts presented to the jury at trial can be found in Road, LLC's brief and reply brief. The facts presented here are merely a summary of the facts overlooked, misapprehended, or unaddressed by the Opinion.

access to approximately 229 acres known as Pinckney Point (the “Point”). See (Pls. Ex. 87, R. p. 1892). The Point was zoned for a residential development and well suited for it with residential lots being allowed as a matter of right, most of them being high-value marsh or creekfront lots. (R. p. 509). The Road Parcel had substantial value because it provided the sole vehicular access to the Point and could accommodate the 50-foot improved right of way required for residential development. See (R. pp. 1180:24-1184:10) (Pls. Ex. 114, R. p. 1981) (Aerial Photograph). Pinckney Point, LLC, planned the residential development of the Point for approximately eight years, obtaining various permits and variances for its development as well as conditional approval from the County of its concept plan for development that contained 76 lots. (R. p. 510:1-6; R. pp. 597:18-603:18; R. p. 1047; R. 1978).

As part of the overall settlement, Road, LLC paid \$1,300,000 to acquire the Road Parcel based on assurances, conditions, and protections in the written multiparty Settlement Agreement. At the same time Road, LLC also entered into a contract to sell the Road Parcel to Pickney Point, LLC for \$5 million to obtain the necessary vehicular access to develop the Point as a residential community. (R.pp. 884:11-888:4; Def. Ex. 3, R. pp. 1994-2001); (R. p. 887:4-22). The Settlement Agreement signed by the County referred to this contract of sale by Road, LLC. (R. p. 1748)(“Road, LLC. . .has agreed to convey either the Road Parcel to PPLLC or an easement for right-of-way not less than fifty feet wide to PPLLC upon payment of certain consideration described in said Road Agreement.”) Road, LLC made the \$1,300,000 investment because the residential development of the Point would require the then-owner of the Point to purchase the Road Parcel to have the improved 50 foot right of way required under the County zoning ordinances. See (R. pp. 885:2-23; 886:15-887:3;

888:21-889:1) (R. pp. 888:21-889:1; 889:5-8; R. pp. 1747-1748) (“Literally, all roads go over Road, LLC’s, property, and any acquirer of the Pinckney tract would need to purchase or acquire the right-of-way across the Road, LLC, tract.”) **(R. pp. 951:20-952:20)** (Q. “[I]t was structured such that, if you wanted to develop that property at the end of the tennis racket there, the Pinckney Point property, you would have to buy an easement or some kind of road access from Road, LLC. A. That’s correct.”).

The purpose of the Settlement Agreement was to end litigation and allow the permitting process to continue for the Point to be fully entitled as a residential development, with terms that included the acquisition of the Road Parcel from Road, LLC, by the developer of the Point, then Pinckney Point, LLC. **(R. pp. 571:14-16; 593:18-594:1; 594:18-24; 883:14-24)** (Kunkel explaining that it would have made sense for BB&T to loan the \$1,300,000 to acquire the Road Parcel as part of the Settlement Agreement because the development would “get outside of the logjam of the litigation,” establish “undisputed legal access to the Pinckney Point tract,” and enable them “to proceed forward to develop it”); **(Pls. Ex. 78, R. p. 1747-1748); (R. pp. 1369:17-1371:20)** (Josh Gruber of the County discussing that the settlement language contemplated the development of the Point as a residential development); **(R. 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 and that following the settlement Pinckney Point, LLC continued to pursue approvals for the purpose of a residential development). **(R. p. 571:14-16)** (Q. What was the settlement to do? A. [Taylor Bush] It was to resolve everything necessary for us to develop the property.).

Despite the clear expression in the Settlement Agreement of multiple provisions contemplating the residential development of the Point into 76 waterfront lots, the allowance of zoning variances to accomplish that development, and knowledge Road, LLC bought the Road Parcel to sell to the developer, the County Administrator testified that the County's primary purpose in buying the Point soon after Pinckney Point, LLC's option expired was to prevent the Point from ever being developed as a residential development as contemplated by the Settlement Agreement. See **(R. p. 1248:3-4)** (Beaufort County Administrator Gary Kubic testifying that in acquiring the Point "the primary use we wanted was to prevent the development of the property"). The evidence further included proof that the County purchased the Point from ERP² for a public park facility and county park headquarters. **(R. pp. 1658-1663; R. pp. 1967-1973)**. Road, LLC's attorney was "flabbergasted, shocked, [and] extremely surprised" to learn the County intended to purchase the Point and wrote a letter to the County warning before it before it closed that its acquisition of the Point violated the letter and spirit of the Settlement Agreement. **(R. pp. 1106:19-1107:11) (R. pp. 1108:1-1109:1); (Pls. Ex. 32, R. pp. 1655-1657)**(Letter of April 17, 2013: "...In reliance upon that 4-Party Settlement Agreement, and for the specific purpose of making the road private, Road, LLC acquired the Road Parcel and granted the Road Parcel Easement to Pinckney Point, LLC. As we discussed, it was never contemplated that Beaufort County would be a potential purchaser of the Point Tract.")**(R. p. 1656)** .

It was for the jury to decide the factual issue of whether the County's conduct in purchasing the Point to eliminate the residential development of the Point breached the implied covenant of good faith and fair dealing implicit in the Settlement Agreement. It was

² ERP had acquired the Point from Pinckney Point, LLC.

for the jury to decide the factual issue of whether the Road Parcel had a highest and best use value of \$5,000,000 as the sole gateway to a high-end waterfront development. It was for the jury to decide whether the County's actions caused damages to Road, LLC and the amount of those damages based on the evidence. Yet, the Opinion fails to even discuss this core basis of liability of the County and, instead, usurps the constitutional role of the jury to decide the credibility of the witnesses and the facts of the case based on the County's and this Court's selective extract of certain proof without consideration of all the evidence.

ARGUMENT

- I. The Court completely overlooked or ignored the principal argument of Road, LLC that the County breached the covenant of good faith and fair dealing implied in the Settlement Agreement by purchasing the Point for the specific purpose of permanently preventing its residential development.

In the Opinion the Court failed to address Road, LLC's alternative basis for liability based on breach of the implied covenant of good faith and fair dealing and suggested that Road, LLC's only basis of liability for breach of contract was the County's failure to abide by its express contractual obligation to keep the access road private and the court order that the access road be forever private. (**R. p. 57; R. p. 222**). The Court went so far as to quote from Road, LLC's counsel's introductory remarks in his closing argument explaining Road, LLC's claim to the jury:

In their closing argument, Developers asserted: '[T]he settlement agreement clearly required that the road was private. Everybody agreed it was private; no dedication; no public use. Judge Dukes entered a court order; we looked at it two times; this road is private. And the County has not treated it as private.' They further argued:

As to Road, LLC, what is the breach there? Well, it's that the County is treating it like it's a public road, and the private property is public property, they're contending. They haven't gated it. Their testimony was they had not gated it. The

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

(Opinion, pp. 5-6).

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

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

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

The proof fully supported a finding by the jury that the County's purchase of the Point to prevent the Point from ever being a residential subdivision breached the County's implied covenant of good faith and fair dealing in the Settlement Agreement and directly caused a loss of \$5 million to Road, LLC. The proof fully supported a finding by the jury that the County purposely destroyed the highest and best use of the Road Parcel as the only access to a future residential subdivision with full knowledge that Road, LLC bought it for that purpose as expressly stated in the Settlement Agreement.

The legal precedent is clear, consistent and unambiguous. If there is any evidence that can support the jury's verdict, the verdict must stand. This Court's failure to address Road, LLC's alternative legal basis for its breach of contract action against the County and to consider all the evidence supporting the verdict on this basis is, by itself, a meritorious reason for granting a rehearing and vacating the Opinion.

II. In ruling that “the jury was presented with no evidence Road, LLC was damaged by the County treating Colony Road as public,” the Opinion overlooks, misapprehends, and fails to address Road, LLC’s argument that the County’s conduct in breaching the multiparty Settlement Agreement by purchasing the Point to prevent any development on the Point caused damages to Road, LLC by eliminating the highest and best use of the Road Parcel as the only access to a residential a development on the Point.

A. The Court mistakenly considered that Road, LLC was a developer and that its realization of the \$5 million highest and best use value of the Road Parcel depended entirely on Pinckney Point, LLC, reacquiring and developing the Point.

As stated above, the Opinion relies on the mistaken premise that Road, LLC’s entire argument for imposing liability on the County was based on the County’s breach of a provision of the settlement requiring that the access road remain a private road:

First, the jury was presented with no evidence Road, LLC was damaged by the County treating Colony Road as public. A potential breach of the private road clause did not render Developers unable to develop the Point Tract, which Road, LLC asserted caused \$5 million in damages. Thus, there was no evidence Road, LLC suffered \$5 million in damages due to the County’s breach of the private road clause.

(Opinion 8). As the above excerpt from the Opinion attests, the Court confused the claims of Pinckney Point, LLC and Road, LLC. Road, LLC never intended to develop the Point. It is not a developer, even though the Court inexplicably describes them jointly with Pinckney Point, LLC as “Developers.” In fact, the proof was that Road, LLC was an investor in real estate not a developer of real estate; it invested in the Road Parcel to sell it to a real estate developer. **(R. pp. 885, 888).**

Further, the Court completely overlooks and does not address that Road, LLC bought the Road Parcel as part of the overall settlement so that it would be in a position to sell the Road Parcel to *any* developer who owned the Point and developed it as a residential development. Road, LLC structured its purchase of the Road Parcel and its participation in the settlement so that *any* owner of the Point who sought to develop it as a residential

community, not just Pinckney Point, LLC, would have to acquire the Road Parcel from Road, LLC to gain the 50-foot improved right of way needed for its development:

Q. Would this arrangement have given Road, LLC, any leverage or bargaining strength over another owner of the Point parcel?

A. Yes, it would.

Q. Did that work to Road's benefit?

A. It should have.

Q. If there were another purchaser who desired to develop the Point parcel as a residential subdivision, what would you expect that they would do, have to do?

A. Literally, all roads go over Road, LLC's, property, and any acquirer of the Pinckney tract would need to purchase or acquire the right-of-way across the Road, LLC, tract.

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

Road, LLC's realization of the highest and best use of the Road Parcel through sale to a residential developer did not depend entirely on Pinckney Point, LLC, developing the Point. The Court appears to have obtained this mistaken impression from the decision of the lower court that "held the loss of profit was too speculative because Road, LLC's profit was dependent on Pinckney acquiring an investor to repurchase the Point Tract." (**Opinion, p. 7**). This factual determination by the lower court repeated by this Court is flat wrong. The acquisition of the Road Parcel was structured specifically to allow its sale to a new developer if Pinckney Point, LLC, failed financially because it was in default on its mortgage payments at the time. (**R. pp. 883:24-884:2; 885:2-23; 886:15-887:3; 888:21-889:1**) (**R. pp. 888:21-889:1; 889:5-8**). The evidence supported the finding that this highest and best use value would have been attained through sale to a different residential developer.

The evidence showed that ERP also foresaw the Point likely being developed by another residential developer. ERP required that Pinckney Point, LLC, assign it all the

development permits and approvals, to update ERP periodically on the status of the permits and approvals, and to sign a new assignment to ERP if a new permit were obtained. (§10 of Option Agreement between Pinckney Point, LLC and ERP and Exhibits B and D thereto) **(R. pp. 1799-1800, 1817, and 1820-1826; see also R. p. 1657; R. p. 694; R. p. 752:2-22; R. p. 2099)**. This evidence supports the reasonable inference that ERP was planning to sell the Point to a residential developer if the County had not immediately stepped in to buy the Point for a park; otherwise, it would not have gone to such great lengths to make sure it held all the approvals and permits for the residential development of the Point. Testimony that the development of the Point would render \$55 million to \$56 million in gross sales revenues was further proof the jury could consider in finding that the Point would be an attractive target for another residential developer who would have paid \$5 million for the Road Parcel to obtain the needed 50-foot right of way. **(R. p. 1183)**.

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

To conclude, the Court incorrectly found that Road, LLC was a co-developer and that its fortunes were tied completely to whether Pinckney Point, LLC could find an investor and buy the Point back from ERP. That conclusion is contrary to the evidence and the reasonable inferences therefrom that supported a jury's finding that Road, LLC, could have realized the \$5 million highest and best use value if the Point had been developed as a residential subdivision by a different developer.

B. The evidence demonstrated that Road, LLC purchased the Road Parcel in reliance on the County's agreement the road would forever be private as well as the future development of the Point as a residential development, both as set forth in the Settlement Agreement.

The requirement that the Road Parcel not be a public road was an essential provision of the Settlement Agreement. Road, LLC, invested \$1.3 million in the purchase of the Road Parcel based upon its value as a private access road to a high-end residential development on the Point. While there was proof the County breached its obligation to keep the road private, the Opinion takes a narrow view of the evidence presented to the jury and completely overlooks the County's other contemporaneous breach of the Settlement Agreement. As set forth above, the Opinion ignores the County also breached the Settlement Agreement by preventing the Point from being developed, which directly damaged Road, LLC.

Road, LLC's willingness to buy the Road Parcel for \$1.3 million was based upon the County's agreement that road be private *and* the County's signing off on concessions and acknowledgements in the Settlement Agreement needed for the Point to be developed. Road, LLC, understood that no one could develop the Point without reaching an agreement with Road, LLC to purchase the Road Parcel to gain the 50-foot right-of-way needed to meet the County's access requirements for a new residential subdivision—it was the sole vehicular access to and from the Point. See (R. pp. 979:22-981:8). Around the time of the settlement,

Pinckney Point, LLC, actually entered into a contract to buy the Road Parcel for \$5 million at the time it proceeded with the residential development of the Point. **(Def. Ex. 3, R. pp. 1994-2001)**. That \$5 million contract for the owner of the Point to purchase the Road Parcel was based upon the value of the Road Parcel as a private access road to a residential development on the Point that met the County's standards.

C. There is abundant evidence to support a finding by the jury that the County breached the implied covenant of good faith and fair dealing in the Settlement Agreement by purchasing the Road Parcel to forever prevent its development and that this conduct caused \$5 million in damages to Road, LLC.

The law implies and imposes obligations on the parties not to frustrate the purpose of the contract, not to impede the performance of the contract, and to do those things that according to reason and justice should be done to carry out the purpose for which a contract was made. See generally, Boddie-Noell Properties, Inc. v. 42 Magnolia Partn., 344 S.C. 474, 485, 544 S.E.2d 279, 284 (Ct. App. 2000), aff'd as modified sub nom., 352 S.C. 437, 574 S.E.2d 726, (2002) (quoting 17A C.J.S. Contracts § 328, pages 282-284); 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). Yet, the County did just that – it bought the Point to keep it from ever being developed.

As discussed above, the Opinion completely overlooks Road, LLC's first argument on appeal that the County's actions in preventing the development of the Point damaged Road, LLC:

The circuit court erred in granting the County's Motion for JNOV on the ground that there was no proof it breached the settlement agreement in the face of abundant evidence that the county bought the Point Tract to frustrate and prevent its residential development as well as evidence it used and intended to use Road, LLC's dirt road as a public road contrary to the parties' agreement and court order, all of which prevented Road, LLC from realizing

the benefit of its bargain as expressed in the settlement agreement, thereby causing it damages.

Heading of Section I of the Argument, Appellant’s Brief, p. 26.

As explained in full detail in Appellant’s brief and reply brief, 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. See (**R. pp. 1540:23-1541:25**) (circuit court’s jury charge on breach of contract); (**R. p. 1540:9-20**) (circuit court’s jury charge on implied covenant of good faith and fair dealing). Here, there was considerable proof at trial (i) that the parties to the Settlement Agreement intended by the express terms of their agreement that the Point be developed for residential purposes, just as the jury specifically commented in its first note during their deliberations (**R. 1552**) (“The settlement agreement, Number 78, is with the County and PPLLC, and Road, LLC, et al, ...with the purpose of developing the land..”), and (ii) that the parties further intended that Road, LLC would sell the Road Parcel to the residential developer to allow it to satisfy the County’s requirements for the minimum improved access necessary for residential subdivisions. This proof fully supports the jury’s verdict.

In addition to referring specifically to Road, LLC’s future sale of the Road Parcel at the time of the Point’s residential development, the Settlement Agreement and its many exhibits are replete with other explicit references to the residential development of the Point and how the settlement would help accomplish this development. See (**Pls. Ex. 78, R. pp. 1747-1748**); (**Pls. Ex. 78, at Ex. B, ¶4, R. p. 1758**) (**Pls. Ex. 78, Ex. E, R. pp. 1766-1771**). Additionally, the circumstances leading up to the settlement provide further evidence that one of the chief purposes of the settlement was to clear the obstacles to the residential development of the Point. Further, *the County’s own representatives* agreed at trial one of

the purposes of the settlement was for the County to facilitate the residential development of the Point and the County's later purchase of the Point for a park frustrated that purpose. See (R. pp. 1369:17-1371:20); (R. pp. 1232:25-1234:1); (R. pp. 1371:20-1372:1). All of this proof supports a reasonable inference, if not establishes conclusively, that the County breached the covenant of good faith and fair dealing implied in the Settlement Agreement.

Even though the County knew Road, LLC purchased the Road Parcel because it would be worth \$5 million dollars as the access to a residential development, that the Settlement Agreement's purpose was to facilitate that residential development, and that the County buying the Point would prevent the residential development, the County proceeded with the purchase. Not only that, the County did it with full knowledge that its intention to use the Point as a conservation area or develop a park would prevent the residential development that Road, LLC had relied upon the County supporting.

Because the Opinion overlooks, misapprehends and fails to address Appellant's arguments that the County breached the Settlement Agreement and the breach of the Settlement Agreement proximately caused its damages, the Court should grant the Petition for Rehearing and issue an opinion reversing the circuit court's order granting JNOV for the reasons stated herein and in Appellants brief and reply brief.

III. In ruling that “the evidence presented at trial showed Road, LLC did not suffer \$5 million in damages because Road, LLC's expert testified that the property was still worth \$5 million after the County purchased the Point Tract,” the Opinion overlooks, misapprehends, and fails to address that the expert’s testimony taken as a whole supports the jury’s verdict and that *other* evidence presented to the jury independently supports the jury’s verdict.

A. Taking Hartnett’s testimony as a whole, it was reasonable for the jury to conclude that the Road Parcel was worth at least \$5 million as the sole entrance to a residential development and that the County’s actions prevented the Point from ever being a residential development.

After hearing all the testimony in the case and reviewing the exhibits admitted into evidence, the jury found Road, LLC had been damaged in the amount of \$5 million. The second ruling in the Opinion considers only a portion of Hartnett’s testimony, fails to address the balance of his testimony, and fails to address the other evidence that independently supports the amount of the jury’s verdict. This Court is required to consider all evidence, not just one line from appraiser Hartnett that is being spun by the County. Further, as stated above, on review of an order granting a motion for JNOV, the Court must consider the *existence* of evidence supporting the jury’s award and in doing so to draw all reasonable inferences in favor of Road, LLC.

Taking its own view of the evidence at trial, this Court found that Hartnett’s statement that the Road Parcel is still worth \$5 million dollars was conclusive as to the decision the jury should have reached because “the evidence presented at trial showed Road, LLC did not suffer \$5 million in damages because Road, LLC's expert testified that the property was still worth \$5 million after the County purchased the Point. Thus, the evidence presented at trial indicated the value of the property did not change.” (**Opinion, p. 9**).

Hartnett’s testimony must be considered in its entirety, just as the jury did. See, e.g., South Carolina State Highway Dept. v. Grant, 265 S.C. 28 (1975). Taken as a whole³, the testimony of Road, LLC’s expert appraiser fully supports the jury’s award of \$5 million damages to Road, LLC. Hartnett testified that the “highest and best use” of the Road Parcel was as the exclusive access to “a proposed residential development” and that it was worth at least \$5 million *if used in that manner*: “...So, you had a highest and best use now of -- of that road being accessed to a proposed residential development. That became the highest and best use.” (**R. p. 1184:3-5**). This one portion of Hartnett’s testimony alone supports the \$5 million verdict because the proof also supported a finding by the jury that the County’s purchase of the Point as a park prevented the Point from ever being developed as a residential development. The jury was free to accept this portion of Hartnett’s testimony and reject other portions of his testimony including the portion the Court found was dispositive when it improperly weighed the evidence.

Hartnett’s opinion that the Road Parcel was worth at least \$5 million was based on its highest and best use as the entrance road to a residential development because of its unique location and unique ability to fulfill the 50-foot right of way required by the County. See (R. pp. 1180:24-1182:17) (“it is the -- it is the bridge to, it is the key to the lock, it is the front door of an incredibly beautiful piece of property that, according to all preformers (sic) I had seen, was going to be worth a lot of money when it was developed.”), (**R. pp. 1184:3-1185:10**). He also considered it important that Pinckney Point, LLC had agreed to

³ The Opinion recognized that the jury was entitled to accept or reject all or a portion of Mr. Hartnett’s testimony, but the Opinion inexplicably addressed only a single line from Mr. Hartnett’s testimony and failed to consider the other portions of his testimony and other evidence in the record, going so far as stating that none exists. See (Opinion 9-10).

pay \$5 million for the purchase of the Road Parcel for access to its development of the Point. See (R. pp. 1178:9-1179:7). He also considered that during previous contract negotiations there had been a \$5 million discount for the purchase of the Point when the prospective purchaser was unable to obtain access via the Road Parcel. **(R. pp. 1183:2-1184:2)**. All of these aspects of Hartnett's opinion have one thing in common: the \$5 million value assumes the Point can be used as a residential development. See (R. p. 1184:3-5). ("So, you had a highest and best use now of – of that road being accessed to a proposed residential development.").

Turning to the testimony where Hartnett referred to the Road Parcel as still being worth \$5 million, he employed an adage about the second mouse getting the cheese: "But it's my contention and my opinion that, that property is very valuable. It has at least -- at least five million dollars. And if it's not five million dollars what we paid for it today, it would be when the second mouse came along to get the cheese, he'd have to pay the five million dollars." It is reasonable to infer from the rest of his testimony, just as the jury did, that he is referring to a second developer being the second mouse. His \$5 million value only applies if the Road Parcel is used as the exclusive private access to a up-scale waterfront residential community. Pinckney Point, LLC was the first mouse and came close but ultimately was unable to pull it off. The County killed the possibility of a second mouse because it devalued the "cheese" to zero in eliminating residential development of the Point.

It is entirely unreasonable to construe Hartnett's testimony to mean that the Road Parcel is worth \$5 million as a dirt road to a park or conservation area as this Court and the lower court does. He qualified his \$5 million value by stating it was contingent on the Road Parcel being used as the exclusive private access to a residential development on the Point

with more than \$50 million in projected land sales. The import of Hartnett's testimony was for the jury to decide, not the lower court or this Court. Instead, this Court and the lower Court have usurped the discretion afforded the jury and have chosen to dictate the meaning of one sentence of Hartnett's testimony that is completely contrary to the remainder of his testimony and common sense.

- B. There was separate evidence, independent of Hartnett's opinions, that supports the jury's finding that the Road Parcel was worth \$5 million but only if it could be used as a private entrance to a residential development.

The Opinion does not address significant evidence of damages at trial outside of Hartnett's opinion. The Opinion inexplicably states that there was no other evidence of damages at trial even though this other evidence was discussed in detail in Road, LLC's briefs. **(Opinion, p. 9-10).**

Specifically, the record establishes two other, separate evidentiary bases that support the \$5 million in actual damages awarded by the jury:(i) the purchase price in the contract of sale between Pinckney Point, LLC, and Road, LLC, from January 2011, and (ii) the reduction in the sales price of the Point to Pinckney Point, LLC in 2005, based on the then lack of sufficient access to satisfy the County's requirements for a residential subdivision.

First, the jury could have determined the Road Parcel was worth \$5 million as the exclusive access to a residential development based upon the \$5 million that Pinckney Point, LLC agreed to pay Road, LLC for the Road Parcel in their contract of purchase and sale.. **(Def. Ex. 3, R. pp. 1994-2001); (R. p. 887:4-22).** A contract for the sale of land that is not too remote in time may be considered as evidence of the market value of real property. Benya v. Gamble, 282 S.C. 624, 632, 321 S.E.2d 57, 62 (Ct. App. 1984)(Trial court did not abuse its discretion in admitting evidence of contract of sale within 18 months of the breach).

Here, not only did the County not object to the introduction of the contract of sale between Pinckney Point, LLC and Road, LLC for the sale of the Road Parcel for \$5 million, the County was the party that introduced the contract into evidence:

Q. Let me show you what's been marked as Defendant's Exhibit 3, and ask you if you can identify that.

A. This is a real estate purchase sale agreement between Pinckney Point, LLC, and Road, LLC.

Q. Okay. And is that the contract whereby Pinckney Point agreed to pay Road, LLC, five million dollars the property that Road paid 1.3 million dollars for?

A. That's correct.

MR. ACHURCH: Your Honor, I'd move this into evidence, please.

THE COURT: Okay.

MR. WALKER: No objection.

THE COURT: Without objection.

ITEM IDENTIFIED AS REAL ESTATE
AND PURCHASE AND SALE AGREEMENT
BETWEEN ROAD, LLC, AND PINCKNEY
POINT, LLC, DATED JANUARY 14, 2011,
MARKED DEFENDANT'S EXHIBIT NUMBER 3,
ADMITTED AS EVIDENCE.

(R.p. 722:4-22).

This contract of sale was referenced in the Settlement Agreement, was not remote in time, and fully supports the jury's verdict on its own even if Hartnett's testimony is tossed out the window. This contract was evidence before the jury that it was entitled to consider as probative of the value of the Road Parcel as \$5 million if available for use as the exclusive private access to a residential development. The proof showed that this value of \$5 million was derived in arm's length negotiations and also that it was entirely dependent on the Point's being a high-end waterfront residential development. **(R. pp. 885:2-23; 886:15-887:3; 888:21-889:1) (R. pp. 888:21-889:1; 889:5-8; R. pp. 1747-1748).** This irrefutable

evidence admitted by the County, alone, supports the jury's verdict even without any testimony by the expert appraiser, yet the Court blotted out reference to it in the Opinion.

The jury also could have relied on proof of the value of the Road Parcel as the exclusive access to a residential development based on the \$5 million reduction in purchase price due to the dispute over that access when Pinckney Point, LLC purchased the Point in 2006. See (R. pp. 495:9-13; 505:21-506:2; 508:2-7; 1182:18-1183:18); (Pls. Ex. 84, R. pp. 1883-1891). Proof of that reduction in the purchase price of the Point without the needed 50-foot improved right of way required by the County if the Point was to be a residential subdivision supported the reasonable inference that the value of the Road Parcel was \$5 million if it could be used as the access to a residential development. This important evidence is also not addressed in the Opinion.

The jury's verdict of \$5,000,000 was not based on speculation. The verdict had roots in three facets of the proof that all independently provide a sound factual basis for the jury to reach this conclusion – Hartnett's testimony, the contract of sale, and the reduction in the sales price to Pinckney Point, LLC. For these reasons, the Court should grant this Petition for rehearing and enter an Opinion reinstating the jury's verdict. See Hobgood v. Pennington, 300 S.C. 309, 313, 387 S.E.2d 690, 692 (Ct. App.1989) (“If there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm.”).

CONCLUSION

The Opinion omits any discussion of critical portions of the evidence that fully support the jury's verdict for \$5 million that were advanced at trial and in Road, LLC's briefs in this Court. Again and again in decisions too numerous to need citation, this Court has

repeated the rigorous standard to be applied in granting a JNOV. Why? Because a jury verdict is sacrosanct and stands if there is *any* evidence at all to support it.

Nevertheless, in this case, maybe because the verdict was too high for some to stomach, the standard for granting a JNOV has been turned on its head. As discussed above, this Court and the trial court did not take the evidence and the inferences therefrom in the light most favorable to Road, LLC. This Court and the trial court determined the jury was not free to make their own assessment of credibility and what portions of the testimony to believe or disregard or to construe it as they saw fit. Rather, this Court and the trial court indulged in a calculated interpretation of one portion of Hartnett's testimony that ignores the remainder of it and is contrary to common sense, and ruled this interpretation is binding. Moreover, even if Hartnett's testimony is disregarded, which the jury was entitled to do, there is other proof that is not speculative that completely supports the jury's determination that the County's purchase of the Point to *assure* it was *never* developed proximately caused \$5 million in damages to Road, LLC.

For the reasons stated above, and those stated in Appellant's brief and reply brief, the Court should **GRANT** rehearing and enter an opinion reinstating the jury's verdict against the County.

Respectfully submitted,



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March 18, 2021
Charleston, S.C.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2017-001736

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5807
Heard June 16, 2020 – Filed March 3, 2021

AFFIRMED

John Phillips Linton, Jr. and George Trenholm Walker,
both of Walker Gressette Freeman & Linton, LLC, of
Charleston, for Appellants.

C. Mitchell Brown, Allen Mattison Bogan, and Nicholas
Andrew Charles, all of Nelson Mullins Riley &
Scarborough, LLP, of Columbia; and Mary Bass Lohr
and Robert W. Achurch, III, both of Howell Gibson &
Hughes, PA, of Beaufort, for Respondent.

LOCKEMY, C.J.: In this breach of contract action, Road, LLC and Pinckney Point, LLC (Pinckney) (collectively, Developers) appeal the trial court's order

granting Beaufort County's (the County's) motion for judgment notwithstanding the verdict (JNOV). Road, LLC argues the trial court erred by finding that (1) there was no evidence to support the jury's finding of breach of contract, (2) the \$5 million in damages were speculative, and (3) the contract was a nullity. We affirm.

FACTS/PROCEDURAL HISTORY

This case involves two adjacent tracts of land: the first is a northern 229-acre tract (the Point Tract), and the second is a .85-acre isthmus (the Road Parcel), which connects the Point Tract to Bluffton. The only way to access the Point Tract was by Pinckney Colony Road (Colony Road), which crosses over the Road Parcel. Pinckney bought the Point Tract on March 31, 2006, with \$5.7 million cash and financed another \$5 million through BB&T. Pinckney intended to build a residential development on the land. When Pinckney purchased the Point Tract, the seller was in the midst of litigation with the County over whether Colony Road was a public or private road (the Road Action). Pinckney applied for a variance to shift Colony Road within the river bluff, the County denied the application, and Pinckney appealed (Variance Action).

In 2010, BB&T sold Pinckney's note and mortgage to Equity Resource Partners (ERP). In December 2011, Pinckney deeded the Point Tract to ERP in lieu of foreclosure and paid ERP \$125,000 for an option to buy back the Point Tract for \$6.5 million. This option was set to expire on August 31, 2012. Pinckney extended the option until February 28, 2013, for an additional \$375,000.

During development of the Point Tract, the County required Pinckney to acquire a separate variance for the water line. This required Pinckney to acquire permission from Dorothy Gnann and Agnes Pinckney (Agnes), owners of the Road Parcel, to add utility lines along Colony Road. In order to facilitate that permission, Pinckney wanted to buy the Road Parcel, but could not afford the \$1.3 million needed to acquire it. Subsequently, John Kunkel, a manager for Pinckney, and Bruce Bunner established Road, LLC, through which they purchased the Road Parcel.

Road, LLC and Pinckney then entered into an agreement (the Road Agreement), which provided Road, LLC would sell the Road Parcel to Pinckney for \$5 million on November 30, 2013. Road, LLC and Pinckney also recorded an easement granting Pinckney a twenty foot right-of-way across the Road Parcel. The easement stated it was for the benefit of the "Grantee and for the benefit of any and

all other occupants of Grantee's Property, and for its respective subtenants, licensees, customers, agents, employees, invitees, mortgages, successors and assigns."

In January 2011, the County; the County's zoning board; Pinckney; Road, LLC; Agnes; and Gnann entered into a settlement agreement (the Agreement), which settled both the Road Action and the Variance Action. Specifically, the Agreement stated the "Road Parcel is and shall be a private road for the use and benefit of those parties described in the Right of Way and Easement Agreement." The Agreement further provided that Road, LLC would convey the Road Parcel to Pinckney in accordance with the Road Agreement. Further, the County agreed the Road Parcel provided sufficient access for the development of the Point Tract in accordance with the Beaufort County Zoning and Development Standards Ordinance. The Agreement also granted Pinckney the variance to relocate Colony Road.

In November 2012, the Beaufort County Land Trust (Land Trust) was contacted by a broker for ERP regarding the Point Tract and the Land Trust determined the property should be conserved.

ERP extended Pinckney's option until March 11, 2013; however, Pinckney failed to secure an investor to fund the repurchase, and the option expired. On March 14, 2013, the County's Rural and Critical Lands Board received and approved an offer to purchase of the Point Tract from ERP for \$6,950,000. The County council approved the purchase of the Point Tract on April 8, 2013, and signed the contract for the purchase the Point Tract on April 24, 2013. On May 21, 2013, Developers (Pinckney, LLC and Road, LLC) filed their first complaint seeking declaratory and injunctive relief prohibiting the sale of the Point Tract to the County based on the Agreement. The County closed on the Point Tract on May 28, 2013. Following the closing, Developers sought declaratory and injunctive relief prohibiting the County from using Colony Road for public access, an order of specific performance that the Road Parcel and Point Tract only be used for a residential community, and damages for breach of the Agreement.

At the August 25, 2016 trial, the trial court found there was a latent ambiguity in the Agreement, which required the admission of extrinsic background evidence. Taylor Bush, the manager for Pinckney, testified to the following on direct examination:

Q: How many cases were there at this point?

A: There was the dock case.^[1] There was the [Variance Action]. There was the [R]oad [Action].

Q: What was the [Agreement] to do?

A: It was to resolve everything necessary for us to develop the property.

The County objected based on the parol evidence rule, and the trial court overruled the objection. Bush testified the County required Pinckney to change the development plan from sewer to septic, collect individual soil samples, and acquire septic permits for each lot, which were not required by ordinance. Bush testified that the request for individual lot permits caused a nine-month delay and obtaining individual permits was unrealistic. He explained these septic delays caused Pinckney to default on the loan. He stated Pinckney completed all permitting with the County in February 2012.

Bush stated Pinckney wanted to repurchase the Point Tract, but was unable to complete the entitlements necessary to acquire an investor. He testified that if Pinckney had been granted another 120-day option from ERP, it could have acquired the remaining approvals needed for the Point Tract. Bush testified the County granted the variance as required by the Agreement.

John Kunkel stated Pinckney could not acquire investment to buy back the loan from ERP because they did not have the permits and approvals in place. Kunkel explained that if Pinckney had 120 more days, they would have acquired an investor because they were 95% complete. Kunkel stated Pinckney lost between \$5.7 million and \$8.5 million in profit. He explained that after the County purchased the Point Tract, Colony Road was kept open and the road was in a better condition than it was before the purchase. Kunkel testified that on March 5, 2013, Silver Point, LLC was interested in investing, but Pinckney rejected Silver Point, LLC's terms. He admitted ERP could sell the Point Tract to whomever they wanted.

Walter Nester, Pinckney's attorney, stated the County required Pinckney to use septic tanks on the Point Tract. He testified Pinckney acquired a permit for a development-wide septic system; however, during development, the South Carolina Department of Health and Environmental Control (DHEC) regulations changed, requiring individual permits for each lot. Nester stated DHEC agreed

¹ The County and Pinckney had a third action over the number of docks Pinckney was granted on the Point Tract. The dock action was not part of the Agreement.

Pinckney's development-wide permit remained valid; however, the County required Pinckney to obtain individual permits for final review. Nester stated that because there was no conditional approval for the septic system, Pinckney's engineering efforts were delayed. Nester stated that on February 23, 2012, the County approved the use of their development-wide permit. He agreed Pinckney faced unusual hurdles during development but admitted the septic issue was the only issue Pinckney had with the County regarding approvals.

Thomas Hartnett, an expert in land appraisals, testified the Road Parcel was worth \$5 million at its highest and best use, which was as an access point to a residential development. He agreed that the Road Parcel was still worth \$5 million after the County purchased the Point Tract and explained that any party wishing to develop the Point Tract would have to pay \$5 million for the Road Parcel.

Gary Kubic, the County Administrator, testified the County had been interested in purchasing the Point Tract since 2003. He stated he approved the Agreement on behalf of the County and admitted he knew Pinckney wanted to build a residential development on the Point Tract. Kubic stated that, to his knowledge, the County had done nothing to restrict access to the Point Tract following the County's acquisition and any taxpayer could access the Point Tract via Colony Road. He testified the County wanted to prevent the development of the Point Tract.

The County moved for a directed verdict. The trial court denied the motion, finding there was evidence from which the "jury could determine that there was a breach of contract."

John H. Irby, one of the owners of ERP, testified via deposition that ERP was not interested in another option with Pinckney; however, if Pinckney had been able to close, they would have sold them the Point Tract.

At the close of the County's case, it again moved for a directed verdict, arguing there was no evidence of a breach of contract, and Pinckney suffered no damages because Hartnett testified the Road Parcel was still worth \$5 million. The trial court denied the County's motion, reasoning "there [we]re facts that were testified to [from which] this jury could conclude there was a breach of contract."

In their closing argument, Developers asserted: "[T]he settlement agreement clearly required that the road was private. Everybody agreed it was private; no dedication; no public use. Judge Dukes entered a court order; we looked at it two

times; this road is private. And the County has not treated it as private." They further argued:

As to Road, LLC, what is the breach there? Well, it's that the County is treating it like it's a public road, and the private property is public property, they're contending. They haven't gated it. Their testimony was they had not gated it. The testimony was there were no signs saying you cannot come here. The testimony was that they treat it like a public road.

The jury found the County did not breach its contract with Pinckney; however, it found the County breached its contract with Road, LLC and awarded \$5 million in damages.

The County filed a motion for JNOV as to Road's breach of contract claim. The County argued the Agreement only obligated it to do two things—(1) grant the road variance and (2) agree the road was private—and it had already fulfilled those requirements. The County argued there was no latent ambiguity in the Agreement, no evidence Pinckney was treated differently than any other developer, and no evidence the County delayed permitting for the Point Tract. Further, the County asserted the jury verdict as to Pinckney supported the finding there was no evidence the County breached as to good faith and fair dealing against Road, LLC because their claims were interconnected. The County argued it did not breach the implied covenant of good faith and fair dealing because when Pinckney's option ended, Pinckney could no longer meet its obligation under the Agreement; thus, the Agreement became a nullity. The County asserted the only testimony about the value of the Point Tract was that it was still worth \$5 million, and any damages were speculative because there was no certainty Pinckney would acquire the funds needed to turn the tract into a residential community. The County also argued if it used the right-of-way as a public road, the appropriate remedy was an injunction or rule to show cause, and that Road, LLC did not show it caused \$5 million in damages by violating the private road clause of the Agreement.

The trial court granted the County's motion for JNOV and entered judgment for the County. The trial court found there was no evidence to support a finding that the County breached the express terms of the Agreement. Specifically, it found the County complied with its obligation to (1) grant the road variance for Pinckney and (2) agree the road was private. The trial court altered its previous ruling and held there was no latent ambiguity in the Agreement and the plain reading of the

Agreement did not bind the Point Tract to be used forever as a residential development. It also found the right-of-way was not converted into a public road by the County's purchase of the Point Tract because there was no evidence the County invited the public to use the property or evidence the public used the road. Further, the court found a private road purchased by a government agency does not de facto become a public road.

The trial court found Pinckney had an easement over the Road Parcel, which runs with the land. The trial court also found there was no evidence the County breached the implied covenant of good faith and fair dealing. The trial court found the evidence does not support the assertion the County held up Pinckney's permitting and found Pinckney was treated like any other developer.

The trial court found there were no issues between the County and Pinckney as of February 2012 and Pinckney had over a year to submit for final approval but failed to do so. The trial court held: "There is no evidence that Pinckney . . . was treated in any way differently than any other developer. There is evidence in the record that the County's actions did not cause Pinckney . . . to fail to meet their obligations under the settlement agreement, but rather, Pinckney['s] . . . own actions did." The trial court further held that by the time the County purchased the Point Tract, the Agreement was a nullity because Pinckney could no longer meet its obligations under the contract.

The trial court also held that even if there was evidence to support a breach of contract claim, Developers failed to present any evidence of \$5 million in damages. The court found the only evidence as to the current value of the Road Parcel was from Hartnett, who stated the value of the tract was still \$5 million; thus, there was no evidence the Road Parcel lost any value. Additionally, the trial court held the loss of profit was too speculative because Road, LLC's profit was dependent on Pinckney acquiring an investor to repurchase the Point Tract. The trial court stated Developers did not offer evidence that any investor would have invested; they only posited they would have found one if the County had not interfered. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by holding there was insufficient evidence to sustain the jury's verdict that the County breached the Agreement?

2. Did the trial court err by holding there was insufficient evidence to sustain the jury's award of \$5 million in damages?
3. Did the trial court err by overturning the jury's damages verdict as "too speculative" because the damages amount was reasonably certain?
4. Did the trial court err by overturning the jury's verdict on the alternate ground that the contract at issue was a "nullity"?

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* at 332, 732 S.E.2d at 171. "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.* "In considering a JNOV, the trial [court] 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). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Boddie-Noell Props., Inc. v. 42 Magnolia P'ship*, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct. App. 2000), *aff'd as modified*, 352 S.C. 437, 574 S.E.2d 726 (2002).

LAW/ANALYSIS

Road, LLC argues the trial court erred in holding there was no evidence of \$5 million in damages. Road, LLC asserts the trial court erred by relying solely on Developers' expert witness's testimony that the Road Parcel was still worth \$5 million, instead of determining if there was any evidence to support \$5 million in damages. Road, LLC further argues the trial court erred in finding the damages were speculative and depended upon an investor. We disagree.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a

natural consequence and a proximate result of such breach." *Id.* (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *Id.* (quoting *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990)). "The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach." *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). "[P]rofits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach." *Id.* at 122, 113 S.E.2d at 335–36.

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* (quoting *Whisenant*, 277 S.C. at 13, 281 S.E.2d at 796).

We must determine whether evidence was presented to the jury that Road, LLC suffered \$5 million in damages as a "proximate result" of a breach of the Agreement. *See Branche Builders, Inc.*, 386 S.C. at 48, 686 S.E.2d at 202 ("The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a *proximate result* of such breach." (emphasis added) (quoting *Fuller*, 240 S.C. at 89, 124 S.E.2d at 610)). First, the jury was presented with no evidence Road, LLC was damaged by the County treating Colony Road as public. A potential breach of the private road clause did not render Developers unable to develop the Point Tract, which Road, LLC asserted caused the \$5 million in damages. Thus, there was no evidence Road, LLC suffered \$5 million in damages due to the County's breach of the private road clause.

Second, the evidence presented at trial showed Road, LLC did not suffer \$5 million in damages because Road, LLC's expert testified that the property was still worth \$5 million after the County purchased the Point Tract. Thus, the evidence presented at trial indicated the value of the property did not change. Although we agree with Road, LLC's assertion that the jury can accept or reject Hartnett's testimony regarding the value of the property, without Hartnett's testimony, there

was no evidence presented to the jury regarding the value of the Road Parcel. *See Smith v. Safeco Life Ins. Co.*, 303 S.C. 131, 136, 399 S.E.2d 427, 429 (Ct. App. 1990) (order on rehearing) ("The jury is . . . free to accept a portion of a witness's testimony and reject a portion."). Thus, even if the jury ignored Hartnett's testimony about the Road Parcel's current value, there was no other evidence presented regarding the value of the Road Parcel after the County had purchased the Point Tract. Therefore, the jury would have been left to speculate as to what damages Road, LLC suffered. *See Austin*, 387 S.C. at 43, 691 S.E.2d at 146 (providing that "neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation"). Based on the foregoing, we find Road, LLC failed to present evidence it suffered \$5 million in damages due to the County's breach of the private road clause.

Because we affirm the trial court's order granting the County's motion for JNOV based on damages, whether the County breached is inconsequential for the disposition of this case. Every element of a breach of contract must be proved, and our holding that Road, LLC failed to prove an element of the claim is dispositive; thus, analysis of the remaining issues is unnecessary. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) ("[A]n appellate court need not address remaining issues when disposition of a prior issue is dispositive[.]"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

CONCLUSION

For the foregoing reasons, the trial court's order granting the County's motion for JNOV is

AFFIRMED.

GEATHERS and HEWITT, JJ., concur.

RECEIVED

Mar 18 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC,

Of whom Road, LLC is the Appellant,

v.


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

PROOF OF SERVICE

I certify that I have served the Appellant's **PETITION FOR REHEARING**, on Respondent by electronic mail on March 18, 2021, addressed to its attorneys of record as follows:

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From: [Nancy Jane Dennis](#)
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Cc: [Trenholm Walker](#); [John P. Linton, Jr.](#)
Subject: Road LLC v Beaufort Co. Appellate Case No. 2017-001736
Date: Thursday, March 18, 2021 5:20:10 PM
Attachments: [image374467.png](#)
[1 - 03-18-21 Petition for Rehearing.pdf](#)
[2 - 03-03-21 Court of Appeals Order Affirmed.pdf](#)
[03-18-21 Proof of Service.pdf](#)
[03-18-21 GTW LT Clerk COA.pdf](#)

Attached please find for service by electronic mail only, Appellant's Petition for Rehearing.

With kind regards,
Nancy Jane Dennis
Paralegal



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March 18, 2021

BY U.S. Mail and Email

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

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Mar 18 2021
SC Court of Appeals

Dear Ms. Kitchings:

I have this date served and filed Appellant's Petition for Rehearing in the above-referenced appeal by electronic mail only. In compliance with the Court's emergency operations I have enclosed the \$50 filing fee for the Petition. Thank you for your courtesies herein.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LL

G. Trenholm Walker

Enclosure (Check)

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