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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Walton J. McLeod, Circuit Judge

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Opinion No. 6069 (S.C. Ct. App. filed July 3, 2024)

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John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

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PETITION FOR A WRIT OF CERTIORARI

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September 11, 2024

D. Randolph Whitt  
S.C. Bar No. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellants

Other Counsel of Record:

Amy H. Wooten  
751 Corporate Center Drive  
Suite 300  
Raleigh NC 27607  
AHWooten@wardandsmith.com

Paul A. Fanning  
PO Box 33009  
Raleigh NC 27636  
PAF@wardandsmith.com

INDEX

Certificate of Counsel.....1

Question Presented.....1

1. Did the Court of Appeals err in affirming the trial court's grant of summary judgment, not on the rationale relied upon by the trial court, but based on the authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) which the Court of Appeals construed as holding that the existence of a default absolves an opposing party from any duty of good faith and fair dealing as to conduct occurring both before and after the default.

Statement of the Case.....1

Argument.....1

Conclusion.....3

## Certificate of Counsel

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 12, 2024.

### QUESTION PRESENTED

1. Did the Court of Appeals err in affirming the trial court's grant of summary judgment, not on the rationale relied upon by the trial court, but based on the authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) which the Court of Appeals construed as holding that the existence of a default absolves an opposing party from any duty of good faith and fair dealing as to conduct occurring both before and after the default.

### Statement of the Case

This action was commenced by the Respondent's filing of a Summons and Complaint on December 20, 2018. (R. p.11) Appellant served an Answer and Counterclaims alleging respondent had breached the implied duty of good faith under several contracts. (R. p.32) Respondent served a Reply to the Counterclaims (R. p. 50), and an Amended Reply. (R. p. 54)

Respondent filed a motion for summary Judgment. (R. p. 64). The Circuit Court granted the motion as to Appellants Counterclaims (R. p.1)

The Court of Appeals affirmed the order of the circuit court. *John Deere Construction & Forestry Company, v. North Edisto Logging, Inc. and Paul Gunter*, Opinion No. 6069 (S.C. Ct. App. filed July 3, 2024) Petitioner seeks a writ of certiorari to review that decision.

### Argument

The Court of Appeals erred in affirming the trial court's grant of summary judgment, not on the rationale relied upon by the trial court, but based on the authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) which the Court of Appeals construed as holding that the existence of a default absolves an opposing party from any duty of good faith and fair dealing as to conduct occurring both before and after the default.

The Court affirmed the trial court's grant of summary judgment on the counterclaim for breach of the implied duty of good faith and fair dealing, but not on the sole basis stated in the trial court's order, which was that a breach of the implied duty of good faith and fair dealing is only actionable if there is also a breach of an express term of the contract.

Rather, the Court of Appeals affirmed based on *Swinton Creek*, a case that was premised on the existence of a default in May of 1991 being uncontested. (See *Swinton Creek* 334 S.C. at 487). Nothing in *Swinton Creek* or in *Parks* suggests that a default relieves a part of the burden of acting fairly and in good faith retroactively to a period before the default occurred.

In this case, the existence of a late payment does not constitute a default without John Deere electing to declare a default. See Contracts in the record, e.g. R. at page 17 ¶ 10(b). The decision of whether and when to declare a default is John Deere's. Paragraph 9 of the contract provides “We may determine you to be in default...” (R. p. 17).

The Record also contains John Deere's declaration of a default as of December 10, 2018, which is quoted in this Court's July 3 Decision. This declaration is the earliest that any default could have occurred. Therefore the authority of *Swinton Creek* and *Parks* does not immunize John Deere from scrutiny based on the principles of good faith and fair dealing for any of its conduct before December 10, 2018.

Examples of conduct that occurred long before this cutoff include the loan origination issues from 2015 and the issues related to the October 8, 2015 letter quoted in this Court's decision and the subsequent actions and inactions related to a modification of the loans.

The authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) does not provide a basis for using a default to immunizing conduct that occurred before the default from scrutiny on good faith and fair dealing principles.

Conclusion

For the foregoing reasons, this Court should grant Certiorari, and reverse the Court of Appeals Order affirming trial court's order granting summary judgment on the claim for breach of the duty of good faith and fair dealing as to any conduct that occurred before December 10, 2018.

Respectfully submitted,

A handwritten signature in black ink that reads "D Randolph Whitt". The signature is written in a cursive style with a long horizontal flourish extending from the end of the name.

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D. Randolph Whitt  
S.C. Bar No. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellants

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