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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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Appellate Case No. 2017-001736

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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.

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**Return to Petition for Rehearing**

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## INTRODUCTION

Pursuant to Rule 221(a), SCACR, Beaufort County (the "County") hereby submits this Return to Appellant Road, LLC's ("Road, LLC") Petition for Rehearing. For a petition for rehearing to be granted, appellants must demonstrate that "the Court overlooked or misapprehended their argument." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). A petition may be granted only for this limited purpose. *See id.*

The purpose of a petition for rehearing is not to have a case tried in an appellate court for a second time. *Id.* As a result, a petition should not rehash matters which a court has already considered and disposed of. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). Additionally, a petition for rehearing is an inappropriate vehicle to raise new arguments or issues which the petitioner failed to preserve during the initial appeal. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

Rehearing is not warranted in this case because Road, LLC fails to demonstrate that the Court overlooked or misapprehended any of their arguments, or they are not preserved for review. Regardless, they also lack merit. For the reasons outlined herein, the Court should deny Road, LLC's petition for rehearing.

## FACTUAL AND PROCEDURAL BACKGROUND[1]

Road, LLC and its co-plaintiff, Pinckney Point, LLC, filed this action on May 21, 2013, seeking declaratory and injunctive relief against the County. (*See* Compl. at 8–11, R. 29–32).

[1] The County's appellate brief contains a more detailed description of the facts and procedural history of this case. It is thus incorporated by reference. Further, the County incorporates by reference its arguments in its appeal brief as if restated herein to the extent such arguments represent additional sustaining grounds which support affirmance, but which this Court did not need to address in its Opinion.

Road, LLC and Pinckney Point, LLC subsequently filed an amended complaint on July 25, 2014. (*See* Am. Compl.; R. 41–54). In the amended complaint, they alleged that the County breached a 2011 global settlement agreement (the "Settlement Agreement") between the parties.

The Settlement Agreement arose out of two separate lawsuits, one concerning the use of parcel of a land (the "Road Parcel") which leads up to 229 acres of land in the County (the "Point Tract") and the other concerning Pinckney Point, LLC's attempt to obtain a variance from the County to move the driveway to the Point Tract. Under the terms of the Settlement Agreement, the County had only two obligations: (1) to grant Pinckney Point, LLC a variance to move a roadway and to install certain utility lines; and (2) to agree the Road Parcel would remain a private, rather than a public, roadway. (*See* Settlement Agreement, R. 56–57).

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

The County filed a motion for judgment notwithstanding the verdict on May 12, 2016. (JNOV Mot. 5/12/16, R. 238). Road, LLC filed a Memorandum in Opposition, and Judge Mullen held a hearing on the motion on August 9, 2016. (Memo. In Opp. To JNOV Mot. 5/26/16, R. 282, 1567). Judge Mullen subsequently entered an order granting the County's motion and entering judgment for the County on Road, LLC's breach of contract claim. (Order date 7/18/17, R. 1).

This Court subsequently affirmed Judge Mullen's order granting judgment notwithstanding the verdict. (*See* Opinion, attached hereto); *Road, LLC v. Beaufort County*, --- S.E.2d ----, 2021 WL 800612 (Ct. App. 2021).

## ARGUMENT

In its petition, Road, LLC argues that rehearing is justified. First, it argues that the Court's Opinion overlooked evidence regarding damages. Second, it argues that the Court's Opinion overlooked one of its arguments regarding causation. Third, it argues the Court's Opinion overlooked its argument regarding the breach of the covenant of good faith and fair dealing implied in the Settlement Agreement. Rehearing is not warranted on any of these grounds.

With respect to Road, LLC's argument regarding damages, rehearing is not warranted for at least two reasons. First, the Court fully considered Road, LLC's argument regarding damages and correctly determined that Road, LLC failed to establish damages. Second, the evidence allegedly overlooked does not alter the Court's prior conclusions about damages.

With respect to Road, LLC's argument regarding causation, rehearing is not warranted for several reasons. First, Road, LLC failed to preserve the argument it advances for appellate review. Second, this Court correctly ruled on the causation issue before it, namely whether the County's alleged breach of the private road obligation of the Settlement Agreement caused Road, LLC's alleged damages. Third, the Court did not need to address any additional arguments on causation in light of its damages holding.

Finally, with respect to Road, LLC's argument regarding the alleged breach of the covenant of good faith and fair dealing, rehearing is not warranted for two reasons. First, the Court correctly declined to address arguments related to breach in light of its damages holding. Second, even if the Court did consider the argument, Road, LLC failed to establish any breach.

## I. The petition should be denied with respect to Road, LLC's argument regarding damages.

In its petition for rehearing, Road, LLC argues that the Court overlooked, misapprehended, and failed to address expert testimony and other evidence supporting its alleged damages. Specifically, Road, LLC alleges that the Court's 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." (App. Pet. at 17). The petition should be denied.

### A. The Court already considered Road, LLC's arguments regarding damages and correctly determined that Road, LLC failed to establish damages.

Road, LLC's petition for rehearing should be denied because the Court already considered Road, LLC's arguments regarding damages and correctly determined that Road, LLC failed to establish damages. All of the evidence presented by Road, LLC in its petition was already presented to the Court in its appellate briefing. A review of this Court's Opinion demonstrates that the Court considered this evidence and did not overlook or misapprehend Road, LLC's argument on this point.

The Court held that Road, LLC failed to introduce evidence showing that the value of its property changed as a result of the County's purchase of the Point Tract. (Opinion at 9); *Road, LLC v. Beaufort County*, --- S.E.2d ----, 2021 WL 800612, at *5 (Ct. App. 2021). Specifically, the Court noted that Road, LLC's own expert "testified that the property was still worth $5 million after the County purchased the Point Tract." *Id.* As a result, the Court concluded that Road, LLC did not suffer $5 million in damages. *Id.*

In the alternative, the Court noted that even if a jury could reject the expert's testimony in this regard, there was no other evidence presented to show the value of that property after the

County purchased the Point Tract. (Opinion at 10); 2021 WL 800612, at *5. Thus, in the absence of such evidence, a jury would be forced "to speculate as to what damages Road, LLC suffered." *Id.* It is axiomatic that damages may not be based on speculation.

In reaching these conclusions, the Court carefully considered the evidence and arguments presented by Road, LLC, including the testimony of its own expert and its argument that the trial court erred by not "determining if there was any evidence to support $5 million in damages." (Opinion at 8); 2021 WL 800612, at *5.

Road, LLC rehashes these arguments again in its petition. (*See* App. Pet. at 17) ("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."). Road, LLC's petition in effect merely expresses disagreement with the Court's analysis of its evidence and its arguments. Such disagreement is not a proper basis for granting rehearing. *See Arnold.*, 168 S.C. 163, 167 S.E. at 238.

**B. The arguments raised in Road, LLC's petition do not justify a contrary conclusion.**

Alternatively, Road, LLC's petition for rehearing should be denied because the arguments raised in its petition do not justify a contrary conclusion than the one reached by the Court. Road, LLC points to evidence which it argues supports a valuation of its property at $5 million for use as private access to a residential development. (App. Pet. at 21–22). However, this argument misses the mark because it fails to address the dispositive issue in the Court's damages analysis—the current value of the property after the County purchased the Point Tract, which was also stated by Road LLC's expert to be $5 million. It remains undisputed that the only evidence in the record

about the current value of the road property is the opinion of Road, LLC's own expert, which places the current value of the property at $5 million. The evidence referenced in the petition does not address the current value of the property. As Road, LLC itself acknowledges, this additional evidence simply supports the proposition that the road access property was valued at $5 million for use as access to a residential development. Consequently, it does not alter the Court's prior conclusion about the current value of the property.

As noted above, other than the opinion of Road, LLC's own expert, there is no evidence in the record about Road LLC's property's current value. The additional evidence referenced in the petition does not alter this conclusion because it only addresses the value of the property when the Point Tract is used as a residential development. As a result, the evidence or arguments raised in the petition do not alter the Court's prior conclusion about the speculative nature of Road, LLC's damages. *See, e.g., Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("[N]either the existence, causation nor amount of damages can be left to conjecture, guess or speculation . . . ."); *see also Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968) ("It is, of course, true that the existence or amount of damages cannot be left to conjecture, guess or speculation."). The jury would be simply speculating on damages in the absence of any other evidence of the value of the Road, LLC property after purchase by the County. This Court correctly noted that such speculation is not permissible, and thus it correctly affirmed the trial court.

## II. The petition should be denied with respect to Road, LLC's argument regarding causation.

In its petition for rehearing, Road, LLC also argues the Court failed to address Road, LLC's alternative argument that it was damaged by the County's purchase of the Point Tract itself.[2]

The petition should be denied on this ground for multiple reasons. First, to the extent Road, LLC attempts to raise an alternative argument regarding breach of the Settlement Agreement and causation, it failed to properly preserve the issue for appeal. Second, the Court properly and correctly considered the causation argument that was raised by Road, LLC with respect to the breach of the private road clause of the Agreement. Third, and finally, the Court did not need to reach this issue, given its damages holding.

### A. Road, LLC failed to preserve the alternative causation issue for appellate review.

As noted in the County's appellate brief, any argument that the County breached the settlement agreement by preventing *any* residential development through its purchase of the Point Tract is unpreserved for this Court's review. (Resp. Br. at 26 n.9) ("To the extent Appellant now contends that it could have sold the Road Parcel to *any* developer (not just Pinckney Point, LLC) for five million dollars if the Point Tract were converted into a residential development, and the County is in breach of the Settlement Agreement by virtue of the County's purchase of the Point Tract not permitting *any* residential development, this argument is unpreserved for this Court's review. The trial court's order granting the County's JNOV motions does not address this argument, and Appellant did not file a Rule 59(e) motion."). Road, LLC may not preserve this

[2] To the extent Road, LLC argues that the Court mistakenly identified it as a Developer, any such mistake has no bearing on the disposition of the legal issues raised on appeal. For the reasons outlined herein, the Court properly determined that Road, LLC failed to establish damages. Road, LLC's alleged designation as a Developer in the Court's opinion has no bearing on that analysis.

point by way of a rehearing petition. Consequently, this argument by Road, LLC was not properly before the Court.

**B. The Court considered Road, LLC's argument regarding proximate causation and correctly determined that Road, LLC failed to establish causation.**

The petition should be denied also because the Court previously and correctly addressed Road, LLC's argument regarding causation. In its reply brief, Road, LLC argued that the trial court should be reversed because a jury could find that the County's breach of the private road clause of the Settlement Agreement caused it damage. (App. Reply Br. at 15). The Court rejected this argument, acknowledging that any alleged breach of the private road clause itself did not damage Road, LLC, as it had no impact on the development of the Point Tract itself. (Opinion at 9); *Road, LLC*, 2021 WL 800612, at *5 ("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.").

**C. Even if preserved, the Court did not need to address the issue.**

Finally, even if Road, LLC preserved the alternative causation issue for appellate review, the petition should be denied because the Court did not need to address this argument in light of its damages holding. The Court's damages holding was a dispositive basis upon which to affirm the trial court's grant of the motion for judgment notwithstanding the verdict. Consequently, under well-established appellate rules, the Court was under no obligation to consider Road, LLC's additional arguments regarding causation. *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[.]"); *Whiteside v. Cherokee County School Dist.*

*No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when disposition of 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."). As a result, any argument that the Court overlooked or misunderstood arguments regarding causation necessarily lacks merit.

## III. The petition should be denied with respect to Road, LLC's argument regarding breach of the implied covenant of good faith and fair dealing.

As its final argument, Road, LLC argues the Court overlooked or ignored its argument that the County breached the covenant of good faith and fair dealing implied in the Settlement Agreement by purchasing the Point Tract to prevent its residential development.

The petition should be denied on this ground for two reasons. First, the Court properly declined to consider Road, LLC's arguments regarding the breach of the implied covenant of good faith and fair dealing because Road, LLC failed to establish damages. As a result, the Court did not overlook this argument. Second, this Court should deny the petition because Road, LLC has failed to establish any form of breach.

### A. The Court properly declined to consider Road, LLC's arguments regarding breach of the implied covenant of good faith and fair dealing.

The Court properly declined to address whether the County breached the Settlement Agreement in light of its damages holding. *See Road, LLC*, 2021 WL 800612, at *6. As noted above, an appellate court does not need to address remaining issues when the resolution of a prior issue is dispositive. *See Ulbrich*, 390 S.C. at 617, 703 S.E.2d at 225. This is a well-established rule of appellate procedure. *See, e.g., Arredondo v. SNH SE Ashley River Tenant, LLC*, --- S.E.2d ----, 2021 WL 908508, at *7 (S.C. 2021) (declining to address remaining issue when resolution of prior issue is dispositive); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518

S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address [appellant's] remaining issues."). As a result, once the Court determined that the trial court should be affirmed on the issue of damages alone, it was under no obligation to consider Road, LLC's arguments regarding any alleged breach of the implied covenant of good faith and fair dealing.

**B. Even if those arguments are considered, Road, LLC failed to establish any breach of the Settlement Agreement.**

As explained more extensively in the County's appeal brief, even if the Court considers Road, LLC's argument on this point, Road, LLC failed to establish a breach of the implied covenant of good faith and fair dealing because it failed to establish that the County breached the Settlement Agreement. If the County did not breach the Settlement Agreement, it cannot be liable, as a matter of law, for allegedly breaching the implied covenant of good faith and fair dealing. Under South Carolina law, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *Ro Tec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). When there has been no breach of the express terms of a contract of the kind here, there can be no breach of the implied covenant of good faith and fair dealing. *See Ro Tec Servs.*, 359 S.C. at 470–73, 597 S.E.2d at 883–84.

The County did not breach the express terms of the Settlement Agreement. As referenced above, the Settlement Agreement imposed only two obligations on the County: (1) to grant Pinckney Point, LLC a variance to move a roadway and to install certain utility lines; and (2) to agree the Road Parcel would remain a private, rather than a public, roadway. (*See* Settlement Agreement, R. 56–57). Road, LLC presented no evidence that the County breached the settlement agreement by making the road public. *See Hutto v. Tindall*, 40 S.C.L. 396, 400, 1853 WL 2912 (Ct. App. 1853) ("Public roads of any kind, can be established only by public authority; or by

dedication; or by long use, which though not strictly prescription, bears so close an analogy to it, that it may be expressed by that term. Less than twenty years' use is insufficient to create either a public or a private road.").

Further, the terms of the Settlement Agreement do not restrict the use of the Point Tract to residential development by Pinckney Point, LLC. (*See* Settlement Agreement, R. 55; Tr. 661:1–15, 676:9–17, R. 960, 975). Road, LLC itself concedes as much on appeal, noting it "never argued that the written terms of the Settlement Agreement included a specific provision constituting an unconditional written guarantee by the County that the Point Tract would 'be forever used as a residential development." (App. Br. at 31); *see also* App. Br. at 32 ("[T]he question is not whether the Settlement Agreement included an express covenant restricting the Point Tract to residential development.").). Hence, the County thus did not breach the terms of the Settlement Agreement through its purchase of the Point Tract.

Because Road, LLC failed to show that the County breached the Settlement Agreement terms, its argument that the County breached the implied covenant of good faith and fair dealing must also fail. As a result, rehearing is not proper on this ground.

## CONCLUSION

Rehearing is inappropriate in this case. Road, LLC failed to meet its burden of showing that the Court overlooked or misunderstood any of its arguments. Instead, it improperly attempts to have its case tried in appellate court for a second time. This Court should deny the petition.

**Signature Page Attached**

Respectfully submitted,

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April 8, 2021

**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

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

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

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**AFFIRMED**

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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.

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**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.**

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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

Appellate Case No. 2017-001736

Road, LLC and Pinckney Point, LLC, Plaintiffs

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

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by emailing a copy of the same to the following email address(es) listed in the Attorney Information System (AIS), pursuant to the Supreme Court's Order of May 29, 2020, regarding Operation of Appellate Courts during the Coronavirus Emergency:

Pleadings:

Respondent's Return to Petition for Rehearing

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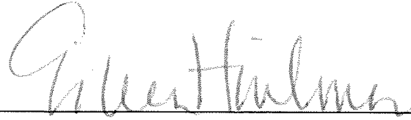

Eileen Hindman

April 8, 2021

## Eileen Hindman

| | |
|---|---|
| **From:** | Eileen Hindman |
| **Sent:** | Thursday, April 8, 2021 2:51 PM |
| **To:** | walker@wgfllaw.com; linton@wgfllaw.com |
| **Cc:** | rachurch@hghpa.com; mlohr@hghpa.com; mitch.brown@nelsonmullins.com; Matt Bogan; Nick Charles; Thomas Hydrick; Meredith Keane |
| **Subject:** | Road, LLC and Pinckney Point, LLC v. Beaufort County, 2017-001736 |
| **Attachments:** | 2021.04.08 Service Letter [Road].pdf; 2021.04.08 Respondent's Return to Petition for Rehearing (and Opinion).pdf; 2021.04.08 Proof of Service [Road].pdf |

Good afternoon:

Attached for service upon you in the above matter, please find 1) cover letter; 2) Respondent's Return to Petition for Rehearing; and 3) Proof of Service. Service is made via email pursuant to the Supreme Court's Order of May 29, 2020, regarding Operation of Appellate Courts during the Coronavirus Emergency.

Thank you.

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April 8, 2021

RECEIVED
Apr 08 2021
SC Court of Appeals

**Via E-Mail**
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: Road, LLC and Pinckney Point, LLC v. Beaufort County
Appellate Case No. 2017-001736
Our File No. 07957/01500

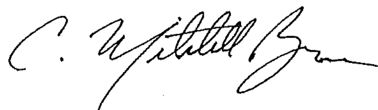
Dear Ms. Kitchings:

Attached for filing in the above referenced matter, pursuant to the Supreme Court's Order of May 29, 2020, regarding Operation of the Appellate Courts during the Coronavirus Emergency, please find (1) cover letter; (2) Respondent's Petition for Rehearing; and (3) proof of service.

By copy of this letter to counsel of record, we are serving them with a copy of same.

With kind regards, I remain

Very truly yours,



C. Mitchell Brown

CMB:eh
Enclosures

cc: G. Trenholm Walker, Esquire
John P. Linton, Jr. Esquire
Robert W. Achurch, III, Esquire
Mary Bass Lohr, Esquire