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S.C. SUPREME COURT

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AND FROM THE UNPUBLISHED OPINION OF THE COURT OF APPEALS,
Unpublished Opinion No. 2018-UP-250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

Appellate Case Number: 2018-001655
Lower Court Case Number: 2013CP4600246 (York)

MORNINGSTAR FELLOWSHIP CHURCH, ...PETITIONER

v.

YORK COUNTY, SOUTH CAROLINA, ...RESPONDENT

INITIAL BRIEF OF PETITIONER
MorningStar Fellowship Church

April 3, 2019

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QUESTIONS PRESENTED FOR REVIEW

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II. Whether the Circuit Court erred as a matter of law and/or abused its discretion by ignoring and/or missing unimpeachable evidence presented by a certified professional estimator 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 a certified professional estimator named Eddie Brown, who was never 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, including a large amusement park, and numerous ministry buildings.

When MorningStar purchased the ministry grounds in 2004, the buildings on the property had been dormant since approximately 1988, the approximate time of the end of the PTL ministry. MorningStar set out to do clean up and repair the grounds, and after removing vestiges of the amusement park, began building 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 professional estimator 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 meaningfully 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, and with this Supreme Court having granted MorningStar's Petition for Writ of Certiorari on March 6, 2019, MorningStar now seeks relief from this court, urging the South Carolina Supreme Court to find that the Circuit Court erred as a matter of law and/or clearly abused its discretion by either refusing to or neglecting to consider clear evidence of damages, through Mr. Eddie Brown, who is a certified professional estimator, and furthermore urges this honorable court to reverse the Circuit Court and to reinstate the plaintiff's cause of action for breach of contract.

In support hereof, MorningStar argues that the Circuit Court clearly erred as a matter of law and abused its discretion in failing to consider certain hard damages evidence as offered by the Petitioner, MorningStar, (hereinafter "MorningStar") and failed to consider damages as offered under SCRE Rule 401.

First, the Circuit Court declared future damages to be speculative. But, the Court overlooked, and/or did not consider monies already spent on the Heritage Tower project incident to the contract, 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 error of law, and

abuse of discretion. The Circuit Court failed to consider crucial evidence from Mr. E.J. Brown, a Certified Professional Estimator, 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.

STANDARDS OF REVIEW

The principle standard of review is a *de novo* standard of review, in a light most favorable to the nonmoving party, wherein the nonmoving party, in this case MorningStar, must only submit "a mere scintilla of evidence" to withstand the motion. *Hancock v. Mid-South Management Co.,* Inc., 673 S.E.2d 801, 381 S.C. 326 (S.C., 2009) This highest and principle standard of review is applicable here, on appeal, because the York County Circuit Court's ORDER GRANTING DEFENDANT'S NEW MOTION FOR ENTRY OF JUDGMENT was granted under a Motion under Rule 56 of the South Carolina Rules of Civil Procedure, a Summary Judgment Motion, as revealed at Finding of Fact 8 of that order, clearly stating that "The County moves for Judgment pursuant to South Carolina Rules of Civil Procedure 54(b), *56* and 58(a)(2)." (Emphasis added).

Indeed, the record shows that York County did move for summary judgment on all causes of action under SCRCP Rule 56, including summary judgment for breach of contract. (R.p. 59). The County, in its brief supporting its Summary Judgment motion, claims that it was "entitled to judgment as a matter of law," citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Well, if the County's claim is that it is "entitled to a judgment as a matter of law" based upon its Summary Judgment Motion, then likewise, MorningStar is now entitled to

appellate review as a matter of law, and thus, our first standard for review is *de novo.*

Secondarily to the *de novo* standard or review, for other matters governing the Circuit Court's actions in either excluding or ignoring evidence, an *abuse of discretion* standard would be applied, with an abuse of discretion occurring when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

ARGUMENTS

I. WHILE THE CIRCUIT COURT DECLARED FUTURE DAMAGES TO BE SPECULATIVE, THE CIRCUIT COURT CLEARLY FAILED TO CONSIDER EVIDENCE IN A LIGHT MOST FABORABLE TO THE NON-MOVOING PARTY, AND 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.

The Circuit Court, references 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 focuses on future developmental costs as being speculative, but overlooks 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) But the Court overlooks costs already spent by MorningStar. This oversight first becomes evident

by the affidavit of Mr. David Yarnes, at paragraph 13 (R.p. 1077), initially providing evidence that MorningStar sunk over $1.2 million in engineering and feasibility studies, based on MorningStar's reliance on the contract (the Development Agreement) at issue. MorningStar later revised this number downward to $819,460.09, as shown by the deposition of MorningStar President Rick Joyner. (R.p. 705).

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." But with respect, the issue here is not costs that MorningStar *would* incur. The issue is costs that MorningStar has *already* incurred. (Emphasis added).

The Circuit Court does not address developmental costs already incurred (the $1.2 million in Mr. Yarnes' affidavit, later reduced to $819,460.09 by Mr. Joyner's deposition R.p. 705) that *MorningStar has already spent in reliance on the contract*. That's a crucial distinction hard costs (developmental costs) already realized and calculated, versus some to-be-determined number off in the future, which the Circuit Court seemed to focus on, largely to the exclusion of all else. The hard costs that MorningStar has *already* incurred gets lost in the Circuit Court's legally-misguided shuffle. (Emphasis added).

While the Circuit Court focuses on the future, it ignores the past. Whether, to use the Circuit Court's phrase from its Order, these costs would have to be "incurred again," in the future, is wholly beside the point. Even if they are never "incurred again," that money has already been spent, and MorningStar's damages have already accrued. That money is gone. Forever.

These damages in Mr. Yarnes' affidavit, later reduced upon further calculation to $819,460.09 (R.p.705), as acknowledged in Mr. Joyner's deposition, are *monies MorningStar already spent* for initial engineering studies, etc., *after the execution of the Development Agreement and in reliance upon what MorningStar believed its obligations were under the Development Agreement.* There is nothing speculative about these numbers. These damages, totaling $819,460.09, for a lack of a better description, are basically calculated by getting out the receipts or the cancelled checks, then getting out the calculator, then typing in the amounts on each check or receipt, then hitting the "+" button, and then hitting the "=" button, and then the calculator displays $819,460.09. It's that simple.

There is nothing "speculative" or hard to figure out about this hard number of $819,460.09. Somehow, the Circuit Court just missed the mark here. To compound the clarity of the Circuit Court's error, nowhere in the record does the County even attempt to undermine the reliability of this number, $819,460.09, but rather, focused all its attention and energy on attacking to so-called speculative nature of future damages. (Emphasis added).

These damages for monies already spent 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 an error of law, and a clear abuse of discretion, which mandates a reversal of the Circuit Court's order dismissing MorningStar's Breach of Contract claim, and a remand to the Circuit Court of York County with instructions consistent therewith.

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. As we review the record as a whole, and in light of the Summary Judgment Motion under Rule 56, which the circuit court referenced at Finding of Fact 8, the amount testified to by Mr. Yarnes, is at the very least a "scintilla" of evidence on the issue of hard damages, and actually it's much more than a "scintilla." But even still, viewed under the "mere scintilla" standard for summary judgment motions, and in light of the clear requirement the summary judgment must be viewed in a light most favorable to the non-moving party, the circuit court should have entered an order denying summary judgment, which, of course, would have circumvented any pre-trial judgment, before even had a chance to put on evidence at trial. At the very least this constitutes "nominal damages," under which the breach of contract action should not have been dismissed.

Secondarily, the circuit court, based upon a review of the record, appears to have ignored this evidence altogether, which 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, are damages due to the County's breach, and warrant grounds for a reversal of the Circuit Court's order dismissing MorningStar's Breach of Contract Claim, and a remand to the Circuit Court with instructions consistent therewith.

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 objectives and hard costs, was a clear abuse of discretion by the Circuit Court, mandating a reversal of the Circuit Court's order dismissing MorningStar's Breach of Contract Claim, and a remand to the Circuit Court with instructions consistent therewith.

II. IN DISMISSING MORNINGSTAR'S FUTURE DAMAGES AS "SPECULATIVE," AND FOCUSING ON FUTURE DAMAGES AND OVERLOOKING PRESENT DAMAGES, THE CIRCUIT COURT CLEARLY FAILED TO CONSIDER EVIDENCE IN A LIGHT MOST FABORABLE TO THE NON-MOVOING PARTY, AND THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN DISMISING THE BREACH OF CONTRACT CLAIM, AND OVERLOOKED MORNINGSTAR'S EXPERT EVIDENCE, PRESENTED BY ITS CERTIFIED PROFESSIONAL ESTIMATOR, WHICH ESTIMATED SALVAGEABLE WORK IN PLACE TO BE $11, 889, 718.

Unfortunately, the Circuit Court, overlooked crucial evidence presented by one of MorningStar's expert witnesses, Mr. Eddie J. Brown, a Certified Professional Estimator, 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 on Appeal at page 408, the Circuit Court, in its Final Order, did not even mention 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, R.p. 47.)

With respect, however, this rationale misses the point. Both the Circuit Court and the Court of Appeals overemphasized the wrong witness (Mr. Joyner), and totally ignored the right witness (Mr. E.J. "Eddie" Brown), who as a certified professional estimator 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 a certified estimator, 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 overlooked this crucial evidence altogether, making 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 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 Estimator, 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 in estimating damages and building value. 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. The Circuit Court overlooked the expert report, which offers a detailed opinion of the current value of the building in place. The report also computes "salvageable work in place," i.e. the value of the building which MorningStar loses because of the County's "default," to be at $11,889.719.

Based upon the summary judgment standard of review, (and as Circuit Court pointed out, the County moved for summary judgment), Morningstar need only offer a "scintilla of evidence" to Defeat the county's Motion for Summary Judgment. And $11,889.719 is a whole lot more than a scintilla of evidence. This is evidence of record, Mr. Brown's report, and is clearly part of the record (R.p. 408), which the Circuit Court should have considered on the County's summary judgment motion, in a light most favorable to the non-moving party. The application of that standard would have mandated summary judgment in favor of MorningStar on the question, and should have pre-empted the entry of judgment, dismissing the breach of contract claim. For whatever reason, the court did not even consider Mr. Brown's report. However, the report is clearly a part of the record, and must be considered under Rule 56, and this evidence mandates immediate reversal of the Circuit Court.

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, R.p. 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. Again, Mr. Joyner's testimony, in addition to the report for Mr. Brown, creates more than a "scintilla of evidence" on the issue of damages, and

viewed in a light most favorable to a non-moving party, the Circuit Court should be reversed and the claim for breach of contract to be reinstated.

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

Moreover, not only does the court overlook this important valuation evidence, presented by MorningStar's Certified Professional Estimator, 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 or other valuation experts opposing Mr. Brown's methods or calculations, nor challenged nor impeached his credibility. Nor did the county present expert evidence in any form to contradict the underlying methods or calculations that supported this professional evaluation.

C. Rule 401 and 402 of the South Carolina Rules of Evidence Mandate Admission of Mr. Brown's 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 either overlooked or excluded. Indeed, it appears to have been overlooked altogether by the Circuit Court, which is a clear abuse of discretion.

Meanwhile, this mandate under Rule 402, adopted by our legislature, that "all relevant evidence is admissible," is legally nonnegotiable. Under the 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 in evidence of the Tower valuation through Mr. Brown, marks a clear abuse of discretion by the Circuit Court.

Of course, evidence can be excluded under other rules, such as Rule 403, if the "danger of unfair prejudice substantially outweighs the probative value." But the Circuit Court made no finding under Rule 403 to bring this exclusionary exception into play, nor did it cite any other evidentiary exclusionary rule.

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 did not cross-examine or otherwise shake the underlying foundation of Mr. Brown's report in any way. Second, the County did not take Mr. Brown's deposition, nor did they attack the integrity of his conclusions in their arguments before Judge Hall. Thus, not taking the expert witnesses' deposition nor offering any evidence to impeach Mr. Brown's conclusions, the County did not shake Mr. Brown's reliability or credibility. Third, the County did not present any expert witness from any other Certified Professional Estimator 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. Mr. Brown is nowhere to be found in the court's order. The Circuit Court's treatment of Mr. Brown, or in this case, the circuit court's decision to ignore him, mandates reversal under the de novo standard of summary judgment, in a light most favorable the non-moving party, and warrants reversal under an abuse of discretion standard as well. It also mandates reversal of the Circuit Court's ORDER ON YORK COUNTY'S MOTION TO EXCLUDE DAMAGES, filed February 3, 2015. (R.p. 45-51). A court simply cannot ignore evidence, and to do so is an abuse of discretion.

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 Valuation on the Question of Damages.

Before concluding, let us consider several other applicable provisions of the South Carolina Rules of Evidence, which 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, and special valuations knowledge.

Mr. Brown applied these highly-specialized skills in assigning a salvageable value to the Tower, and in rendering his expert opinion on that value. That this type of highly-specialized knowledge, undergirding Mr. Brown's finding, would normally be outside the purview of lay witnesses or even the Circuit Court. But for reasons unknown 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, and nothing in the record shows that this opinion was ever challenged.

This 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 –These skills are not with the ordinary purview of a lay person or the trier of fact (Circuit Court or Jury).

Unfortunately, the failure to consider this evidence is both an abuse of discretion, and an error of law, by the circuit court, 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 mandatory, unless a legally recognized basis for exclusion is articulated, which never happened here.

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 professional estimator, but instead focuses only up on the element of future damages as being too speculative.

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 both an error of law, and a clear abuse of discretion and warrants reversal on the issue of damages.

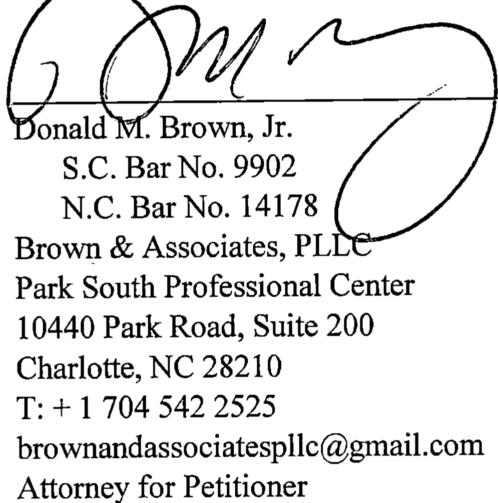
This error of law, by overlooking Mr. Brown's crucial expert report (R.p. 408), and refusing to apply it in a legally required "light most favorable to the nonmoving party" on the summary judgment motion, and by either neglecting or refusing to consider the report in its earlier Order to Exclude Damages (R.p. 47), mandates reversal of the Circuit Court on the crucial evidentiary exclusion of damages in this case, and restoration of MorningStar's cause of action for Breach of Contract.

Under either the de novo standard for summary judgment cases, or under the abuse of discretion standard, the circuit court's order violates both. Mr. Brown's report is a clear part of the record and cannot be ignored. It is more than a "scintilla of evidence" on damages in a light most favorable to the non-moving party, and summary judgment should have been denied, and thus, entry of judgment should not have been entered against MorningStar on its cause of action for

Breach of Contract. And the court's curious decision to seemingly ignore the report and make no findings against its credibility, is an abuse of discretion.

For the foregoing reasons, the Petitioner, MorningStar Church, respectfully request that the Supreme Court reverse the Circuit Court's Entry of Judgment against it and mandate re-instatement of its cause of action for Breach of Contract.

Respectfully submitted, this the 3rd day of April, 2019.



By: ______________________________

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S.C. SUPREME COURT

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

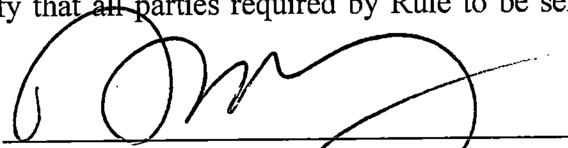
MORNINGSTAR FELLOWSHIP CHURCH, ... PETITIONER,

v.

YORK COUNTY, SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Donald M. Brown, Jr., certify that I have this day served the attached Initial Brief of Petitioner 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.



April 3, 2019 By: ______________________

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