

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
IN THE COURT OF COMMON PLEAS
The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

AND FROM THE UNPUBLISHED OPINION OF THE COURT OF APPEALS,
Unpublished Opinion No. 2018-UP-250
Submitted March 1, 2018; Filed June 13, 2018

AND FROM THE SOUTH CAROLINA COURT OF APPEALS
Order Denying Petition for Rehearing
Filed August 16, 2018

MORNINGSTAR FELLOWSHIP CHURCH,

PETITIONER.

v.

YORK COUNTY, SOUTH CAROLINA,

RESPONDENT.

**MORNINGSTAR CHURCH'S
PETITION FOR WRIT OF CERTIORARI**

September 17, 2018

Donald M. Brown, Jr.
S.C. Bar No. 9902
N.C. Bar No. 14178
Brown & Associates, PLLC
Park South Professional Center
10440 Park Road, Suite 200
Charlotte, NC 28210
T: + 1 704 542 2525
brownandassociatespllc@gmail.com
ATTORNEY FOR PETITIONER

INDEX

CERTIFICATION REGARDING PETITION FOR REHEARING..... 4

QUESTIONS PRESENTED FOR REVIEW 4

STATEMENT OF THE CASE..... 5

INTRODUCTION 7

ARGUMENTS..... 8

 I. WHILE THE CIRCUIT COURT DECLARED FUTURE DAMAGES TO BE
 SPECULATIVE, THE CIRCUIT COURT CLEARLY ABUSED ITS DISCRETION BY NOT
 CONSIDERING MONIES, WHICH CONSTITUTE PRESENT DAMAGES ALREADY
 SPENT ON THE MORNINGSTAR TOWER PROJECT, RESULTING FROM THE
 COUNTY’S BREACH OF THE DEVELOPMENT AGREEMENT. 8

 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. 8

 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, AND THE CIRCUIT
 COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER EVIDENCE ON THIS
 ELEMENT. 10

 III. IN DISMISSING MORNINGSTAR’S FUTURE DAMAGES AS “SPECULATIVE,”
 AND FOCUSING ON FUTURE DAMAGES AND OVERLOOKING PRESENT
 DAMAGES, THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISING THE

BREACH OF CONTRACT CLAIM, AND 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. 13

A. Mr. Joyner Cited Mr. Brown’s Engineering Valuation as Evidence of the Value of the
Heritage Tower. 17

B. Mr. Brown’s Engineering Valuation was Never Impeached by the County..... 18

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..... 19

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..... 21

CONCLUSION..... 23

CERTIFICATION REGARDING PETITION FOR REHEARING

The undersigned council does hereby certify that a petition for rehearing was made and finally ruled on by the South Carolina Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Circuit Court clearly abused its discretion by missing and/or ignoring unimpeachable evidence of money already spent by Morningstar as an element of damage, while instead focusing its order only on the element of future damages and thus ignoring hard damages, and using that failure to consider hard damages as a basis for dismissal of Morningstar's breach of contract claim.
- II. Whether the Circuit Court erred as a matter of law, and abused its discretion, by dismissing Morningstar's cause of action for Good Faith and Fair Dealing within the contract, but, by then dismissing the contract, effectively, disallowing evidence of the county's lack of good faith and fair dealing.
- III. Whether the Circuit Court erred as a matter of law and abused its discretion by ignoring and/or missing unimpeachable evidence presented by an engineer that Morningstar's Tower at present was worth nearly \$12 million dollars, but instead focusing on "future damages" as being speculative, while ignoring present damages, thus leading to the Circuit Court's dismissal of the breach of contract claim, all the while Morningstar introduced clear evidence from an engineer named Eddie Brown, who was never in any way impeached or contradicted at all by the County, and who clearly offered evidence that the Tower in question was worth nearly \$12 million.

STATEMENT OF THE CASE

This case is about a church's quest to complete a 21-story tower located on church property in York County, South Carolina, in the municipality of Fort Mill. The superstructure of the Tower has already been completed, and has been completed for years. The interior has not been completed nor has the tower been hooked up to utilities or made ready for occupancy.

As a brief actual background, in 2004, Morningstar Church bought property that had previously been occupied by a very famous ministry known as "PTL." That ministry property contained many acres, and even contained what was once a large amusement park, and numerous buildings used by the old PTL ministry.

When Morningstar purchased the ministry grounds in 2004, the buildings on the property had been dormant since approximately 1997, approximately ten years after the end of the PTL ministry. Morningstar set out to do clean up and repair the grounds. Another group, headed by developer Earl Coulston, had already removed the old amusement park aspect of the property, meaning water slides, etc. Morningstar then began to build out other parts of the buildings that were still left to use for purposes of its church. One of those buildings was a 21-story tower, which was going to be used by the old PTL basically as a hotel facility.

Morningstar wanted to finish building out the Tower, to be used as an extension of its ministry for elderly Christian congregants who desire to come, live, and worship on site at Morningstar. Around 2007, Morningstar approached the County about obtaining the necessary permits to finish building out the Tower, which has been standing in its present state since about 1988.

The County insisted that Morningstar enter into something called a "Development Agreement," under the South Carolina Development Agreement Act. The Act required the

County to pass an ordinance prior to entering into a contract with Morningstar, and the County did in fact pass an ordinance authorizing the Development Agreement in November of 2007.

Pursuant to the county's ordinance, the parties signed a Development Agreement in January of 2008. The Development Agreement specifically expired by its own terms in a period of five years from the date of execution, unless extended by the parties by mutual agreement. The development agreement expired on or about January 12, 2013. Meanwhile, in January of 2008, Morningstar begin the process of finishing construction on the Tower.

In 2009 and 2010, disagreements ensued between the parties. Morningstar, in January of 2013, filed suit for declaratory judgment and breach of contract against the County, in the York County Circuit Court and sought damages for the delay which it claimed were caused by the County arbitrarily declaring a "default" in the Development Agreement.

The County counterclaimed, also asking for declaratory judgment, and asking that the Tower be demolished both under the Development Agreement and under a "nuisance" theory. The case has not yet been tried on the merits, but made its way to the South Carolina Court of Appeals because of certain orders and judgments entered by the Circuit Court along the way.

The Circuit Court ruled that Morningstar's damages elements were too speculative, and entered orders to the effect that future damages could not be calculated with enough certainty, or words to that effect. It struck Morningstar's claim for monetary damages, and used that as a basis for dismissing the breach of contract action. The Circuit Court ruled against York County in its Motion for Summary Judgment on the Declaratory Judgment action. Both sides appealed. The Court of Appeals issued an order affirming Judge Hall's orders from the Circuit Court, leaving the status quo in place.

Morningstar argues, that the Circuit Court clearly abused its discretion by ignoring money in the form of present damages that Morningstar has already spent on the case, and without any logical reason at all, ignored damages evidence in the record given from a certified engineer named E.J Brown on the present value of its tower.

Morningstar petitioned for rehearing, pursuant to SCACR Rule 221. After the Court of Appeals requested that responsive briefs be filed by the County, it again affirmed the Circuit Court in its focus on only future damages, but did not address present damages as measured by money that Morningstar had already spent in reliance on the Development Agreement.

Still convinced that the Circuit Court clearly abused its discretion in failing to consider clear evidence of damages that are measurable and clearly part of the record, Morningstar now petitions this court for a Writ of Certiorari pursuant to SCACR Rule 242.

INTRODUCTION

Now comes Appellant/Respondent, Morningstar Church (Morningstar), under the authority granted it by Rule 242 of the South Carolina Appellate Court Rules, and hereby petitions the South Carolina Supreme Court for a Writ of CERTIORARI, based upon (1) The Court of Appeals' denial of Petition for Rehearing filed August 16th 2018, and, before that, (2) the Court of Appeals' Unpublished Opinion, No. 2018-UP-250, filed June 13, 2018.

In support of its Petition, Morningstar argues that the Circuit Court clearly abused its discretion in failing to consider certain hard damages evidence as offered by the Petitioner, Morningstar, (hereinafter "Morningstar") and the Court of Appeals overlooked the Circuit Court's failure to consider damages as offered under SCRE Rule 401.

First, the Court of Appeals declared future damages to be speculative. But, the Court overlooked, and did not consider monies already spent on the Heritage Tower project, which

supports the present damages element of Morningstar's Breach of Contract claim. Failure to consider these present damages by the Circuit Court was a clear abuse of discretion. The Circuit Court disregarded, and the Court of Appeals overlooked, evidence the County's lack of good faith and fair dealing, as a crucial component underlying Morningstar's breach of contract claim. Failure to even consider evidence of the county's lack of good faith and fair dealing constitutes an error of law on the part of the Circuit Court. Both the Circuit Court and the Court of Appeals failed to consider crucial evidence from Mr. E.J. Brown, a certified professional engineer, who provided through crucial expert opinion evidence on the present value of the Heritage Tower, which supports the damages element of Morningstar's Breach of Contract. The Circuit Court's failure to consider this evidence of present value damages, and choosing instead to focus on future damages, is a clear abuse of discretion.

ARGUMENTS

- I. WHILE THE CIRCUIT COURT DECLARED FUTURE DAMAGES TO BE SPECULATIVE, THE CIRCUIT COURT CLEARLY ABUSED ITS DISCRETION BY NOT CONSIDERING MONIES, WHICH CONSTITUTE PRESENT DAMAGES ALREADY SPENT ON THE MORNINGSTAR TOWER PROJECT, RESULTING FROM THE COUNTY'S BREACH OF THE DEVELOPMENT AGREEMENT.

Both the Court of Appeals and the Circuit Court, in their respective decisions, reference the speculative nature of *future* damages in this case. The alleged speculative nature of the future damage is used as a basis for dismissing Morningstar's breach contract claim. But the courts ignored present damages which would sustain the breach of contract claim. Nowhere does either court ever address present damages, which were clearly a part of the record.

- 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.

In the Circuit Court's order, Judge Hall focuses on whether these costs, referring to "developmental costs" of \$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) 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.

Like the Circuit Court, the Court of Appeals focuses only on the future damages component of Morningstar's claim. See, for example, the excerpt below from the Court of Appeals decision, where the court focuses on 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 address 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 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. The Circuit Court cannot ignore those numbers as an element of damages. This is a clear abuse of discretion, which mandates a Writ of Certiorari under Rule 242, SCACR.

Put another way, it cannot be argued logically that monies already spent, in this case \$819,460.09, is now “speculative.” But that is what the Circuit Court did by its order. This is a clear example of an abuse of discretion by the Circuit Court. Morningstar’s out-of-pocket expenditures to date, totally ignored by both the Circuit Court and Court of Appeals, are damages due to the County’s breach, and warrant grounds for a Writ of Certiorari.

As Morningstar argues in its Memorandum of Law, originally submitted to the Court of Appeals 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 \$819,460.09, are objectively measurable, are not “speculative” by any means, and are more objectively measurable than future costs. This number, \$819,460.09, shows a precise calculation, right down to nine cents, and is not some “speculative” estimate that should be excluded from evidence.

The Circuit Court’s refusal to consider these hard costs, and especially in the absence of any attempt by the County to undermine or discount these objective and hard costs, was a clear abuse of discretion by the Circuit Court, mandating a Writ of Certiorari, and the Supreme Court should reverse the 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, AND THE CIRCUIT COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER EVIDENCE ON THIS ELEMENT.

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, it remains a component of South Carolina contract law. There 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). Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995); Parker v. Byrd, 309 S.C. 189, 420 S.E.2d 850 (1992).

This principle, that is a recognition of good faith and fair dealing as a subelement of contract, is recognized by the majority of the jurisdictions around the country, and is furthermore reiterated by the basic treaties on contracts by which the common law is often drawn.

"In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made".

17A C.J.S. Contracts § 328, pages 282--284:

In this case, Morningstar raised good faith and fair dealing in the underlying complaint, both as a legal cause of action, and also 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) are incorporated by reference, thus integrating Morningstar's complaint about lack of good faith and unfair dealing into its Breach of Contract Claim. 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 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).

The complaint placed the County on notice of the County's lack of good faith and fair dealing. But Circuit Court did not consider any of those actions at all, and summarily chose to dismiss the separate cause of action for good faith or fair dealing. Morningstar, because good faith and fair dealing is a sub element of breach of contract within South Carolina, is entitled to a trial on the county's actions.

Morningstar will be damaged as a result of the County's failure to engage in "good faith and fair dealing," because the County has attempted to use a lack of good faith and fair dealing to seek destruction of Morningstar's Tower.

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 61, they want Morningstar declared in default, they consequently 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)

If Morningstar is forced to pay "all costs of demolition" as result of the County's breach, and bad faith underlying that breach, those costs are damages to Morningstar.

Where is a lack of good faith and fair dealing in this case? Morningstar claims that it is the County's phony use of a default, which is not based on anything measurable or objective or within reason, but which is used as a tool to try to force Morningstar to tear down its Tower.

Therefore, the Supreme Court should grant a Writ of Certiorari on this issue, and reverse the Circuit Court on its order striking damages, and its order dismissing Morningstar's claim for Breach of Contract to include evidence on the issue of good faith and fair dealing.

III. IN DISMISSING MORNINGSTAR'S FUTURE DAMAGES AS "SPECULATIVE," AND FOCUSING ON FUTURE DAMAGES AND OVERLOOKING PRESENT DAMAGES, THE CIRCUIT COURT ABUSED ITS DISCRETION IN DISMISSING THE BREACH OF CONTRACT CLAIM, AND 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, both the Court of Appeals and 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 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 by the courts, but nonetheless, a legally significant oversight proving harmful to Morningstar. The failure to consider Mr. Brown's testimony on present damages, as the Circuit Court failed to do, is a clear abuse of discretion.

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, both the Circuit Court and the Court of Appeals, miss the point. The Circuit Court and the Court of Appeals overemphasized the wrong witness (Mr. Joyner), and totally ignored the right witness (Mr. E.J. "Eddy" Brown), who as a certified engineer is

imminently qualified to render an opinion on damages which requires a high degree of specialized knowledge and training in the engineering field.

The Circuit Court focuses on Mr. Joyner, and only Mr. Joyner, and essentially makes Joyner a “red-herring” talking point in its order, determining that Joyner was not qualified to give an estimate of damages with any certainty.

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 to engage in the science of building valuations. He is not held out as a construction damages expert. Mr. Joyner’s designation as the Plaintiff’s 30(b)(6) 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.

So, with respect, the Circuit Court focused on a factual “red herring,” while failing to address the qualifications of the proper witness, namely Mr. Brown, and the expert report on valuation presented through Mr. Brown.

The Circuit Court ignored Mr. Brown altogether, which is a clear abuse of discretion, as the court’s misguided decision to focus on Mr. Joyner’s qualifications, or in this case lack thereof while, ignoring Mr. Brown’s qualifications, led to improper exclusion of crucial damages evidence, which formed an improper building block which the circuit court used as a basis for dismissing Morningstar’s breach of contract claim.

Morningstar placed into the record evidence of Mr. Brown’s considered expert opinion, and Morningstar should be able to rely upon this evidence, certainly at the motion stages prior to the formal presentation of evidence at trial.

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 its 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 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.

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.

That the Circuit Court would discuss these other experts, such as Integra, but mention nothing about Mr. Brown, suggests that the Circuit Court flat-out missed Mr. Brown's evidence-of-record altogether.

The Circuit Court 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 the solid and unchallenged engineering assessment provided by Mr. Brown. 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. Regrettably, the Court of Appeals failed to correct the Circuit Court's error.

Based upon the County's breach of contract, as set forth in the Morningstar's complaint, by 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 place 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 cites and corroborates that expert testimony, which was 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 overlook this important valuation evidence, presented by Morningstar's Engineer, and put into evidence by questions from the County's own attorney during Mr. Joyner's deposition, 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. 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 ignore Mr. Brown's expert opinion smacks of abuse of discretion. To put this in perspective, let's go back to the basic evidentiary rules that govern 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 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 Circuit 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, is excluded. Indeed, it appears to have been overlooked altogether by the Circuit Court, which is a clear abuse of discretion, and also was overlooked 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. To simply ignore evidence, or to refuse to admit it all together without any reason whatsoever, as was the case of the evidence of the valuation of the Tower through Mr. Brown, is a clear abuse of discretion by the Circuit Court.

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 have taken Mr. Brown's deposition, or if they did, they did not place it in the record, nor did they attack the integrity of his conclusions in their arguments before Judge Hall. Thus, by electing not to take the expert witnesses' deposition and by not offering any evidence at all attempting to impeach Mr. Brown's conclusions, 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 242 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 Circuit Court apparently did not consider the expert opinion evidence at all, and if it did consider the expert opinion evidence, did not follow the mandate 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 within the ordinary purview of a lay person or the trier of fact (Circuit Court or Jury).

Unfortunately, the failure to meaningfully consider this 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, 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. The circuit court, without any explanation or semblance of logic, appears to have totally overlooked evidence of objective damages, measured by monies already paid by Morningstar under the development agreement. Likewise, the Circuit Court seems to have inexplicably overlooked clear evidence of the value of Morningstar's Tower, as offered by Mr. E.J. Brown, a licensed engineer, but instead focuses only up on the element of future damages as being too speculative

While this case presents numerous factual issues to be managed by a Circuit 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 Circuit Court and, thus, improperly excluded.

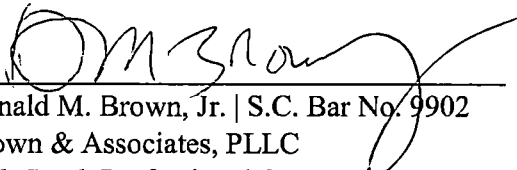
The Circuit Court's failure to even consider clear evidence of the record, including indisputable evidence of present damages that were paid in hard cash by Morningstar in the amount of \$819,460.09, and the Circuit Courts inexplicable refusal to even comment upon the report on damages, offered through Mr. Brown, in his estimated value of the Tower in the amount of \$11,889,719, is a clear abuse of discretion and warrants reversal on the issue of damages.

Likewise, it is also clear, by an examination of both the record and the Court of Appeals 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 Writ of Certiorari on this matter but, more importantly, a reversal of the Circuit 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 Supreme Court grant a Writ of Certiorari on the issues as set forth herein.

Respectfully submitted, this the 17th day of September, 2018.

By:



Donald M. Brown, Jr. | S.C. Bar No. 9902
Brown & Associates, PLLC
Park South Professional Center

10440 Park Road, Suite 200

Charlotte, NC 28210

T: + 1 704 542 2525

brownandassociatespllc@gmail.com

Attorney for Appellant/Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
IN THE COURT OF COMMON PLEAS
The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

AND FROM THE UNPUBLISHED OPINION OF THE COURT OF APPEALS,
Unpublished Opinion No. 2018-UP-250
Submitted March 1, 2018; Filed June 13, 2018

AND FROM THE SOUTH CAROLINA COURT OF APPEALS
Order Denying Petition for Rehearing
Filed August 16, 2018

MORNINGSTAR FELLOWSHIP CHURCH, APPELLANT/RESPONDENT,

v.

YORK COUNTY, SOUTH CAROLINA, RESPONDENT/APPELLANT.

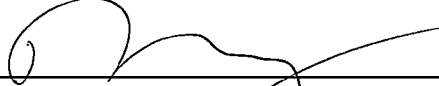
PROOF OF SERVICE

I, Donald M. Brown, Jr., certify that I have this day served the attached Petition for Writ of Certiorari and Appendix on Respondent by sending a copy of the same via US MAIL to: 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.

I further certify that all parties required by Rule to be served have been served.

September 17, 2018

By: _____


Donald M. Brown, Jr. | S.C. Bar No. 9902
Brown & Associates, PLLC
Park South Professional Center
10440 Park Road, Suite 200
Charlotte, NC 28210
T: + 1 704 542 2525
brownandassociatespllc@gmail.com
Attorney for Appellant/Respondent