THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Opinion No. 4914 (S.C. Ct. App. Filed November 30, 2011)

Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., Garfield Traub Development, LLC, and Turner Construction Company. . . . . Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc. Gary Realty Company, Inc. and Garfield Traub Development, LLC are . . . . . Respondents,

vs.

City of Columbia, Paul C. "Bo" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners, LLC, and Hilton Hotels Corporation . . . . . Defendants,

Of Whom

City of Columbia is . . . . . Petitioner.

BRIEF OF PETITIONER

July 3, 2013
Columbia, South Carolina

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INTRODUCTION

These actions now on appeal were brought by parties to a "Memorandum of Understanding" ("MOU") against the City of Columbia, South Carolina, also a party to the MOU. The MOU provided a framework for the development of a publicly-funding Hilton Hotel to complement the City's recently built convention center. After some efforts, the City determined to go with a privately funded and developed hotel. The Plaintiffs sued, alleging that the MOU was a contract. The Plaintiffs also asserted a quantum meruit action.

This appeal arises from an order granting summary judgment by the trial court with respect to the Respondents' breach of contract and quantum meruit claims. Upon appeal by the architects, Stevens & Wilkinson and two of the developers, Gary Realty and Garfield Traub, the Court of Appeals reversed the trial court, finding that a scintilla of evidence existed to create a question of fact for both the breach of contract and quantum meruit causes of action, precluding summary judgment.

The case *sub judice* illustrates the confusion that exists among the bench and bar with regard to the viability of summary judgment in our state's courts. Here, the Plaintiffs at the hearing on the Defendants' motion for summary judgment, after repeatedly being asked by the Court, could not define the terms of the "contract" they assert was formed by the operative documents (Order of Judge George c. James, Jr., November 11, 2009, Appx. 0021, lines 7-8), nor could the Plaintiffs identify any benefit bestowed upon the Defendant to justify their theory of quantum meruit. Therefore, the trial court granted summary judgment. Similarly, the Court of Appeals did not identify

one "genuine issue of material fact" in the record which could allow the Plaintiffs to proceed to trial. However, the Court of Appeals held that there was a "scintilla of evidence," without identifying what that evidence was, to preclude summary judgment. By so doing, the Court of Appeals opinion, if upheld, serves to render Rule 56 of the South Carolina Rules of Civil Procedure irrelevant.

This Court has previously held that summary judgment is an effective judicial tool that permits courts to expedite the "disposition of cases which do not require the services of a fact finder." Austin v. Beaufort County Sheriff's Office, 377 S.C. 316, 59 S.E.2d 122 (2008); Dawkins v. Fields, 580 S.E.2d 433, 438 (2003); Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008). Where no further inquiry into the facts is needed to clarify the application of the law, the grant of summary judgment is appropriate. State v. Franklin, 318 S.C. 474, 56 S.E.2d 357 (1995). In fact, summary judgment is such an important tool that the language of Rule 56(c) is mandatory rather than discretionary: summary judgment "**shall be rendered forthwith**" if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id. (emphasis added.)

The purpose and importance of the rules governing summary judgment cannot be overstated. When appropriate, summary judgment is an important tool to "prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials" as well as to "weed out frivolous lawsuits and avoid wasteful trials." 10A Fed. Prac. & Proc. § 2712 *Purpose, Scope, and*

Construction of Rule 56 (3d ed.). Ultimately, the purpose is not to determine an issue but to determine whether there is even an issue to be tried. CJS Fed. C. Pro. § 1148.

It is important that the purposes and standards of Rule 56 be given meaning to allow prudent application by our trial courts. To do this, this Court should give meaning to the entirety of Rule 56 to require the trial courts either to identify any genuine issues of material facts which might exist to preclude summary judgment or grant summary judgment; simply holding that a "scintilla of evidence" exists shoudl not be enough to withstand summary judgment. Otherwise, our summary judgment procedure will simply contribute more to the "vexation and delay" it was intended to prevent.

STATEMENT OF THE CASE

This appeal arose from two separate lawsuits filed against the City of Columbia ("City") by members of the project team selected to work with the City to propose a plan to develop a headquarters hotel for the City's recently constructed convention center. Two developers, Gary Realty, a local real estate company, and Garfield Traub, a developer from Dallas, Texas ("Gary Realty/Garfield Traub"), filed a joint Amended Complaint against the City on July 29, 2005, alleging causes of action for quantum meruit and breach of the covenant of good faith and fair dealing[1]. Architects Stevens & Wilkinson of South Carolina ("Stevens & Wilkinson") filed an Amended Complaint

[1]Gary Realty/Garfield Traub moved to amend their Complaint for a second time and the City consented to that amendment. The proposed Second Amended Complaint added two causes of action for breach of contract and estoppel, premised on the same legal and factual arguments as presented by Stevens & Wilkinson. Gary Realty/Garfield Traub never filed or served the Second Amended Complaint; however, the City contends that if this Court determines that the trial court correctly granted summary judgment finding that the MOU was not a binding contract, then Gary Realty/Garfield Traub's currently inchoate claim for breach of contract based on the MOU should also fail.

against the City on November 14, 2005, alleging causes of action for breach of contract, quantum meruit and estoppel. The City timely answered both Amended Complaints. The two cases were consolidated for the purposes of discovery.

On December 15, 2008, the City filed separate motions for summary judgments in both cases. As to the Gary Realty/Garfield Traub complaint, the City contended that there was no evidence that it breached a covenant of good faith and fair dealing because there was no contract to support such a covenant and no evidence that the City improperly received or retained any benefit from Gary Realty/Garfield Traub. As to the Stevens & Wilkinson complaint, the City contended that there was no evidence that it breached a contract, that it improperly received or retained any benefit and, as to the estoppel claim, that it made any unambiguous promise to pay Stevens & Wilkinson.

The Honorable George C. James heard these motions and on November 19, 2009 issued his Order granting summary judgment in favor of the City on each of the Respondents' causes of action. On November 30, 2009, the Plaintiffs each filed motions pursuant to Rule 59(e), SCRCP, to alter or amend Judge James' Order. On February 1, 2010, the trial court denied the Respondents' motions to alter or amend the judgment.[2]

Gary Realty/Garfield Traub filed their Notice of Appeal of Judge James's orders on February 17, 2010. On March 5, 2010, Stevens & Wilkinson also filed a Notice of Appeal of Judge James's orders.

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[2] Turner Construction Company, the Design/Builder under the MOU, also filed a complaint against the City on March 15, 2007, alleging causes of action for breach of contract, quantum meruit, contract implied in law, breach of duty of good faith and fair dealing, and violation of state procurement law. The trial court granted the City's motion for summary judgment as to all of Turner Construction's causes of action, but Turner Construction did not take an appeal.

The Court of Appeals issued its single Opinion No. 4914 on November 30, 2011. Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., and Garfield Traub Development, LLC v. City of Columbia, 396 S.C. 338, 721 S.E.2d 455 (Ct. App. 2011).

The Court of Appeals reversed the trial court's order granting the City's motion for summary judgment on the breach of contract claims, holding that there was a genuine question of material fact as to whether the MOU was a contract. The Court of Appeals also reversed the trial court's grant of summary judgment in favor of the City on Gary Realty/Garfield Traub's claim for quantum meruit. The Court of Appeals affirmed the lower court as to Stevens & Wilkinson's claim for estoppel, holding that Stevens & Wilkinson failed to present a genuine issue of material fact that the City ever made an unambiguous promise to pay Stevens & Wilkinson; Stevens & Wilkinson did not appeal this ruling.

Because the Court of Appeals consolidated the two separate appeals of Gary Realty/Garfield Traub and Stevens & Wilkinson, the City submitted a single Petition for Rehearing, pursuant to Rule 221(a) and Rule 240 of the South Carolina Appellate Court Rules, on December 15, 2011. The Court of Appeals denied the Petition for Rehearing by Order, dated January 27, 2012. On February 24, 2012, the City filed and served its Petition for Certiorari, which this Court granted on May 2, 2013.

STATEMENT OF THE FACTS

This case and subsequent appeal arose out of planning efforts to develop and construct a headquarters hotel to support the Columbia Metropolitan Convention Center

located in downtown Columbia, South Carolina. In 2002, following a Request for Proposal ("RFP") the Columbia City Council selected a project team to propose a feasible plan acceptable to the City for the development and construction of a Hilton-branded convention center hotel. The relevant members of the project team were Edens & Avant and the Respondents Gary Realty/Garfield Traub as Developers; Respondent Stevens & Wilkinson as the Architect; Turner Construction Company as the Design/Builder; Hilton Corporation as the Operator; and Citigroup Global Markets as the Underwriter. John Lumpkin of Edens & Avant, a local real estate firm, served as the "point man" for the project team. (Deposition of John Lumpkin, 40:20-25, Appx. p. 1330, lines 20-25.[3]

On April 17, 2003, the City and the project team executed a Memorandum of Understanding (the "MOU"). (Appx. pp. 1443-1465.) The MOU set forth a framework necessary for the project team to propose a plan acceptable to the City for the development of a publicly-funded convention center headquarters hotel.

The first section of the MOU addressed what were termed "General Conditions." These General Conditions expressly stated that "definitive written agreements" addressing the "business terms and conditions" set forth in the MOU would be required subsequent to the execution of the MOU, providing further that the City had the exclusive right to determine that "it is not feasible to proceed with the Hotel."

[3] Edens & Avant did not join the Plaintiffs in this litigation.

1. GENERAL CONDITIONS

> 1. This MOU reflects the intent to proceed in good faith **to execute definitive written agreements** with respect to the business terms and conditions herein contained. **Notwithstanding anything herein to the contrary, if the City determines that it is not feasible to proceed with the Hotel project it shall have no liability under this MOU.**

(MOU § I. 1, Appx. pp. 1444, lines 23-29.)

The concept set out in the MOU contemplated the formation of a non-profit corporation which would issue tax-exempt hotel revenue bonds to finance the development and construction of the hotel and own the hotel, which bonds would be supported by revenues from the proposed hotel as well as by "City Credit Support." The City Credit Support was to be the City's guaranty of the bonds in the event the hotel revenues would be insufficient to cover the debt service on the bonds. Notably, however, the City's tolerance for this risk was something within the City's sole discretion. In pertinent part, the MOU provided:

V. ROLE OF THE CITY

> 4. NPC Financing - The NPC [Non-Profit Corporation] is to retain the Underwriter and legal counsel to structure and issue approximately $60 million in tax-exempt hotel revenue bonds **in amounts acceptable to the City** ("the Bonds") supported by Hotel revenues and the City Financial Participation.
>
> 5. City Credit Support - The City is willing to provide a credit enhancement to support **an amount acceptable to the City** which would be utilized for any debt service shortfall on the Subordinate Bonds or Hotel Bonds (as the case may be), if project

> revenues net of expenses are insufficient to provide for the debt service on the Subordinate Bonds or on the Hotel Bonds.

(MOU §§ V. 4 and 5, Appx. p. 1446, lines 17-35) (emphasis added).

The framework set forth in the MOU provided that the project team members were working "at risk;" that is, the members would not be paid for their services unless and until there was a bond closing. Within the section titled "VI. Role of the Developer," the MOU states as follows:

> 2. Development Fee – The Developer is to be paid a development fee of **4.75% of the project budget**, exclusive of land and any financing related fees, to ensure the coordination and delivery of the Hotel on time and on budget . . . . The Development Fee is to be paid as follows: 33 1/3% **upon closing the bond sale**; 57 2/3% on a pro rata basis **over the construction period** based on percentage of completion of the Hotel and the balance of 10% at the issuance of a Certificate of Occupancy for the Hotel.
>
> 3. Pre-Development Funding. – **The Project Team will be responsible for the costs incurred prior to closing the financing.** These costs include, but are not limited to, design, testing, bid packages, legal underwriting, travel, etc. If the Hotel financing fails to close as a result of the City not meeting its obligations outlined in the Development Agreement, or as a result of an unforeseen catastrophic event not caused by any of the Project Team, the City will reimburse the Project Team for actual, documented costs incurred to that point in time **up to an amount to be agreed upon**. All studies, tests, plans, and the like prepared or obtained by the Project Team will be assigned to and become the property of the City.

(MOU § VI. 3, Appx. p. 1447, lines 1-18) (emphasis added).

The framework contemplated by the MOU similarly provided that the Architects, Stevens & Wilkinson, would be proceeding at risk until the definitive written agreements

were signed and the bond closing occurred. However, unlike the Developer, Stevens & Wilkinson was to be paid by the Design/Builder, Turner Construction:

> **VIII. ROLE OF THE ARCHITECT**
>
> 1. Fee – The Architect is to be paid a fee of 7.25% **by the Design/Builder** based on hard construction costs together with the Design/Builder's general expenses and fees . . . . **If the Underwriter does not close the financing, the City will not be responsible for reimbursing any costs incurred except as provided in VI, 3 herein above.**

(MOU § VIII. 1, Appx. p. 1448, lines 19-21.)

Importantly, the MOU did not contemplate that Stevens & Wilkinson would ever have a contract for payment with the City or the non-profit corporation, even if the bonds closed and construction proceeded. With full knowledge that they were working at risk – and in the case of Stevens & Wilkinson that it could look only to Turner Construction for payment – the project team proceeded with work to design a hotel within a budget and financing structure acceptable to the City.

While the MOU contemplated numerous "definitive written agreements," the two most important terms of the hotel project were the amount of bonds to be issued and the amount of City Credit Support. Over the months following execution of the MOU, the financial terms of the hotel project, as projected in plans proposed by the project team, spiraled out of control. Although the MOU contemplated the issuance of approximately $60 million in tax-exempt bonds, in less than ten months the project team's proposed financing plan rose to approximately $70 million in bonds and subsequently rose to in excess of $72 million. (Citigroup Financial Models, Appx. pp. 1654-1679.)

The anticipated City Credit Support also increased dramatically. In September 2003, the maximum City Credit Support was estimated to be $53,135,000. (Citigroup Financial Model, dated September 24, 2003, Appx. pp. 1654-1664.) By March of 2004, just six months later, that number had increased to $89,735,000, an almost 70% increase. (Citigroup Financial Model, dated March 15, 2004, Appx. pp. 1665-1679.) In fact, as the project team's plan ultimately evolved, it appeared that the project team would look to the City to bail out the entire project if the hotel revenues failed to cover debt service. (Deposition of John Lumpkin, 60:11-61:7, Appx. p. 1333, line 11-p.1334.) The City never agreed to any amount of bond issue or City Credit Support and was under no obligation to do so.

As the project continued to morph, the project team's proposals evolved into a structure requiring the City, rather than the non-profit corporation, to issue the bonds in order to fund the project. (Letter from John Lumpkin to Bill Corrado, dated February 26, 2004, Appx. pp. 1727.) Even Ambac, the proposed bond insurer and a key player in the project team's numerous financing proposals, indicated on a Commitment for Financial Guaranty Insurance that the obligor on the bond issue was to be the "City of Columbia, South Carolina." (Ambac Commitment Letter, dated February 17, 2004, Appx. pp. 1652-1653.) The MOU never contemplated that the City issue the hotel revenue bonds.

As late as February 11, 2004, the project team and the City were still negotiating the key "definitive written agreements" that would be the binding agreements for the business terms and conditions outlined in the MOU. (Columbia Convention Center Hotel

Corporation Meeting Minutes, February 11, 2004, Appx. p. 1633). The project team made at least two presentations to the non-profit corporation, known as the Columbia Convention Center Hotel Corporation. Only at the February 11, 2004 meeting did the non-profit corporation take a recorded vote. On that day, William Corrado, a director with Citigroup Global Markets, presented the most current financing proposal developed by the project team. The non-profit corporation – not the City Council – voted four to one:

> to approve the new financing plan for the hotel that requires the **Convention Center Hotel Corporation** to be legally responsible for 50% of the principal and interest payments on the hotel bonds for the first ten (10) years and from year eleven (11) until the final payment of the hotel bonds the Corporation's legal responsibility will be 70% of the principal and interest payments for the bond issue.

(Columbia Convention Center Hotel Corporation Meeting Minutes, February 11, 2004, Appx. p. 1633) (emphasis added).

Those same minutes from the February 11, 2004 meeting also reflect that the project team and the City were still negotiating the key "definitive written agreements" called for in the MOU:

> Mr. Joel Gottlieb, Gottlieb & Smith, P.A., told the members of Council that the most significant agreement is the Qualified Management Agreement also known as the Hotel Management Agreement between the Corporation and the Hilton that must reflect the business deal with Hilton and fall within the various tax safe harbors so the bond financing will flow. He said that the Room Block Agreement between the Convention Center and the Convention Center Hotel is also significant. **Mr. Gottlieb stated that several agreements and various bond documents are still under negotiation.**

Id. (emphasis added.)

After this presentation to the non-profit corporation, the project team continued to alter the financing plan. Whereas the par amount of the bonds presented to the non-profit corporation on February 11, 2004, had risen to $69,870,000 (Citigroup Presentation, dated February 11, 2004, Appx. p. 1681), that amount increased again to $72,015,000 in financial models and projections dated March 15, 2004. (Citigroup Financial Model dated March 15, 2004, Appx. pp. 1665-1669.)

Also as indicated by the March 15, 2004 Financial Model, the project team had changed the structure of the transaction to include some portion of taxable bonds rather than all tax-exempt bonds. This was a significant deviation from the proposal presented to the non-profit corporation on February 11, 2004, and is further indication of the ever-evolving nature of the hotel project. Significantly, Ambac's so-called "Commitment Letter" for bond insurance, issued six days after the February 11, 2004 meeting and one of the key ingredients to make any bond financing proposal acceptable to Wall Street, was for only $63,295,000, over $6.5 million less than the amount presented by the project team to the non-profit corporation. (Ambac Commitment Letter, February 17, 2004, Appx. pp. 1652-1653.)

Ultimately, there was no bond closing. In March 2004, the City determined that the hotel project was not feasible, as was its prerogative under the MOU. The City issued a second Request for Proposals for a privately-funded hotel option. (Columbia City Council Meeting Minutes, March 17, 2004, Appx. p. 1643, lines 26-27; Columbia City Council Meeting Minutes, March 24, 2004, Appx. p. 1648, lines 19-37; RFP, Appx. pp. 1466-1475.) According to their point man, John Lumpkin, the project team was well aware of the City's determination that the hotel project was not feasible and understood

that the City intended to pursue a privately-funded hotel project rather than the publicly-funded hotel project proposed by the project team. (Deposition of John Lumpkin, 84:10-18, Appx. p. 1339, lines 10-18; 86: 18-19,Appx. pp. 1340, lines 18-19.) Notably, members of the Project Team — including Stevens & Wilkinson — made alternative proposals for a privately-funded hotel under the new RFP but were not selected. Windsor/Aughtry Co., Inc., owned by Paul C. "Bo" Aughtry, was selected as the hotel developer in this second selection process. Thereafter, Windsor/Aughtry Co., Inc. successfully developed and constructed a full-service Hilton Hotel to support the Columbia Metropolitan Convention Center.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald

allegations made by the non-moving party in order to create a genuine issue of material fact." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

ARGUMENT

This case illustrates the uncertainty among the bench and bar regarding the application of Rule 56 of the South Carolina Rules of Civil Procedure. Here, neither the Plaintiffs nor the Court of Appeals point us to any discernible genuine issue of material fact. The Court of Appeals nonetheless reversed the trial court's decision to grant summary judgment, which was granted only after the Plaintiffs could not respond to two simple questions:

(1) With regard to the contract cause of action, what were the terms of the alleged contract?

(2) With regard to the quantum meruit cause of action, what was the benefit bestowed on the City?

Rule 56 of the South Carolina Rules of Civil Procedure provides in pertinent part:

> (b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) **Motions and Proceedings Thereon**.
>
> * * * *
>
> **The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .**

(d) **Case Not Fully Adjudicated on Motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, **shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.** It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.**

* * * *

When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth** specific **facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.**

Rule 56, South Carolina Rules of Civil Procedure (emphasis added).

In South Carolina, a non-moving party must submit only a "mere scintilla" of evidence that there is a genuine issue of material fact extant to overcome a motion for summary judgment.. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). But even this seemingly low threshold requires the non-moving party to make some "specific" evidentiary showing, as required by the rule, that there is a genuine issue of material fact to be gleamed from the record in order to survive a motion for summary judgment. This Court has defined a scintilla of evidence as "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Turner v. American Motorists Ins. Co., 176 S.C. 260, 263, 180 S.E. 55, 57 (1935) (quoting Taylor v. Railway Co., 78 S.C. 552, 556, 59 S.E. 641, 643 (1907). Speculative,

theoretical, and hypothetical views do not constitute material evidence necessary to meet the scintilla standard. Id.; Gosnell v. S.C. Dept. Of Transp., 282 S.C. 526, 533, 320 S.E.2d 454, 457 (1984). Evidence must be probative; mere speculation is not probative and is insufficient to overcome a motion for summary judgment. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872, 875 (1947). "Arguments made by counsel are not evidence." S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

The trial court rightly found no discernible, specific evidence of a genuine issue of material fact in the record to support either the contract or the quantum meruit causes of action. To survive summary judgment, even the "scintilla" of evidence required must be identifiable for Rule 56 to have any relevance in our system of justice. In reversing the Court of Appeals, this Court has an opportunity to educate the bench and bar of the importance of Rule 56 and the requirements it places upon the moving and non-moving parties and the bench, as well.

I. The Court of Appeals erred by relying on matters outside the four corners of the Memorandum of Understanding to determine that a scintilla of evidence exists to create a question of fact as to whether the parties intended to form a binding contract.

"The purpose of all rules of construction is to ascertain the intention of the parties to the contract." Hansen ex rel. Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002) (internal quotation marks omitted). "The construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment." Id. at 67, 565 S.E.2d at 116 (internal quotation marks omitted).

South Carolina follows the objective theory of contract construction, which provides that it is the parties' outward manifestations of intent that are determinative of the meaning of a contract rather than any subjective intent one party may have. "Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it." Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (1984).

The clearest manifestation of the parties' objective intent is the language of the document itself. "To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

The same analysis applies when determining not only the terms of a contract but also whether a written document is a contract in the first instance. Just as in the case of a contract, a purported party to an alleged contract cannot be expected to know the other party's subjective, hidden intent, nor can he fairly be held hostage to such unknown subjective intent of the other party.

In this case, the language of the MOU is clear and unambiguous on its face. Thus, the Court of Appeals was precluded from going beyond the four corners of the MOU to determine the parties' intent to be bound. Id. However, instead of looking solely to the intent expressed in the MOU, the Court of Appeals based its decision in part on the affidavits of three employees of Gary Realty/Garfield Traub. (Affidavit of Greg Garfield, Appx. pp. 1401-1404; Affidavit of Ray Garfield, Appx. pp. 1405-1428;

Affidavit of Eric Anthony Traub, Appx. pp. 1433-1436.) It is telling that out of the reams of evidence available to all of the parties, the most reliable evidence to the Court of Appeals as to the existence of a contract was the Respondents' self-serving, after-the-fact opinions about the nature of the MOU.

In these affidavits, the Plaintiffs assert that they "believed" that the MOU was a binding contract. However, Rule 56(e) requires that any affidavits submitted under the rule "shall set forth facts as would be admissible in evidence." These self-serving affidavits of the Plaintiffs/Respondents "beliefs" do not set forth any admissible facts upon which a Court can rely. Furthermore, this Court has held that one's subjective, after-the-fact meaning assigned by a party does not govern interpretation of a contract. Bannon, 282 S.C. at 593, 320 S.E. 2d at 472. Certainly the Plaintiffs' "beliefs" cannot provide any basis for creating a question of fact about whether the MOU was intended to be a binding contract. To find otherwise, would permit all future plaintiffs in breach of contract cases to overcome a defendant's motion for summary judgment merely by stating that they had some secret opinion not set forth in the written document that they thought the document was a binding contract. In those circumstances, it would be impossible for a court to ever grant summary judgment in a case regarding the existence of a contract.

Application of the related parol evidence rule also precludes the Court of Appeals from considering evidence outside the four corners of the MOU. The parol evidence rule is applicable to the construction of any written instrument not just contracts. In re Est. of Holden, 343 S.C. 267, 276, 539 S.E.2d 703, 708 (2000). Thus, the parol evidence rule prohibits the admission of any evidence extrinsic to the MOU to

vary, contradict, or explain the express terms of the MOU. From a practical standpoint, it would be illogical for a court to use parol evidence to determine that a written instrument is a contract and then apply the parol evidence rule to exclude parol evidence in construing the terms of the same instrument.

When the proper analysis is applied and only the four corners of the MOU are examined, the unambiguous language of the MOU evidences that neither the City nor any member of the project team intended to be bound by the MOU. Instead, the language of the MOU demonstrates that the parties intended the MOU to serve as a framework for continuing to negotiate and execute "definitive written agreements" specifically contemplated by the MOU, which agreements would then define the terms of the transaction.

Where, as here, "the material facts concerning the formation of an alleged contract are not in dispute, the issue of a contract vel non is a question of law." W.E. Gilbert & Assoc. v. South Carolina Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985). This is consistent with a more recent treatise treatment of the matter:

> Pursuant to the generally applicable rule concerning decisions in respect of undisputed facts, whether undisputed facts establish a contract is a question of law, for decision by the court. By application of this principle whether a document, or multiple documents exchanged by the parties, constitute a contract is generally held to be a question of law for determination by the court, since the question involves the interpretation of an instrument or instruments, the determination of their validity as a matter of law, or both.

17B C.J.S. Contracts § 771 (2008). An examination of the plain language of the MOU demonstrates that, as a matter of law, the parties did not intend to be bound by the MOU.

First, the MOU was simply a framework for the parties to negotiate subsequent "definitive written agreements" to define the business terms and conditions only generally outlined in the MOU. Some of the definitive written agreements contemplated by the MOU were the Development Management Agreement (Appx. p. 1446, line 39), the Design/Build Agreement (MOU, §VII. 1, Appx. p. 1448, line 1), the Qualified Management Agreement (MOU, § X. 2, Appx. p. 1449, line 7), and the Room Block Commitment (MOU, § X. 12, Appx. p. 1450, line 20), not to mention the ever-evolving project budget and bond financing agreements, all of which would have been essential not only to the development of the convention center hotel but in establishing the very fees for which Plaintiffs now seek in damages.

Second, the plain language of the MOU leaves all of the critical determinations of the project to the sole discretion of the City. For example, the City had sole discretion to determine the feasibility of the project (MOU, § I.1, Appx. p. 1444), the City had sole discretion to approve the project budget (MOU, § IV.7, Appx. p. 1445), the City had sole discretion to determine the amount of the bond issue (MOU, § V.4, Appx. p. 1446), and the City had sole discretion to determine what amount, if any, of City Standby Support it would provide (MOU, § V.5, Appx. p. 1446). These "off-ramps" for the City make it plain that none of the parties intended to be contractually bound by the MOU.

Third, the express terms of the MOU demonstrate that there was never to be any contract between the City and Stevens & Wilkinson for payment for services – whether in the MOU or any subsequent definitive written agreement. Turner Construction, who is not a party to this lawsuit, was the Design/Builder, and any contract for payment to Stevens & Wilkinson was to be contained in a subsequent "definitive written agreement"

between Stevens & Wilkinson and Turner Construction. There is no evidence that such an agreement was ever signed by those parties.

Fourth, the express terms of the MOU also demonstrate that it was the intent of the Respondents that they would be working "at risk" of not getting paid unless and until the bonds closed. In the case of the architects Stevens & Wilkinson, they were to be paid by the Design/Builder out of its fees, which was based upon the to-be-established "Design/Build costs," the project costs subject to the City's approval, and then only upon the bond closing and subsequent events based upon construction. MOU §§ VII. 1 and VIII. 1, Appx. pp. 1447-1448.)

In the case of the Developer, Gary Realty/Garfield Traub, its fees were to be based upon a yet to be determined project budget, acceptable to the City in its sole discretion, payable beginning upon the bond closing and thereafter upon certain events based on the progress of construction. (MOU § VI.2, Appx. p. 1447.) In addition, the MOU provided that the Project Team would be responsible for the costs incurred prior to closing the financing. See, MOU § VI. 3, Appx. p. 1447, lines 10-18.

These sections of the MOU demonstrate that the parties' intent, as determined from the four corners of the MOU, was that the MOU would not be a binding contract but rather a conceptual framework for working together to create a plan for developing the convention center hotel. Virtually none of the material terms of an agreement were defined by the MOU, yet no one argues that the MOU was ambiguous. Accordingly, the Court of Appeals erred in relying on evidence outside the four corners of the MOU to find that a question of fact exists as to whether the MOU was a contract where the plain

language of the MOU evidences the parties' intent that the MOU not be a binding contract.

II. The Court of Appeals erred in holding that a question of fact exists as to whether the Memorandum of Understanding is a binding contract where (a) there was no mutual assent of the parties to material terms and (b) the Memorandum of Understanding expressly stated that those material terms would be contained in definitive written agreements executed subsequent to the Memorandum of Understanding.

The project team and the City developed the MOU to provide a framework from which the parties might develop the convention center hotel. Such a framework was necessary because the transaction was to involve intricate Wall Street bond financing, a developer from Dallas, Texas, an international hotel operator, general contractors from Atlanta and tax issues which, if not resolved, could jeopardize the tax-exempt status of the bond financing. The MOU could not have provided the entire contractual basis for a transaction of this size and sophistication. The MOU provided the initial framework so that the parties might create a plan to develop a publicly-funded convention center hotel, but the MOU was not itself a contract. The City relied on the non-binding nature of the MOU to exit the project and formulate a new strategy for hotel development that would promote the best interest of its taxpayers.

In considering whether evidence existed that the MOU might be a contract, the Court of Appeals failed to acknowledge the most essential fact that there was no mutual assent as to the material terms of the transaction and that it was the subsequent definitive agreements, not the MOU, wherein the parties would reach agreement on the terms of the deal. The Respondents presented not even a scintilla of evidence that there was any

mutual assent as to the most material terms of the deal — the amount of the bond issue and the amount of the City Standby Support.

It is axiomatic that in order for a contract to exist, there must be a meeting of the minds as to all material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1973). Where mutual assent to even one material term is missing, no contract can be formed and at most the parties have entered into an unenforceable agreement to agree.

> If the document or contract that the parties agree to make is to contain **any material term** that is not already agreed on, no contract has yet been made; the so-called "contract to make a contract" is not a contract at all.

Arthur L. Corbin *et al.*, Corbin on Contracts § 2.8, at 133-34 (footnotes omitted) (emphasis added).

In this case, the two terms that defined more than any others the development of the entire publicly-funded hotel project were the amount of the bonds to be issued and the City Standby Support. As to the amount of bonds to be issued, the MOU provides:

> The NPC is to retain the Underwriter and legal counsel to structure and issue approximately $60 million in tax-exempt hotel revenue bonds **in amounts acceptable to the City**.

(MOU, § V.4, Appx. p. 1446) (emphasis added). By the plain language of the MOU, the amount of the bonds was not finally determined within the MOU but was left to the complete discretion of the City. .

Where the contract is unambiguous, extrinsic evidence cannot be used to show the existence or non-existence of a contract or its terms. However, the extrinsic evidence

may be used to demonstrate that the four corners of the MOU did not define the materials terms so as to change the parties "understanding" to a contract. For example, the record is undisputed that, as the project team's proposals evolved, the total amount to be financed by the bond issue increased continually. While the MOU, executed in April 2003, contemplated a $60 million bond issue, by September 24, 2003, the projected bond issue necessary to fund development and construction of the hotel had increased to $62,785,000. (Citigroup Financial Model, dated September 24, 2003, Appx. pp. 1654-1664.) By February 2004, the proposed bond issue had increased dramatically to $69,870,000. (Citigroup Presentation, dated February 11, 2004, Appx. pp. 1680-1684.) At the time the City issued the second Request for Proposals, this time for a privately-funded hotel project, the project team's estimate had sky-rocketed to an eye-watering $72,000,000, $12 million – fully 20% – more than contemplated in the MOU. (Citigroup Financial Model, dated March 15, 2004, Appx. pp. 1665-1679.) The Columbia City Council never voted to approve this figure. That this tremendous increase over that contemplated by the MOU was never approved by the City indicates that there was never a meeting of the minds as to this material business term, the *sine qua non* of the project.

The City Standby Support was the second critical term of the deal that was not defined within the MOU. Without the City Standby Support, there would be no bond issue. The MOU merely states that:

> The City is willing to provide a credit enhancement to support an **amount acceptable to the City** which would be utilized for any debt service shortfalls on the Subordinate Bonds or Hotel Bonds (as the case may be), if project revenues net of expenses are insufficient to provide for the debt service on the Subordinate Bonds or Hotel Bonds.

(MOU § V.5, Appx. p. 1446) (emphasis added). The amount of City Standby Support was not defined by the MOU, but rather was left to be determined in the complete discretion of the City.

Like the amount of the bond issue, the City Standby Support Payment was constantly a moving target and continued to increase exponentially throughout the project negotiations. In September 2003, the maximum City Standby Support Payment was estimated to be $53,135,000. (Citigroup Financial Model, dated September 24, 2003, Appx. pp. 1654-1664.) By March of 2004, that number had increased to $89,735,000, an almost 70% increase. (Citigroup Financial Model, dated March 15, 2004, Appx. pp. 1665-1679.)

The parties unambiguously left it to the City to unilaterally set its tolerance for the amount of the bond issue and City Standby Support. Thus, the terms were not defined by the MOU. Further, the MOU did not provide any manner or formula for calculating the amount of the bond issue or the City Standby Support. Thus, there was no mutual assent to these critical material terms and therefore no contract was formed by the MOU. The MOU was to be framework and nothing more.

While ignoring the lack of mutual assent, the Court of Appeals placed great emphasis on the possible existence of mutual promises within the MOU. Regardless of whether there are statements that are purported to be promises on certain terms, if there are no promises indicating mutual assent to any material term of the alleged contract, then there can be no contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1973); Corbin on Contracts § 2.8. The mere existence of promissory-type language in a

document cannot cure a lack of mutual assent on material terms so as to render a contract enforceable or to even create a question of fact as to the enforceability of an alleged contract.

The MOU specifically contemplated the negotiation and execution of subsequent agreements that **would** define the parties' contractual relationships. It remained necessary, under the express terms of the MOU, for the parties to "execute definitive written agreements" in order for those business terms and conditions to become binding in contract upon any of the parties to the MOU. Not only were the terms of the mandatory agreements not fully set forth in the MOU, none of these agreements was ever completely negotiated or executed. Because of the interdependence of these agreements, the failure to execute any one meant the project would not go forward.

Accordingly, the MOU, rather than being a binding contract, was a non-binding agreement to agree in the future. Although certain agreements to agree may be enforceable under certain conditions, the MOU at issue here is an unenforceable non-binding agreement to agree. The difference has been explained by a leading authority on contracts:

> It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent final agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on **all essential terms** that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain **any material term** that is not already agreed on, no contract has yet been made; the so-called "contract to make a contract" is not a contract at all.

Arthur L. Corbin et al., Corbin on Contracts § 2.8, at 133-34 (footnotes omitted) (emphasis added). Because there were multiple material terms upon which there was never any mutual assent, the MOU was a non-binding agreement to agree, not a contract.

Several South Carolina cases recognize that oral or written "agreements to agree" are not themselves contracts. One of the earliest such cases is Savannah Guano Co. v. Fogle, 112 S.C. 234, 100 S.E. 59 (1919). In Savannah Guano, the South Carolina Supreme Court held that where there was a promise to make a contract there could be no actual contract until the material terms had been agreed upon. Id. at 112, 100 S.E. at 60.

A more recent case emphasizes the point that an "agreement to agree" represents negotiations only and not the formation of a contract. Electro-Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004). In Electro-Lab, a general contractor used an electrical subcontractor's bid in its bid to build a school. Id. at 366, 593 S.E.2d at 171. When the general contractor was subsequently informed that another company could do the same work for a lower bid, the general contractor asked the subcontractor if it could do the work for the lower price. Id. at 267, 593 S.E.2d at 172. The subcontractor agreed to do so. The general contractor sent a signed confirmatory fax to the subcontractor stating the agreed-to price and instructing the subcontractor to begin the necessary preparations for the electrical work, including obtaining a performance and payment bond. The fax also stated, "A subcontract is forthcoming." According to the contractor, the subcontractor indicated six weeks later that he would not be able to obtain the bond and asked to withdraw from the project, and the general contractor hired another company to do the electrical. The subcontractor then sued the general contractor for breach of contract. Id.

The Court of Appeals held that the writing sent to the subcontractor was insufficient to create a contract. Id. at 370, 593 S.E.2d at 174. The general contractor's statement that a subcontract was forthcoming demonstrated that the parties were engaged in negotiations. Id. They had agreed to agree but were not yet bound in contract. Id.

The MOU is even less like a contract than the confirmatory fax in Electrolab. The MOU described some of the business terms and conditions but expressly contemplated that the final negotiated terms would be incorporated into the subsequent binding contracts. Here, even more so than in Electrolab, such a document, although in writing, signed, and containing the boilerplate recitation of consideration, cannot itself form a contract.

This conclusion is in accord with other South Carolina state and federal authorities applying South Carolina law that have held that an agreement to make an agreement does not form a contract. Holliday v. Peagram, 89 S.C. 73, 73, 71 S.E. 367, 370 (1911); Blanton Enterprises v. Burger King Corp., 680 F.Supp. 753, 770 (D.C.S.C. 1988); Trident Constr. Co. v. Austin Co., 272 F. Supp. 2d 566, 575 (D.C.S.C. 2003).

Finally, this Court should consider the importance in commerce served by non-binding agreements to agree such as the MOU here. The Plaintiffs' position, if successful, will render much more difficult the creation of such complicated commercial ventures such as that with the Convention Center hotel development. From a policy standpoint, if parties cannot participate in non-binding memoranda of understanding, for fear of being dragged into protracted litigation like we have seen in this case, then the willingness and ability of parties to explore the possibility of development projects will be chilled. Governmental entities in particular are subject to responsibilities beyond the

financial pressures felt by private entities and, in certain cases, must maintain some flexibility to act in the best interest of all of their constituents, the taxpayers. Yet noting about this position would diminish the ability of parties to enter into binding contracts for development projects if they draft enforceable, binding contracts for that purpose, spelling out all material terms.

III. The Court of Appeals erred in reversing the trial court's order of summary judgment in favor of the City on Gary Realty/Garfield Traub's claim for quantum meruit where it could not identify a scintilla of evidence creating an issue of fact as to the value of any benefit conferred on the City by Gary Realty/Garfield Traub.

The trial court granted summary judgment in favor of the City on Gary Realty/Garfield Traub's claim of quantum meruit because Gary Realty/Garfield Traub failed to put forth even a scintilla of probative evidence of a benefit conferred by Gary Realty/Garfield Traub and realized by the City. The only "grounds" set forth by Gary Realty/Garfield Traub that a benefit was conferred upon and realized by the City was speculation. Rule 56 requires "specific" evidence. To meet the scintilla standard, evidence must also be probative; mere speculation is not probative and is not sufficient to meet the scintilla standard. McDowell v. Stilley Plywood Co., 210 S.C. 173, 41 S.E.2d 872, 875 (1947) (recently quoted in Bass v. Gopal, Inc., 2009 WL 1917283, 4 (Ct. App. 2009) (unpublished)).

Quantum meruit is an equitable action for the recovery of unjust enrichment. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 259, 440 S.E.2d 129, 129 (1994). In Scudder May, this Court held that quantum meruit allows recovery for unjust enrichment when the following elements are met:

a. A benefit is conferred upon the defendant by the plaintiff,

b. The defendant realizes the benefit, and

c. The defendant retains the benefit under circumstances that would make it unjust for him to retain the benefit without paying its value.

Id.

The theory of quantum meruit differs from that of contract and even estoppel in that the focus is on the amount that the alleged recipient is enriched rather than the cost of performance of the one allegedly conferring the benefit. Id. The proper measure of the amount of damages is the value conferred upon the defendant rather than the expense to the plaintiff. Stringer Oil Co., Inc. v. Bobo, 320 S.C. 369, 373, 465 S.E.2d 366 (Ct. App. 1996). In Stringer Oil, the Court of Appeals cited with approval two cases from Georgia. "'Value' for purposes of the quantum meruit remedy means value to the owner rather than cost to the workman producing the result." Brumby v. Smith & Plaster Co. of Ga., 181 S.E.2d 303, 305 (Ga. Ct. App. 1971). "[T]he 'reasonable value' which plaintiff may recover in quantum meruit is not the value of labor but the value of the benefit resulting therefrom." Remediation Serv., Inc. v. Georgia-Pacific Corp., 433 S.E.2d 631, 637 (Ga. Ct. App. 1993). In addition, the court stated, "It is basic hornbook law that although plaintiff's costs of performance might represent some evidence of value, they do not represent a recoverable item of restitution themselves." 320 S.C. at 374, 465 S.E.2d at 369 (Citing Dobbs, Dan B., Remedies § 45 at 261).

Appellate courts should only reverse an order granting summary judgment where the appellate court can clearly articulate what scintilla of evidence was presented by the non-moving party to overcome the motion. With regard to the quantum meruit claims,

the question ruled upon by the Court of Appeals was whether the work of Gary Realty/Garfield Traub had any value to the City after the City decided to pursue a plan for a privately-funded convention center hotel. The only ruling on that question was the Court's bare statement: "We do not believe it is possible to rule as a matter of law that the alleged benefit to the City had no value." (Opinion, Appx. pp. 1896-1897.) However, the Court of Appeals pointed to absolutely no evidence from the record of what the "alleged benefit to the City" was, much less that the alleged benefit had any value to the City. The Court of Appeals failed to identify even a scintilla of evidence regarding the benefit conferred by Gary Realty/Garfield Traub as its value bestowed upon the City, sufficient to support Gary Realty/Garfield Traub's claim for quantum meruit, but nonetheless held that there was a genuine issue of material fact regarding that claim.

On a motion for summary judgment, judgment in favor of the moving party will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C. R. Civ. P. Rule 56(e), S.C. R. Civ. P., additionally states,

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must **set forth specific facts** showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id. (emphasis added).

Rule 56 confers upon the non-moving party an obligation to present at least a scintilla of identifiable evidence to create a genuine issue of material fact; speculation, conjecture, and argument of counsel do not constitute material evidence necessary to meet the scintilla standard.

At the hearing on the City's Motion for Summary Judgment, Gary Realty/Garfield Traub asserted that they conferred a benefit of valuable material and services upon the City in the following forms: (1) a rendering of the proposed hotel, (2) plans and drawings for construction of the proposed hotel, (3) concepts and terms contained in negotiated agreements, and (4) "intellectual capacity." However, there is no evidence in the record of this case to suggest these items resulted in any benefit to the City or were used by the City in any way. Ultimately, because the publicly-funded hotel development failed to materialize, the City realized no benefit from any of the materials or services Gary Realty/Garfield Traub may have produced.

For example, it is undisputed that the City paid a third-party artist to prepare a rendering of the proposed hotel for use in presentations to the public. (Notes of Development Team/City Meeting on July 10, 2003, Appx. p. 1628; Letter from Jack Plaxco to Shawn Epps dated July 8, 2003, Appx. p. 1725.) The City also does not dispute that it provided a copy of the rendering to Aughtry's architect. However, the rendering was not a confidential or proprietary document; indeed, the City, not Gary Realty/Garfield Traub, commissioned and fully paid for the rendering.

There is no evidence in the record showing that the plans and designs themselves had any intrinsic value or that they would only have been valuable for any purpose other

than to construct the proposed hotel. Despite Gary Realty/Garfield Traub's speculations, there is no evidence in the record to indicate that the plans, which were prepared by Stevens & Wilkinson and not Gary Realty/Garfield Traub, were ever utilized by the City or Mr. Aughtry.

But Gary Realty/Garfield Traub argued that there is a "striking similarity" between the proposed hotel designed by Stevens & Wilkinson and that built by Mr. Aughtry that can only be accounted for by Mr. Aughtry's use of Stevens & Wilkinson's plans and drawings. Nonetheless, Gary Realty/Garfield Traub had every opportunity to inspect the hotel developed by Aughtry and to produce evidence of any similarities through a comparison of the plans developed by Stevens & Wilkinson with those prepared for Aughtry. (Transcript of Hearing on August 17, 2009, 206:19-207:6; 210:10-21, Appx. pp. 1258, line 19; Appx. p. 1259, line 6; Appx. p. 1262, lines 10-21.) Despite having access to the hotel and both sets of plans, Gary Realty/Garfield Traub failed to make such a side-by-side comparison. (Id.) Thus, the trial court was left with nothing but mere speculation upon which to judge the Plaintiffs' claims that Aughtry utilized Stevens & Wilkinson's plans and drawings in designing and constructing the current Hilton Hotel. Even assuming for the sake of argument that Aughtry had utilized Stevens & Wilkinson's plans and drawings, the benefit of such use would have accrued to Aughtry and not the City.

Gary Realty/Garfield Traub also argued that the City realized some benefit from their work in negotiating a Room Block Agreement – one of the "definitive written agreements" never finalized and executed. Again, Gary Realty/Garfield Traub presented

no evidence beyond mere speculation as to the terms of the Room Block Agreement, which was still not fully negotiated when the second RFP was issued and which was ultimately entered into between the City and Aughtry. No evidence was presented that the City or Aughtry relied upon the draft Room Block Agreement negotiated by the project team or that they otherwise used it in any way. Gary Realty/Garfield Traub introduced no evidence into the record to indicate that the Room Block Agreement between Aughtry and the City contains any proprietary information created by Gary Realty/Garfield Traub.

Gary Realty/Garfield Traub finally argued that their efforts conferred a benefit of intellectual capital upon the City, the assertion being that Gary Realty/Garfield Traub somehow "educated" the City in how to proceed with the development and construction of a publicly-funded construction project and that such "education" was of a benefit conferred upon the City. (Transcript of hearing, August 17, 2009, Appx. p. 1235.) Again, this argument is the sum total of the "evidence" in this regard submitted in defense of the motion for summary judgment.

Importantly, even Gary Realty/Garfield Traub admitted that the City received no benefits from their work. Consider the following sworn deposition testimony of Charles Gary:

> Q. What part of what Gary Realty did did [sic] the City of Columbia ever ultimately use?
>
> A. Ultimately used?
>
> Q. Yes, sir.
>
> A. **I don't know whether they ultimately used it**, but

when I take a look at the final product down there, it has a pretty good resemblance of what we put together.

Q. Okay. The city of -- the location for the hotel was always there, and that's something that had been talked about for years prior to this; isn't that correct?

A. That's my understanding, yes.

Q. All right. And the hotel that was ultimately built was, what, about two-thirds the size of what your team proposed?

A. That's my understanding.

Q. But it has a resemblance to -- is that what you're saying, it has a resemblance to what y'all proposed?

A. Yes, it does.

Q. **Okay. What else did the city of -- besides the resemblance of the facility, is there anything you can tell me specifically that the city used that y'all produced? When I say "y'all," I mean the project team.**

A. **No, there's nothing I could tell you we produced. That we as a team produced.**

Deposition of Charles Gary, 30:22-31:24, Appx. p. 1374, line 22; Appx. p. 1375, line 24.

Greg Garfield, a principal in Garfield Traub, testified similarly:

Q. Okay. Is there any part of the work that Garfield Traub did or the development team did which was ultimately used by the City of Columbia?

A. You're talking about any of the work product that our team prepared for the city that-- **you're asking me if I am aware that any such material was used by the city on the deal it ultimately did with Bo Aughtry?**

Q. **That's exactly what I'm asking you.**

A. **I don't know.** I haven't been -- I'm not privy to the plans and specifications of the hotel. I have no idea whether it, you know, borrows anything from the plans that our team prepared other than what I indicated earlier, which is that the rendering we saw of the hotel bears a striking resemblance to the drawings that were prepared by our architects.

Q. **You mean the 300-room hotel has a resemblance to the 212-unit hotel that was ultimately built?**

A. **I don't know that because I don't know that I've really looked at the hotel that was ultimately built,** but I believe the -- the original rendering that we saw that he used in his presentation, I think we believe that that did resemble very much our work product.

Q. Okay. Other than that, you're not aware of anything that -- any work product that your team did or prepared that was used by the City of Columbia?

A. **Not that I'm aware of other than -- I mean, I assume -- I guess I should say not that I'm aware of.**

Deposition of Greg Garfield, 285: 11-286: 12, Appx. p. 1356, line 11; Appx. p. 1357, line 12.

Q. . . . . How is -- tell me what -- what the city shared with anybody that was proprietary to the team.

A. Well, again, I talked about this earlier today, and I talked about it -- **I believe you asked me the same question earlier in the deposition, and I referenced our team's conceptual rendering for the hotel,** which was provided to Bo Aughtry and his architect presumably to help them prepare for their submittal to the city in response to that second RFP/RFQ process.

Q. **Is there anything else?**

A. **I'm not -- I can't recall -- I'm not aware of anything that I could cite to you right now.**

Deposition of Greg Garfield, 290:2-20, Appx. p. 1358, lines 2-20.

Despite years of discovery, Gary Realty/Garfield Traub failed to present a single material fact to support their contention that their work had conferred any value to the City. To argue that there "must have been" some benefit to the City is not evidence, it is pure speculation. There was no attempt to quantify that value or identify the alleged benefit with any particularity. The trial court recognized that the mere speculation and argument of counsel about what value may have been conferred on the City are in no way evidence. For the Court of Appeals to hold, "We do not believe it is possible to rule as a matter of law that the alleged benefit to the City had no value" is to engage in speculation and, contrary to the plain language of Rule 56, shifts the burden back upon the moving party: it was the non-moving parties' burden – in this case, Gary Realty/Garfield Traub's burden – to present some specific fact to show there was a benefit conferred and that the benefit had value to the City. This it failed to do.

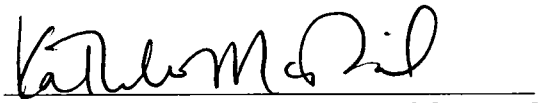
The Court of Appeals cited no evidentiary basis to support its conclusory reversal of the trial court's grant of summary judgment on the issue of quantum meruit because

there is none. The trial court's grant of summary judgment in favor of the City on the issue of quantum meruit should be upheld.

CONCLUSION

The Court of Appeals opinion in this case illustrates the source of confusion and frustration among bench and bar alike in applying the principles set forth in Rule 56. The trial court repeatedly offered the Plaintiffs the chance to articulate what, in this voluminous record, created a genuine issue of material fact that the MOU formed a contract and, if not, that the Plaintiffs had conferred a benefit upon the City such that they were entitled to recover in quantum meruit. The Plaintiffs failed to satisfy their burden under Rule 56.

For these reasons, the City requests that this Court reverse the Court of Appeals and uphold the trial court's grant of summary judgment in favor of the City on the Respondents' causes of action for breach of contract and quantum meruit.



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CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Petitioner complies with Rule 211(b), SCACR.

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Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Opinion No. 4914 (S.C. Ct. App. Filed November 30, 2011)

Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., Garfield Traub Development, LLC, and Turner Construction Company. . . . . Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc. Gary Realty Company, Inc. and Garfield Traub Development, LLC are . . . . . Respondents,

vs.

City of Columbia, Paul C. "Bo" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners, LLC, and Hilton Hotels Corporation . . . . . Defendants,

Of Whom

City of Columbia is . . . . . Petitioner.

PROOF OF SERVICE

I certify that I have served the **BRIEF OF PETITIONER AND APPENDIX** on the Respondents herein, by causing copies of same to be hand-delivered, to its attorneys of record, Richard A. Harpootlian and Graham L. Newman, at 1410 Laurel Street, Columbia, South Carolina

29202 and Kenneth M. Suggs, Esquire and Francis M. Hinson, IV, Esquire, at JANET JENNER & SUGGS, LLC, 500 Taylor Street, Suite 301, Columbia, South Carolina 29202, on July 3, 2013:

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July 3, 2013
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