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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Opinion No. 2024-UP-281 (S.C. Ct. App. filed July 31, 2024)

Eastwood Construction Partners, LLC and
Eastwood Development Corporation, ... Appellants,

v.

GHD Brooks Creek, a North Carolina Limited Liability Company, and AF-Brooks Creek, LLC, a North Carolina Limited Liability Company, GHD River Falls, a North Carolina Limited Liability Company, and AF-River Falls, LLC, a North Carolina Limited Liability Company, Greenhawk Corporation, Inc. and
TRI Pointe Homes, Inc., ...Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

In accordance with SCACR 242(d)(1), counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 8, 2024.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENT ORDER AS TO EASTWOOD'S CONTRACT AND SPECIFIC PERFORMANCE CLAIM?

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENT ORDER AS TO EASTWOOD'S JOINT VENTURE CLAIM?

III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING SUMMARY JUDGMENT BEFORE EASTWOOD COULD COMPLETE ESSENTIAL DISCOVERY?

STATEMENT OF THE CASE

This is a dispute between Eastwood and Greenhawk over a contract and joint venture to purchase residential lots on two tracts of real property in York County, South Carolina (together, the "Properties"). Eastwood claims its contract with Greenhawk is evidenced by multiple writings and Eastwood's part performance. Petitioners now seek a writ of certiorari from this Court because the decisions of the trial court and Court of Appeals are in conflict with prior decisions of the South Carolina Supreme Court.

Petitioners Eastwood Construction Partners, LLC and Eastwood Development Corporation (together, "Eastwood") filed this action against Respondents GHD Brooks Creek, AF-Brooks Creek, LLC, GHD River Falls, LLC, AF-River Falls, LLC, and Greenhawk Corporation, Inc. (collectively, "Greenhawk") seeking specific performance of contracts for the sale of the Properties, as well as other remedies. (R. pp. 71-83). Eastwood is a residential homebuilder, and Greenhawk is a land developer. (R. p. 73, ¶14). In 2014, Eastwood placed the Properties under contract and then assigned those contracts to Greenhawk. (R. p. 59, at 58: 2–4).

Eastwood assigned the sales contracts pursuant to an agreement with Greenhawk whereby Greenhawk would develop the Properties and then sell finished lots back to Eastwood so Eastwood could build homes and townhomes for sale to consumers. (R. p. 1314, ll. 12–22; p. 1208, ll. 1–13; p. 1263; p. 959, at 58:2–59:25). In accordance with their contract, Eastwood assisted Greenhawk in the development of the Properties, to include expending $360,000 in pre-development costs that have never been reimbursed and were to be treated as an earnest money deposit for purchase of the lots. (R. p. 1333, ll. 9–12; p. 1032).

Eastwood and Greenhawk also agreed to a pricing method for the lots—Greenhawk would sell the lots to Eastwood at a price that would generate a 20% return on Greenhawk's investment.

(R. p. 958, at 56:7-20; p. 962, at 70:11-13; p. 963, at 75:7-16; p. 972, at 112:11-16; p. 1300, at 16:19-21; p. 1302, at 23:18–21; p. 1306, at 39:6-18; p. 1308, at 49:8-12; pp. 1321 - 1322, at 101:12 -102:10).

Greenhawk never finished developing the lots for resale to Eastwood. In 2020, one of Eastwood's officers happened to drive by one of the Properties, the Brooks Creek site, where he saw townhome construction underway. Only then did Eastwood learn that Greenhawk had contracted to sell finished lots to another residential homebuilder, Respondent TRI Pointe Homes, Inc. ("TRI Pointe").

Eastwood filed suit against Greenhawk on June 30, 2020, and simultaneously filed lis pendens against the Properties. (R. pp. 142 – 148; 149-155). Greenhawk moved to dismiss the Complaint, and Eastwood filed a First Amended Complaint. The Circuit Court denied Greenhawk's motion to dismiss. On September 4, 2020, TRI Pointe moved to intervene in the suit and was allowed to do so.

Eastwood filed a Second Amended Complaint on October 30, 2020, and a Third Amended Complaint on January 7, 2021. In its Third Amended Complaint, Eastwood brings claims for: 1) specific performance of its contract with Greenhawk; 2) breach of contract against Greenhawk; 3) unjust enrichment against Greenhawk and TRI Pointe; 4) unfair trade practices against Greenhawk and TRI Pointe; 5) tortious interference with contracts against TRI Pointe; 6) misappropriation of trade secrets against TRI Pointe; 7) breach of joint venture agreement against Greenhawk; 8) breach of partnership agreement against Greenhawk; 9) another claim for tortious interference with contractual relationships against TRI Pointe; and 10) interference with prospective business advantage against TRI Pointe. (R. pp. 72-73).

In late 2021, Greenhawk and TRI Pointe filed motions for partial summary judgment seeking dismissal of Eastwood's claims for specific performance and all other claims directly affecting title to the Properties. Eastwood filed a brief in opposition to both motions. (R. pp. 328-359). The Circuit Court held a hearing on the motions on December 10, 2021. Eastwood objected to the motions as premature, arguing that Respondents were rushing the summary judgment process to consummate sale of the Properties Eastwood claims it is entitled to purchase before Eastwood—the party with the burden of proof—had completed discovery.

On January 14, 2022, the Circuit Court granted TRI Pointe's motion in a written Order. (R. pp. 32-39). Eastwood moved the Court to reconsider, and, on February 15, 2022, the Court denied Eastwood's motion to reconsider the TRI Pointe Order. (R. pp. 19-21). On February 15, 2022, the Court granted Greenhawk's motion in a written Order. (R. pp. 22-31). Eastwood moved the Court to reconsider, and, on March 8, 2022, the Court denied Eastwood's motion to reconsider the Greenhawk Order. (R. pp. 16-18).

The Circuit Court's summary judgment orders were only partial and addressed only Eastwood's claims for specific performance of the alleged contract. As a result, Eastwood's other claims for damages, as well as Respondents' counterclaims, are still pending.

Eastwood timely filed its notices of appeal on March 11, 2022. (R. pp. 286-313). Eastwood's appeals were subsequently consolidated. (R. pp. 1387-1388). This Court has jurisdiction to hear this appeal pursuant to S.C. Code Ann. § 14-3-330. *See, Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011) ("An order 'involves the merits' when it finally determines a substantial matter forming the whole or a part of some cause of action or defense.").

After Eastwood filed the present appeal, Respondents moved the Circuit Court to lift the automatic stay and immediately cancel the lis pendens on the Properties. Eastwood opposed the motions in a written brief. (R. pp. 192-248). The Circuit Court granted the motions and lifted the stays in orders dated April 18, 2022.

After the Circuit Court lifted the stays, Eastwood filed a petition, pursuant to SCACR 241(d)(7), asking the Court of Appeals to reverse those orders lifting the automatic stay. The Court of Appeals denied that petition. Eastwood then filed a petition with this Court, asking it to reverse the orders lifting the automatic stays. This Court denied that petition.

Following litigation regarding the lifting of the stays, in Unpublished Opinion No. 2024-UP-281 filed on July 31, 2024, a Panel of the Court of Appeals affirmed the trial court's order granting Respondents' Motion for Partial Summary Judgment. The Court of Appeals found that the trial court did not err in concluding that there was no genuine dispute of material fact as to whether there was a contract between Eastwood and Greenhawk for the sale of the Properties. Eastwood moved for rehearing—the Court of Appeals denied that request on October 8, 2024.

As will be demonstrated below, the Court of Appeals improperly concluded that the evidence, taken in a light most favorable to Eastwood, did not support an agreement on all the essential terms for the sale of land. In this way, the Court of Appeals misapprehended the facts and law and misapplied the standard under Rule 56 by focusing on the evidence supporting Respondents' position and ignoring material evidence supporting Petitioners'. Finally, the Court of Appeals misapprehended the facts underlying Eastwood's argument that summary judgment was premature under Rule 56(f).

ARGUMENT

This Court should grant certiorari because the Court of Appeals' decision in in conflict with Supreme Court precedent. *See,* Rule 242(b)(3), SCACR. Specifically, the Court of Appeals' decision contradicts opinions dealing with the Statute of Frauds, contracts for the sale of land, joint ventures, and Rule 56(f) of the South Carolina Rules of Civil Procedure.

V. The Court of Appeals Erred When It Ignored Material Evidence Establishing An Agreement Between The Parties As To Price.

In concluding that there was no genuine dispute of material fact as to whether the Parties had a "meeting of the minds" on the essential terms of the contract for the sale of the Properties, the Court of Appeals erred by focusing on evidence supporting Respondents' position and ignoring material evidence supporting Petitioners'. In this way, the Court of Appeals' decision stands in direct opposition to this Court's precedent interpreting Rule 56.

Under the Rule 56 standard, summary judgment is proper only "if, ***viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party***, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014) (emphasis added). Instead of following this standard and viewing the evidence in a light most favorable to Eastwood, the Court of Appeals misapplied the standard and ignored the evidence that created a genuine dispute of material fact as to the key terms for price.

First, the Court of Appeals focused exclusively on testimony from Eastwood's 30(b)(6) witness, Joe Polite, that was damaging to Eastwood's position, all but ignoring the testimony by Polite that was favorable to Eastwood, and was consistent with the testimony of Greenhawk's former president, Craig Briner. By doing so, the Court of Appeals, in effect, made credibility

determinations as to Polite's testimony, crediting portions damaging to Eastwood and discounting or disregarding portions favorable to Eastwood. Apart from the general obligation to consider all evidence in the light ***most favorable*** to Eastwood, a court is not permitted to make credibility determinations on a motion for summary judgment; that is left up to the trier of fact. *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 281 n.2, 851 S.E.2d 724, 732 n.2 (Ct. App. 2020), *aff'd as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) ("[W]itness credibility is not a proper consideration in deciding a motion for summary judgment . . . ."); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . . .").

The sworn testimony of Greenhawk's Craig Briner and Eastwood's Rule 30(b)(6) designee confirm that both sides of the agreement knew how a price would be determined.

Craig Briner was a founding member and at the time was president of Greenhawk Corporation. (R. p. 948, at 15:24–16:6; p. 975, at 123:24). He was also one of Greenhawk Development, LLC's three managers with full authority to enter into agreements with Eastwood. (R. pp. 1100-1001). Part of the reasoning for deciding to purchase the land and enter the agreement with Eastwood was that Eastwood would be buying the lots, providing a source of income and return on investment. (R. p. 954, at 37:7–38:1).

Throughout development, Eastwood and Greenhawk agreed that, after all costs were factored in, the lot prices would be calculated such that Greenhawk would receive a 20% return. (R. p. 958, at 56:7–20; p. 962 at 70:11–13; p. 963, at 75:7–16; p. 972, at 112:11–16; p. 1300, ll. 19–21; p. 1302, ll. 18–21; p. 1306, ll. 6–18; p. 1308, ll. 8–12; pp. 1320, l. 12 – 1321, l. 10).

As Mr. Briner testified:

Q. What was GreenHawk's I would say standard estimated markup over costs for a lot?

THE WITNESS: Typically, we were trying to get sort of a 20 percent IRR number. Some were more, if we both cured it ourself. Some were less, if the risk was assumed to be less or the time frame was shorter than sort of normal takedown. But 20 IRR.

Q. And how would you go about calculating that for any given project?

A. Obviously, you start with the cost, the length of time that it would take to go ahead and sell those, typically in a takedown schedule, over a period of a couple three years, something like that typically.

And use that time frame, and then the sales price, which frequently had escalators in them, given the time that it took to consume them.

Q. And was that part of the analysis that would have been done at the initiation of a project to get Mr. Agarwal's approval and permission to make the acquisition and have it funded?

A. Typically, yes.

Q. To your recollection, was Mr. Dority or anybody else at Eastwood aware of GreenHawk's standard expected 20 percent IRR on its development projects?

A. I think -- I think Joe Dority was aware of what we were trying to target, I'm pretty sure.

Q. And was he aware that costs, you know, that the takedown schedule and price escalators would roughly be pegged so that GreenHawk would get a 20 percent rate of return on its money over the life of the takedown as far as you know?

A. Yes.

(R. p. 958, at 55:6–56:20).

After Mr. Dority left Eastwood in late 2016, Joe Polite, became Eastwood's Vice President of Land. (R. p. 1202, ll. 1–5). Polite concurred with Briner's testimony on the pricing of the lots:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?
>
> A. I would say yes.
>
> Q. Okay. All right.
>
> A. If –
>
> Q. If what?
>
> A. No, if we all confirm the pricing and the costs, both parties together, we, being GreenHawk, if we confirm those prices, yes, we would be willing to purchase based on those costs.
>
> Q. You said pricing and costs. You said pricing and costs. As I understand your testimony costs determine the price, correct?
>
> A. Plus profit less our investment.

(R. pp. 1218, l. 12 – 1219, l. 5).

This price agreement within the Eastwood-Greenhawk unwritten contract was borne out by the numerous "pro formas" sent from Greenhawk to Eastwood that show a projected IRR near 20% for both Properties. (R. pp. 1018-1028; 1033). Greenhawk included Eastwood in meetings and discussions where the pro forma analysis was discussed. (R. p. 962, at 72:2–8). In other words, after all costs were accounted for, Eastwood would pay a lot price and on a schedule that allowed Greenhawk to reach the 20% IRR mark. (R. pp. 1218, l. 12 – 1219, l. 5; p. 958, at 56:7–20; p. 962, at 70:11–13; p. 963, at 75:7–16; p. 972, at 112:11–16).

Greenhawk's internal documents from 2016 confirmed that Eastwood was the intended buyer of the lots and that the costs, and cost increases were the prohibiting factor in having a final

lot sales price. (R. pp. 1115-1139). Even after this lawsuit began, Briner confirmed to Greenhawk that lot pricing had been delayed because of increased costs. (R. pp. 1153-1154). However, Briner was also clear that the agreement to price lots at 20% over costs had never changed:

> Q. And was there ever any change in the discussion with Eastwood about the 20 percent internal rate of return expectation on the project?
>
> A. Not to my knowledge.
>
> Q. And was there ever a point in time that you recall anyone at Eastwood saying that they would not be willing to accommodate a purchase price for River Falls that would provide GreenHawk with that 20 percent rate of return?
>
> A. I don't think we ever got -- no, no.

(R. p. 963, at 75:7-16).

Briner, who was the decision-making authority for Greenhawk at the critical time the agreement was entered into, agrees with Eastwood that the price for the lots would be whatever it took to earn Greenhawk a 20% IRR. The only reasonable inference to draw from the concurrence of this evidence, much less the inference in Eastwood's favor, is that a price term had been set that was sufficiently definite so as to constitute a meeting of the minds. *See, Trident Const. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 576 (D.S.C. 2003), *aff'd sub nom. Trident Constr. Co. v. Austin Co.*, 93 F. App'x 509 (4th Cir. 2004) (quoting *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208, 211 (1986)) ("Where a contract does not fix a definite price, there must be a definite method for ascertaining it."); *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). A percentage of profits is a definite method of determining price. *See, Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010) ("Here, the parties agreed on a price term: $20,000 and 50% of the 'net profits' generated by each supply contract."); *Barry v. Liddle, O'Connor, Finkelstein & Robinson*, 98 F.3d 36, 40 (2d Cir. 1996) (analyzing New York law); *Ross v. Ross*, 170 N.H. 331, 339, 172 A.3d 1069, 1076–77 (2017) ("For example, a

writing that does not explicitly state the agreed-upon price may satisfy the statute of frauds if the contract prescribes a method, such as a future appraisal, which will necessarily result in the determination of the price."); *Headstart Bldg., LLC v. Nat'l Centers for Learning Excellence, Inc.*, 2017 WI App 81, ¶ 20, 379 Wis. 2d 346, 360, 905 N.W.2d 147, 154; *Wakelam v. Hagood*, 151 Idaho 688, 693, 263 P.3d 742, 747 (2011) ("[A] seller can agree that, rather than stating a definite purchase price, the land sale contract provide a definite method to determine the purchase price, such as being established by an appraiser, by arbitrators, or by the successful bidder at an absolute auction.").

As Mr. Polite, Eastwood's 30(b)(6) designee, summarized when asked:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?
>
> A. I would say yes.

(R. p. 1328, ll. 12–19).

The Court of Appeals misapprehended both the material evidence and the appropriate legal standard when it came to the price term of the Parties' agreement and made inappropriate credibility determinations. When accounting for all the material evidence and drawing all inferences in Eastwood's favor, there was sufficient evidence to create a genuine dispute of material fact as to the price Eastwood and Greenhawk had agreed Eastwood would pay for the Properties.

The Court of Appeals decision directly contradicts this Court's precedent regarding the proper analysis under Rule 56. When considering a motion for summary judgment, the precedent of this Court makes clear that "the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d

857, 860 (2002); *accord Garrard for R.C.G. v. Charleston Cnty. Sch. Dist.*, 439 S.C. 596, 598 n.1, 890 S.E.2d 567, 568 n.1 (2023), *reh'g denied* (Aug. 11, 2023).

The Circuit Court ignored the probative evidence in favor of Eastwood: Eastwood's 30(b)(6) testimony and the testimony of Craig Briner, Greenhawk's decision maker in the relevant time. Both depositions support that there was a contract between Eastwood and Greenhawk and that the terms were definite. However, rather than drawing the reasonable inference in Eastwood's favor, the Circuit Court ignored this evidence and drew a less reasonable inference in favor of the movants, Greenhawk and TRI Point. By affirming this decision, the Court of Appeals directly contradicted this Court's precedent.

VI. The Court of Appeals Erred When It Determined That The Takedown Schedule Was An Essential Term Between The Parties.

As with the material evidence supporting Eastwood's contention that the price was set at 20% IRR for GHD, the Court of Appeals also misapprehended the facts and law regarding evidence of time. The Court of Appeals erroneously concluded that time was an essential element of the contract and that there was no agreement on time because there was no agreed takedown schedule. In this way, the Court of Appeals' decision stands in direct opposition to this Court's decision in *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948), when this Court stated that time is not an essential term of every contract for the sale of land.

First, the timing of a property sale is not, as a matter of law, an essential term—instead, the essential terms are price and description. *See, Speed v. Speed*, 213 S.C. 401, 409, 49 S.E.2d 588, 592 (1948); *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007); *Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc.*, 367 S.C. 108, 115, 623 S.E.2d 853, 856 (Ct. App. 2005).

As noted by this Court in *Speed v. Speed*, two writings were sufficient, when read together, to supply all the essential terms of a contract for the sale of land:

> But when the two letters are considered together, all the essential terms of the contract, the amount of the purchase money, the name of the vendor and vendee, and the location and identity of the property to be sold, can all be definitely and certainly learned from the writings relied upon. They show internal evidence of their unity."

Speed, 213 S.C. at 409, 49 S.E.2d at 592. Indeed, the *Speed* Court expressly rejected the argument that time was an essential element for a land sale contract:

> The general rule, however, sustained by many authorities, is that time is not of the essence of a contract to convey land unless made so by its terms expressly, or by implication from the nature of the subject matter, the object of the contract, or the situation or conduct of the parties. In the case of an executory contract for the sale of land, where the time for the execution of the conveyance or transfer is not limited as in the case at bar, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient.

Id. at 412–13, 49 S.E.2d at 593.

Furthermore, one fact is conclusive when it involves the sale of lots in a subdivision: no lot can be conveyed until the local government authority approves the final plat of the subdivision and the plat is recorded. Thus, government action was a precondition to setting the time for delivery of the lots, and therefore the time for performance by Eastwood. Additionally, Briner testified that there would be only a single takedown, not a schedule of takedowns in series. (R. pp. 1037 - 1062). As a matter of law, therefore, Eastwood would be required to purchase the lots within a "reasonable time" after the plat was recorded. *Speed*, 213 S.C. at 412-13, 49 S.E.2d at 593.

Eastwood and Greenhawk had a custom or practice regarding takedown schedules, and "a contract [will not] fail for indefiniteness when the gaps that the parties have left 'may be implied from custom and usual forms and former course of dealing.'" *S. Fire & Cas. Co. v. Teal*, 287 F.

Supp. 617, 622 (D.S.C. 1968), *aff'd*, 406 F.2d 1330 (4th Cir. 1969) (quoting *Carolina Aviation v. Glens Falls Ins. Co.*, 214 S.C. 222, 230, 51 S.E.2d 757, 761 (1949)). The Court of Appeals misapprehended both the law and the material evidence supporting Greenhawk's and Eastwood's custom and practice regarding takedown schedules. Greenhawk and Eastwood's agreements in other developments show, the takedown schedules are often changed during the course of development. (R. p. 1334, ll. 1–17; pp. 1079-1085).

Takedown schedules between Greenhawk and Eastwood changed in the past, and that customary gap should not have served as a basis for the Court of Appeals' decision. *S. Fire & Cas.*, 287 F. Supp. at 622. By affirming the Circuit Court's ruling on this point, the Court of Appeals directly contradicted this Court's precedent. *See Speed*, 213 S.C. at 409, 49 S.E.2d at 592.

VII. **The Court of Appeals Erred When It Concluded There Was No Genuine Dispute Of Material Fact As To Petitioner's Joint Venture Claim.**

The record before the Court of Appeals contained evidence that created a genuine dispute of material fact on the issue of whether Eastwood and Greenhawk were joint venturers. However, the Court of Appeals misapprehended this evidence and again failed to properly apply the Rule 56 standard. In this way, the Court of Appeals' decision is once again in conflict with this Court's precedent on the proper application of the Rule 56 standard.

"A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992) (citing *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)). "Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and

control the conduct of each other with respect thereto." *Id.* (citing *Spradley v. Houser*, 247 S.C. 208, 146 S.E.2d 621 (1966)). Joint venturers also share in profits and losses. *See, Mid-S. Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, No. 2004-UP-611, 2004 WL 6337256, at *1 (S.C. Ct. App. Dec. 7, 2004) (noting that agreement provided for allocation of profits and losses).

The record contained substantial evidence that Eastwood and Greenhawk were working for a common purpose. Eastwood expended its own funds for the joint benefit of the project and then made what was essentially a gratuitous assignment of the contracts to buy both Properties to Greenhawk. (R. pp. 175-177).

Even more compelling, for no consideration from Greenhawk, Eastwood transferred a sliver of land for which it paid $55,741, which was essential, according to SCDOT, for proper ingress and egress to the River Falls project. (*See,* Helms Settlement Statement, BATES ECP_ECP_0012091 (R. pp. 1381-1382); Deed from Caroline Helms to Eastwood Development Corp (R. pp. 1402-1406); Quitclaim Deed from Eastwood to Greenhawk, BATES ECP_0005870) (R. pp. 1407-1410). Not only did Eastwood pay dearly for the sliver of land, Eastwood also agreed to build the Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. (*See,* Helms Purchase and Sales Agreement, BATES GHD_0016151, ¶3 (R. p. 1391)). Eastwood is not in the habit of giving away land—it made this transfer because it expected Greenhawk to comply with the unwritten contract and sell Eastwood developed lots.

Eastwood also provided a coordinator for early development. Joe Dority was Greenhawk's uncompensated man on the ground in Tega Cay. (R. p. 959, at 59:11–14; p. 959, at 60:1–6; p. 969 at 99:2–6). He worked to coordinate engineering services, wetland services, and meeting with Tega Cay officials. He directed efforts for Greenhawk and Eastwood.

Pro formas were regularly exchanged between Greenhawk and Eastwood and sensitive financial information shared as they worked to finalize pricing and costs. (R. p. 962, at 72:2–8). There was also an agreement to share profits and losses. Greenhawk and Eastwood agreed that Greenhawk would receive a 20% return for the lots after factoring in their costs. This equation would ensure that both parties shared in the financial burden or windfall in a way that was predetermined.

For these reasons, there was, at a minimum, a genuine dispute of material fact as to whether Greenhawk and Eastwood were joint venturers as to the River Falls and Brooks Creek properties. It was error for the Court of Appeals to affirm summary judgment on this claim and ignore this Court's precedent regarding the proper analysis under Rule 56. See *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860; *accord Garrard for R.C.G.*, 439 S.C. at 598 n.1, 890 S.E.2d at 568 n.1.

VIII. **<u>The Court of Appeals Misapprehended The Facts Regarding Appellant's Rule 56(f) Arguments.</u>**

Finally, the Court of Appeals misapprehended the facts related to Eastwood's argument that summary judgment was premature. In this way, the Court of Appeals' decision is in conflict with this Court's decision in *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 563 S.E.2d 331 (2002).

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. Rule 56(f) exists because "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *See, Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). A party arguing that summary further discovery is needed before summary judgment can be granted "must advance a good reason

why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53–54, 677 S.E.2d 32, 36 (Ct. App. 2009).

The Court of Appeals misapprehended the facts about discovery in the trial court for three reasons. First, as described above, the Court of Appeals misapprehended the facts and law as it pertained to a genuine dispute of material fact on the issue of whether there was a contract between Greenhawk and Eastwood. Because evidence from Eastwood ***and*** Greenhawk confirmed a pricing mechanism for the Properties, and because time is not an essential term, there was a genuine dispute of material fact as to the contract. For that reason, further discovery would have aided Eastwood in better illuminating the terms of the contract and supporting its claims.

Second, the Court of Appeals misapprehended the importance of the outstanding discovery. The incomplete discovery includes essential testimony and documents from Greenhawk decision makers, not trivial matters. Eastwood did not have a chance to depose Greenhawk's founder and president, Sajjan Agarwal, prior to the December hearing. (R. p. 419, ¶23 ("Bradley Aff.")). This left a critical gap in Eastwood's discovery prior to summary judgment—there is no dispute that Mr. Agarwal is the final decision maker, financial backer, and leader of Greenhawk. (*See, e.g.*, Briner Dep., (R. p. 948, at 15:17–20; p. 948, at 16:16–19; p. 949, at 18:20–25). Indeed, even though Mr. Briner was President of Greenhawk in 2013/14, he still had to get approval from Sajjan Agarwal to buy land, including River Falls and Brooks Creek. (*Id.* at 19:14–17). A deposition of the most important decision maker at the conception of the Eastwood-Greenhawk is no "fishing expedition," but is instead the type of specific, essential discovery that should have delayed summary judgment.

Furthermore, prior to the December hearing,[1] Greenhawk also failed to comply with the terms of its informal agreement with Eastwood to search the email account of Sajjan Agarwal, Greenhawk's founder and current president,[2] for responsive documents. On June 3, 2021, Eastwood issued a subpoena to the Agarwal Family III, LLC. (R. pp. 421-424). Greenhawk[3] moved for a protective order and to quash the subpoena, and Judge Hall heard the motion on August 24th, 2021. At Judge Hall's suggestion, Eastwood and Greenhawk entered into an informal agreement. (R. p. 417, ¶16.)

Third, the Court of Appeals misapprehended the timeline that explained Eastwood's inability to receive this critical discovery prior to the summary judgment hearing. Mr. Agarwal's importance was not revealed until the deposition of Craig Briner in August 2021. (R. p. 417, ¶15). This was less than four months prior to the summary judgment hearing. Additionally, Eastwood had served a subpoena duces tecum on a related entity seeking documents from Mr. Agarwal in June 2021. (R. p. 417, ¶¶14, 16). No comprehensive production was ever made. (R. p. 418, ¶18). In short, the Court of Appeals misapprehended the facts when it concluded that Eastwood had not been diligent in pursuing this critical discovery.

The Circuit Courts order denying Eastwood the opportunity to complete discovery contradicts this Court's precedent. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331,

[1] Following the December 10, 2021 hearing, Greenhawk did produce some handwritten notes taken by Mr. Agarwal.

[2] (R. p. 948, at 15:17–23; p. 951, at 26:6–8).

[3] Though the subpoena was issued to Agarwal Family III, LLC, Greenhawk is the only entity who has responded in any way, further evidence that Agarwal and Greenhawk are so interwoven that no practical distinction can be made.

334 (2002). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.* As this Court has made clear, when critical evidence is only in the hands of the party moving for summary judgment, the "drastic remedy" of summary judgment cannot be rendered against the nonmoving party until the relevant discovery motions are resolved. *See, Id.*

Here, Eastwood diligently pursued discovery from Greenhawk's founder and leader. It served a subpoena and attempted to resolve the dispute with opposing counsel. That dispute was never resolved, either by the parties or the Circuit Court. It was error on the Court of Appeals' part to affirm the trial court's decision to grant summary judgment before this discovery was completed.

CONCLUSION

As demonstrated above, the Court of Appeals' decision conflicts with prior Supreme Court Decisions. For this reason, Petitioners respectfully request that this Court issue an order granting their Petition for Writ of Certiorari.

Respectfully submitted,

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