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. 2015-002460

Morningstar Fellowship Church . . . . . Appellant/Respondent

v.

York County, South Carolina . . . . . Respondent/Appellant

Respondent/Appellant's Return to
Petition for Rehearing

Respondent/Appellant York County ("York County") submits the following return in opposition to Appellant/Respondent Morningstar Fellowship Church's ("Morningstar") petition for rehearing.

ARGUMENT

I. Morningstar's petition for rehearing should be denied because Morningstar has not demonstrated that this court "overlooked or misapprehended" any issue that was presented to the court but, instead, seeks to introduce new legal theories and arguments through its petition.

Morningstar's petition for rehearing should be denied because the petition is not a request for "re-hearing" of any issue or argument previously presented to this court. Instead, it is a

thinly-veiled attempt by Morningstar to revamp its appellate arguments by presenting new issues and theories that were neither raised on appeal nor preserved for appellate review. For that reason alone, the petition should be denied.

South Carolina's rules of appellate procedure expressly require a party to set forth, in its initial brief, "each of the issues [that will be] presented [to the court] for review." Rule 208(b)(1)(B) S.C.A.C.R. (setting forth requirements for an appellant's initial brief). "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Id. When a party seeks rehearing, it is not permitted to raise new arguments or issues that were not part of its initial appeal. Instead, it is permitted only to "state with particularity the points supposed to have been overlooked or misapprehended by the court" in deciding that party's appeal. Rule 221(a) S.C.A.C.R.

These rules serve three important purposes. First, the rules ensure that this court devotes its time and resources to reviewing only those issues that the parties have deemed sufficiently important to present to the court. After all, "appellate courts . . . do not answer questions that they are not asked." Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001). Second, these rules help an appellate court "at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). Finally, these rules provide a framework for a fair appellate proceeding, because they prevent a party "from keeping an ace up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). If an issue on appeal is important to a party, South Carolina's appellate court rules demand that the issue be

raised at the outset and then thoroughly presented through that party's appellate briefs. A petition for rehearing is not an opportunity to "present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)(quoting JEAN H. TOAL, ET AL, *APPELLATE PRACTICE IN SOUTH CAROLINA* 309 (1999)(citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933)).

When Morningstar's petition for rehearing is compared to its original statement of issues on appeal, it is apparent that Morningstar has filed this petition in the hope of pulling a proverbial "ace from its sleeve," rather than to seek rehearing of any legitimate issue. In its petition for rehearing, Morningstar raises three issues:

> (1) Morningstar contends that, in affirming the trial court's exclusion of Morningstar's evidence of damages, this court considered only future damages and overlooked Morningstar's evidence of "monies already spent";
>
> (2) Morningstar contends that this court affirmed the trial court's judgment as to breach of contract without considering "evidence of [the County's alleged] lack of good faith and fair dealing"; and
>
> (3) Morningstar contends that this court failed to consider the testimony of one of Morningstar's retained experts on the issue of damages.

See Petition at 4. By contrast, when Morningstar filed this appeal it sought appellate review of three separate issues:

> (1) whether the trial court improperly limited the scope of Morningstar's breach of contract claim to "the facts pertaining to the reasonableness of [York County's] notice of approval of the site plan";
>
> (2) whether the trial court improperly excluded all of Morningstar's damages evidence through its ruling on a motion *in limine*;[1] and

[1] As York County pointed out in its responsive brief, the trial court did not exclude Morningstar's evidence of damages through an *in limine* ruling. Instead, the trial court made a dispositive ruling, which was based upon the record. *See* Respondent/Appellant's Brief at 15-17.

(3) whether the trial court erred in excluding evidence of mediation discussions and statements made by individual county council members as evidence of the County's breach of contract.

See Appellant/Respondent's Brief at 1. Morningstar's appellate brief did not focus on the distinction between "past" and "future" damages, or upon the trial court's perceived failure to discern that distinction. Nor did its appellate brief mention the supposed importance of its engineering expert's statement on the issue of damages. Finally, Morningstar did not argue that the implied covenant of "good faith and fair dealing" should have somehow salvaged its breach of contract cause of action. This court did not "overlook or misapprehend" any of those issues - Morningstar never presented them. For that reason, alone, Morningstar's petition for rehearing should be denied. *See* Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)(wherein the Supreme Court refused to consider "one significant argument not previously considered by the court" because that argument "was never presented to this Court.").

II. Morningstar fails to recognize that its claimed damages – whether past, present or future – were too speculative and conjectural to be recovered in a judicial proceeding.

Much of Morningstar's petition addresses the exclusion of its evidence of damages. First, Morningstar argues that this court focused only on the speculative nature of Morningstar's claim for future damages, without considering its claim for alleged "past" damages and expenditures. *See* Petition, Argument I (at pp. 4-6). Next, Morningstar argues that this court failed to consider the testimony of E.L. Brown, an engineer who provided an estimate of the value of the "work in place." Id., Argument III (at pp. 9-18). As previously discussed, however, neither of these issues may be considered as a basis for rehearing because neither of them was an issue presented in Morningstar's appeal. *See* Rule 208(b)(1)(B) S.C.A.C.R. Nonetheless, even if

this court were to consider the substance of Morningstar's arguments, there is still no basis for rehearing.

Morningstar's contention that this court focused exclusively on Morningstar's claim for "future" damages, while ignoring its claim for "past" damages, is incorrect. Both the trial court and this court considered all three components of Morningstar's claimed damages – its alleged "loss of value of the tower" ($11,889,719); its alleged incurred "cost[s] of engineering, marketing, architectural, legal and development" ($819,460.89); and its claim for future "lost income . . . over the next five years" ($7,187,421). *See* Trial Court Order at 2-7 (R. at 18-23); Ct. App. Op. 2018-UP-250, at 3. Both the trial court and this court concluded that Morningstar could not recover any of those alleged damages as a matter of law – not because they were premised (solely) upon uncertain future events, but because Morningstar's claimed damages (including its claim for $819,460.89 in "sunk" costs) were inherently conjectural, speculative and "not based on reasonable certainty." Trial Court Order at 3; 4; 7 (R. at 19; 20; 23); Ct. App. Op. 2018-UP-250 at id.

With regard to the so-called "report" of Morningstar's engineer, E.L. Brown, it is somewhat disingenuous for Morningstar to contend that this court "overlooked" that report, when the full report (assuming one exists) is not even in the record. In its petition, Morningstar directs this court's attention to page 408 of the record, but the document at page 408 is a "Statement of Probable Cost for Completion of 'Heritage Towers,'" not an expert witness' report or affidavit. A single line-item entry, labeled "statement of probable costs for salvageable work in place" (presumably, the basis for $11,889,719 of Morningstar's alleged damages), appears on that page. *See* R. 408; *see* Petition for Rehearing at 9. The page on which that line-item entry appears is just one page within a 42-page document titled "Morningstar Mediation Response"

which Morningstar proposed to introduce as an exhibit at trial. *See* R. 335-341 (proposed Exhibit 37 – "Morningstar Mediation Response"). That very same 42-page document was excluded from evidence by the trial court's ruling on York County's motion *in limine*. *See* R. at 23. This court affirmed that ruling, and Morningstar has not sought rehearing as to that issue. *See* Ct. App. Op. 2018-UP-250 at 2, ¶ 2; *see also* Petition for Rehearing at 4. Only a line-item summation of what Morningstar now describes as "crucial" evidence appears in the record, and that is only by happenstance.

Courts are not obliged to scour a record in search of evidence that, presumably, supports a party's position. *Cf.* Jones v. Eaton Corp., 2017 WL 2332638, at *15 n.25 (D.S.C. 2017). If the report of Morningstar's engineer was so critical to its case, Morningstar easily could have, and certainly should have, brought more attention to that evidence. At a minimum, Morningstar should have designated the engineer's full report or affidavit for inclusion in the record, rather than rely upon a single line-item entry buried within another document. Rule 209(b) S.C.A.C.R. Its failure to do so belies Morningstar's assertion that the report of its engineer was a "crucial" piece of evidence presented by Morningstar, but overlooked by this court.

In any event, the engineer's "statement of probable cost (salvageable work in place)" that appears in the record would hardly qualify as admissible expert testimony. There is no indication that the engineer's "statement of probable cost (salvageable work in place)" was supported by verifiable facts or data. *See* Rule 703 S.C. R. Evid. There is no evidence that the engineer was tendered, or qualified, as an expert witness in valuing "salvageable work in place." *See* Rule 702 S.C. R. Evid. There is no evidence that the engineer provided sworn opinion testimony within a reasonable degree of professional certainty. *Cf.* Jamison v. Hilton, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (holding that expert testimony must be set forth with "reasonable

certainty."). The document appearing at page 408 of the record is neither an expert's report nor is it admissible expert testimony. It is part of a mediation presentation that was ruled inadmissible evidence at trial. R. at 23.

Even if an engineer (or some other qualified "valuation" expert) *had* properly testified concerning the value of the "salvageable work in place," that testimony would be irrelevant to the question of Morningstar's alleged damages in this lawsuit. When Morningstar first acquired the land on which the tower sits, it became the owner of a partially-completed and deteriorating building that it was contractually obligated to demolish. Order for Partial Summary Judgment at 1 (R. at 4). Presumably, the "salvageable work in place" had some value. While E.L. Brown apparently calculated his estimate of that value (in 2010), Morningstar did not present any evidence that the value of the "salvageable work in place" decreased after the County declared Morningstar in default of its development agreement.[2] Just as the difference between one and one is zero, the difference between $11,889,719 and $11,889,719 is also zero. Morningstar produced no evidence that it had suffered recoverable damages for "loss of the 'salvageable work in place,'" and the trial court properly prohibited it from claiming damages for which it had no evidentiary support. R. at 19. This court also correctly ruled when it affirmed. Ct. App. Op. 2018-UP-250, at 3.

This court did not misapprehend or fail to consider any issue when it affirmed the trial court's order excluding Morningstar's claimed damages. There is no reason that Morningstar is entitled to be reheard on those issues.

III. Morningstar's "good faith and fair dealing" argument cannot form the basis for a rehearing of this appeal.

[2] As the trial court noted, Morningstar's own expert opined "that the cost to renovate and restore has not significantly increased due to any change in the building condition . . . between 2010 and present." R. 19.

because the issue was not properly preserved.

Presumably, Morningstar does not challenge the circuit court's dismissal of its stand-alone "good faith and fair dealing" cause of action. That cause of action was dismissed through an order granting York County partial summary judgment. *See* R. at 9-10 (citing Rotec Svcs, Inc. v. Encompass Svcs, Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004)). Morningstar did not appeal that portion of the trial court's order. Consequently, the trial court's determination that Morningstar had no claim for "breach of the covenant of good faith and fair dealing" is the law of the case. Rumpf v. Massachussetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004)("Any unappealed portion of the [circuit] court's judgment is the law of the case, and must therefore be affirmed.").

It appears that Morningstar is now focused on the proposition that its "good faith and fair dealing" allegations, though dismissed as a separate cause of action, provided it another pathway to proving its breach of contract claim. However, there are fallacies with this argument.

First, Morningstar's argument overlooks that a breach of contract claim has three essential elements: (a) the existence of a contract; (b) its breach; and (c) damages caused by that breach. Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 653, 780 S.E.2d 263, 272 (Ct. App. 2015). When Morningstar failed to produce admissible evidence of damages, its breach of contract claim lacked evidentiary support for an essential element and failed as a matter of law. There was no reason for the trial court to consider whether York County had performed "in good faith," or whether those allegations provided Morningstar an alternative pathway to proving an alleged breach of the parties' contract. With no provable damages, Morningstar had no claim for breach of contract.

Morningstar's argument also sidesteps the fact that it was "within the purview of the circuit court to limit the issues [for trial] in the order granting partial summary judgment to York County." Op. 2018-UP-250, at 2. The circuit court reviewed the extensive case record and considered the party's arguments before determining that the only material issue in dispute was "whether reasonable notice of approval was communicated, and knowledge of such approval was received, by Morningstar, either directly, or [through] its agent." R. at 14. The circuit court's case management orders should not be "second-guessed" through a petition for rehearing.

Most importantly, though, Morningstar's argument ignores that it *did not argue on appeal* that it was entitled to pursue a breach of contract claim based upon the County's alleged breach of the implied covenant of good faith and fair dealing. While Morningstar's appellate brief included some boilerplate mention of the implied covenant of good faith and fair dealing,[3] its argument focused, almost exclusively, on its assertion that it should have been allowed to present evidence that York County failed to provide notice of site plan approval "pursuant to Section XI.H" of the parties' written contract and, thereby, breached the agreement. *See* Appellant/Respondent's Brief at 11-14. While Morningstar now emphasizes the significance of its "good faith and fair dealing" theory, it was not an issue raised by Morningstar's appeal. A petition for rehearing is not an opportunity to "present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)(quoting JEAN H. TOAL, ET AL, *APPELLATE PRACTICE IN SOUTH CAROLINA* 309 (1999)(citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933)).

[3] Appellant/Respondent's Brief at 10.

CONCLUSION

Morningstar's petition for rehearing should be denied. The petition is, primarily, an attempt to introduce new arguments and case theories after Morningstar's original arguments and theories were rejected by this court. Morningstar has failed to "state with particularity" any issues or matters that this court, presumably, missed when deciding this appeal. Contrary to Morningstar's arguments, this court did not overlook Morningstar's contention that it suffered "past" damages. Nor did this court erroneously disregard the statement of Morningstar's engineering expert. This court simply found, and properly so, that the trial court acted within it discretionary authority when it excluded Morningstar's speculative and conjectural evidence of damages. *See* Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). This court also properly recognized that it is "within the purview of the circuit court to limit the issues" for trial.

This court's reasoning is sound, and its standard of review was appropriate, given the issues that Morningstar presented on appeal. Morningstar should not be permitted to expand the scope of its appeal or to craft new arguments through a petition for rehearing. Morningstar's petition should be denied.

July 6, 2018.

W. Keith Martens
HAMILTON MARTENS, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

Michael K. Kendree
YORK COUNTY ATTORNEY
P.O. Box 229
York, South Carolina 29745

ATTORNEYS FOR RESPONDENT/APPELLANT

4852-3775-7292, v. 1

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. 2015-002460

Morningstar Fellowship Church . . . . . Appellant/Respondent

v.

York County, South Carolina . . . . . Respondent/Appellant

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens, LLC certifies that the Respondent/Appellant's Return to Appellant/Respondent's Petition for Rehearing was served upon other counsel of record by depositing same in the United States Mail with sufficient postage affixed and addressed as follows:

Donald M. Brown, Jr.
S.C. Bar. No. 9902
Brown & Associates, PLLC
Park South Professional Center
10440 Park Road, Suite 200
Charlotte, NC 28210
ATTORNEYS FOR APPELLANT/RESPONDENT

July 6, 2018

L. Melia Sweatt
Paralegal

HAMILTON
MARTENS
ATTORNEYS AT LAW

L. Melia Sweatt
Paralegal
803-329-7672
melia.sweatt@hmandb.com

July 6, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: *Morningstar Fellowship Church vs. York County, South Carolina*
Appellate Case No.: 2015-002460

Dear Ms. Kitchings:

Enclosed for filing in the above-named matter are the original and seven copies of Respondent/Appellant's Return to Appellant/Respondent's Petition for Rehearing, including Proof of Service.

Please return one clocked copy of the Return to me in the envelope that I have provided.

By copy of this letter, I am forwarding a copy of the Return to the Appellant/Respondent, Morningstar Fellowship Church.

Please call me if you have any questions or concerns. Thank you for your assistance in this matter.

Sincerely,

L. Melia Sweatt
Paralegal

/lms
Enclosures
cc: Donald M. Brown, Jr.
Brown & Associates, PLLC
Park South Professional Center
10440 Park Road, Suite 200
Charlotte, NC 28210