THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

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SC Court of Appeals

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church, Appellant-Respondent,

v.

York County, South Carolina Respondent-Appellant.

RESPONDENT/APPELLANT'S INITIAL RESPONDENT'S BRIEF

April 15, 2016

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II. **Whether the trial court properly determined that Morningstar's claimed damages were too speculative and conjectural to be recovered as a matter of law.**

III. **Whether, as additional sustaining grounds to affirm the trial court's order of judgment, no genuine issue of material fact exists as to the question of notice of site plan approval, and summary judgment as to the breach of contract and declaratory judgment claims should have been granted in favor of York County.**

IV. **Whether Morningstar has abandoned its appeal as to the Circuit Court's exclusion of *in limine* evidence of mediation discussions and statements made by county council members, and whether the Court properly excluded such evidence.**

STATEMENT OF THE CASE

Morningstar Fellowship Church (Morningstar) commenced this action on January 24, 2013, alleging claims for breach of contract, declaratory judgment and breach of the implied duty of good faith and fair dealing regarding a development agreement entered into between it and York County, South Carolina pursuant to the South Carolina Local Government Development Agreement Act, S.C. Code Ann. §6-31-10, *et seq*. Summons and Complaint filed January 24, 2013. York County timely answered, denying the allegations of the Complaint, and asserting counterclaims for breach of contract, declaratory judgment, and nuisance. Answer and Counterclaims filed March 23, 2013. Discovery commenced thereafter.

York County moved for summary judgment or partial summary judgment pursuant to Rule 56 S.C.R. Civ. P. based in part on Morningstar's notice of site plan approval. Motion for Summary Judgment filed April 29, 2014. The County's motion was heard by the Honorable S. Jackson Kimball on June 19, 2014. On July 16, 2014, the Circuit Court granted York County summary judgment as to Morningstar's cause of action for breach of the covenant of good faith and fair dealing, but denied the County's motion as to the breach of contract claim. July 16, 2014 Order. York County moved for reconsideration of that order on July 29, 2014. Motion for Reconsideration filed July 29, 2014. By order dated September 29, 2014, Judge Kimball denied that motion. September 29, 2014 Order.

York County also moved for an order excluding Morningstar's damages as a matter of law. Motion to Exclude Damages, September 15, 2014. Discovery was concluded in late January of 2015, and then, on January 23, 2015, York County moved for an order *in limine* preventing certain evidence, including settlement discussions and mediation, from being introduced at trial. Motion *in limine*, filed January 23, 2015.

The case was scheduled for trial the first week of February, 2015, before the Honorable Daniel D. Hall. By a single order dated February 3, 2015, Judge Hall granted both the County's motion to exclude damages, and substantially granted the County's Motion *in limine*. February 3, 2015 Order. Specifically as to damages, Judge Hall found and concluded that Morningstar's claims for damages were based on conjecture and speculation, were not supported by any competent or admissible evidence and not able to be established with any reasonable certainty. Id. The trial court separately found that evidence of settlement discussions, mediation and a public petition were neither relevant nor probative of any issue for trial, and should be excluded *in limine*. Id.

Based upon Judge Hall's February 3, 2015 Order, York County immediately moved for entry of judgment. Motion for Entry of Judgment filed February 4, 2015. Also on February 4, 2015, Morningstar filed a notice of appeal of those combined orders as well as Judge Kimball's July 16, 2014 Order. Notice of Appeal filed February 4, 2015.

On February 13, 2015, York County filed a motion to dismiss Morningstar's appeal as well as a precautionary notice of cross appeal as to the Circuit Court's orders of July 16, 2014 and September 29, 2014. Motion to Dismiss Appeal filed February 13, 2015; Notice of Cross Appeal filed February 13, 2015.

On March 4, 2015, Morningstar filed its Return to York County's Motion to Dismiss Appeal. Return to Motion to Dismiss, filed March 4, 2015.

On April 16, 2015, the Court of Appeals granted the County's motion to dismiss Morningstar's appeal as interlocutory and not immediately appealable.

On October 20, 2015, York County renewed its motion for entry of judgment, which motion as heard by Judge Hall on October 27, 2015. Renewed Motion for Entry of Judgment, filed October 20, 2015. On November 10, 2015, Judge Hall granted York County's motion and entered judgment against Morningstar on its breach of contract and declaratory judgment claims. November 10, 2015 Order. This appeal and York County's cross appeal followed.

STATEMENT OF FACTS

This case arises from a development agreement ("Development Agreement" or "Agreement") entered into by Morningstar and York County for the completion and rehabilitation of a long-standing fixture in northeastern York County, the Heritage Tower, a 21-story residential high-rise planned as part of the former PTL Ministries development (the "Tower"). See, generally, July 16, 2014 Order for Partial Summary Judgment, at 1-4. PTL

began construction of the Tower in 1986, but with the dramatic and public collapse of its ministries and its subsequent bankruptcy in 1987, all work on the hotel abruptly ceased, leaving a partially constructed and progressively deteriorating shell that has dominated the Fort Mill skyline for more than a generation. Prior to its purchase by Morningstar, the property had been owned by Regent Carolina Corporation ("Regent"). In the summer of 2004, Regent contracted to sell 162 acres to Coulston Enterprises, Inc., which in turn agreed to sell 52 acres, including the Tower, to Morningstar for $1.6 million. Demolition of the Tower was made a specific contractual requirement of Morningstar's purchase from Coulston.

In its Complaint, Morningstar describes the Tower at the time of its purchase as "abandoned and derelict." Morningstar did not conduct an inspection prior to purchasing the 52 acre tract. The tract also contained other significant improvements. Further, Morningstar contracted with Coulston that it would demolish the Tower within 24 months of closing or pay Coulston an additional $300,000.00. It also acknowledged that York County could still require the demolition of the Tower anyway. Morningstar's deed contained a specific easement allowing Coulston to enter the property to demolish the Tower if Morningstar failed to do so. Coulston remained involved in the redevelopment of the remainder of the property, and submitted a proposed PD development plan to the County on behalf of Morningstar, which was approved in January of 2005. That Plan required Morningstar to demolish the Tower by January of 2007.

Notwithstanding these contractual commitments, after acquiring the property, Morningstar announced its intention to complete construction of the Tower and redevelop it for residential use. In pursuit of that intention, Morningstar engaged Roe Messner, a real estate developer specializing in church properties requested that York County permit it to renovate and

complete the Tower. On December 14, 2005, York County rejected that request, citing the requirements of the existing PD Development Plan that Morningstar had just obtained for the property earlier that year.

In response, Morningstar proposed entering into a Development Agreement to provide a framework for either the completion or demolition of the Tower within five years. The Agreement reflects that the County would not allow an indefinite time frame for Morningstar to complete the Tower project, and further required specific benchmarks Morningstar was required to meet along the way. Specifically, Morningstar was required to produce evidence of satisfactory financing for the project within 180 days of site plan approval. Section IV.C.2. of the Agreement provides:

> 2. Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer. Agreement, at p. 5.

Morningstar engaged Power Engineering, Inc. ("Power") to serve as its project engineer in handling dealings with York County, and designated Power as the entity with which the County would correspond. Gerald Lee ("Lee"), then the manager of Power's Charlotte office, was assigned by Power as project manager in early 2009, and he communicated directly with Morningstar's construction manager, Pat Selvey, concerning the site plan approval process. There were rounds of comments and changes through the spring and summer of 2009 concerning the site plan. Deposition of Pat Selvey, August 19, 2014, at 24-26; Deposition of David Yarnes, December 17, 2014, at 111-114; Deposition of Gerald Lee, March 20, 2014, at 14-18; 38-40; 82-83.

On August 18, 2009, Lee met with Billy Payne ("Payne"), the County's Stormwater Plans Examiner, and made some final additions and corrections to the plans. Following that meeting, Lee considered that the site plan had met all requirements for final approval and Power's work was complete. Deposition of Gerald Lee, March 20, 2014, at 58-59, 68-69, 90-93, 97. Deposition of Susan Britt, October 9, 2014, at 25, 30. Moreover, Pat Selvey testified that he knew that the site plan had been approved but did not think it was official since he had not been sent a stamped set of plans. Selvey Dep. Tr. at 30-33; 64, 74-75. It is undisputed that no formal "notice" of approval was independently sent to Morningstar. Despite the fact that both Lee and Selvey knew that the site plan was complete and had been approved, Morningstar contends that the County was required to communicate such approval directly to Morningstar president Rick Joyner by certified or registered mail. Appellant/Respondent's Brief at 9.

Morningstar's development efforts coincided with the economic downturn and aftermath of the Great Recession, and attempts to secure financing were plagued by numerous difficulties. Selvey Dep. Tr. at 51, 85-106, Exhibit 10; Yarnes Dep. Tr. at 233-34, 238-39, 291, 292. Even after approval of the site plan, Morningstar was unable to secure any commitment to long term permanent financing of the project, which was critical to its ability to meet the requirements of Paragraph IV.C.2 of the Agreement. Morningstar project manager Dave Yarnes testified that they continued to seek financing throughout 2009, and at various points changed the scope and nature of the project in order to try to appeal to a difficult market. Yarnes Dep. Tr. at 238-39; 291 – 93. Predictably, despite having its site plan approved, Morningstar was unable to provide any bid, performance or payment bond, any letter of credit or any other acceptable evidence of the financial viability of the project as required by the Development Agreement with 180 days, or any time thereafter. In fact, in February of 2010, prior to the declaration of default,

Morningstar admitted that it could not obtain the required financing even if York County started the 180-day clock over. Deposition of James Baker at 65-69.

Ultimately, in early 2010, York County was told by Morningstar that it did not have long term permanent financing in place, and that there were no reasonable prospects for such financing in the near future. Yarnes Dep. Tr. at 460-61. On March 5, 2010, the County notified Morningstar in writing that its failure to comply with Section IV.C.2 constituted a default under the Agreement. Yarnes Dep Tr. at 470, 485.

In this lawsuit, Morningstar seeks money damages for breach of contract and a declaration that it was not in default under the Development Agreement, despite the fact that it did not, and to this day has never, provided any of the required evidence of financial viability contemplated and required by Section IV.C.2 of the Agreement.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under S.C. R. Civ. P. 56. Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)(citations omitted). An order granting summary judgment should be affirmed "where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). Although an appellate court is required to construe every fact and inference in a light "most favorable to the non-moving party," disputed issues must be genuine. "Neither the trial court nor this court . . . is 'required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine.'" Englert v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993)(per curiam); see also Saluda Motor Lines, Inc. v.

Crouch, 300 S.C. 43, 45, 386 S.E.2d 290, 292 (Ct. App. 1989)(to overcome summary judgment,"[i]t is not sufficient that evidence create a far-fetched inference.").

An order admitting or excluding evidence "is within the sound discretion of the trial court" and "the trial court's decision will not be disturbed on appeal absent an abuse of discretion." Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005)(internal citations omitted). An appellant seeking reversal of a trial court's decision to exclude evidence "must prove both the error of the ruling and the resulting prejudice." Id. at 26, 609 S.E.2d at 509 (citing Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Timmons v. S.C. Tricentennial Commn., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powers v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764 (1967)). To establish "error," the appellant must show that the trial court's ruling was based upon an "error of law or a factual conclusion that is without evidentiary support." Id. (citing Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991)).

ARGUMENT

I. The Circuit Court properly held that the sole issue of material fact, if any, precluding summary judgment was the reasonableness of the notice of site plan approval when the Development Agreement does not require any formal notice of such approval and the Appellant received actual notice of approval.

A. This court should refuse to consider Morningstar's argument that the trial court improperly limited the scope of issues for trial, because Morningstar failed to preserve the issue for appeal.

Morningstar's entire case arises from its claim that the County failed to provide sufficient notice of site plan approval. As Judge Kimball noted, all of its claims flow from this pivotal assertion. July 16, 2014 Order at 5. In an email exchange in January of 2010, the County raised the issue of the 180-day time limit following site plan approval with Morningstar construction

manager Pat Selvey. Selvey Dep. Tr. at 35-38. Even though Power Engineering had previously told Selvey that the site plan had been approved, he responded that time was not an issue because the 180 days under the Agreement did not begin to run until he had received from the County a stamped set of site plans. Selvey Aff. at para. 6; Selvey Dep. Tr. at 49-50. Morningstar then argued that the time had not commenced because York County failed to provide notice that the site plan had been approved by certified or registered mail "as provided in the Agreement." Complaint ¶27(a), Deposition of Rick Joyner at 421-423.

Morningstar has abandoned Selvey's argument that its clock started with delivery of a stamped set of plans, but contends that the County was obligated "as provided in the Agreement" to provide notice of site plan approval by certified or registered mail. Appellant's Initial Brief at 11. Without question, Morningstar attaches tremendous significance to this issue, for it cannot prevail in this case unless it can establish that York County was contractually required to convey notice of site plan approval in that particular manner. July 16, 2014 Order at 5, 6.

York County moved for summary judgment based upon the fact that the Agreement contains no mention of notice to Morningstar of the approval of its site plan in any particular form or manner, and that approval was communicated directly to Morningstar's agent, Power. While the trial court denied York County's motion, its order significantly narrowed the issues in dispute. See July 16, 2014 Order at 5, 6.; see also Rule 56(d) S.C. R. Civ. P.[1] Specifically, the trial court found that the Agreement does not require formal notice of site plan approval by certified or registered mail as specified in Article XI, §H of the Agreement. The trial court

[1] **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 . . . 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.**

further found that even though Section IV.C.2 does not specify that notice is required, a requirement of reasonable notice should be implied into the Agreement. Finally, the court found that notice was in fact given by the County to Power, but it nonetheless reserved granting judgment as to Morningstar until a "full presentation of the facts pertaining to the reasonableness of the notice." July 16, 2014 Order at 6. This final ruling is also the subject of the County's cross appeal, which is a companion to this appeal.

York County sought reconsideration of the Court's denial of summary judgment, arguing actual notice to Morningstar's agent. Motion for Reconsideration, July 29, 2014. On the other hand, Morningstar did nothing to challenge the validity of the portions of the trial court's decision it now claims it lost by motion for reconsideration or otherwise. For the first time on appeal, Morningstar now takes issue with the breadth and scope of the court's order, having taken no steps in the court below to seek reconsideration of the court's findings of fact or conclusions of law.

Rule 56(d) S.C. R. Civ. P. expressly authorized the trial court to narrow the issues for trial by "specify[ing] the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just." Furthermore, pursuant to that rule, "the facts so specified [in the court's order were] deemed established." Rule 56(d) S.C. R. Civ. P. If, as Morningstar contends, the trial court erroneously "specified the facts that appear without substantial controversy" or erroneously directed "further proceedings in the action," then it was incumbent upon Morningstar to seek reconsideration of the court's order. As it stands, Morningstar's appeal raises an issue as to the scope of Judge Kimball's order that he has never had an opportunity to address, and is only now raised after the fact.

As the South Carolina Supreme Court explained in I'On, LLC v. Town of Mt. Pleasant, an appellant, "the losing party in the lower court . . . must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). Further, "[i]It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). If, as Morningstar contends, it was the "loser" of an erroneous ruling in the circuit court, then it was required to seek reconsideration of those rulings to preserve them on appeal. Having failed to do so, it is now too late for Morningstar to challenge that order, as it has failed to properly preserve its first argument for appeal.

B. The Circuit Court did not err by limiting the issues pertaining to the County's notification to Morningstar of Site Plan Approval.

As noted above, even though Morningstar prevailed on the County's motion for summary judgment, it now contends that it "lost" because, in denying the motion, the trial court narrowed the issues in dispute. Even if Morningstar had properly preserved this issue for appeal, its argument runs head-on into a plain reading of the parties' Agreement and the admitted facts in the case. Specifically, Section IV.C.2. of the Development Agreement provides:

> Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to the County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer.

The Development Agreement is silent as to any requirement that the County provide formal notice of site plan approval, and certainly nothing in the Agreement prescribed a

mandatory procedure by which the County was required to give Morningstar notice of site plan approval, much less notice by certified or registered mail as described in Section XI.H of the Agreement. Morningstar had designated Power as its agent in obtaining plan approval from the County, as the approval process was interactive and ongoing, and involved direct communications and actual notice back and forth of proposals, objections and approvals. As Judge Kimball noted, "progress on the project was monitored and communicated by other means, such as emails and direct interaction between Power and the County and Power and Morningstar, throughout the approval process." July 16, 2014 Order at 6. Under the circumstances, no need existed to require any additional notice, since the process ensured that the parties were aware of the status of approval throughout the review process. Selvey Dep. Tr. at 28-32.

It is well settled that courts must enforce a contract according to its terms "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)(quoting Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct.App.1997)). Moreover, the cardinal rule of contract construction is to ascertain and give effect to the intention of the parties. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992)(citing Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990)). Where a contract's language is clear and capable of legal construction, "the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." M & T Enterprises, 379 S.C. at 655, 667 S.E.2d at 13. Courts have no "authority to alter an unambiguous contract by construction or to make new contracts for the parties." Id. (citing

C.A.N. Enterprise, Inc. v. South Carolina Health and Human Svcs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)).

The Development Agreement plainly and unambiguously required Morningstar to obtain bid, performance and payment bonds "within 180 days of County approval of the commercial site plan for the Property," or the Agreement would be "deemed null and void." Agreement at 5. Because that language was an unequivocal expression of the parties' agreement, the trial court properly ruled that Morningstar was precluded from introducing evidence of its own, self-serving and subjective, interpretation of that provision. If Morningstar required more formal notice of site plan approval, delivered to a particular person in a particular manner, it could have negotiated that term for itself. Selvey Dep. Tr. at 80.

The trial court properly narrowed the issues for trial pursuant to Rule 56(d) S.C. R. Civ. P., by "specify[ing] the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just." Furthermore, pursuant to that rule, "the facts so specified [in the court's order were] deemed established." Rule 56(d) S.C. R. Civ. P. If, as Morningstar contends, the trial court erroneously "specified the facts that appear without substantial controversy" or erroneously directed "further proceedings in the action," then it was incumbent upon Morningstar to seek reconsideration of the court's order.

So too, contrary to Morningstar's characterization of their engineer's testimony, Power project manager Gerald Lee received actual notice that the site plan had been approved as of August 24, 2009, and in fact understood and believed that the plans had been approved. Lee Dep. Tr. at 56-60, 68-69, 72-74, 90-93, 97. The normal site plan approval process involves multiple rounds of submittals, staff review, staff comments and responses, either directly by a developer or through its designated agents and engineers, which in this case was Power. Lee Dep. Tr. at 30-

32. Power had been designated by Morningstar as the point of contact with York County staff, and communications between them began early on in the site plan approval process, and continued for many months without any complaint whatsoever by Morningstar. Lee Dep. Tr. at 83-84. Lee was Power's project manager for the Tower project, and testified that he regularly communicated with Pat Selvey at Morningstar throughout the site plan approval process, beginning in January of 2009, providing Morningstar with regular status reports. Lee Dep. Tr. at 14-16. Lee also testified that he understood on August 24, 2009 that the work Power had been hired to perform was complete and the site plan had been approved. Lee Dep. Tr. at 56-59, 68-69, 90-93, 97. Several months later, Power sought to be paid on overdue invoices for the work that had been performed. Deposition of Derrick Boyte at 26-29. Selvey testified that Power was attempting to collect the invoices once the site plan had been approved and could not understand why Morningstar thought otherwise. Selvey Dep. Tr. at 28-33, 39-43, 66-67, 78.

Notice to Power as an agent while acting within the scope of its authority was binding as notice to Morningstar. Hill v. Carolina Power & Light Co., 204 S. C. 83, 28 S. E. 2d 545 (1944); Wimberly v. Sovereign Camp, W.O.W., 190 S. C. 158, 2 S. E. 2d 532 (1939); 23 S.C. Jur. Agency § 95. Pat Selvey testified that he had communicated with Power about approval, but since he had not received a stamped set of plans, he (erroneously) felt the 180 clock had not started. Selvey Dep. Tr. at 38, 60-64.

Morningstar's claim that it somehow believed that the County was in "no real rush to get started" because it never provided a non-reimbursable extension agreement is not credible and was correctly rejected by the trial court. Section VII.A of the Agreement, entitled Water and Sewer Service, provides:

Prior to site plan approval, Developer shall sign the County's non-reimbursable extension agreement if there is a proposed extension or relocation of existing County-owned water and sewer lines. (emphasis added).

Morningstar's argument presupposes that an extension or relocation of existing lines was ever proposed, when it was not. Affidavit of Rebecca Bowyer. In fact, David Yarnes candidly admitted that there was no discussion at all with the County about extending or relocating water lines. Yarnes Affidavit at ¶ 16. Since Morningstar never proposed to relocate water or sewer lines, no extension agreement was ever required. Morningstar cannot reasonably claim that a hypothetical and conditional requirement that never materialized would have any impact whatsoever on the overall approval of the site plan it had deemed to be "imminent" in May of 2009. Yarnes Dep. Tr. at 282-86. Instead, it is abundantly clear that Morningstar was not concerned with any time frames because it willfully ignored the reports of its engineers based on an assumption that it had more time, and an unfounded belief that the County would not require compliance with the Agreement. Yarnes Dep. Tr. at 284-85.

While the County contends that the issue of reasonable notice is one of law, and not a genuine issue of material fact, Judge Kimball was clearly correct in limiting the issues in this case as much as he did. Moreover, the record establishes actual notice to Morningstar's agent that is imputable to Morningstar as principal as a matter of law, avoiding the need for any evidentiary hearing on the question of reasonability at all. However, based on the evidence in the record and the arguments on appeal, Morningstar's appeal should be denied.

II. The trial court properly determined that Morningstar's claimed damages were too speculative and conjectural to be recovered as a matter of law.

Morningstar's principal challenge to the trial court's order excluding damages is that the Judge Hall "converted" a motion *in limine* into a motion for summary judgment, and entered

judgment "without allowing Morningstar to put on its case." Appellant's Brief at 15. Morningstar is mistaken on this point, and its challenge to the trial court's order excluding damages is, therefore, misdirected. Morningstar's argument conflates two distinct motions and two distinct rulings of the court.

In September 2014, York County filed a motion to exclude "certain damages alleged to have been sustained [by Morningstar] on the grounds that *such claimed damages are not recoverable as a matter of law.*" See Motion to Exclude Damages, filed Sep. 15, 2014 (italics added).[2] That motion was, for all intents and purposes, a motion for summary judgment. Rule 56(c) S.C. R. Civ. P.[3] The County's motion to exclude damages was not heard for several months, during which the parties concluded discovery, including discovery as to damages. On the eve of trial in January 2015, York County filed a separate motion, seeking *in limine* rulings on several evidentiary issues unrelated to damages. See Motions in Limine, filed Jan. 26, 2015. Both of York County's pending motions were heard at the same time.

On February 3, 2015, the trial court issued a single order, ruling upon York County's long-pending motion to exclude damages as well as its recently-filed motions *in limine*. Feb. 3, 2015 Order at 1 ("This matter comes before me on (1) Motion . . . for an order excluding damages and (2) Motion *in limine* to exclude certain testimony and evidence at the trial of this

[2] While the parties and trial court referred to York County's motion as a "motion to exclude damages," the motion was, in substance, a motion for summary judgment. York County and Morningstar each submitted deposition excerpts, discovery responses and other substantive evidence in support of their respective positions. Each side presented detailed legal arguments to the court. *See* Motion to Exclude Damages, filed Sept. 15, 2014; Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Exclude Damages, filed January 23, 2015. The parties' arguments and the trial court's February 3, 2015 order all addressed a single issue in dispute – whether Morningstar's claimed damages were recoverable as a matter of law. To the extent the parties and trial court mischaracterized the motion as one to "exclude damages" rather than one for "summary judgment," the mischaracterization did not affect the substantial rights of the parties and was, therefore, harmless error. *See* Rule 61 S.C. R. Civ. P. ("The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[3] "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, if any, show that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law."

case."). A review of the trial court's February 3, 2015 order makes clear that the court separately considered and ruled upon the two motions. Section "A" of the trial court's order includes extensive discussion and consideration of Morningstar's evidence of damages including discovery responses, extensive deposition testimony and written reports of Morningstar's own expert witnesses, before finding and concluding that all of Morningstar's claimed damages were "not recoverable as a matter of law." Id. at 2. It is clear from the Order that the trial court relied extensively on the submissions of counsel, exhibits and admissions and sworn statements of witnesses.

Because Morningstar could not establish recoverable damages (an essential element of its claim for breach of contract), the trial court later entered judgment on that claim in favor of the County. See Order Granting Defendant's Renewed Motion for Entry of Judgment, filed Nov. 10, 2015; see also Plaintiff's Response to Defendant's Motion for Entry of Judgment, filed Feb. 11, 2015 ("Morningstar agrees that the court's rulings on York County's motion [to exclude damages] in effect have determined the action as to Morningstar's claims for monetary relief.").

Morningstar's contention that it was "kicked out of court" through a motion *in limine*, is simply incorrect. Morningstar finds itself out of court because it did not present any competent and admissible evidence that it had sustained recoverable damages. Gauld v. O'Shaughnessy Realty Co., 300 S.C. 548, 562-63, 671 S.E.2d 79, 87 (Ct. App. 2008)(affirming summary judgment where plaintiff failed to present "competent, admissible evidence of the existence or amount of damages."). Morningstar has failed to identify any evidence in the record that creates a genuine issue of material fact as to the existence or amount of Morningstar's alleged damages. The trial court's February 3, 2015 order and its November 10, 2015 entry of judgment should therefore both be affirmed.

A. No competent or admissible evidence exists in the record to support any portion of Morningstar's claimed damages.

As the trial court noted in its February 3, 2015 order, Morningstar divided its damage claims into "three basic categories:" (1) "Loss of value of the Tower which [York County] seeks to have demolished;" (2) "Cost of the engineering, marketing, architectural and development spent to date;" and (3) "Lost income from reservation holders at the Tower over the next 5 years." Feb. 3, 2015 Order at 2. In its February 3, 2015 order, the trial court considered the recoverability of each of those "categories" of damages, and the admissibility of the evidence Morningstar had produced in support of its claims. After reviewing extensive testimony and evidence, the trial court found and concluded that none of Morningstar's claimed damages was recoverable as a matter of law.

1. Loss of value of tower

Morningstar's claim for "loss of value of the Tower" was based upon the alleged value of the "partially constructed building in place that would not have to be paid for if the Tower were completed." Feb. 3, 2015 Order at 2; see also Joyner Dep.Tr. at 498-504. According to Morningstar's designated corporate representative,[4] Morningstar incurred damages because the cost to complete construction of the Tower was "likely" higher in 2015 than it would have been had Morningstar been able to complete construction during the 2009-2010 timeframe. However, as the trial court recognized, that claim for damages suffered from two fatal defects.

First, Morningstar admitted that it had not determined "with any degree of certainty" the amount (if any) that its construction costs had actually increased as a result of the County's declaration of default. Feb. 3, 2015 Order at 3 (citing Joyner Dep. Tr . at 511-514). In fact, at his deposition, Joyner admitted there was "no way" Morningstar could accurately determine its

[4] Morningstar designated it president and senior pastor, Rick Joyner, to testify concerning its damages claim, pursuant to Rule 30(b)(6) S.C. R. Civ. P.

"Loss of the Tower" damages. Joyner even proposed that any damages awarded at trial be placed in escrow, until Morningstar could determine the amount that it had actually suffered as a result of the County's alleged breach of contract. See Joyner dep. at 511-512 ("[I]f we win this case . . . I would be absolutely fine to put [any damages awarded for loss of the Tower] in escrow and say, 'okay, let's go in and do the studies.' . . . If we find out it's only going to cost a certain amount, I think it should be taken that the County cost us that money, and we should be able to take that out of the escrow. And I would be glad for the rest to be returned to the County"). Joyner's testimony highlights the inherent uncertainty, and the speculative nature, of Morningstar's claim for damages related to "loss of value of the Tower." As the trial court recognized, Morningstar's claim was based on little more than its self-serving assumption that there "must" have been some indeterminate increase in construction costs between 2010 and 2015.

The second flaw in Morningstar's claim was that its own expert opined "that the cost to renovate and restore has not significantly increased . . . between [the expert's] cost estimates in 2010 and present." Joyner Dep. Tr. at 508-509 (referring to letter of Jefferson C. Woodall, dated Feb. 12, 2014). Thus, Morningstar's position that it "must" have suffered (some) damages for "loss of value" was rendered even more dubious by the testimony of its own experts. Morningstar's claim for "loss of the Tower" damages was, at best, speculative and, at worst, non-existent. Because Morningstar could "not establish any amount of damages resulting from 'loss of value of the Tower,'" the trial court properly excluded that element of damages.

2. Development Costs

While Morningstar claimed damages related to "engineering, marketing, architectural, legal and development [costs] spent to date," its witnesses admitted in depositions that

Morningstar had made no attempt to identify those expenses it allegedly "lost" as a result of York County's alleged breach of the parties' contract. Feb. 3, 2015 Order at 4; Joyner Dep. Tr. at 582-584, 578-580, 591-592; Yarnes Dep. Tr. at 368. Instead, Morningstar simply tallied all of its expenses on the project and claimed the entire amount as damages. But, "[w]ithout evidence of which expenses . . . are required to be incurred again [because of the County's alleged breach] . . . the calculation of damages proximately caused by the alleged breach become a matter of conjecture and speculation." Feb. 3, 2015 Order at 4 (citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) and Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, 162 S.E.2D 705 (1968)). For that reason, the trial court properly held, as a matter of law, that Morningstar's "development cost" damages were too speculative and vague to be recoverable.

3. Lost Income from Reservation Holders

Morningstar based its claim for "lost income" upon a hypothetical projection of income that it claimed it would have earned from the sale of condominium units over a five-year period. However, Morningstar could produce no documentation to support its income projections, could not identify the original source of the information used in those projections, and proposed "no methodology" by which to calculate or verify its projections. Feb. 3, 2015 Order at 5-6. Moreover, Morningstar was unable to produce any "evidence that any person who made a reservation for a unit in the Tower withdrew that reservation because of [any alleged act or omission of the County]." Id. For all of those reasons, the trial court fairly characterized Morningstar's "lost income" claim for damages as "pure speculation." Id. (*citing* Vortex Sports & Entm't., Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444, 450-51(Ct. App. 2008)).

As South Carolina's appellate courts have long recognized,

> To [constitute recoverable damages,] loss of profits must be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative .... The law does not require absolute certainty of data upon which lost profits are to be estimated, but [it does require] such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.

South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 122-23, 113 S.E.2d 329, 336 (1960)(emphasis added). Morningstar's claim for "lost income" was simply too vague and uncertain to meet this standard, and was, therefore, properly excluded. See Gauld v. O'Shaughnessy Realty Co., 300 S.C. 548, 561, 671 S.E.2d 79, 86 (Ct. App. 2008)(affirming summary judgment where plaintiff presented only "bald allegations" of damages). Morningstar's vice president, David Yarnes, admitted at deposition, that Morningstar's "lost income" damage calculation was based upon figures pulled from an undated and unverified preliminary operating statement that Morningstar had prepared for potential lenders and investors. Feb. 3, 2015 Order at 5; Yarnes Dep. Tr. at 370, 601. Morningstar could not identify who compiled the information contained in that operating statement, could not verify its accuracy, and could not state with any certainty when the statement was prepared. Feb. 3, 2015 Order at 5; Yarnes Dep. Tr. at 371, 602. "Morningstar . . . simply proposed a number . . . which it contend[ed] without any objectively measurable support, constitutes an amount of lost income over the next 5 years on a project that was not complete and had no funding in place." Order at 5. Morningstar was also unable to produce evidence that even one reservation holder cancelled his or her reservation because the County declared Morningstar in default of the development agreement. Id. at 6. Morningstar's claim for lost profits was a bald allegation of damages, was far too speculative to be pursued at trial, and was properly excluded by the trial court.

B. Because Morningstar was unable to prove any of its alleged damages with the requisite degree of certainty, the trial court properly dismissed Morningstar's claim for breach of contract and entered judgment in favor of York County.

Our courts have routinely held that complete failure of proof concerning an essential element of a claim, such as damages, renders all other facts immaterial. Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 671, S.E.2d 79, 85 (Ct. App. 2008)(citing Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537(1991)). Specific to damages, bald allegations of diminution in property values are not sufficient to create a genuine issue of material fact and under such circumstances, summary judgment is warranted. Gauld, 671 S.E.2d at 86. The trial court correctly found that the damages claimed by Morningstar are unsupported by competent evidence and are not recoverable by Morningstar as a matter of law, and properly granted judgment to York County accordingly. "Proof of damages is an essential element of a breach of contract claim and the inability to prove that elements warrants dismissal of the claim." November 10, 2015 Order at 5 (citing Branche Builders, Inc. v. Coggins, 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009) and Collins Entertainment, Inc. v. White, 363 S.C. 546, 559-60, 611 S.E.2d 262, 268-69 (Ct. App. 2005)). As Morningstar acknowledged in its brief and at least twice in arguments before the trial court, when the trial court determined in February 2015 that all of Morningstar's alleged damages were not recoverable as a matter of law, the court "effectively entered judgment against Morningstar" at that time. Appellant's Initial Brief at 15; Transcript of Oct. 27, 2015 hearing at 14-15; Plaintiff's Response to Defendant's Motion for Entry of Judgment, filed Feb. 11, 2015. The court's order of November 10, 2015 "simply carried the [order excluding damages] to its logical next step by granting judgment to the County on Morningstar's breach of contract claim." Appellant's Initial Brief at 15. Because Morningstar

could not establish the existence of any recoverable damages, the trial court properly dismissed Morningstar's breach of contract claim and entered judgment in favor of York County. See Rule 58(a)(2) S.C. R. Civ. P. Both the trial court's order excluding damages and its entry of judgment on Morningstar's breach of contract claim should be affirmed.

C. The Order Excluding Damages should be affirmed because Morningstar has failed to demonstrate any error in the trial court's substantive rulings.

Morningstar's challenge to the trial court's order excluding damages is procedural, rather than substantive. Morningstar does not argue that the trial court's findings were erroneous, but merely complains that its breach of contract claim was dismissed before it was allowed "to put on its case." Appellant's Brief at 15. However, even if Morningstar could establish some procedural defect in the trial court's disposition of its case, those efforts would only postpone the end result – dismissal of Morningstar's breach of contract cause of action. Morningstar's evidence of damages has been excluded by the trial court, and Morningstar has not properly challenged the substance of any of the trial court's rulings on appeal. Those unchallenged rulings are now the law of the case. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004).

A trial court's decision to allow or exclude evidence rests within the "sound discretion" of that court, and the trial court's decision "will not be disturbed on appeal absent an abuse of discretion." Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005)(internal citations omitted). An appellant seeking reversal of the trial court's decision to exclude evidence "must prove both the error of the ruling and the resulting prejudice." To establish error, the appellant must show that the trial court's ruling was based upon an "error of

law or a factual conclusion that is without evidentiary support." 5 Id. (citing Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991)). Here, Morningstar has not offered any proof or argument that the trial court's ruling was erroneous.

Morningstar's substantive criticism of the trial court's order to exclude damages occupies but a single sentence of Appellant's brief – "The [trial court] misapplied South Carolina law, which allows a plaintiff to recover all damages that 'either flow as a natural consequence of the breach or [were] reasonably within the parties' contemplation at the time of contract.'" See Appellant's Brief at 17 (quoting Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595, 493S.E.2d 875, 880 (Ct. App. 1997)). Nowhere in its brief does Morningstar discuss how the trial court presumably misapplied South Carolina law, and nowhere in its brief does Morningstar direct this court's attention to any admissible evidence of damages that the trial court supposedly overlooked, misconstrued or excluded. In short, Morningstar has failed to demonstrate any "error of the [trial court's] ruling," and it has, therefore, failed to carry its burden on appeal. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

It is telling that Morningstar attacks the trial court's February 3, 2015 order on procedural,[6] rather than substantive, grounds. This is no mistake, but an attempt to avoid the unavoidable: Morningstar could not meet its *prima facie* burden of proof as to the "existence, causation or amount" of recoverable damages in the circuit court and it cannot do so on appeal. The trial court recognized the failure of Morningstar's proof, and refused to let Morningstar rely

[5] "Prejudice" is shown when there is a "reasonable probability" that the outcome of the case turned on "the challenged evidence or lack thereof." Fields v. Reg'l. Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). Because the trial court's order excluding damages resulted in dismissal of Morningstar's claim, Morningstar could likely establish prejudice.

[6] Appellant's Initial Brief at 15-16.

upon evidence that was entirely "conjecture and speculation." See Feb. 3, 2015 Order at 3; see also Respondent's Argument, Section II, *supra*.

Even had the trial court not excluded Morningstar's evidence of damages prior to trial, it does not follow that Morningstar would have been entitled to present its speculative evidence of damages to a jury "subject to cross examination." See Appellant's Initial Brief at 18. After, all, a trial is not an evidentiary free-for-all, where all claims are submitted to a jury and all evidence, no matter how speculative or tenuous, is allowed in. Trial judges are cloaked with authority to weigh the legal sufficiency of claims and evidence, and are charged with the duty to exclude evidence that is legally incompetent, not probative of a party's claim, or otherwise inadmissible. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005)(internal citations omitted)("the admission or exclusion of evidence is within the sound discretion of the trial court."). That is exactly what the trial court did in this case. York County moved to exclude certain damages that Morningstar claimed – either because the claimed damages had not been suffered, because they were conjectural and speculative, or because they were refuted by Morningstar's own witnesses and documents. Motion to Exclude Damages, filed Sept. 15, 2014. The trial court considered the legal sufficiency of Morningstar's claimed damages, reviewed the evidence offered by Morningstar in support of its claims, and concluded that none of Morningstar's claimed damages were recoverable as a matter of South Carolina law. See Feb. 3, 2015 Order (Sect. A). On appeal, Morningstar fails to address, much less explain, any perceived fallacy in the trial court's reasoning.

The trial court's order excluding Morningstar's evidence of damages should be affirmed, as should its entry of judgment in favor of York County. Morningstar has failed to show that the trial court abused its discretion, and has failed to show that the trial court's substantive rulings

were, in any way, erroneous. It is not enough simply to say that the trial court "misapplied South Carolina law," yet that is the extent of Morningstar's argument on appeal. The trial court's order on damages and its entry of judgment as to Morningstar's breach of contract claim must, therefore, be affirmed.

III. **As additional sustaining grounds to affirm the trial court's order of judgment, no genuine issue of material fact exists as to the question of notice of site plan approval, and summary judgment as to the breach of contract and declaratory judgment claims should have been granted in favor of York County.**

A respondent may raise any additional grounds to affirm the lower court's ruling, that were not the primary basis for the lower court's decision. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 722-23 (2000). The appellate court may, in its discretion, review any additional reasons asserted by the respondent and, "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. In this case, judgment against Morningstar should be sustained on appeal because the evidence in the record establishes that Morningstar had notice of site plan approval, failed to comply with Section IV.C.2. and is in default under the Agreement. The time to provide the information required by Section IV.C.2. began to run upon site plan approval by York County. Morningstar's agent, Power, had notice of site plan approval on August 24, 2009, and when Morningstar could not provide the required evidence of financial viability within 180 days thereafter, the County properly declared default.

Notice to an agent is notice to the principal. See, Crystal Ice Co. of Cola. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979) (holding that notice of a prior lien by an attorney was imputable to his real estate purchaser client, even where the attorney acted fraudulently). In this case, Morningstar hired Power as its agent with actual authority to obtain

approval by York County of the Tower project site plan required under the Development Agreement. Matters relating to the site plan approval were specifically within the scope of Power's duties. As noted by Morningstar's construction manager, Pat Selvey, Power prepared and submitted a preliminary site plan consisting of detailed engineering and architectural drawings, which generated a series of noted deficiencies and responses from County planning staff to Power. Affidavit of Pat Selvey. at para. 6. Power communicated directly with Pat Selvey throughout this process. Affidavit of David Yarnes, at para. 12. Power's primary point of contact with Morningstar was Selvey, and Selvey reported directly to Morningstar vice president Dave Yarnes. Yarnes Aff. at para. 12. Moreover, Morningstar never limited the scope of Power's agency or authority in dealing with the County on site plan matters. July 16, 2014 Hearing Tr. at 39, lines 1-11. Consequently, Power acted with Morningstar's actual authority in matters involving the approval of the commercial site plan, and was Morningstar's agent for such purposes.

The primary contact at Power Engineering throughout the site plan approval process was Gerald Lee. Lee shepherded the site plan through the approval process on Morningstar's behalf. Lee Dep. Tr., at pp. 30-32, 83-84. Lee was Power's project manager for most of the Tower project, and testified that he regularly communicated with Selvey and Yarnes at Morningstar throughout the site plan approval process, beginning in January of 2009, and provided Morningstar with regular status reports. Lee Dep. Tr.., at p. 14-16; Yarnes Dep. Tr. at 420-427, Ex. 23, 24. Mr. Lee testified about his final day on the project, August 24, 2009, which was also his final day with Power. With only a few details on the site plan left to be addressed, he personally travelled from Columbia to Rock Hill to meet with Billy Payne, in the York County Planning Department. Mr. Lee testified that he remembered meeting with Mr. Payne, "signing –

putting the notes on the drawings he wanted, and that was my understanding that our plans were then approved." Lee Dep. Tr., at 68. Lee received actual notice that the site plan had ultimately been approved as of August 24, 2009, and in fact understood and believed that the plans had been approved. Lee Dep. Tr., at p. 56-59, 68-69; 90-93, 97. He was then let go by Power in connection with a downsizing of Power's offices. Lee Dep. Tr. at 60, 68.

After Gerald Lee's departure, Derrick Boyte took over on the Morningstar project for Power. Since Lee had obtained approval of the site plan, Boyte's primary responsibility on the project was collecting payment for the work Power had done in obtaining approval. Deposition of Derrick Boyte at pp. 26-28; Selvey Dep Tr. at 78.

As a matter of law, notice to Power as Morningstar's agent while acting within the scope of its actual authority is binding as notice to Morningstar. Hill v. Carolina Power & Light Co., 204 S. C. 83, 28 S. E. 2d 545 (1944); Wimberly v. Sovereign Camp, W.O.W., 190 S. C. 158, 2 S. E. 2d 532 (1939); 23 S.C. Jur. Agency § 95. As noted above, Pat Selvey testified that he had communicated with Boyte about approval of the site plan, but since he had not received a stamped set of plans, he (erroneously) felt the 180-day clock had not started. Selvey Dep. Tr. at 64. The sum of this evidence is the inescapable conclusion that both Power and Selvey were aware that the site plan had been approved.

A principal is deemed to have knowledge of all material facts its agent obtains while acting within the scope of its agency. Crystal Ice Co. of Cola., 257 S.E.2d 496; see also American Freehold Land Mortgage Co. v. Felder, 44 S.C. 478, 22 S.E. 598 (1895); Hill, *supra*). This rule is based on the agent's duty to communicate all material information to the principal and the presumption that the agent has done so. 23 S.C. Jur. Agency § 94. So too, a third party is not required to look behind the relationship between a principal and its disclosed agent to

determine if communications to the agent are passed on to the principal. Because Morningstar's agent had actual knowledge of site plan approval by August 24, 2009, such knowledge is imputed to Morningstar. *See* Dorman v. Campbell, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App. 1998)(home purchasers charged with notice of information contained in letter sent to their attorney; fact that home purchasers did not actually receive letter was "irrelevant, for knowledge of the information in [the] letter was imputed [to purchasers] through their agent").

As Judge Kimball noted, all of Morningstar's claims flow from the assertion that the County failed to provide sufficient notice of site plan approval. (July 16, 2014 Order at 5). Even though Power had previously told Selvey that the site plan had been approved, Selvey erroneously believed that the 180 days did not begin to run until he had received a stamped set of plans from the County. Selvey Aff. at para. 6, 7, 9, 10. Morningstar has understandably not embraced Selvey's interpretation, but instead argues that the time had not commenced because York County failed to provide notice that the site plan had been approved by certified or registered mail "as provided in the Agreement." Complaint ¶27(a) (emphasis added) Yarnes Aff. at para. 22-23, 25 and Ex. B thereto.

The only way that Morningstar can argue lack of notice is by throwing its own engineers under the proverbial bus, and claim that the County was required to give notice of approval to Morningstar's president Rick Joyner by certified or registered mail. Even then, Morningstar must disavow Pat Selvey's testimony that he knew that the engineer's work was done and the site plan was approved. Selvey Dep Tr. at 30, 64, 80. Judge Kimball expressly rejected this argument, and noted that "progress on the project was monitored and communicated by other means, such as emails and direct interaction between Power and the County and Power and Morningstar, throughout the approval process." Finally, the court found that, even if a term of reasonable

notice were implied into the Agreement, notice of approval was in fact given by the County to Power. Inexplicably, however, the court reserved granting judgment until a "full presentation of the facts pertaining to the reasonableness of the notice." July 16, 2014 Order at 6; September 25, 2014 Order at 2.

The Development Agreement is silent as to any requirement that the County provide notice of site plan approval, and certainly nothing in the Agreement prescribed any mandatory procedure by which the County was required to give Morningstar formal notice of site plan approval, much less notice by certified or registered mail as described in Section XI, §H of the Agreement. Whether Selvey, Yarnes or Joyner drew the correct conclusions as to Morningstar's rights and obligations under the Agreement from the information provided to them is irrelevant, and any communication problems they may have had with their engineers does not modify the terms of Section IV.C.2. Under the circumstances, notice of site plan approval on August 24, 2009, was actual, imputable to the principal, and inherently reasonable.

The cardinal rule of contract construction is to ascertain and give effect to the intention of the parties. United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992)(citing Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990)). Courts must enforce a contract according to its terms regardless of the parties' failure to guard their rights carefully. S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)(quoting Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct.App.1997)). Where a contract's language is clear and capable of legal construction, "the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." M & T Enters., 379 S.C. at 655, 667 S.E.2d at 13. Courts have no "authority to alter an unambiguous contract by

construction or to make new contracts for the parties." Id. (citing C.A.N. Enterprise, Inc. v. South Carolina Health and Human Svcs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)). The language of the Agreement unambiguously required timely action by Morningstar once its site plan was approved, and such approval was obtained by its hired engineers. Under these circumstances, the circuit court should have granted summary judgment, and the record provides ample basis for affirming on these additional sustaining grounds.

IV. Morningstar has abandoned its appeal as to the Circuit Court's exclusion of *in limine* evidence of mediation discussions and statements made by county council members, and whether the Court properly excluded such evidence.

In its Statement of Issues on Appeal, Morningstar contends that the trial court erred by "excluding evidence of mediation discussions and statements made by city (sic) council members as evidence of the County's breach of contract." Appellant's Brief at 1. Morningstar has abandoned this issue on appeal, as it makes no argument or further mention of the issue in support of its assertion of error. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (*citing*, Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct.App.1991), and noting that "[m]ere allegations of error are not sufficient to demonstrate an abuse of discretion) and State ex rel. McLeod v. Wilson, 279 S.C. 562, 310 S.E.2d 818 (Ct.App.1983), finding that the burden of showing abuse of discretion is on the party challenging the trial court's ruling.)

To the extent that the Court deems such issue preserved, York County relies upon the long-standing rule that "evidence of disclosures made by either party to the other, directly or indirectly, in negotiations for a compromise" is inadmissible for purposes of establishing liability or damages. Woodward v. Southern Ry. Co., 88 S.C. 453, 70 S.E. 1060, 1061 (1911). Rule 408 S.C. R. Evid.; see also, Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir.

1988)(the purpose of Rule 408 "is to encourage the parties to be able to meet and attempt to settle claims outside of court . . . through "frank and open discussion of the strengths and weaknesses of each side's case." Polk v. BP Amoco Chem. Co., 586 F. Supp. 2d 619, 622 (D.S.C. 2008)).

S.C. ADR Rules, Rule 8 unequivocally states that "[c]ommunications during a mediation settlement conference shall be confidential," and that parties and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding. S.C. ADR Rules, Rule 8. Such evidence was properly excluded by the trial court's *in limine* ruling.

As for statements made by members of York County Council, this Court admonished a party in Bear Enterprises v. County of Greenville, for "interrogating" individual members of the Greenville County Council in an attempt to demonstrate that the County had arbitrarily denied the landowner's rezoning request. 319 S.C. 137, 139 n.1, 459 S.E.2d 883, 885 n.1 (Ct. App. 1995). No authority exists for allowing someone challenging action by a county council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise. If individuals are not satisfied with decisions made by members of a municipal government within the limits of the law, their remedy is at the polls, not the courts. Similarly, the Supreme Court cited Bear Enterprises with approval in finding that subpoenas for county council members were properly quashed by the trial court in Greenville Co. v. Kenwood Enters., 353 S.C. 157, 175 577 S.E.2d 428 (2003), overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). As Justice Waller noted, "[w]hat County Council members' motivations were for passing the Ordinance simply is not a

proper inquiry." Id. Likewise, what the personal motivations Mr. Motz or any other member of County Council may have had in voting to hold Morningstar in default is not a proper inquiry in this case, and all such evidence was properly excluded.

CONCLUSION

Judge Kimball properly limited issues of fact in this case, if any exist, as set forth in the July 14, 2014 Order. Judge Hall correctly excluded all evidence of Morningstar's damages and properly entered judgment in favor of York County. Morningstar has failed to preserve its issues on appeal, has failed to assert any substantive error on the part of the trial court, and has abandoned any issue arising from the court's in limine ruling. Additional grounds exist in the record to sustain the result of Judge Hall's orders, and accordingly, the trial court's orders should be affirmed.

April 15, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. Daniel D. Hall, Circuit Court Judge

Case No.: 2013-CP-46-00246

Morningstar Fellowship Church, Appellant- Respondent,

v.

York County, South Carolina Respondent- Appellant.

PROOF OF SERVICE

The undersigned certifies that she has served this Respondent/Appellant's Initial Respondent's Brief on the Appellant-Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 15th, 2016, addressed to its attorney of record, Richard B. Fennell, James, McElroy & Diehl, PA, 600 South College Street, Charlotte, North Carolina 28202.

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