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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

Case No. 2015-CP-46-002460

Morningstar Fellowship Church, Appellant/Respondent

v.

York County, South Carolina, Respondent/Appellant

APPELLANT/RESPONDENT MORNINGSTAR CHURCH'S PETITION FOR A REHEARING

June 28, 2018

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

RULES

INTRODUCTION

Now comes Appellant/Respondent, Morningstar Church (Morningstar), under the authority granted it by Rule 221 of the South Carolina Appellate Court Rules, and hereby petitions the Court of Appeals for a rehearing from its Unpublished Opinion, No. 2018-UP-250, filed February 13, 2018.

In support of its Petition, and in compliance with Rule 221, Morningstar will argue that three points have been overlooked or misapprehended by the court.

First, as will be revealed in more detail below, Morningstar will argue that while the Court of Appeals declared future damages to be speculative, the Court overlooked, and did not consider as a component of damages monies already spent on the Heritage Tower project, , which supports the damages element of Morningstar's Breach of Contract claim.

Second, as will be argued in more detail below, Morningstar will argue that the Court of Appeals overlooked evidence a lack of good faith and fair dealing by the County, as a crucial component underlying Morningstar's breach of contract claim.

Finally, as we will argue in more detail below, the Court of Appeals overlooked and failed to consider crucial evidence from Mr. E.J. Brown, a certified professional engineer, who provided through crucial expert opinion evidence on the value of the Heritage Power, which supports the damages element of Morningstar's Breach of Contract claim.

ARGUMENTS

I. WHILE THE COURT DECLARED FUTURE DAMAGES TO BE SPECULATIVE, THE COURT OVERLOOKED, AND DID NOT CONSIDER MONIES ALREADY SPENT AS A COMPONENT OF DAMAGES ON THE MORNINGSTAR TOWER PROJECT, AND THUS, SHOULD REVISIT THIS ISSUE.

As will be seen, both the Court of Appeals and the Circuit Court, in their respective decisions, reference the speculative nature of *future* damages in this case. Nowhere, however, does the Court of Appeal address whether Morningstar can recover for hard dollars already spent, in the past, now lost because of the County's actions in breaching its contract with Morningstar. Put another way, the Court overlooks current damages attributable to Morningstar.

This oversight is first noted in the affidavit of Mr. David Yarnes, at paragraph 13 (R. p. 1077), showing that Morningstar sunk over $1.2 million in engineering and feasibility studies. Morningstar later revised this number downward to $819,460.09. Regardless, if the Heritage Tower were demolished because of the County's bad faith, and its breach of contract, that money, spent by Morningstar in the beginning stated of its tower renovation project, will be forever lost. That sum of $819,460.09, already spent, constitutes damages to Morningstar because of the County's breach.

A. The Circuit Court and the Court of Appeals focus on future developmental costs as being speculative, but overlook costs already spent that will be unrecoverable damages to Morningstar if its Breach of Contract claim is dismissed.

A distinction should be made here regarding developmental costs. In the Circuit Court's order, the Judge focuses on whether these costs, $819,460.09, would have to be "incurred again," i.e., in the *future*, and determines that the *future* developmental costs are too "speculative." (Emphasis added). (R.p. 48)

Like the Circuit Court, the Court of Appeals follows up on the future damages component of Morningstar's claim. See, for example the excerpt below, which is a snapshot from the Court of Appeals decision, where the issue of developmental costs to the alleged speculative nature of future costs.

> We find the evidence supports the circuit court's determination that the value of Heritage Tower was not based on reasonable certainty, including the testimony of Morningstar's president providing he did not know the amount it would cost to complete construction of the building. Additionally, we find the evidence supports the circuit court's finding that Morningstar based its calculation of damages on conjecture and speculation because Morningstar failed to establish with reasonable certainty the engineering, marketing, architectural, legal, or developmental costs it would incur due to York County's noncompliance with the Heritage Tower agreement.

Note here, in the last three lines, the phrase "or developmental costs it would incur ... due to York County's noncompliance." The Court does not use the phrase developmental costs (the $1.2 million in Mr. Yarnes' affidavit, reduced to $819,460.09) that Morningstar has already incurred. That's a crucial distinction – future costs versus losses (developmental costs) already realized and calculated.

These damages, the $1.2 million in Mr. Yarnes' affidavit, later reduced upon further calculation to $819,460.09, are foreseeable, are measurable, and consequentially flow from a bad-faith breach by the county. But no ruling has been made on this question of monies already spent versus future costs.

While there is an apparent assertion that future costs are speculative, a point with which Morningstar disagrees as will be explained in more detail below, the order is silent, one way or the other, on the degree of speculation versus the degree of reasonable certainty as spelled out in these costs.

Thus, as a component of damages, the present costs already realized and calculated by Morningstar, as opposed to future projections, has been overlooked by the Court of Appeals, which mandates a rehearing under Rule 221, SCACR.

Neither the Court of Appeals nor the Circuit Court make any findings on any type of "speculative" nature of the $1.2 million, reduced upon subsequent calculation to $819,460.09, that Mr. Yarnes testified by affidavit that Morningstar has *already spent on the studies* (in the past). Nor is there any finding or conclusion anywhere concerning costs spent already, that is whether monies already spent and calculated are either "speculative" or capable of being calculated to a reasonable certainty. The Court overlooked this element of damages already incurred, which under the rule, Morningstar's out-of-pocket expenditures to date which become damages due to the County's breach, which establishes grounds for rehearing.

As Morningstar argues in its Memorandum of Law previously submitted at page 3, "Morningstar may 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 (S.C. Ct. App. 1997). (R.p. 489).

Costs already spent by Morningstar, including the $1.2 million, reduced upon subsequent calculation to $819,460.09, are objectively measurable, and certainly much more objectively measurable than future costs. Note the specificity of this number. It reeks of precision, and is in fact precisely calculated down to nine cents tacked upon the damages figure exceeding $819,460.00. This number, $819,460.09, shows a very precise calculation, right down to nine cents, and is not some speculative estimate that should be excluded from evidence.

These precise, objective costs as a measure of damages are a natural consequence of the County's breach and The Court of Appeals overlooked this element of damages. Therefore, the Court should grant rehearing on this issue, and subsequently reverse the Circuit Court on its order striking damages, and its order dismissing Morningstar's claim for Breach of Contract.

II DESPITE ITS DISMISSAL AS A CAUSE OF ACTION, THE COUNTY'S DUTY TO ENGAGE IN "GOOD FAITH AND FAIR DEALING" NONETHELESS REMAINED A PART OF THE UNDERLYING CONTRACT, AND THE COUNTY'S ACTIONS ON THIS CLAIM WERE OVERLOOKED BY THE COURT OF APPEALS.

When affirming the circuit court's actions dismissing Morningstar's claim for Breach of Contract, the Court of Appeals overlooked the clear underlying requirement for the County to engage in good faith and fair dealing in the contract. Put another way, even if good faith and fair dealing is not a separate cause of action in South Carolina, nonetheless, good faith and fair dealing is clearly a component of South Carolina contract law. here exists in every contract an implied covenant of good faith and fair dealing." Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966).

Put another way, good faith and fair dealing is a legal subset of contract law in South Carolina, and must be considered, factually, even if not recognized as a separate legal cause of action.

In this case, Morningstar raised good faith and fair dealing in the underlying complaint, both as a legal cause of action and as a factual allegation.

Consider this portion of the complaint, at paragraphs 30 - 33:

> **FOR A THIRD CAUSE OF ACTION**
> **(BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)**
>
> 30. The allegations in paragraphs 1 – 29 are incorporated herein by reference.
>
> 31. There existed in the Agreement an implied covenant of good faith and fair dealing.
>
> 32. York County's conduct in wrongfully declaring a default and causing work on the Tower to cease, and in failing to participate in the mediation process in good faith are breaches of the Agreement and the covenant of good faith and fair dealing that is inherent within the Agreement.

(R. p. 502).

As can be seen above, at paragraph 30 paragraphs 1-29 (which includes the Breach of Contract Claim and also allegations of York County's bad-faith actions) by reference, thus integrating Morningstar's complaint about lack of good faith and unfair dealing into its Breach of Contract Claim, even Breach of Covenant of Good Faith and Fair Dealing does not stand as a separate cause of action. Paragraph 32 of the complaint describes the breaches of the implied covenant of good faith and fair dealing – namely the County having wrongfully declared a default, which stopped work on the Tower, under highly questionable circumstances.

The underlying conduct describing a lack of good faith and fair dealing is also found, in part, at paragraph 14 of the complaint:

14. Rather than continuing to work towards completion of the project, the County began to take steps that made it impossible to move forward. On or about March 5, 2010, York County notified Morningstar Church that it was allegedly in default under the Agreement because Morningstar Church had not provided the County with bid, performance and payment bonds as discussed in Section IV., ¶ C. of the Agreement. Prior to the notice of default, however, the County had never provided Morningstar Church with any notice that the site plan had been approved by the county. The bonding process, therefore, had not been started.

(R. p. 499).

Factually, York County doesn't get a pass to act in bad faith or unfair dealing in, whether or not there is a separate claim for Breach of Good Faith and Fair Dealing.

The Court of Appeals, while affirming November 10, 2015 Order Granting Defendant's Renewed Motion for Entry of Judgment of the Honorable Daniel D. Hall (the "Final Order"), focused only on the speculative nature of damages, but overlooked whether the record showed lack of good faith or lack of fair dealing which might have harmed Morningstar.

Moreover, Morningstar will be damaged as a result of the County's failure to engage in "good faith and fair dealing," with some of those damages falling into in separate categories aside from the future value of the tower, etc., with some of those future valuations having been deemed "speculative" by the Circuit Court.

These future damages flowing from the County's lack of good faith and fair dealing can be prognosticated, at least partially in the County's counterclaim at paragraph 53, pages 7-8 under their Declaratory Judgment claim. Here, in their counterclaim at paragraph 61, they want Morningstar declared in default (a default which we contend is because of their bad faith and lack of fair dealing), they want Heritage Tower demolished, "*with all costs for its demolition to be born by Morningstar.*" (R. p. 511).

Again, at paragraph 66 of their counterclaim, they again seek costs to be borne by Morningstar for the "immediate demolition and removal of the Tower." (R. p. 513)

So, the County engages in lack of good faith and fair dealing, and from that conduct, now wants a "default" declared, and from that bad-faith generated default, wants Morningstar to bear "all costs for demolition," i.e. damages.

If Morningstar is forced to pay "all costs of demolition" as result of their breach, and bad faith, those costs are damages to Morningstar. Morningstar would be damaged by those "costs," through no fault of its own, but rather, because of the County's bad-faith which undergirded and constituted breach of contract.

York County cannot on the one hand, seek an order requiring Morningstar to pay costs for demolition, and even though those costs are yet to be determined, then turn around and argue that Morningstar won't be damaged by having to bear those costs arising from their bad faith actions in the contract designed to wrongfully force Morningstar to pay those costs.

In this case, the Court of Appeals has overlooked the factual elements alleged by Morningstar which amount to lack of good faith and fair dealing by the County, has not addressed the lower court's summarily dismissing the cause of action for Lack of Good Faith and Fair dealing but ignoring the underlying facts which remain relevant to Morningstar's Breach of Contract claim, and has overlooked the reality of how the County's lack of good faith and fair dealing would bring damages to Morningstar.

Therefore, the Court of Appeals should grant rehearing on this issue, and subsequently reverse the Circuit Court on the its order striking damages, and its order dismissing Morningstar's claim for Breach of Contract. The Court of Appeals should also order the Circuit Court to allow evidence on the issue of good faith and fair dealing, with a determination of the County's conduct on good faith and fair dealing to be decided by a jury.

III. IN SUMMARILY AFFIRMING THE LOWER COURT AND DISMISSING MORNINGSTAR'S FUTURE DAMAGES AS "SPECULATIVE," THE COURT OF APPEALS OVERLOOKED MORNINGSTAR'S EXPERT EVIDENCE, PRESENTED BY ITS CERTIFIED MECHANICAL ENGINEER, WHICH ESTIMATED SALVAGEABLE WORK IN PLACE TO BE $11, 889, 718.

Unfortunately, the Court of Appeals, as did the Circuit Court, overlooked crucial evidence presented by one of Morningstar's expert witnesses, Mr. Eddie J. Brown, a Certified Professional Engineer, who presented his report that the statement of probable costs for salvageable work in place would be $11,889,719. Mr. Brown, who is a Certified Professional Engineer, is a member of the American Society of Professional Engineers, and his Certification Number is 1184671.

Although Mr. Brown's report is found in the Record of Appeal at page 408, neither the Circuit Court, in its Final Order, nor the Court of Appeals, even mentioned him at all. This appears to be an oversight, but nonetheless, a legally significant oversight proving harmful to Morningstar.

Interestingly, both the Circuit Court and the Court of Appeals comment upon the deposition testimony of Mr. Rick Joyner, the President of Morningstar, and Morningstar's 30(b)(6) designee. As can be seen below, the Court of Appeals notes in its decision, "We find the evidence

supports the circuit court's determination that value of Heritage Tower was not based on reasonable certainty, including the Testimony of Morningstar's president, providing he did not know the amount it would cost to complete the construction of the building."

Likewise, the Circuit Court also mentions Mr. Joyner's testimony. "Morningstar contends that it should be allowed to present evidence of the "lost value of the Tower .... However Morningstar has not determined what this number is, and Joyner admitted he cannot put a value on it with any degree of certainty. Joyner at 511-514." (Circuit Court's Order to Exclude Damages, page 3, Record, page 47.)

With respect, however, from both the Circuit Court and the Court of Appeals, there appears to be too much emphasis on the wrong witness, with no emphasis or acknowledgment at all on the right witness who is actually qualified to render an opinion on damages which requires a high degree of specialized knowledge and training in the engineering field. With great respect to Mr. Joyner, who is a well-respected preacher and the CEO of one of the largest Christian evangelical ministries in South Carolina, he is not an engineer, nor is he trained or qualified qualified to engage in the science of building valuations. He is not trained in building and construction evaluation techniques, and does not profess to be, nor is he proffered as a such an expert by Plaintiff. His designation as the 30(b)(6) witness on behalf of the Plaintiff does not make him a buildings evaluation expert, nor a construction expert, nor can he reasonably be expected to testify with an expertise in an area for which he is not an expert.

Mr. Brown, in stark contrast to Mr. Joyner, is imminently qualified to make such valuations, as a construction engineer, and Morningstar placed into the record evidence of his considered expert opinion, though this evidence appears to have been overlooked by all courts from start to finish. Morningstar should be able to rely upon this evidence.

The Court of Appeals apparently overlooks Mr. Brown's crucial evidence, and does not mention it at all, one way or the other, even though it was part of the appellate record. In

overlooking this report, the Court overlooks credible, unchallenged, and undeniable evidence of the current value of the Tower, which is the subject of this litigation.

Perhaps even more curiously, the Circuit Court (Judge Hall) appears to have first overlooked this crucial evidence altogether, and makes no findings that Mr. Brown's report either was not credible, or not based on proper foundation, or without a reasonable certainty in its calculations. Put it simply, the Circuit Court totally overlooks Mr. Brown and the substance of his expert report.

A quick review of the Circuit Court's order, and it's finding that "Morningstar Cannot Prove Loss of Value of the Tower" (R. p. 47), reveals Mr. Joyner's supposed inability to compute value "with any degree of certainty," and then goes on to briefly discuss several other Morningstar experts, who provided evidence on a variety of topics. Included among the subject matter experts mentioned by Judge Hall. are "Moore Stevens & Lovelace," a CPA firm out of Macon, Georgia, and "Integra Realty Sources," a Charlotte-based real estate company which does property valuations, and certainly has an ability to bring valuable work to the table in this regard.

Obviously, the CPA firm would not ordinarily possess any degree of expertise to offer any expert opinion of the current value of a large 21 story structure, partially complete, with potential engineering issues to be made part of the evaluation equation.

However, Integra Realty Resources, even with the value they bring, still would not bring the same level of expertise for the opinion rendered as would Mr. Brown, who is a certified professional engineer, and with potential engineering issues to be made part of the evaluation equation. The category of damages as presented by Mr. Brown, by necessity, present an engineering component to be computed. The category of "salvageable work in place" necessarily required an engineering assessment of building integrity, of structural soundness, and a specific assessment of engineering matters, which Mr. Brown and his engineering firm bring to the table, above and beyond what the property valuation company could bring.

With great respect to the Circuit Court, it apparently discussed in its Final Order evidentiary elements that go to various peripheral damages issues, but did not address evidence of the actual value of the building itself, based upon a solid engineering assessment. Both the Circuit Court, and then the Court of Appeals overlooked the engineering report, which offers a detailed opinion of the current value of the building in place.

Based upon the County's breach of contract, as set forth in the Morningstar's complaint, the County's unreasonable decision to declare a "default" on the project, and its attempt to bring about demolition of the Tower, it is clear, by the County's own declarations in its answer and counterclaim, that it seeks destruction of the Heritage Tower. If the Heritage Tower is destroyed, as the County seeks to accomplish by unjustifiably breaching the contract, then insisting on demolition of the Heritage Tower, Morningstar would suffer specifically-calculated damages in loss of the value of the building in the amount of $11,889,719.

A. Mr. Joyner Cited Mr. Brown's Engineering Valuation as Evidence of the Value of the Heritage Tower.

The Circuit Court finds that "However Morningstar has not determined what this number is, and Joyner admitted he cannot put a value on it with any degree of certainty. Joyner at 511-514," However, that simply is not an accurate portrayal of the totality of the evidence on record.

In fact, in the same deposition of Mr. Joyner, cited by the Circuit Court, contrary to the Circuit Court's finding, Mr. Joyner does in fact put a value on the building, and specifically cites Mr. Brown's engineering report to present solid evidence of the value. This evidence begins at page 497 of Mr. Joyner's deposition (R. p. 651), when counsel for the county begins to question Mr. Joyner about Mr. Brown's findings.

In fact, on the next page, page 498 of Mr. Joyner's deposition, (R. p. 652) counsel for the County specifically asks Mr. Joyner about Mr. Brown's engineering report, as follows:

Q. Okay. Number 2, Statement of Probable Costs salvageable work in place, 11,889,719. What do you understand that number to represent?

A. The value of the building as it stood in its present condition.

On the next page, at page 498 of Mr. Joyner's deposition (R. p. 653), counsel for the County follows up with additional questions, leading to answers that cut against the Circuit Court's opinion that Mr. Joyner could not "put a value on it with any degree of certainty. Joyner at 511-514." (Circuit Court's Order to Exclude Damages, page 3, Record, page 47.)

Q. Okay. So that is the value of the partially constructed building that you don't have to spend in order to complete the project?

A. Correct.

Therefore, unimpeached evidence exists in the record, through Mr. Brown, concerning the value of the Tower as it presently stands. Mr. Joyner in fact cite and corroborate that expert testimony, which as missed by the Circuit Court, and overlooked by the Court of Appeals.

B. Mr. Brown's Engineering Valuation was Never Impeached by the County.

Moreover, not only does the court appear to overlook this important valuation evidence, presented by Morningstar's Engineer, but there is no evidence, anywhere in the record, that the County ever called any engineers opposing Mr. Brown's methods or calculations, nor was his credibility ever challenged or impeached.

Perhaps it is significant that the county apparently elected not to take Mr. Brown's deposition. Nor, apparently, did the county present expert evidence in any form to contradict the underlying methods or calculations that supported this engineering valuation.

C. Rule 401 and 402 of the South Carolina Rules of Evidence Mandate Admission of Mr. Brown's Engineering Valuation on the Question of Damages.

The Circuit Court's apparent decision to basically ignore Mr. Brown's testimony smacks of abuse of discretion. To put this in perspective, let's go back to the basic evidentiary rules governing the admissibility of evidence in our state.

Rule 401 of the South Carolina Rules of Evidence provides in relevant part that:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Thus, the first question we must ask, logically, is whether Mr. Brown's report on the current value of the Tower is relevant on the breach of contract claim. There's no point in debating. Of course it does, and has a "tendency to make the existence of any fact that is of consequence to the determination of the action (the amount of damages in a breach of contract claim) more probable or less probable than it would be without the evidence.

Now let's move to an analysis of Rule 402 of the South Carolina Rules of Evidence, which provides in relevant part that:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.

This is where the Circuit Court runs amok of a possible abuse of discretion. The mandate of Rule 402 is not discretionary. "All relevant evidence is admissible." State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). In this case, there simply is no evidentiary support of record which would reveal or otherwise explain why this crucial evidence, in which Mr. Brown gives expert opinion on the value of the tower, in excluded. Indeed, it appears to have been overlooked altogether by the trial court, and also by the Court of Appeals.

Meanwhile, this mandate under Rule 402, adopted by our legislature, that "all relevant evidence is admissible," is for the most part nonnegotiable. Under the basic requirements of the rule, the Circuit Court cannot declare relevant evidence to be inadmissible, without good, legal reasoning.

Of course, there are some ways to get around this mandate of automatic admissibility, from an evidentiary standpoint, such as Rule 403, if the "danger of unfair prejudice substantially outweighs the probative value." But the Circuit Court had made no finding under Rule 403 to bring this exclusionary exception into play.

And then there are caselaw created exceptions to the basic requirements of Rule 402, mandating admission of relevant evidence. Those caselaw exceptions are rooted in the defense argument, that if a court finds such damages evidence to be "speculative," then it could be excluded.

But as outlined immediately below, the county's problem vis-à-vis Mr. Brown's evidence is five-fold.

First, even in their deposition of Mr. Joyner as highlighted at pages 497-498 of his deposition above, they were not by cross-examination able to shake the underlying foundation of Mr. Brown's report.

Second, the County appeared not to take Mr. Brown's deposition, or if they did, they did not place it in the record, nor did they attack his the integrity of his conclusions in their arguments before Judge Hall. Thus, by electing not to take the expert witnesses' deposition, the County was unable to shake the reliability of his foundation through discovery.

Third, the County did not call, or present any expert witness from any other Certified Professional Engineer to question or rebut Mr. Brown's expert valuation evidence, nor call it into question one way or the other.

Fourth, the Circuit Court, (Judge Hall in this case) despite having the evidence before it, did not even mention Mr. Brown's report of the real, salvage value of the Morningstar Tower, as it proceeded to strike damages on the basis that damages are supposedly too "speculative." There is

no finding that he was not credible, or that his opinion was considered, evaluated and rejected by the Circuit Court. There is nothing about Mr. Brown at all in the Circuit's order, as he is nowhere to be found.

Fifth, Court of Appeals, despite having this evidence in the record, apparently overlooked it, which is one of the prerequisites under Rule 221 that would require a re-hearing.

D. The "Expert Witness Rules," Set Forth at Rule 701 - 704 of the South Carolina Rules Justify and Mandate Admission of Mr. Brown's Expert Engineering Valuation on the Question of Damages.

Before concluding, let us consider several other applicable provisions of the South Carolina Rules of Evidence, which powerfully support Morningstar's claim on this point. First, let's recall the expert witness rules, at Rules 701-703, beginning with Rule 701, as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

In this case, Mr. Brown's testimony requires a high degree of expertise, in that the opinion of the salvageable value of the Tower requires special construction engineering knowledge, special construction engineering skill, special construction engineering knowledge, and/or special construction engineering training.

Mr. Brown applied some or all these highly-specialized skills in assigning a salvageable value to the Tower, and in rendering his expert opinion on that value. It is inconceivable that this type of knowledge, undergirding Mr. Brown's finding, would normally be within the purview of the Circuit Court. At any rate, whether such high degree of expertise is in the purview of the Circuit Court is functionally irrelevant in this case, because the trial court apparently did not consider the expert opinion evidence at all, and if it did consider the expert opinion evidence, did not follow the mandated of Rule 402 which would require the admissibility of this relevant evidence.

Rule 701 states that expert opinion evidence is admissible if the opinions or references (in this case, Mr. Brown's opinion of a salvageable value of the Tower of $11,889,719) are based upon special knowledge, special skill, and/or special training.

To this extent, Rule 702 of the South Carolina Rules of Evidence provides in relevant part that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 704 of the South Carolina Rules of Evidence also comes into play to support the consideration of Mr. Brown's opinion, and thus cutting against the dismissal order, by providing in relevant part that:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

In this case, the ultimate issue embraced by Mr. Brown's expert opinion, placing the salvageable value of the Tower at $11,889,719, is not objectionable because it embraced an ultimate issue to be decided by the trier of fact, notably the current, salvageable value of the Heritage Tower.

This again reinforces the principle that Mr. Brown's opinion of a salvageable value of the Tower of $11,889,719) is based upon special knowledge, special skill, and/or special training – namely special construction engineering knowledge, skill, and or training. These skills are not with the ordinary purview of a law person or the trier of fact (Circuit Court or Jury).

Unfortunately, the failure to meaningfully consider evidence is both an abuse of discretion, and an error of law, by violating Rules 401 and 402 of the Rules of Evidence (requiring the admission of all relevant evidence). A court's requirements under Rule 401, to consider relevant evidence, and to admit relevant evidence, under Rule 402, is not discretionary, but is mandatory.

CONCLUSION

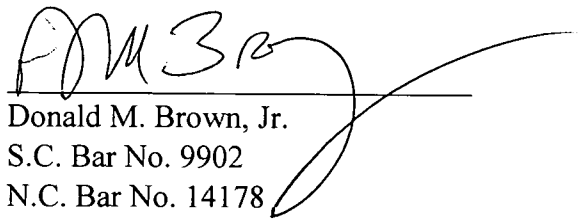
While it is true that trial judges have a wide latitude on the question of admissibility of evidence in numerous circumstances, at the same time, there is no latitude under Rule 401 to simply ignore relevant evidence as presented by a moving party, nor is there any discretion simply to refuse to admit evidence which is relevant under Rule 402, without a legally articulable reason for admitting relevant evidence.

While this case presents numerous factual issues to be managed by a trial court, and while, in the course of intensive litigation, it is always possible that relevance qualifying for admission under Rules 401 and 402 might be inadvertently overlooked by a court, the clear evidence of record, unfortunately, shows that the crucial expert opinion evidence of Mr. Brown was overlooked by the trial court and, thus, improperly excluded.

Moreover, pursuant to the plain requirements as set forth by Rule 221 of the South Carolina Rules of Appellate Procedure, it is also clear, by an examination of both the record and this Court's decision of June 13, 2018, that the Court of Appeals has likewise, inadvertently, overlooked certain crucial evidence, as spelled out above, which would mandate not only a rehearing on this matter but, more importantly, a reversal of the trial court on the crucial evidentiary exclusion of damages in this case.

For the foregoing reasons, the Plaintiff-Appellant, Morningstar Church, does respectfully request that the Court of Appeals grant a rehearing on the issues as set forth herein.

Respectfully submitted, this the 28th day of June, 2018.



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PROOF OF SERVICE

I, Donald M. Brown, Jr., certify that I have this day served Appellant/Respondent's Petition for Rehearing upon the Respondent/Appellant by depositing a copy in the United States Mail, postage prepaid, addressed to their attorneys of record, Michael Kurt Kendree, Sr., P.O. Box 299 York, SC 29745 and Walter Keith Martens of Hamilton Martens, LLC, P.O. Box 10940, Rock Hill, SC 29731.

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