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August 10, 2021

VIA ELECTRONIC MAIL ONLY

Hon. Patricia A. Howard
Clerk of Court for S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Road, LLC v. Beaufort County
Appellate Case No. 2021-000625
WGFL File 7087.001

Dear Ms. Howard:

We are filing and serving Appellant's Reply to Respondent's Return to the Petition for Certiorari and Proof of Service by electronic mail only

Thank you very much for your courtesies in filing this with the Court.

Sincerely,

WALKER GRESSETTE FREEMAN & LINTON, LLC

G. Trenholm Walker

Enclosure (Reply)
c: C. Mitchell Brown, Esq.
Allen Mattison Bogan, Esq.
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Robert W. Achurch, Esq.
Mary B. Lohr, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2021-000625

Road, LLC and Pinckney Point, LLC of whom Road, LLC is the ..... Petitioner,

v.

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

PETITIONER'S REPLY TO RETURN OF RESPONDENT

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INTRODUCTION

Nothing is more firmly embedded in our legal precedent, laws, and Constitution than the principles that the jury decides the facts and that the jury's verdict for damages will be not be vacated and judgment entered for the defendant unless there is **no** evidence to support it. Yet, without addressing the specifics of Petitioner's explanation of the special considerations justifying a writ of certiorari, Respondent Beaufort County (the "County" or Respondent) dismissively states in its Return that there are no circumstances warranting this Court's review of the Court of Appeals decision in Opinion No. 5807 (S.C. Ct. R. filed March 3,2021) (the "Opinion").

As noted in the Petition for Writ of Certiorari (the "Petition"), the Opinion affirmed the trial court's order overturning a verdict for breach of contract against the County on the basis that the jury misevaluated the evidence and based its damages on speculation. The Court of Appeals specifically held there was no competent proof the County caused Road, LLC damages of $5,000,000. In so doing, the Court of Appeals failed to address, much less discuss, considerable evidence supporting the verdict that is outlined in the Petition.

Article I, § 14 of the South Carolina Constitution provides "[t]he right to a trial by jury shall be preserved inviolate." Further, it is well established that JNOV should not be granted in circumstances where the trial court simply disagrees with the jury's findings. It should only be implemented in those rare and extraordinary instances where the record is totally devoid of evidence that could support the jury's award and no reasonable jury could have reached the verdict that was rendered. See generally, Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh 'g denied* (July 13, 2016).

Here, in holding that there was no proof that any breach of contract by the County caused $5,000,000 in damages to Road, LLC, the Court of Appeals weighed the evidence and

based its decision on the Court's view of what portions of the witnesses' testimony should be considered and what portions should be disregarded. In so doing, the Court of Appeals invaded the province of the jury and violated Road, LLC's constitutional right to a jury trial. There is little doubt that had the verdict been $5,000 instead of $5,000,000, neither the lower court nor the Court of Appeals would have tampered with it. However, the exacting standard of review for a JNOV remains the same regardless of the verdict amount. A plaintiff's constitutional right is not measured on a sliding scale where the higher the verdict the more disposable the right to jury trial. The right is inviolate.

The Opinion affirmed the circuit court's decision to remove the determination of the facts from the jury and replace the jury's assessment of the evidence with the Court's view of just a portion of that evidence. At least two of the considerations for granting a writ of certiorari stated in Rule 242(h) are directly implicated by the Petition—the Opinion conflicts with prior decisions of this Court and the Opinion has the effect of depriving Road, LLC of its constitutionally protected right to a jury trial. SCACR 242(h)(3) & (4). For these reasons, as explained more below, Petitioner respectfully requests the Petition be granted.

ARGUMENTS IN REPLY

I. The jury's verdict was supported by substantial, non-speculative evidence that Road, LLC suffered $5,000,000 in damages as a result of the County's breach of the Settlement Agreement.

The jury found that the Road Parcel was worth at least $5,000,000 as the sole gateway to a residential development of 76 waterfront lots and that the County breached the parties' contract in its effort to ensure that this highest and best use would never happen. The evidence likewise supported the finding that the Road Parcel had no more than nominal value without this highest and best use that was destroyed by the County's actions.

In its Return, the County argues that the "only evidence" presented at trial regarding the current value of the Road Parcel was testimony from Petitioner's expert witness, Thomas F. Hartnett ("Hartnett"). **(Return at p. 7).** According to the County, Hartnett's "testimony established that the value of the road parcel, which was previously valued at $5 million prior to the County's purchase, was unchanged following the County's purchase." **(Return at p. 7).** As its sole support for this inaccurate assertion, the County selects a single excerpt from Hartnett's testimony and ignores the context of that excerpt and the balance of Hartnett's testimony. As explained in detail in the Petition, a review of entirety of Hartnett's testimony shows that he opined the Road Parcel was worth $5,000,000 *only if* it was being used as the sole ingress and egress to the significant waterfront development that the County had previously approved. See, e.g., **(Pet. at pp. 14-17); (R. at pp. 2229-2232); (R. at pp. 2335-2338).** One reasonable interpretation of his testimony, if not the only reasonable interpretation, is that the Road Parcel was devalued by $5,000,0000 when the County purposely bought the Point Tract to permanently prevent the residential development it approved on the Point Tract and fostered in the Settlement Agreement.

Sufficient independent evidence aside from Hartnett's testimony also supports the $5,000,000 award of damages, contrary to the County's arguments in its Return. **(Return at p. 7-8).** [1] Both the Circuit Court and Court of Appeals fail to even mention this separate proof of damages, further demonstrating that they engaged in imposing their own views of the evidence

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[1] The County implies that Road, LLC only now asserts that additional evidence supported the damages verdict. See **(Return at p. 8)** ("In its Petition, Road, LLC now attempts to point to additional evidence, which allegedly supports the jury's award of $5 million in damages."). That is incorrect. Road, LLC brought up this additional evidence that is consistent with and supportive of Hartnett's opinion and the verdict at both the trial and appellate levels. **(R. at pp. 292-296); (Appellant's Final Br. at pp. 26; 38-47); (Appellant's Reply Br. at pp. 15-22); (Pet. for Reh'g at pp. 20-22).**

rather than scrutinizing the record to ascertain whether there was *any* evidence to support the jury's verdict.

Specifically, there was testimony from a member of Pinckney Point, LLC that the seller of the Point Tract was forced to reduce the purchase price by $5,000,000 to account for the potential loss of the needed access for the planned residential development in the then-pending litigation that later was resolved with the Settlement Agreement. Additionally, there was proof that Pinckney Point, LLC entered a written contract with Road, LLC to buy the Road Parcel for $5,000,000 to assure that it would have the 50' right of way required by the County's ordinances for the 76 lots the County entitled on the Point Tract. See **(Pet. at pp. 17-19); (R. at pp. 505-506 ll. 21-2); (Pls. Ex. 84, R. at pp. 1883-1891); (R. at pp. 1994-2001); (R. at pp. 886-887 ll. 24-3); (R. at pp. 292-296).**

This proof was admitted into evidence as being relevant to the issues in the case. What issues? It was relevant to the value of the Road Parcel as the only land available that could provide the needed right of way to develop the Point Tract. The jury could have reasonably relied on either of these as the evidentiary basis for its verdict, yet both Courts ignored this proof completely and chose not to mention either of them even though raised by Petitioner in its opposition to the Motion for JNOV and its briefs before the Court of Appeals. See, fn. 1, supra.

The County asserts the Court of Appeals properly ignored this additional evidence supporting the verdict because, according to the County, none of this evidence established the "current value" of the Road parcel. See **(Return at p. 8).** That was not the question before the jury. As relates to Road, LLC's damages, the question before the jury was the difference in the value of the Road Parcel when used as the exclusive access to a waterfront residential development and its value after the County's breach of contract to make sure it could never be used for this

purpose. As discussed in the Petition, there was considerable proof that the Road Parcel's only real value depended on its serving as the required 50' right of way to an exclusive waterfront residential development and that it had only nominal value if not so used. **(Pet. at pp. 18-19).** The jury could reasonably infer from the plat of the Road Parcel, **(Pltf. Ex. 87, R. at p. 1892)**, that this long narrow parcel with a 20' unimproved dirt road all the way through the middle of it was otherwise non-developable and had little to no value. **(R. at pp. 755:17-756:22; 816:25-820:5; 1146:20-1147:21; 1148:17-1151:2; 1360:15-1364:23).** This finding was reinforced by the County's contentions that its easement over this dirt road was the only access it needed to its park, obviating any need for it to ever acquire the Road Parcel.

In addition to misinterpreting Hartnett's testimony and disregarding the importance of the alternative proof of damages, the County asserts the Court of Appeals correctly held that the verdict was the result of impermissible speculation as to damages. See **(Return at p. 7).** In support of this proposition, the County cites Gray v. S. Facilities, Inc., 256 S.C. 558, 571, 183 S.E.2d 438, 444 (1971) and State Farm Fire and Cas. Co. v. Barton, 897 F.2d 729, 733 (4th Cir. 1990). Neither case is apposite.

In Gray, a property owner sued petroleum plant operators for negligence, carelessness, and recklessness for allowing gasoline to flow into a creek and ignite, which caused property damage. 256 S.C. 558, 183 S.E.2d 438. The trial court granted a motion for directed verdict; plaintiff appealed. The Supreme Court affirmed, finding that plaintiff's expert's testimony was too speculative because plaintiff alleged his property now had a "'bad name,'" which was a "psychological factor." Id. at 569, 443. This case is nothing like Gray. Road, LLC did not base its damages claim on stigma or psychological impacts to property value but instead on three alternative bases of proof discussed above. Further, there was no proof in Gray even remotely

equivalent to the land purchase contract between Road, LLC and Pinckney Point, LLC that established a value of $5,000,000 for the Road Parcel.

Barton is also far off the mark. In Barton, a homeowner brought a declaratory judgment action against its insurer following a fire. 897 F.2d 729. The jury awarded consequential damages and the insurer appealed. The Court of Appeals for the Fourth Circuit held that all of the homeowner's evidence for his claim of damages was too attenuated from the fire and no valuation had been admitted into evidence of the several of the categories of damages sought. Id. at 733. This case does not involve the types of damages claimed in Barton. More important, unlike the damages asserted in Barton, Road, LLC's damages were specific, quantifiable and supported by lay and expert proof. Road, LLC presented the jury with concrete evidence of a concrete injury.

Moreover, nothing about the two alternative factual bases for the jury's award, separate from Hartnett's testimony, is speculative. No opinions were involved, just facts. It is a fact that the seller of the Point Tract to Pinckney Point, LLC, reduced the price by $5,000,000, to account for not being able to assure the required 50' right of way needed to develop the property – competent circumstantial proof that the Road Parcel was worth $5,000,000 if it were used to provide the legally required access to a residential development on the Point Tract. It is a fact that Pinckney Point entered a contract to buy the Road Parcel for $5,000,000 to provide the needed the 50' right of way at the time it began the actual development of the Point Tract.

The County's argument that this evidence is "insufficient" implicitly acknowledges that the Court of Appeals was engaged in weighing the evidence rather than determining if there was *any* evidence to support the jury's verdict. In evaluating a JNOV motion, the trial court or appellate court is concerned with the existence of evidence, not its weight or sufficiency. Maybank v. BB&T Corp., 416 S.C. 541, 571, 787 S.E.2d 498, 513 (2016), *reh'g denied* (July 13, 2016) (finding that

the trial court correctly refused to grant JNOV of an Unfair Trade Practices Cause of Action because evidence existed that could support the verdict). It is also worth noting again that the Circuit Court ruled three times that Road, LLC presented sufficient proof of liability, causation, and damages when denying motions by the County for summary judgment, for directed verdict at the conclusion of Road LLC's case in chief, and for directed verdict at the close of the evidence. **(R. at pp. 16-18); (R. at p. 1285: 21-23)** ("I do think there was evidence put up by the plaintiffs from which this jury could determine that there was a breach of contract); **(R. at p. 1418: 5-7)** ("So, respectfully, I'm going to deny your motion based on the evidence for Road, LLC, and we'll see what the jury will do with it.").

For these reasons, there was proof to support the jury's award of $5,000,000 in damages. This proof was not speculative. The Circuit Court and Court of Appeals improperly usurped the role of the jury in determining credibility and giving weight to some evidence and ignoring other evidence. In so doing, Road, LLC was deprived of its constitutional right to have the jury determine the facts, and both Courts committed legal error by not abiding by the established standard of this Court for evaluating and granting a motion for JNOV.

II. The Court of Appeals failed to consider other evidence that supported the jury's verdict for $5,000,000, namely proof that the County breached the Settlement Agreement's implied covenant of good faith and fair dealing.

The County contends that because the Court of Appeals affirmed the Circuit Court's order granting a JNOV based on alleged lack of proof of damages, the Court of Appeals did not need to consider Road, LLC's assertion that the County violated the covenant of good faith and fair dealing. **(Return at p. 9).** Road, LLC disagrees. The failure of the Circuit Court and the Court of Appeals to consider the County's breach of the implied covenant of good faith and fair dealing amounted to a failure to consider *all* the evidence and theories of liability for breach of contract that led to the verdict for $5,000,000. In the Opinion, the Court of Appeals considered only what it deemed to be the two express obligations of the County in the Settlement Agreement. **(Opinion at p. 3).** The Court of Appeals held there was no proof that a breach of the obligation to keep the road private caused any damages to Road, LLC. **(Opinion at p. 9).** That is only part of the inquiry. The Court should have taken into account Road, LLC's proof the County breached the implied covenant of good faith and fair dealing and the damages ensuing from the breach. The issue of proof of causation and damages is intertwined with the County's breach of the implied covenant.

As set forth in the Statement of Facts in the Petition, the County admitted it bought the Point Tract for a park specifically to thwart its residential development per the development plan it approved. It was for the jury to decide whether the County's deliberate action violated the Settlement Agreement's implied covenant of good faith and fair dealing. The Circuit Court charged the jury on this basis of liability **(R. at p. 1540 ll. 9-20),** and the jury had ample evidence to premise its verdict on this basis.

In its Return, the County mistakenly asserts that there can be no recovery for breach of the implied covenant unless there is proof of breach of an express provision. Putting aside that Road, LLC, provided evidence of the County's breach of its express obligation to treat the road as a private road, (See, **Appellant's Final Br. at pp. 36-41)**, the County is simply wrong in asserting that breach of the implied covenant cannot proceed unless there is proof of breach of an express term of the contract. This Court has rejected that argument. Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 504, 473 S.E.2d 52, 55 (1996) ((". . . ***[W]e decline to make breach of an express contractual provision a prerequisite to bringing the action***" for breach of the implied covenant of good faith and fair dealing.) (double emphasis added)). It also goes without saying that the description of the covenant itself undermines the County's assertion. The covenant of good faith and fair dealing is ***implied***, not express.

The County cites only RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004), in support of its untenable position. See **(Return at p. 9).** RoTec does not come close to holding what the County suggests. In RoTec, the Court of Appeals simply held that there is no *separate* cause of action for breach of the covenant of good faith and fair dealing; it is subsumed within a cause of action for breach of contract. Id. at 473, 597 S.E.2d at 884 ("we conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."). In Ro Tec, the Court even noted that the reason that there is no separate cause of action for breach of the implied covenant of good faith and fair dealing is that the implied covenant of good faith is merely another term of the contract that is implied by the law. Id. at 472, 597 S.E.2d at 884 (citing Boddie–Noell Props., Inc. v. 42 Magnolia P'ship, 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002)).

The fact that the Settlement Agreement did not include an *express* term that prohibited the County from purchasing the Point Tract is not dispositive of whether the County breached the *implied* covenant of good faith and fair dealing when it did so to prevent the precise residential development the Settlement Agreement was intended to facilitate. The County would have our courts endorse a cynical, legally unsupported, view of contractual relationships where the parties are bound by the covenant of good faith and fair dealing only with respect to the express terms of the contract and are at liberty to undermine the contract by doing anything the contract does not specifically forbid. Here, for example, according to the County, "[o]nce the Pinckney Point, LLC option expired, anyone could have purchased the Point Tract and done anything they wished...." **(Return, at p. 11).** The County was not anyone. It was a party to the Settlement Agreement that was entered to settle litigation, to advance the development of the Point Tract as a residential development, and to induce Road, LLC to spend $1,300,000 to acquire the Road Parcel to serve as the sole access for that residential development. Road, LLC acknowledges that the implied covenant would not be implicated if someone other than a party to the Settlement Agreement bought the Point Tract. But those are not the facts. The facts are that the County began secretly inspecting the Point Tract before Pinckney Point's option expired and put it under contract immediately on the heels of the expiration of that option to prevent the property from ever becoming the waterfront residential development contemplated by the Settlement Agreement. **(Pet. at p. 9)**.

The County also argues that its actions were not legally compensable because there was insufficient proof that another residential developer would likely have purchased and developed the Point Tract if the County had not bought it. First, the argument overlooks (as discussed above) that the County prevented that from happening. Second, there was ample evidence at trial

supporting an inference by the jury that if the County had not intervened to immediately purchase the Point Tract, another developer would probably have purchased it for residential development in accordance with the approved plan and permits. This "new" developer would have had to purchase the Road Parcel to gain the right of way that was legally required to accomplish that development.

Almost everything was in place for the development of the Point Tract. The County had given approval to the conceptual subdivision plan for 76 waterfront lots. The Settlement Agreement authorized the needed variance for the development plan and stated no other variances would be needed. As stated in the Settlement Agreement, if purchased, the 50' right of way over the Road Parcel fully satisfied the County's ordinances' requirements for access for this residential development. ERP contractually required Pinckney Point, LLC to assign it all the development permits and approvals, to update ERP periodically on the status of the permits and approvals, and to execute another assignment to ERP if a new development permit were obtained. The evidence also included proof the development of the Point Tract per the County-approved concept plan would render $55 million to $56 million in gross sales revenues, further supporting an inference that market forces were such that another developer probably would have purchased the Point Tract and the Road Parcel had the County not prevented that from happening. **(R. at p. 1183)**. The fact that the County felt it necessary to purchase the Point Tract to stop it from being a residential development immediately after the expiration of Pinckney Point, LLC's option is further proof the jury could consider in finding there was a reasonable likelihood the Point Tract would have been developed by another development entity if not for the County's preemptive purchase. **(Pet. at pp. 21-22) (R. at pp. 1799-1800, 1817, and 1820-1826);** see also **(R. at pp. 1657; 694; 752:2-22; 2099).**

For these reasons, the Court of Appeals erred in considering only whether Road, LLC proved a breach of an express provision of the Settlement Agreement that caused it $5,000,000 in damages even though the lower court charged the jury on the implied covenant of good faith and fair dealing and the proof supported a verdict on this basis on liability as well as damages.

III. Road, LLC's argument that the County frustrated the purpose of the Settlement Agreement is preserved for review.

The County asserts Road, LLC's argument that the County prevented the purchase of the Point by another residential developer is not preserved because Road, LLC failed to file a Rule 59(e) motion following Judge Mullen's grant of JNOV. **(Return at p. 12).**[2] Not so. This ground is fully preserved because it was raised and ruled upon by the lower court. A Rule 59(e) motion is not necessary, and in fact is inappropriate, when the circuit court has already addressed the argument. See generally, Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.").

At its core, the County is arguing the issue of causation—that is, whether the County's purchase caused damages to Road, LLC by preventing other developers from purchasing the Point Tract and the Road Parcel. Road, LLC argued this issue extensively in its Memorandum in Opposition to the County's Motion for JNOV. **(R. at pp. 285-288)**. The Circuit Court explicitly ruled on the issue of causation. In the order granting the County's motion for JNOV, the Circuit Court held that the County's action did not cause Road, LLC's damages. See **(R. at p. 8)** ("There is evidence in the record that the County's actions did not cause Pinckney Point to fail to meet

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[2] The substantive response to the County's argument in this regard is covered in the preceding section.

their obligations under the settlement agreement, but rather, Pinckney Point's own actions did."); See also **(R. at p. 9)** ("The only evidence in the record is that Beaufort County performed its obligations under the settlement agreement and it was the failure of Pinckney Point to perform its obligations and subsequent loss of the property which cased Road's alleged damages.") (emphasis added). The Court of Appeals also ruled upon the issue of causation. **(Opinion at p. 9)** ("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.") (emphasis added).

It is worth noting that even if the issue was not explicitly raised and ruled upon, which it was, South Carolina courts favor only excluding issues that are clearly unpreserved; the record is to be liberally reviewed on questions of issue preservation. State v. Franks, 432 S.C. 58, 80, 849 S.E.2d 580, 592 (Ct. App. 2020), reh'g denied (Nov. 24, 2020) ("whe[n] the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.") (citing Johnson).

Road, LLC preserved this alternative argument for appeal. Without objection from the County, the lower court charged the jury on the implied covenant of good faith and fair dealing.[3] **(R. at p. 1540: 9-20)**. The County cannot now conveniently complain in hindsight that the implied covenant is not implicated in any way by the facts of the case.

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[3] The County's failure to object to this jury charge further undermines its unfounded legal position in the Return that there can be no breach of the implied covenant of good faith and fair dealing without proof of breach of an express provision of the contract. If this were the law, which it is not, it was certainly incumbent on the County to object to the judge's charge on the law governing the implied covenant. It did not do so.

Road, LLC's alternative ground for liability for breach of contract based on the breach of the implied covenant of good faith and fair dealing and the damages resulting from that breach should have been addressed by the Court of Appeals. This claim and supporting proof easily sustain a finding by the jury that the County breached the Settlement Agreement and caused $5,000,000 in non-speculative damages to Road, LLC. The Court of Appeals' failure to consider this proof and this basis for liability and damages while instead imposing its view of the weight of the evidence was contrary to law, and deprived Road, LLC's right to have all the facts at issue determined by the jury based on the law, including the law governing the implied covenant of good faith and fair dealing charged by the lower court.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari, Road, LLC respectfully requests that this Court **GRANT** its Petition for Writ of Certiorari.

WALKER GRESSETTE FREEMAN LINTON, LLC

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August 10, 2021
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appeal Case No. 2021-000625

Road, LLC and Pinckney Point, LLC
of whom Road, LLC is the ..... Petitioner,

v.

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

PROOF OF SERVICE

I certify that on **August 10, 2021**, I have served **APPELLANT ROAD LLC'S REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR CERTIORARI AND PROOF OF SERVICE**, by electronic mail, in accordance with the May 29, 2020, order of the Supreme Court, Appellate Case No. 2020-000447 at § (g)(3) on counsel of record as follows:

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Subject:	Road LLC v Beaufort County
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Attachments:	image954058.png 08-10-21 Appellant Reply Brief.pdf

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Counsel for Respondent:

Attached for service by electronic mail only, please see Petitioner's Reply to Respondent's Return to Petition for Certiorari with Proof of Service.

Nancy Jane Dennis
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WALKER GRESSETTE FREEMAN LINTON LLC
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