

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM YORK COUNTY  
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge  
S. Jackson Kimball, Special Circuit Court Judge

---

Case No. 2013-CP-46-00246

---

Morningstar Fellowship  
Church,

Appellant,

v.

York County, South Carolina,

Respondent.

---

**APPELLANT'S RETURN TO  
RESPONDENT'S MOTION TO DISMISS APPEAL**

---

Richard B. Fennell  
S.C. Bar No.: 10467  
James, McElroy & Diehl, P.A.  
600 South College Street  
Charlotte, NC 28202  
Telephone: (704) 372-9870  
Facsimile: (704) 333-5508  
**Counsel for Appellant**

**RECEIVED**  
MAR 05 2015  
**SC Court of Appeals**

## MEMORANDUM

### I. Preliminary Statement

Pursuant to Rule 240, SCACR (2015), Morningstar Fellowship Church (“Appellant”) respectfully responds to the Motion to Dismiss Interlocutory Appeal filed by York County (“Respondent”). Respondent’s Motion should be denied because Judge Hall’s Order excluding Appellant from offering evidence of damages allowing is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2).

### II. Legal Argument

Appellant filed this action on January 24, 2013. The complaint raises claims for declaratory judgment, breach of contract, and breach of duty of good faith. (The complaint and answer are with counterclaim attached to the affidavit of Richard B. Fennell being filed contemporaneously with this Return). The claim for breach of duty of good faith was dismissed by order on summary judgment by the Honorable S. Jackson Kimball on July 16, 2014. Judge Kimball’s order otherwise denied Respondent’s Motion for Summary Judgment but held that the Development Agreement at issue in this case “does not require that Morningstar receive formal notice of site plan approval as specified in Article XI, J or H of the Agreement quoted herein.” Respondent filed a Motion to Exclude Damages on September 12, 2014. It also filed a Motion *in Limine* (which actually contained five motions) on January 23, 2015. Those motions were heard on January 26, 2015. The Honorable Daniel D. Hall granted all of the motions, except for one, by Order entered on February 3, 2015.

Appellant is appealing a number of different issues arising out of these orders. Fundamentally for this Motion, however, Judge Hall ruled that Appellant could not introduce any evidence of its damages. The effect of that ruling was to eliminate from consideration all of Appellant's plaintiff claims for affirmative relief, and reduce the case simply to a trial of Respondent's claims. Judge Hall's Order, then, effectively determined those claims sufficiently to be, immediately appealable under S.C. Code Ann. § 14-3-330(2) (2013). That section provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

\* \* \*

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

S.C. Code Ann. § 14-3-330(2) (underscore added).

As set forth in the complaint, the underlying action is centered around Appellant's efforts to complete and redevelop a tower located on property it owns. The parties entered into a development agreement in 2008. The development process required Appellant to generate a site plan for approval by Respondent. The site plan was submitted in the fall of 2008. Respondent notified Appellant on March 5, 2010 that it was in default of the Agreement for failing to produce bid, performance and payment bonds within 180 days of site plan approval. Appellant contends that it did not receive notice of site plan approval, and therefore did not know that the 180-day clock had started.

Appellant further contends that the notice of default, among other breaches committed by Respondent, caused damages “including but not limited to the loss of the value of its investment in the Tower, the loss of individual sales of units in the Tower, and the loss of the market for near term sales of the remaining units in the Tower.” Judge Hall excluded any evidence of those damages. This ruling was in error, and the error must be corrected before the case is tried. The finder of fact will certainly view the case in a different way if Appellant is precluded from explaining the ways in which Respondent’s actions have caused it harm.

The analysis in State v Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) is not applicable in this case. Judge Hall did not simply make a ruling that a particular piece of evidence would not be presented to the jury based on the record as it stood. Rather, he excluded all of Appellant’s evidence of damage, which effectively disposed of any claims Appellant had against Respondent for which it could recover relief and made it impossible for Appellant to proceed to trial on any of those claims.

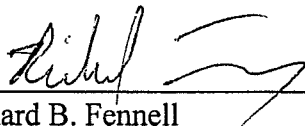
South Carolina courts have recognized that similar *in limine* rulings that suppress evidence and significantly impair the State’s ability to prosecute a case are immediately appealable. See, e.g., Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (S.C. Ct. App. 1999); State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). The same rationale applies with equal force to civil cases in general where, as here, the ruling effectively dismisses any basis for which Appellant could be awarded damage. See, e.g. Widener v. Fort Mill Ford, 381 SC 522, 524, 674 S.E.2d 172, 174 (Ct. App. 2009) (holding that the trial court’s dismissal of appellant’s case

so the parties could arbitrate was immediately appealable because the dismissal finally determined the parties' rights).

### **III. Conclusion**

Judge Hall's Order conclusively determined and disposed of Appellant's claims against Respondent for which it could recover damages, and deprived Appellant of any ability to obtain an appealable judgment on those issues. Accordingly, Judge Hall's Order is immediately appealable under S.C. Code Ann. § 14-3-330(2).

March 4, 2015

  
Richard B. Fennell  
S.C. Bar No.: 10467  
James, McElroy & Diehl, P.A.  
600 South College Street  
Charlotte, NC 28202  
Telephone: (704) 372-9870  
Facsimile: (704) 333-5508  
**Counsel for Appellant**

Other Counsel of Record:  
Daniel J. Ballou  
Hamilton Martens Ballou & Carroll, LLC  
P.O. Box 10940  
Rock Hill, SC 29730  
(803)329-7672  
Attorneys for Respondent-Appellant

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge  
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2013-CP-46-00246

Morningstar Fellowship  
Church,

Appellant,

v.

York County, South Carolina,

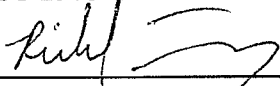
Respondent.

**RECEIVED**  
MAR 05 2015  
**SC Court of Appeals**

**PROOF OF SERVICE**

I certify that this **Appellant's Return to Respondent's Motion to Dismiss Appeal** was served this date on Respondent by depositing a copy of same in the United States Mail, postage prepaid, addressed to Respondent's attorney of record, Daniel J. Ballou, Hamilton Martens Ballou & Carrol, LLC, 130 E. Main Street, Rock Hill, SC 29731.

March 4, 2015

  
Richard B. Fennell  
S.C. Bar No.: 10467  
James, McElroy & Diehl, P.A.  
600 South College Street  
Charlotte, NC 28202  
Telephone: (704) 372-9870  
Facsimile: (704) 333-5508  
**Counsel for Appellant**