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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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AND FROM THE UNPUBLISHED OPINION OF THE COURT OF APPEALS
Unpublished Opinion No. 2018-UP-250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

Appellate Case No. 2018-001655

Morningstar Fellowship Church

Petitioner

v.

York County, South Carolina

Respondent

BRIEF OF RESPONDENT

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May 20, 2019

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QUESTIONS PRESENTED

- I. Whether Morningstar's petition should have been denied where the petition seeks to introduce entirely new legal theories and appellate arguments that were not presented as issues on appeal.
- II. Whether the trial court and Court of Appeals properly recognized that Morningstar's claims failed as a matter of law because its alleged damages were too speculative and conjectural to be recovered in a judicial proceeding.
- III. Whether the trial court and the Court of Appeals properly disregarded a line-item "statement of probable costs" as evidence of alleged damages, where that "statement" was contained within an inadmissible document, where Morningstar never presented admissible evidence of the alleged "value" of its Tower, and where Morningstar failed to present any evidence that it had suffered a loss of that "value" as a proximate result of York County's alleged breach of contract.

COUNTER-STATEMENT OF THE CASE

I. Underlying Facts

Morningstar Fellowship Church (Morningstar) purchased 52 acres of land in northeastern York County in September 2004 (the "Property"). The Property had formerly been owned by PTL Ministries and, at one time, had served as the headquarters of that vast organization, overseen by televangelist Jim Bakker. Following PTL's highly-publicized collapse in the late 1980s, the Property changed hands several times before Morningstar purchased it. The Property contained several buildings and other structures left behind by PTL, including a vacant, incomplete and deteriorating high-rise condominium tower (the "Tower").

Morningstar's seller had previously committed to demolish the Tower and, when it sold the Property to Morningstar, inserted a provision in the parties' contract which obligated Morningstar to complete the planned demolition within twenty-four months. R. at 137.

Morningstar's deed also contained an easement that would allow the Property's seller to re-enter the Property and demolish the Tower if Morningstar failed to do so. R. at 164.

In late 2004, Morningstar submitted a proposed development plan to York County which confirmed Morningstar's plans to demolish the Tower. That development plan called for demolition within two years following county approval of the plan. York County approved that development plan in January 2005. R. at 165.

Within months, Morningstar had changed course. In the fall of 2005, Morningstar announced plans to complete the Tower, rather than demolish it. Morningstar requested that York County approve plans for completion and renovation of the Tower, but York's County Council rejected that request on December 14, 2005. Id.

Nearly two years later, as Morningstar's self-imposed deadline to demolish the Tower approached, Morningstar proposed a comprehensive development agreement for the Property. Among other provisions, the proposed development agreement would afford Morningstar an opportunity finish and renovate the Tower. The county agreed, and on January 13, 2008, Morningstar and York County entered a formal development agreement (the "Development Agreement"). R. at 73-93. The Development Agreement provided a five (5) year schedule for development of the Property, including completion and renovation of the Tower. The Development Agreement also imposed interim completion "benchmarks" upon Morningstar, including one that provided:

Within 180 days of County approval of the commercial site plan for the Property, should [Morningstar] or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by [Morningstar].

(R. at 77).

Even though the parties dispute whether York County properly and effectively conveyed its approval of Morningstar's commercial site plan, the record clearly establishes that York County approved Morningstar's plan on or about August 18, 2009. R. pp. 865-66; 874-75; 882-85; 945-48; 968-69; 1040; 1045. The record also establishes that Morningstar was unable to provide the county with any bid, performance or payment bond, letter of credit or other acceptable evidence of the financial viability of its project within 180 days of site plan approval. R. at 1030-34. On March 5, 2010, York County formally declared Morningstar in default of the Development Agreement. R. at 804-05.

II. Disposition in the Circuit Court and the Court of Appeals

On January 24, 2013, Morningstar sued York County, alleging that the county had breached the parties' Development Agreement. R. at 496-503. Morningstar's complaint included claims for breach of contract, declaratory judgment and for breach of the implied duty of good faith and fair dealing. *Id.* York County timely answered and asserted counterclaims for breach of contract, declaratory judgment, and nuisance. R. at 504-14.

In June 2014, York County moved for summary judgment or partial summary judgment as to Morningstar's claims. R. at 59. On July 16, 2014, the circuit court issued an order granting York County summary judgment on Morningstar's cause of action for breach of the covenant of good faith and fair dealing, but denying the County's motion as to the breach of contract claim. R. at 4.

In September 2014, York County moved for an order excluding Morningstar's claimed damages as a matter of law. R. at 274. For reasons that are not clear, that motion was not set for a hearing. Then, on January 23, 2015 (a few weeks before trial), York County also filed a separate motion *in limine* to prevent certain evidence, including evidence of settlement

discussions and mediation, from being introduced at trial. R. at 297. Both motions were heard by Judge Daniel D. Hall the week before trial was scheduled to begin.

On February 3, 2015, Judge Hall issued a single order granting the County's motion to exclude damages, and also granting much of the County's motion *in limine*. R. at 17-28. Of relevance to Morningstar's petition for writ of certiorari, Judge Hall found and concluded that Morningstar's claims for damages were based entirely on conjecture and speculation, were not supported by any competent or admissible evidence and were not established with any reasonable certainty. R. at 19-23. For that reason, Judge Hall ruled that Morningstar would be precluded from introducing any evidence of its claimed damages at trial. R. at 19. The trial court separately found that evidence of the parties' settlement discussions, mediation presentations and a public petition were neither relevant nor probative of any issue for trial, and should be excluded *in limine*. R. at 23-28.

Based upon Judge Hall's orders, and the trial court's exclusion of all of Morningstar's claimed damages, York County immediately moved for entry of judgment. R. at 440. That same day, Morningstar filed a notice of appeal. On April 16, 2015, the Court of Appeals dismissed Morningstar's appeal as interlocutory. *See* S.C. App. Order, filed April 16, 2015 (Case No. 2015-000262).

The case was remanded, and then, on October 22, 2015, York County renewed its motion for entry of judgment. R. at 482. On November 10, 2015, Judge Hall granted York County's motion, in part, and entered judgment against Morningstar on its breach of contract cause of action. R. at 31-35.

Again, Morningstar appealed. On June 13, 2018, the South Carolina Court of Appeals issued an unpublished opinion affirming the circuit court's judgment. *See* 2018-UP-250 (Ct.

App. June 13, 2018). Morningstar petitioned for rehearing. On August 16, 2018, the Court of Appeals denied that petition. *See* S.C. App. Order filed Aug. 16, 2018.

ARGUMENTS

I. Morningstar’s petition should not have been granted because the petition introduces entirely new legal theories and appellate arguments that were never presented as issues on appeal.

None of the questions presented by Morningstar’s petition is properly before this court. Rule 242(d)(2) mandates that “only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari.” (italics added). Despite this clear mandate, the “questions” that Morningstar asks this court to review are not remotely similar to the issues it presented during its appeal.

Morningstar’s appellate brief set forth three 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
- (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.

Appellant/Respondent’s Brief, Statement of Issues on Appeal. In sharp contrast, its petition for writ of certiorari sought review of three *different* “questions” by this court:

- (1) whether the circuit court and Court of Appeals overlooked Morningstar’s evidence of “monies already spent” in determining that Morningstar’s damage claims were entirely speculative and conjectural;

¹ As York County has repeatedly pointed out in responding to Morningstar’s appeals, 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.

(2) Whether the Court of Appeals affirmed the trial court’s judgment on Morningstar’s breach of contract claim without considering “evidence of [the County’s alleged] lack of good faith and fair dealing”; and

(3) Whether the Court of Appeals overlooked “Morningstar’s expert evidence” that, presumably, supported its claim of damages.

Each of the “questions presented” in Morningstar’s petition was first introduced through the petition for rehearing that Morningstar filed in the Court of Appeals. By the time Morningstar filed that petition, of course, the Court of Appeals had already ruled upon the issues presented in Morningstar’s appeal and had unanimously affirmed the circuit court’s judgment. Morningstar’s petition for rehearing was not a legitimate attempt to seek rehearing of some fact or issue that the Court of Appeals supposedly overlooked or misapprehended. *See* Rule 221 S.C.A.C.R. It was a last-gasp effort to salvage Morningstar’s case by attempting to draw the Court of Appeals’ attention to three new issues that, in hindsight, might have appeared more “winnable” to Morningstar and its newly-retained appellate counsel.² Because none of those issues had been presented during Morningstar’s appeal, none of them was properly presented through its petition for rehearing. Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011)(“[A] party may not raise an issue for the first time in a petition for rehearing.”). By the same token, none of those issues is properly before this court upon a petition for writ of certiorari.

South Carolina’s rules of appellate procedure require a party to set forth, in its initial appellate brief, “each of the issues presented 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 that statement. *Id.* Once initial briefs have been served, parties are not allowed to change the substance of their appellate arguments. *See* Rule 211(b) S.C.A.C.R. (“The

² Donald L. Brown, Esq. entered an appearance in November 2017, more than a year after Morningstar filed its final appellate brief. *See* Docket Entries for Appellate Case 2015-002460.

final brief(s) shall be identical to the brief(s) previously served under Rule 208. . . .”). Furthermore, when a losing party later seeks rehearing, that party is not permitted to introduce new arguments or issues for the court’s consideration. 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)). In a similar vein, on certiorari a petitioner is limited to “those questions raised in the Court of Appeals *and* in [the petitioner’s] petition for rehearing.” Rule 242(d)(2) S.C.A.C.R. (emphasis added). South Carolina’s appellate court rules do not permit parties to “substitute” new issues or arguments at various stages of appeal in the hope of finding one that might, eventually, prove successful.

The “questions presented” by Morningstar’s petition do not remotely resemble the “issues” that Morningstar initially set forth as the bases for its appeal. This court should not have accepted certiorari, and Morningstar’s petition should be dismissed as improvidently granted.

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.

Morningstar contends that both the Court of Appeals and the trial court focused solely upon its claims for future damages, without considering its claims for alleged “past” damages and expenditures. *See* Petition for Writ of Certiorari, Question I. As previously discussed, this court should not even consider that argument because it was never presented as an issue 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 argument, the argument has no merit.

Morningstar’s contention that the Court of Appeals and trial court focused exclusively on Morningstar’s claim for “future” damages, while ignoring its claim for “past” damages, is

incorrect. The County's motion to exclude damages advanced three distinct arguments: (1) "Morningstar cannot prove 'loss of value of the Tower'"; (2) "Morningstar cannot recover damages for [previously incurred] development costs;" and (3) "Morningstar has produced no evidence of lost reservations resulting from actions of the County." *See* Motion to Exclude Damages, filed Sep. 15, 2014 (R. at 274-278). Morningstar responded to each of those arguments in a memorandum filed January 23, 2015. (R. at 290-296). When the trial court issued its order excluding Morningstar's damages, the court's order also addressed each of those arguments, and each category of claimed damages. (R. at 17-23). Likewise, the Court of Appeals considered each "category" of Morningstar's alleged damages in affirming the trial court's order. *See* Ct. App. Op. 2018-UP-250, at 3. Both the trial court and the Court of Appeals concluded that Morningstar could not recover any of its alleged damages as a matter of law – not because they were premised upon uncertain future events, but because they 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.

III. Neither the trial court nor the Court of Appeals "failed to consider" Morningstar's so-called "expert evidence," because that "evidence" was not presented to either court by testimony, affidavit or other form of admissible evidence.

Morningstar's petition makes much of what it describes as "expert evidence" prepared by a "certified professional estimator," Eddie J. Brown, P.E.³ Petitioner's Br. at 12. Morningstar contends that Mr. Brown's report was "presented" to the trial court but, in fact, the record is devoid of any affidavit or sworn testimony that could remotely pass as a "presentation" of expert testimony.

³ Presumably, Mr. Brown's calculation is an estimate of what it would have cost Morningstar to replicate that which PTL left behind when it abandoned construction of the Tower.

As evidence that Mr. Brown's "report" was presented to the trial court, Morningstar first directs this court's attention to the deposition testimony of Morningstar's senior pastor, Rick Joyner. Petitioner's Br. at 13-14. Morningstar argues that, because Mr. Joyner referred to Mr. Brown's "report" at his deposition, the trial court was bound to consider the substance of that report. Morningstar's argument on this point runs directly afoul of the rules of evidence. *See* Rules 801 and 802 S.C.R. Evid. Essentially, Morningstar seeks to rely upon an out-of-court statement made by someone (Mr. Brown) other than the declarant (Mr. Joyner) as evidentiary support for the "truth of the matter asserted" (the value of the "salvageable work in place"). Mr. Joyner's testimony is a paradigm of hearsay, and Morningstar's reliance upon that testimony is improper.

Morningstar also directs this court's attention to page 408 of the record, but the document at page 408 is merely a summary "Statement of Probable Cost for Completion of 'Heritage Towers,'" not an expert witness' verified report or affidavit. Moreover, the "Statement of Probable Cost (Salvageable Work in Place)" is a single line-item appearing on that page, with no back-up calculation or explanation. The document on which that line-item entry appears was actually part of Morningstar's mediation presentation in this case, which the trial court determined was inadmissible at trial. *See* R. at 25 (citing S.C.R. Evid. 408 and S.C. A.D.R. Rule 8). Mr. Brown never testified in the case, and he never gave an affidavit that was presented to the court as evidence of anything.

South Carolina's Rules of Civil Procedure and Evidence would never permit a litigant to support its claim for damages with a line-item entry in an unsworn statement. S.C.R. Civ. P. 11(c) ("Affidavits . . . shall be written statements . . . sworn to or affirmed before an officer authorized to administer oaths. . . ."); S.C. R. Evid. 602 ("A witness may not testify to a matter

unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). Moreover, because that line-item entry was only “presented” in ways that the Rules of Evidence do not allow – once in the context of mediation, and once through Rick Joyner’s hearsay testimony – it would have been *improper* for the trial court to consider it. If Mr. Brown’s opinions were so critical to Morningstar’s case, why were they not properly presented by affidavit or sworn testimony below? The answer to that question is obvious: Morningstar only decided that Mr. Brown’s calculations were “critical evidence” when it began crafting arguments for rehearing of its by-then dismissed appeal. See Argument I, supra.

Morningstar argues that York County “did not impeach” Mr. Brown’s “opinions” but, since those opinions were never presented as evidence in this case, the County had nothing to impeach. York County cannot be maligned for “failing to impeach” evidence that was never presented, and the trial court cannot be criticized for “failing to consider” that non-evidence. Nor can the Court of Appeals be blamed for disregarding the same non-evidence on appeal. Appellate courts are not required to scour a record in search of some evidentiary morsel that, presumably, supports an appellant’s position. Cf. Jones v. Eaton Corp., 2017 WL 2332638, at *15 n.25 (D.S.C. 2017). This is particularly true where, as here, the so-called “evidence” was never presented to the trial court.

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 before now. 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, inadmissible, document. Rule 209(b) S.C.A.C.R. If the lower courts failed to consider this “crucial evidence,” Morningstar has only itself to blame.

In any event, Mr. Brown's "statement of probable cost (salvageable work in place)" would hardly qualify as admissible expert testimony. There is no indication that Mr. Brown'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 Mr. Brown 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 Mr. Brown 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."). In fact, the document itself describes these costs as merely "probable" and not as costs calculated to a reasonable degree of professional certainty. The document appearing at page 408 of the record is neither an expert's report nor is it admissible expert testimony.

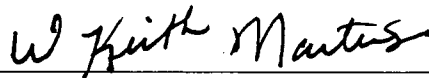
Even if a qualified "valuation" expert *had* properly testified concerning the value of the "salvageable work in place," that testimony would be irrelevant to the question of Morningstar's alleged damages in this lawsuit. When Morningstar first acquired the land on which the Tower sits, it became the owner of a partially-completed and deteriorating structure 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 Mr. 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 the parties Development Agreement.⁴ Morningstar produced no evidence that it had suffered recoverable damages for "loss of the 'salvageable work in place,'" as a proximate result

⁴ 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.

of York County's alleged breach of the parties' contract. The trial court properly prohibited Morningstar from claiming damages for which it had no evidentiary support. R. at 19. The Court of Appeals also correctly ruled when it affirmed that decision. Ct. App. Op. 2018-UP-250, at 3.

CONCLUSION

Neither the trial court nor the Court of Appeals misapprehended or failed to consider any issue regarding Morningstar's claimed damages. Morningstar's claimed damages of "sunk costs" were inherently speculative and, therefore, properly excluded by the trial court. Its reliance upon the summary calculation regarding the alleged value of "salvageable work in place" was inadmissible and the trial court committed no error when it failed to consider that "evidence." Morningstar's petition is not supported by the facts in the record, the law of this state or the applicable rules of evidence, civil procedure and appellate procedure. This court should dismiss the petition or, at a minimum, affirm the Court of Appeals.



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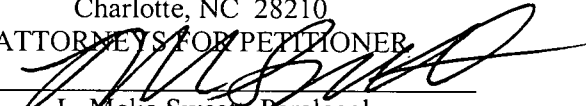
Morningstar Fellowship Church Petitioner

v.

York County, South Carolina Respondent

PROOF OF SERVICE

The undersigned, an employee of Hamilton Martens, LLC certifies that the Brief of Respondent was served upon other counsel of record by depositing same in the United States Mail with sufficient postage affixed and addressed as follows:

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