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. 2015-CP-46-002460

Morningstar Fellowship Church, Appellant/Respondent

v.

York County, South Carolina, Respondent/Appellant

APPELLANT/RESPONDENT'S BRIEF

July 6, 2016

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STATEMENT OF THE ISSUES ON APPEAL

Appellant/Respondent Morningstar Fellowship Church ("Morningstar") respectfully appeals the Order for Partial Summary Judgment of the Honorable S. Jackson Kimball, entered on July 17, 2014; the February 3, 2015 Order on Defendant York County's Motion to Exclude Damages and Motion In Limine; and the November 10, 2015 Order Granting Defendant's Renewed Motion for Entry of Judgment of the Honorable Daniel D. Hall. Morningstar raises the following issues on appeal:

I. Did the trial court err in its summary judgment order by limiting the presentation of Morningstar's breach of contract claim at trial?

II. Did the trial court err in excluding evidence of Morningstar's damages and entering judgment on Morningstar's breach of contract claim?

III. Did the trial court err in excluding evidence of mediation discussions and statements made by city council members as evidence of the County's breach of contract?

STATEMENT OF THE CASE

Morningstar filed this action on January 24, 2013, asserting claims for breach of contract, declaratory judgment, and breach of the duty of good faith, and seeking damages in an amount exceeding $12 million. The case centers around a development agreement entered into between Morningstar and York County (the "Development Agreement"). (R. pp. 1081-1129). The Development Agreement concerns the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower (the "Tower"), a 21-story condominium planned to have been part of PTL Ministries' development in the Regent Park area of Fort Mill, South Carolina. Morningstar purchased the property in 2004. The Complaint asserts that York County breached the Development Agreement and engaged in conduct which made it impossible

for Morningstar to complete the Tower, and that Morningstar is entitled to damages as a result.

York County answered the Complaint on March 23, 2013, denying all liability. It asserted counterclaims for breach of contract, declaratory judgment, and nuisance. It seeks an order holding that it is entitled to demolish the Tower, with all costs borne by Morningstar.

York County filed a "Motion for Summary Judgment or Partial Summary Judgment" on April 29, 2014. Judge S. Jackson Kimball entered an "Order for Partial Summary Judgment" on July 16, 2014 (the "Summary Judgment Order"). The Summary Judgment Order dismissed Morningstar's claim for breach of duty of good faith and limited Morningstar's claim to the single issue of whether Morningstar received adequate notice of site plan approval. York County moved for reconsideration of that order, and its motion was denied by order dated September 29, 2014.

York County also filed a "Motion to Exclude Damages" on September 12, 2014. This motion was combined for hearing with a "Motion in Limine" which was filed on January 23, 2015. These motions were heard at a pretrial conference in front of the Honorable Daniel Hall on January 26, 2015. Judge Hall granted the motions in large part by order entered on February 3, 2015. This order (the "Motion in Limine Order") precluded Morningstar from putting on any evidence of damage related to its breach of contract claims. Morningstar filed and served a notice of appeal on February 4, 2015. This Court dismissed the appeal by order dated April 16, 2015.

York County filed a Motion for Entry of Judgment on February 4, 2015 followed by a renewed motion on October 20, 2015. It was heard by Judge Hall on October 27,

2015. Judge Hall reaffirmed his earlier order and entered judgment on November 10, 2015 against Morningstar on its claim for breach of contract (the "Final Order"). Morningstar timely appealed the Final Order, the Summary Judgment Order and the Motion in Limine Order by serving its Notice of Appeal on November 12, 2015. York County has cross-appealed the trial court's Summary Judgment Order.

STATEMENT OF FACTS

Morningstar purchased the old PTL property in 2004. That property had multiple improvements and structures located on it, including a twenty-one (21) story building (the Tower). Morningstar's original intention was to tear the Tower down. The Tower was incomplete and had stood dormant for many years. Morningstar changed course after an investigation revealed the Tower to be structurally sound. Morningstar began exploring the market for multifamily, retirement-style housing. The market seemed very strong and the idea fit a niche in the overall concept for the Morningstar property. It began to take the steps necessary to complete and redevelop the Tower into such a facility. (R. p.1076, ¶¶ 4-5).

A detailed Development Agreement relating to the Tower was negotiated with the County over many months and executed in January, 2008. The Development Agreement envisioned a five (5) year time horizon, but also contained the following language:

> The Parties acknowledge that the market conditions may, and will likely, affect the pace and character of the Property. Therefore, the Parties agree that they shall take into account...any change in market conditions, demographics or similar matters when deliberating disputes or negotiating for future modifications to this Agreement made pursuant to this paragraph. Section X.C.

Both sides, then, anticipated delays and built their understanding into the Development Agreement. The project was complicated because of the length of time during which the Tower had simply stood there without any construction activity. Moving it forward was a mutually beneficial goal. (R. pp. 1076-1077, ¶¶ 7-10). The parties attempted to deal with the mechanics of communicating with each other in the Development Agreement. Section XI.H of the Development Agreement provides that: "All notices, certificates, or other communications hereunder shall be sufficiently given and shall be deemed given when mailed by certified or registered mail, postage prepaid, addressed as follows," specifying that notice to Morningstar should be addressed to Rick Joyner, with a copy to its attorney, James Sheedy.

Morningstar made progress on the project, and delivered a preliminary site plan for the County's consideration in December, 2008. Since the execution of the Development Agreement, the economy had begun to teeter, and development nationwide came to a halt. Morningstar continued to try to get this site plan into final form throughout 2009. There appeared to be no problems between the parties. Morningstar continued to wait for formal notification that the site plan was approved, but simply assumed that the County was in no rush to begin actual construction. (R. pp. 1077-1078, ¶¶ 15-16). Morningstar continued to expend significant funds trying to move the project forward. (R. p. 1078, ¶ 17).

Things changed in early 2010. Pat Selvey from Morningstar sent a progress update to the County on January 12, 2010. (R. p. 1191, ¶ 9). This sparked an internal email debate about the Tower among County representatives, and about Morningstar, in general. A portion of an email sent from Jim Baker to the entire council reads as follows:

> "I have no idea whether there is a realistic probability that Morningstar will complete this project. However, more than anything else, staff and I believe the Council should take a strong stance and give notice of default to Morningstar if they cannot provide the financial assurances that were promised in a Development Agreement they signed on April 28, 2008. Again, the initial stages of this process will not necessarily be public and will take substantial time. However, I wanted to give everyone some advance notice about this upcoming deadline because this project has been so prominent in the public's eye."

(R. p.1137).

The response from Buddy Motz reads as follows:

> "Thanks Jim. I see them as being made in the same mold as the old PTL, and just as scheming. They are only out to fleece the investors of the units and bilk them for every dime they can get. The County has delayed this for too long and I see no reason for us to allow them to continue further. It would not be accepted for other businesses and it should not be allowed for them."

(R. p. 1136).

The County had begun contending a week earlier, for the first time, that site plan approval had been granted in August, 2009. (R. p. 1078, ¶ 19). This was critically important, because the Development Agreement contains the following language:

> Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contract 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.

The County demanded the bonds or alternative financial assurances be presented by the end of February 2010. The parties to the email exchange knew their position was going to result in litigation, and appear to have recognized that what they were asking for could not be delivered on such short notice. *See e.g.* (R. pp. 1140-1141). A commercial site plan is a set of drawings that discloses information relating to infrastructure, landscaping, traffic flow, parking, and the location of the anticipated improvements. (R. p. 1077, ¶ 14). It is a necessary first step in getting accurate pricing for any development. (R. pp. 1190-1191, ¶¶ 5-8). Morningstar had not received any communication from the County about the site plan for many months. (R. p. 1078, ¶¶ 16-18). The Development Agreement contemplates the negotiation and execution of a "Non-Reimbursable Extension Agreement" connected to utilities on the site prior to site plan approval. This had never even been discussed. (R. p. 1078, ¶¶ 16-18). Morningstar was not in a position, then, to get definitive bid information. Without accurate pricing, it is impossible to supply the necessary information to purchase performance bonds. (R. p. 1191, ¶¶ 8-10). There was simply no way to scramble and comply with the County's demands. (R. pp. 1078-1079, ¶ 22).

Morningstar's representatives met with County representatives on February 4, 2010. They attempted to explain the predicament Morningstar was being placed in, but were met with a response consistent with the Motz email. They were accused of not having the ability to complete the project, and of taking people's money improperly. (R. pp. 1191-1192, ¶ 11; R. p. 1079, ¶¶ 23-24). David Yarnes sent a letter on February 17, 2010, setting out the problems with the notice issue, but there was no changing the County's position. (R. p. 1079, ¶¶ 25-26).

A formal notice of default was sent on March 5, 2010 ("Default Notice"). The news was picked up in the media. The results were dramatic, and devastating. Reservations to purchase units in the Tower were cancelled, and the project came to a stop. Morningstar continued, and still continues, to try to move the Tower project forward, but has not been able to do so. It has attempted to provide all information the County has requested, but it has been apparent that demolition is the only acceptable option. This litigation is the result of that reality. (R. p. 1080, ¶ 28).

Morningstar necessarily incurred approximately $819,460.89 in engineering, marketing, legal, architectural and development expenses by the time the County issued the Default Notice, expenses for which it seeks recovery in this action. (R. p. 669, line 10-p. 705, line 11). Morningstar also forecasted evidence of $7,187,421.00 in lost profits. (R. p. 722, line 10-p 725, line 15; R. p. 727, line 7-p. 731, line 21; R. p. 739, line 7-p. 740, line 4; R. p. 742, line 9-p. 759, line 14; R. p. 760, line 12-p. 770, line 14; R. p. 806, line 4-p. 827, line 23). Finally, Morningstar forecasted evidence that the value in place at the Tower was $11,887,719.00. (R. p. 650, line 3-p. 668, line 17).

ARGUMENT

I. THE TRIAL COURT ERRED BY LIMITING THE PRESENTATION OF MORNINGSTAR'S BREACH OF CONTRACT CLAIM AT TRIAL.

Appellate courts review "questions of law de novo." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). Similarly, review of an order granting summary judgment is de novo, as appellate courts apply the same standard governing 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." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616

S.E.2d 722, 729 (Ct. App. 2005). Appellate courts must take "all ambiguities, conclusions, and inferences . . . in a light most favorable to the nonmoving party below." Id. The nonmoving party is only required to "submit a mere scintilla of evidence to withstand a summary judgment motion . . . ." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Although the Summary Judgment Order purports to deny York County's motion for summary judgment on Morningstar's breach of contract claim, it actually dramatically and erroneously limits the contract claims Morningstar is permitted to bring to trial. Morningstar forecasted evidence that York County (1) failed to provide timely notice of the purported approval of the site plan for the project, (2) failed to deliver the notice in the fashion dictated by the Development Agreement, (3) failed to provide a required utilities extension agreement, (4) demanded financial assurances without providing Morningstar the necessary time and information necessary to obtain those assurances, and (5) publicly declared Morningstar in default prior to the one hundred and eighty (180) days required by the Development Agreement. In spite of these facts, the Summary Judgment Order limited the case for trial to "the facts pertaining to the reasonableness of the notice of approval of the site plan." (R. p. 9). This was erroneous, and should be reversed.

The Development Agreement contains specific language governing how notices to both parties are to be provided; with respect to Morningstar, Section XI. H states:

> H. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when mailed by certified or registered mail, postage prepaid, addressed as follows:
>
> To Developer:

Rick Joyner, President
Morningstar Fellowship Church
375 Star Light Drive
Fort Mill, SC 29715

However, the trial court incorrectly concluded that the Development Agreement "does not require that Morningstar receive formal notice of site plan approval as specified in Article XI,. § H. . . . ." (R. p. 8). The trial court interpreted Section XI.H as providing that notice by certified mail to the specified address is sufficient, but not necessary, as "the language does not exclude the giving and receiving of notice by other means." (R. p. 9). The trial court went on to determine that Section IV.C.2 of the Development Agreement does not actually contain a notice requirement, but rather "says only that the 180 days for compliance starts with approval of the site plan . . . ." (R. p. 9). Instead of applying the notice provision in Section XI.H to Section IV.C.2, the trial court merely concluded that "some standard of reasonable notice should be implied as part of this provision . . . ." Id.

The goal of contract interpretation is to determine "the parties' intention." Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). Courts must also consider "the situation of the parties, as well as their purposes, at the time the contract was entered into" when determining the parties' intention. Id. In addition, in South Carolina every contract contains an implied covenant of good faith and fair dealing. United States ex rel. Williams Elec. Co. v. Metric Constructors, 325 S.C. 129, 133, 480 S.E.2d 447, 448 (1997). The implied covenant of good faith and fair dealing imposes an obligation "that neither party will do anything which injures the right of the other to receive the benefits of the agreement." Bicycle

Transit Authority, Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (N.C. 1985) (internal quotations and citation omitted); accord Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) ("[T]here is an implied covenant of good faith and fair dealing in every insurance contract 'that neither party will do anything to impair the other's rights to receive benefits under the contract.'").

It is clear that both Morningstar and the County understood, when executing the Development Agreement, that site plan approval would be a watershed moment for the project, as it triggered Morningstar's 180-day period to obtain the required financing. Notice of that site plan approval was thus of obvious, paramount importance. Accordingly, it is not necessary to include a specific notice requirement in the language of each paragraph. It is implicit in the overarching purpose of the Development Agreement. See (R. p. 540, lines 11-16). To permit the County to approve the site plan and begin counting down 180 days, without requiring the County notify Morningstar, would clearly injure Morningstar's ability and right to receive the benefits of the Development Agreement and develop the Tower. Indeed, even in the Summary Judgment Order the trial court recognized that "[i]t would make no sense to suppose that the County could secretly approve the site plan, then make no communication of such approval to Morningstar, or its responsible agent, and wait for the 180 days to elapse to declare a default." (R. p. 9).

For this reason, Morningstar provided a specific address and a person to whom any notices should be directed, in order to ensure that Morningstar would be aware of all important dates and milestones under the Development Agreement. Clarity on this point was important to Morningstar, given its size and the number of people working on the

Tower project. As the County is clearly required to provide Morningstar with notice of the site plan approval, the only notice that makes sense and comports with the parties' intentions is notice of approval sent pursuant to the agreed-upon notice provision in Section XI.H. The gravity of this issue required clarity, and the language of the Development Agreement provides for it. South Carolina law implies a covenant of good faith and fair dealing to avoid precisely this result, and to prevent one party from deliberately hindering the other party's ability to receive the benefits of their contract. The trial court erred in holding that the County was not required to provide formal notice of site plan approval pursuant to Section XI.H, and the Summary Judgment Order should be reversed.

As the trial court observed, "[i]t is undisputed that . . . no formal 'notice' of the approval was sent to Joyner per the provision in the Agreement quoted above." (R. p. 6). The Record shows plainly the problems with ignoring the formal notice provision. The Court and the County relied heavily on an assumption that Power Engineering had been adequately informed of site plan approval. Morningstar's primary contact with Power Engineering was Gerald Lee. He testified in his deposition that he left Power Engineering in August and did not recall ever receiving a letter notifying him of site plan approval. (R. p. 530, lines 9-10; R. p. 872, line 24-p. 873, line 2). The County in fact acknowledged that Power Engineering "was in a state of turmoil in 2009," (R. p. 530, lines 6-10) – all the more reason for Morningstar to expect that notice of site plan approval would be formally provided to Rick Joyner pursuant to Section XI.H.

Nonetheless, the trial court found that since Power Engineering was designated as project engineer, it "would necessarily be the first to have knowledge of site plan

approval." (R. p. 9). Both Mr. Lee and Derrick Boyte testified that they thought Power Engineering had completed the tasks necessary for site plan approval. The County's assertion that it communicated that approval to Power Engineering in a fashion the parties were expecting doesn't hold up. Gerald Lee and Jack Boyte of Power Engineering were both deposed, and had trouble remembering much of substance. The primary document relied on by the county is entitled "Notice of Approval," but deals with storm water related issues. Mr. Lee claims to have actually left Power Engineering prior to August 18, 2009, and his timesheet entries stop after July 7, 2009. (R. p. 867, line 1-p. 871, line 1; R. p. 881, lines 9-16). Mr. Lee believes that Power Engineering had done everything it was required to do, but remembered expecting a formal notice of acceptance of the site plan from York County that never came:

Q. I show Exhibit 14. Can you identify this document?

A. It's a letter from Billy Payne to me.

Q. Saying what?

A. And it's saying --- basically, saying it's been approved by stormwater.

Q. And that's all you were waiting for at that point?

A. No, this is just stormwater approval.

Q. What else needed to be approved by York County as of this date?

A. I would imagine York County Planning would issue an approval, if everything --- if everybody --- if all the departments had signed off on it.

Q. And so the documents that we saw previously telling Power engineering that everything they've asked for had been accomplished ---

A. Right.

Q. Would be enough

Mr. Fennell: Objection.

By Mr. Ballou

Q. --- in your opinion, is that right?

Mr. Fennell: Objection

A. Typically, you would get something from the County, not the department, when the project is finally approved.

(R. p. 864, line 25-p. 866, line 2).

Derrick Boyte, who took over for Mr. Lee upon his departure, testified similarly:

Q. Okay. Did it appear to you that Morningstar was using the fact that they hadn't received stamped plans as a reason not to pay Power, pay a bill?

A. Well, that was their first response and they --- As I recall, they did pay, you know once we had --- because we did have --- I believe we would've received a letter from York County saying the plans are approved, which is not a copy of the plans themselves.

Q. Would you have received that or would Gerald have received that?

A. It would've come to the office and been filed.

Q. Are you aware of such a letter existing?

A. I have not personally laid eyes on it. I've been told that it exists.

(R. p. 933, lines 11-25).

Morningstar, like the Power Engineering representatives, was also waiting for something more formal. In fact, Morningstar was waiting for a preliminary document the Development Agreement indicates would be a necessary predicate to site plan approval.

Section VII.A of the Development Agreement states that "[p]rior to site plan approval, Developer shall sign the County's non-reimbursable extension agreement" providing for relocation and extension of water and sewer lines. Section VII.C reiterates this requirement. The non-reimbursable extension agreement was not provided to Morningstar for its review and was never executed by Morningstar. This was an important part of site plan approval and a proper analysis of construction costs. Without the extension agreement, there was nothing in the Development Agreement to indicate that formal site approval was even in the offing. Morningstar did not consider the project to be in jeopardy at that point, though. It simply believed that the County was in no real rush to get started.

In sum, the facts before the trial court indicate a dispute as to whether the County breached the Development Agreement beyond the reasonableness of the notice purportedly provided by the County. There is simply no evidence that would show, as a matter of law, that Morningstar knew that the 180 day period had started until January 13, 2010, when the County first raised its claim to Pat Selvey. By limiting Morningstar's case at trial to "the facts pertaining to the reasonableness of the notice of approval of the site plan," (R. p. 9), the trial court presupposed that the County did provide notice of some kind, and prevented Morningstar from challenging that assumption. The Summary Judgment Order should therefore be reversed, and Morningstar should be permitted to present all of the facts relevant to its breach of contract claim at trial.

II. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF MORNINGSTAR'S DAMAGES AND THE COUNTY'S BREACH OF CONTRACT, AND BY ENTERING JUDGMENT ON MORNINGSTAR'S BREACH OF CONTRACT CLAIM.

Following the trial court's restriction of Morningstar's breach of contract claim to a narrow set of facts in the Summary Judgment Order, the County moved to limit Morningstar's case still further and preclude that claim altogether. The subsequent Motion in Limine Order effectively entered judgment against Morningstar on its breach of contract claim without allowing Morningstar to put on its case. The Final Order simply carried the Motion in Limine Order to its logical next step by granting judgment to the County on Morningstar's breach of contract claim, and essentially dismissed Morningstar's claims for affirmative relief. Because the trial court erred in granting the County's motion *in limine* to exclude damages and in awarding judgment to the County, both orders should be reversed.

The purpose of a motion *in limine* is to "narrow the evidentiary issues for trial." Tompkins v. Eckerd, 2012 U.S. Dist. LEXUS 46718, 4-5 (D.S.C. April 3, 2012). In contrast, summary judgment is a "drastic remedy" the purpose of which "is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). The Supreme Court warned of the peril of *in limine* proceedings in State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988):

> "Trial judges must not be held, conclusively, to preliminary rulings made without benefit of all the pertinent and relevant evidence. We caution Bench and Bar that these pretrial motions are granted to prevent prejudicial matter from being revealed to the jury, but do not constitute final rulings on the admissibility of evidence."

Other courts have routinely recognized the dangers of converting a motion *in limine* to a motion for summary judgment or directed verdict and have accordingly refused to allow non-evidentiary matters to be raised *in limine*. See, e.g., Louzon v. Ford Motor Co., 718 F.3d 556, 561-562 (6th Cir. 2013); Mid-America Tablewares v. Mogi Trading Co., 100 F.3d 1353, 1363 (7th Cir. 1996) (holding that an argument that plaintiff could not prove its lost profits with reasonable certainty was a proper argument for summary judgment, but "not a proper basis for a motion to exclude evidence prior to trial"). Though the "admission or exclusion of evidence is left to the sound discretion of the trial judge," a ruling on a motion *in limine* will be reversed if the ruling constituted an abuse of discretion. State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). The court in this case abused its discretion by effectively converting *in limine* motions into a summary judgment or directed verdict motion, as confirmed by the Final Order.

Here, the trial court entered the Motion In Limine Order precluding Morningstar from presenting evidence on any of its three categories of damages on its breach of contract claim. The trial court held that Morningstar's evidence as to the loss of the value of the Tower, the development costs it had incurred, and lost profits was all speculative. (R. pp. 19-20, 22-23). According to the trial court, Morningstar had not established what development costs would have to be incurred again, or that lost profits were foreseeable when the Development Agreement was executed and were caused by the County's notice of default. (R. p. 22). The trial court also excluded all communications and statements exchanged "during the course of settlement discussions or mediation," which Morningstar proposed to admit to demonstrate the County's breach of the Development Agreement's alternative dispute resolution provision. (R. p. 25). The trial court further

excluded the email correspondence of York County Councilman Buddy Motz, which Morningstar sought to admit to demonstrate the County's bias against Morningstar. Id.

The Motion In Limine Order 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 the contract," Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595, 493 S.E.2d 875, 880 (Ct. App. 1997), including lost profits established by facts "from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn," Sterling Dev. Co. v. Collins, 309 S.C. 237, 242, 421 S.E.2d 402, 405 (1992); accord Minter v. GOCT, Inc., 322 S.C. 525, 529, 473 S.E.2d 67, 70 (Ct. App. 1996) (business owner may testify to lost profits if his testimony has a rational basis). The Motion In Limine Order also ignored precedent which restricts the admissibility of mediation and settlement discussions only when such evidence is used to establish liability or damages, and which otherwise permits such evidence to be admitted for the purpose of demonstrating, among other things, bias. See, e.g., Meehan v. Commercial Casualty Ins. Co., 166 S.C. 496, 504, 165 S.E. 194, 197 (1932) (holding that offers of compromise admissible if offered to establish agency relationship "and not for the purpose of showing that an offer of compromise has been made"); Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987) (observing that the nearly identical Fed. R. Evid. 408 "need not prevent a litigant from offering such evidence when he does not seek to show the validity or invalidity of the compromised claim"). In addition, the Motion In Limine Order did not take into account South Carolina case law finding that evidence of a city councilman's views are admissible if the plaintiff is "not

attempting to go behind the actions of county council" or challenge a legislative or quasi-legislative decision. Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 78 (1999).

Most significantly, however, the sweeping breadth of the Motion In Limine Order went beyond narrowing the evidentiary issues for trial and effectively rendered judgment on Morningstar's breach of contract claim. The County may well have valid cross examination points in this case, but they are just that. The Court should have allowed a finder of fact to determine their impact. Following the entry of the Motion In Limine Order, the County moved for entry of judgment on Morningstar's breach of contract claim on the basis that, as the trial court had excluded all evidence of Morningstar's damages, they could not prove an essential element of their claim for breach of contract. (R. p. 631, line 18-p. 632, line 12). Shortly before the Court's ruling in the Final Order, the Court indicated that it had reconsidered the earlier order, and would permit Morningstar to put on its evidence and would rule in the context of the trial. (R. p. 637, line 14-p. 638, line 16). Morningstar respectfully submits that this would have been the correct procedure to follow. The Court ultimately decided, though, to uphold its earlier rulings and preclude Morningstar from putting on evidence of damages. That, in turn, led to the entry of judgment which is being appealed. This Court should reverse the Motion In Limine Order and Final Order, and send the case back for trial.

CONCLUSION

For the foregoing reasons, the Summary Judgment Order, Motion in Limine Order, and Final Order should be reversed.

Dated: July 6, 2016
Charlotte, North Carolina

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PROOF OF SERVICE

I, Richard B. Fennell, certify that I have this day served Appellant/Respondent's Brief upon the Respondent/Appellant by depositing a copy in the United States Mail, postage prepaid, addressed to their attorneys of record, Daniel J. Ballou, Morton & Gettys, LLC, P.O. Box 707, Rock Hill, SC 29731 and W. Keith Martens, Hamilton Martens, LLC, P.O. Box 10940, Rock Hill, SC 29731. The undersigned also certifies that this Final Brief complies with Rule 211(b), SCACR.

July 6, 2016

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