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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 202-000290
Case No. 2020-CP-46-02006

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.

APPELLANTS' FINAL REPLY BRIEF

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INTRODUCTION

In their opening brief, Respondents make the same mistake the Circuit Court made in its summary judgment orders: Respondents and the Circuit Court drew all inferences in favor of Respondents; Respondents and the Circuit Court viewed the record in a light most favorable to Respondents. To do so, Respondents and the Circuit Court construe facts to Respondents' advantage and cherry-pick portions of testimony which favors Respondents. Consequently, both Respondents and the Circuit Court misapply the summary judgment standard. If the summary judgment standard was applied as Respondents and the Circuit Court applied it in this case, no plaintiff would ever get to trial.

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). "[T]he nonmoving party. . . is ***only required to submit a mere scintilla of evidence*** in order to withstand a motion for summary judgment." *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 271, 826 S.E.2d 609, 614 (2019) (emphasis added) (quoting *Hancock v. Mid-S. Mgmt.*, 381 S.C. 326, 329–31, 673 S.E.2d 801, 802–03 (2009)). "[A] scintilla of evidence is **any material evidence** which, taken as true, would tend to establish the issue in the mind of a ***reasonable juror***." *Lemmons v. Macedonia Water Works, Inc*., 431 S.C. 186, 200, 847 S.E.2d 471, 479 (Ct. App. 2020) (quoting *Crosby v. Seaboard Air Line Ry*., 81 S.C. 24, 31, 61 S.E. 1064, 1067 (1908)) (italics in original; bold added). Because all evidence is to be constructed in the light most favorable to the non-moving party, all inferences are to be drawn in its favor, and "any material evidence" is sufficient

to withstand summary judgment, it is rare for summary judgment to be granted. Respondents and the Circuit Court have turned the standard completely on its head.

Despite being denied the chance to complete material discovery, Appellants still came forward with more than a "mere scintilla" of evidence in support of their contract and joint venture claims. Among other evidence, Appellants demonstrated, from deposition testimony from both sides of the contract—Craig Briner, Respondent's president at the time the contract was entered into, and Eastwood's 30(b)(6) representative, Joe Polite—that both parties to the alleged contract agreed and understood that an agreement existed, agreed to and understood the material terms, and jointly worked together to bring the matter to completion. The only thing missing was a unified writing. Appellants also came forward with numerous pro formas that demonstrated the material terms and show Eastwood and Greenhawk preparing to execute the contract and applying the pricing method they agreed to apply. These pro formas made clear that Eastwood and Greenhawk would share in profits and losses. And Eastwood presented evidence of repeated partial performance by Eastwood, including a highly valuable sliver of land it gave to Greenhawk for no money but in consideration of the lots Greenhawk had agreed to sell back to Eastwood.

Against this evidence, which reaches far beyond the "any material evidence" standard, supporting the Eastwood-Greenhawk contract, Respondents continue to proffer testimony and emails taken out of context and construed against Eastwood. The Circuit Court erred when it accepted Respondent's flawed application of the Rule 56 standard.[1] For that reason, this Court should reverse the Circuit Court's orders granting Respondents' partial summary judgment motions.

[1] The Circuit Court adopted, verbatim, the proposed summary judgment orders submitted by Respondents. *Compare* Greenhawk Order *and* TRI Pointe Order, *with* proposed Greenhawk Proposed Order, *and* TRI Pointe Proposed Order. (R. pp. 22 – 39; 54 - 70).

ARGUMENTS

Respondents urge this Court to misapply the Summary Judgment standard and commit the same error as the Circuit Court. Respondents cherry-pick testimony and documentary evidence without context, they downplay evidence supporting Eastwood's position, and they draw every possible inference in their own favor while ignoring the clear, reasonable inferences to the contrary. In short, Respondents miscomprehend the Rule 56 standard and pray this court to do the same.

A. RESPONDENTS URGE THIS COURT TO ADOPT THE SAME, FLAWED SUMMARY JUDGMENT ANALYSIS AS THE CIRCUIT COURT.

The Circuit Court consistently drew inferences in favor of Respondents and failed to view all the evidence in a light most favorable to Eastwood. Respondents now urge this Court to do the same by interpreting the evidence in their favor. (*See, e.g.*, Resp. Br., at 6 - 7).

1. The Circuit Court's Order granting Greenhawk's Motion demonstrates its flawed application of the summary judgment standard.

In its Order granting Greenhawk's Motion for Partial Summary Judgment (the "Greenhawk Order"), which Respondents fully support, the Circuit Court cited a string of "undisputed facts" that it claimed supported its conclusion that there was no genuine issue of material fact. (R. pp. 24 - 25). However, a review of several of those "undisputed facts" reveals that the Circuit Court consistently ignored contradictory material evidence and context, that, if considered at all, would have been "any material evidence" in support of the claims requiring a denial of summary judgment.

For example, the Circuit Court found that "[v]arious Eastwood representatives repeatedly acknowledged or admitted that there was no contract, or that Eastwood needed a contract, with respect to purchase and sale of Brooks Creek." (R. p. 25). The Circuit Court made an identical finding as to the River Falls Property. (*Id.* R. p. 25). To support these findings, the Circuit Court

cited to pages 4–13 of Greenhawk's Memorandum in Support of its Motion ("Greenhawk SJ Brief") (R. pp. 453 - 462). In those pages of the Greenhawk SJ Brief, Greenhawk Respondents presented a chart with excerpts and exhibits that all go to the point that is not contested: The Eastwood-Greenhawk contract was never reduced to a single writing. The Circuit Court stretched this unremarkable point beyond its limits, drawing all inferences in favor of the movants and ignoring the totality of the evidence.

The evidence cited by Greenhawk in its summary judgment brief falls into two categories: contemporary documents, such as emails, and deposition testimony. In all instances, the sources are not attorneys, and they did not testify or write as attorneys. The reasonable inference drawn in Eastwood's favor is that the statements about the absence of a contract refer to a singular, written document, not the legal concept of an enforceable agreement.

For instance, during Mr. Polite's testimony in his individual capacity, he repeatedly conceded that there was no unitary memorialization of the Eastwood-Greenhawk contract. However, he also explained, in his lay terms, that there was an enforceable contract:

> Q. Sure.
> Is it Eastwood's position that it currently has a contract for the purchase of the Brooks Creek lots?
>
> A. In the definition of that you used for contract, I would say no.
>
> Q. Well, what definition do you use?
>
> A. An agreement since 2013 that we – they would assign the property and we would fund the predevelopment of that and give it to GreenHawk with the understanding that when at a point in time that they were comfortable with their pricing, they would then offer back the purchase of those lots that were completed to Eastwood.
>
> Q. Okay. And you've asked the court to do that, you've basically asked the court as part of the relief you've requested in your complaint to force GreenHawk to sell these Brooks Creek lots back to Eastwood; isn't that right?
>
> A. Yes.

> Q. Okay. Let's say the court takes you up on that offer and says, Agreed, Mr. Polite, I'm going to order GreenHawk to sell these lots back to you all. What's the price, Mr. Polite?
>
> A. I would go back with, as we always have, once they knew their cost and a reasonable rate of turn for the developer, and what that price would be would be the one that we would agree with.
>
> Q. So is it fair to say as we sit here right now, you and GreenHawk have never agreed on a lot purchase price for the lots in the Brooks Creek parcel?
>
> A. There was an agreement in principle of around this number. But there were still changes yet to come since this date.

(R. pp.[2] 1234, l. 11 – 1235, l. 24).

That testimony from Eastwood reaffirmed when Mr. Polite testified as a 30(b)(6) witness for Eastwood and was fully corroborated by Craig Briner, the president of Greenhawk during the relevant time when the agreement was struck. (R. p. 973 (114[3]), ll. 2–24 (all that was left was "solving for what's our cost")). The reasonable inference in Eastwood's favor, to which it was entitled as the nonmoving party, was that Mr. Polite's emails and deposition testimony about the absence of a contract referred to the absence of a single, written document, not the absence of an enforceable legal contract between Greenhawk and Eastwood. It was error for the Circuit Court not to draw this inference in Eastwood's favor, and it was error to ignore Greenhawk's agreement with this testimony.

The Circuit Court made the same improper inferences when crediting Greenhawk's interpretation of Joe Dority's deposition testimony.[4] In its Summary Judgment Brief, Greenhawk

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[2] Mr. Polite testified first in his individual capacity, and later as Eastwood's Rule 30(b)(6) representative.

[3] To minimize the size of the Record on Appeal, condensed deposition transcripts were used when available. As there are four transcript pages per printed page in the ROA, the specific page number cited will be shown within parenthesis.

[4] Joe Dority was Eastwood's Vice President of Land in 2013-2014 when the agreement with Greenhawk was struck.

quoted a small portion of Mr. Dority's answer to a question about a transition document he left to his replacement, Joe Polite. (R. p. 458). Mr. Dority had created a spreadsheet of ongoing projects with comments about their status. In the comment boxes for the River Falls and Brooks Creek properties, Mr. Dority left a note about the need for a contract, a note that counsel question him about:

> Q. It appears from this transition summary that you still didn't have a contract with -- a lot purchase contract with GreenHawk at the time you left in the fall of 2016. Is that accurate?
>
> A. That's the way it appears with this that whatever we agreed to was not in a ***contract form*** that both parties -- I mean, it looks like to me ***there needs to be a written contract inked up***.· That's the way I read that.
>
> Q. Right.· And this also says you didn't even have a lot price yet, did you, because they wanted to wait until all prices were in before pricing the lots?
>
> A. Again, I don't remember if we did or didn't. I can read that's what the -- that they don't want to price the lots until all costs are in.

(R. p 1073, ll. 8–22) (emphasis added)). Again, this testimony leaves a reasonable inference for Eastwood, one that the Circuit Court did not draw. The inference is that Mr. Dority, like Mr. Polite, was referring to the absence of a unitary, written memorialization of the Eastwood-Greenhawk contract, not the absence of an agreement on material terms. Mr. Dority even says there needs to be a "written contract," while still saying that the parties had agreed to terms of a contract.

Finally, the Circuit Court erred in the inferences it drew from Mr. Polite's 30(b)(6) testimony. Contrary to the excerpts cited by Greenhawk in their Summary Judgment Brief, Mr. Polite testified unequivocally that there was an enforceable contract between Greenhawk and Eastwood, though it was not reduced to a single writing:

> Q. And is it correct that -- well, let me ask it this way. Does Eastwood contend that it has a contract to buy the undeveloped River Falls land?

> A. Yes. I would say we have, as I've mentioned, an agreement in principle that there was a way for us to purchase those lots back, yes.

(R. p. 1319 (92), ll. 3–8). And again, when pressed by counsel if Eastwood was prepared to buy back finished lots at a price guaranteeing a 20% return to Greenhawk, Mr. Polite committed Eastwood to doing so. (*Id.* at R. p. 1328 (129), l. 12 – 1329 (130), l. 5). In light of this testimony from Mr. Polite as Eastwood's corporate representative, it was error for the Circuit Court to infer that Mr. Polite's testimony on the absence of a contract referred to anything other than a single, written document.

Throughout the Greenhawk Order, the Circuit Court continually failed to properly apply the Rule 56 standard, and Respondents now urge this Court to adopt this faulty reasoning.

2. Eastwood gave highly valuable land to Greenhawk without requiring payment, part performance that had no reasonable explanation other than in the context of Eastwood and Greenhawk's contract.

Respondents' untenable summary judgment position is further revealed in the way they handle one of Eastwood's strongest pieces of evidence: the uncompensated transfer of valuable land to Greenhawk. Eastwood is not a land charity. It gave that sliver to Greenhawk in anticipation of benefiting from the sale of finished lots in River Falls.

Respondents offer two arguments against Eastwood's partial performance theory: 1) that two different Eastwood entities were involved, and 2) that no definite contract existed to which the performance could relate. Both arguments fail at the summary judgment stage.

a. For partial performance, there is no legal significance between Eastwood Development and Eastwood Construction.

First, Respondents cite no precedent or statute in support of the contention that related entities cannot partially perform contracts for others. (*See* Resp. Br., at 16–17). Eastwood Development gave land to Greenhawk in the expectation that Eastwood Construction could then buy back finished lots and build homes. The two entities are owned by common owners and work

under the Eastwood umbrella to attain the same end: the construction and sale of residential homes. (*See* R. pp. 1199, l. 8 – 1200, l. 18). The two act for one another's benefit. Eastwood Development acting to its detriment is undoubtedly for its or Eastwood Construction's benefit. Respondents' attempt to differentiate the two in the context of part performance is untenable.

b. The uncompensated contribution of valuable land is clearly relatable to the Eastwood-Greenhawk Contract

Second, the contribution of highly valuable land to complete the River Falls property was only compatible with one scenario: a contract between Eastwood and Greenhawk. Respondents urge this Court to adopt the inference that Eastwood just gave away the land because it had "written off" the River Falls development. (Resp. Br., at 18). Even if that were true, which it is not, Eastwood would have, at a minimum, sought to recover some of the $50,000 it paid for the roughly 2,000 square *feet* of land. The Circuit Court was misled by Respondents and made the same flawed inference that Respondents urge this Court to adopt.

Instead, as case law applied to these facts reveals, Eastwood's uncompensated transfer of expensive land was related to and evidence of the Eastwood-Greenhawk contract. "An oral contract within the Statute of Frauds may be taken out by performance where one party does some act essential to performance of the agreement resulting in loss to himself and benefit to the other." *Graham v. Prince*, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987); *accord Parr v. Parr*, 268 S.C. 58, 65, 231 S.E.2d 695, 698 (1977). In short, conduct by one party to an oral or otherwise unwritten contract which enriches the other party excuses any Statute of Fraud failings. *Id.*

> The courts will require specific performance of an oral contract for the conveyance of land, where the terms of the contract are clear, definite and certain and are established by competent and satisfactory proof, and where the party seeking to rescue it from the statute shows such acts of performance or part performance on his part, ***clearly and unequivocally referable to such agreement,*** as would render application of the statute unconscionable.

Fesmire v. Digh, 385 S.C. 296, 311, 683 S.E.2d 803, 811 (Ct. App. 2009) (emphasis in original) (quoting *Scurry v. Edwards*, 232 S.C. 53, 61, 100 S.E.2d 812, 816 (1957)); *see also Parr*, 268 S.C. at 66, 231 S.E.2d at 698; *Scurry*, 232 S.C. at 62, 100 S.E.2d at 817; *Honorage Nursing Home*, 367 S.C. at 115, 623 S.E.2d at 857.

Eastwood's uncompensated transfer of land to Greenhawk could only be explained in the context of the Eastwood-Greenhawk contract, and the evidence produced by Eastwood supports that conclusion. Eastwood and Greenhawk reached an agreement that Greenhawk would develop River Falls and Brooks Creek and sell finished lots to Eastwood at cost plus 20%. Eastwood performed that venture and agreement by locating the property, placing it under contract, assigning the property to Greenhawk for no consideration, and expending hundreds of thousands of dollars to obtained entitlements, permits, and engineering plans.

Then, in 2014, Greenhawk and Eastwood were informed by the South Carolina Department of Transportation ("SCDOT") that the planned entrance to River Falls would have to be moved a few feet down Gold Hill Road. However, the land placed under contract by Eastwood and then acquired by Greenhawk under the assignment from Eastwood did not encompass the area where SCDOT dictated the entrance had to be.

To satisfy SCDOT's requirement and facilitate development of River Falls, Eastwood bought the 2316 square feet of land, or .055 acres, needed to move River Falls' entrance on Gold Hill Road for the sum of $55,741, a cost per acre of over $900,000. (*See* R. pp. 1389 – 1390; 1402 – 1406). The land owner was apparently aware of the predicament Eastwood and Greenhawk were in and used that to her advantage. (*See* R. pp. 1412 - 1413). In addition to an exorbitant purchase price, Eastwood also agreed that when it was building the homes in River Falls it would build the

Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. (*See* R. pp. 1391 - 1392 ¶3).

In 2018, at Greenhawk's request, Eastwood transferred the sliver of land to Greenhawk for no cash consideration in furtherance of the overarching agreement for Greenhawk to sell finished lots to Eastwood at cost plus 20%. (R. p. 960 (61), l. 17 – (62), l. 8; 1326 (122), ll.1–4; 1331 (141), ll. 21 – 24; 1407 - 1410). Eastwood gave Greenhawk that vital piece of land for no consideration other than Greenhawk's agreement to develop and sell lots to Eastwood as attested to by Mr. Polite, Eastwood's 30(b)(6) representative:

> Q. Why did Eastwood transfer that property to GreenHawk without being paid for it?
>
> A. As I said earlier, it was my decision that it was the right thing to do for the betterment of River Falls and that it was the right thing to do for the agreements we've had in place.

(R. pp. 1331 (141), l. 25 – (142), l. 5). In other words, Eastwood did not require payment because it was merely performing the agreement between the parties and expected to benefit once the River Falls property was conveyed back to it pursuant to the Eastwood-Greenhawk contract.

Respondents are correct that case law requires that the performance be clearly relatable to a contract with definite terms. Respondents are incorrect, however, that Eastwood's performance is not relatable to the Eastwood-Greenhawk contract. As one of the out-of-state cases cited by Respondents points out, the performance must not be "accounted for on any other reasonable hypothesis." (Resp. Br., at 21 (quoting *Ficke v. Wolken*, 291 Neb. 482, 490, 868 N.W.2d 305, 311 (2015)). There is ***no*** reasonable hypothesis for why a commercial entity, like Eastwood, would give away land it paid $50,000 for unless it expected something in return. What did Eastwood expect in return? It expected GreenHawk to honor is agreement and sell Eastwood River Falls lots at a price that guaranteed Greenhawk a 20% return.

c. Out-of-state cases cited by Respondents support Eastwood's right to a have a jury hear its contract and specific performance claims.

Finally, the other out-of-state cases cited by Respondents do not support the Circuit Court's summary judgment orders or Respondents' position. *Zappa v. Basden* was an appeal from a directed verdict, not summary judgment. 188 Ga. App. 472, 472, 373 S.E.2d 246, 247 (1988). That plaintiff was allowed to present his partial performance claim to a jury despite the fact that there was no price nor was there a pricing mechanism agreed to by the parties. *See id.* at 473, 373 S.E.2d at 248. *Brenda Darlene, Inc. v. Bon Secour Fisheries, Inc.*, was not even about the sale of land, but was instead a U.C.C. case dealing with the sale of shrimp. *See* 101 So. 3d 1242, 1249 (Ala. Civ. App. 2012). In that case, as Respondents quote, those parties did "not agree on the price terms." *Id.* at 1250. In contrast, Eastwood has come forward with evidence that Briner and Eastwood agreed on the pricing mechanism to be used for River Falls and Brooks Creek. (R. p. 958 (55), l. 6 – (56), l. 20).

Far from supporting Respondents' positions, these cases show the impropriety of granting summary judgment in this case. As the *Zappa* court said, "[p]artial performance which will vitiate the statute of frauds must be substantial and essential to the contract and which results in a benefit to one party and a detriment to the other." *Zappa*, 188 Ga. App. at 476, 373 S.E.2d at 249 (cleaned up). Eastwood acted to its detriment in transferring land it paid a substantial price for. This act made River Falls possible, because without the sliver there could be no connection to the only road abutting the property. Against these cases stands *Parr* and *Honorage Nursing Home*, South Carolina decisions that support Appellants' contention that they have performed substantially enough, and to their detriment, to merit a jury trial.

Eastwood is not in the business of giving away valuable land. The Circuit Court ignored this critical evidence in granting the motions for partial summary judgment. Respondents urge this Court to make the same mistake.

3. Respondents continue to ignore the pricing mechanism that provided a definite way to determine price.

While conceding the extensive case law supporting a definite pricing method in lieu of an exact precise, (*see* Resp. Br., at 13), Respondents erroneously contend that a method must also have a definite result. However, this conclusion is legally flawed and acts as a further misapplication of the Rule 56 standard.

Respondents continue to ignore the testimony of Briner and Polite, both sides of the contract, which confirmed the way the price would be determined: a 20% profit for Greenhawk. Instead, both the Circuit Court and Respondents contend that because costs were not yet final, there was no price. This inference ignores case law and the evidence in this case. The reasonable inference in favor of Eastwood was that all costs were not accounted for, meaning the pricing method agreed to by Eastwood and Greenhawk could not yet be applied. (R. p. 973 (114), ll.2 – 24 (all that was left was "solving for what's our cost")). The Circuit Court erred by failing to draw this inference—Respondents are wrong to continue to advance this fallacious argument.

At several times, Eastwood pressed Greenhawk for costs so that the terms could be computed, but Greenhawk's development delays prevented that from happening. Eastwood inquired in April 2016, (R. pp. 1247 – 1250); October 2016, (R. pp. 1251 - 1252); December 2016, (R. pp. 1255 - 1259); February 2017, (R. p. 1034 - 1035 ("Mike Conley (of Eastwood) is eager to this these projects started")); March 2017, (R. p. 1260 - 1262 (Eastwood is "anxiously awaiting those lots")); and May 2017, (R. p. 1036 ("Good news they [River Falls and Brooks Creek] will

be ours!")). Again, Greenhawk understood that the parties were waiting on costs, pursuant to the terms of their agreement. (R. pp. 1115 - 1139).

Compounding the delays and problems with the Properties, in July 2018, the towns of Fort Mill and Tega Cay both passed new builder "impact fees" that affected pricing. (R. pp. 977 (132), l. 10 – 978 (133), l. 12; 1268 - 1271). As it turned out, the lawsuit persisted through 2019 and was not resolved initially until January 2020.

Although it is true that final lot pricing had been delayed because of ever changing costs, (R. pp. 1153-1154), 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 (75), ll. 7-16).

Indeed, adding insult to injury, Greenhawk acted to prevent the agreement from coming to fruition by all but abandoning the River Falls project. Rather than continuing its development efforts so it could determine the price at which Eastwood would buy the lots, it simply stopped, preventing the consummation of the Eastwood-Greenhawk agreement. (R. p. 1102, ll. 1 –13).

The Circuit Court drew the inference that because the final, precise cost per lot was not set, then there was no price term in the Eastwood-Greenhawk agreement. However, Briner's own testimony refutes that inference. The Circuit Court misapplied the Rule 56 standard as to Briner's testimony on the Eastwood-Greenhawk contract, and Respondents urge this Court to do the same.

4. Contrary to Respondents' assertions, the Eastwood-Greenhawk contract does not fail for a lack of take-down schedules or deposits.

In addition to ignoring the pricing mechanism agreed to by Eastwood and Greenhawk, Respondents also erroneously assert that the lack of a take-down schedule or deposit amount is fatal. (Resp. Br., at 15). The Circuit Court also drew this inference in favor of the moving parties when it noted the absence of a takedown schedule or deposit price. These are not legally significant terms, and to emphasize their absence further demonstrates the Circuit Court's and Respondents' improper Rule 56 analysis.

First, the timing of a property sale is not, as a matter of law, an essential term. The essential terms are price and description. *Fici*, 372 S.C. at 346; 642 S.E.2d at 604; *Honorage Nursing Home*, 367 S.C. at 115, 623 S.E.2d at 856. There is no question in this case that the properties are sufficiently defined, and, as explained fully *supra*, the pricing mechanism was agreed to by both Eastwood and Greenhawk.

Second, as Greenhawk and Eastwood's agreements in other developments show, the takedown schedules are often changed during the course of development. (R. p. 1334 (153), ll. 1 – 17; 1079 - 1085). Indeed, the only true determining factor for the timing of lot sales is the recording of a plat, something that may be delayed due to governmental issues unrelated to the parties own plans.[5] "[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)).

[5] In fact, Greenhawk was not able to deliver lots to TRI Pointe on the agreed schedule for that very reason. Further, the original agreement called for a single takedown, not multiple takedowns. (R. pp. 1037 - 1061).

Even so, Greenhawk's president, Briner, testified that the pro formas offered by Eastwood contained all of the material terms, (R. p. 973 (116), ll. 22–25), including takedown schedule and price. All that was required was for the parties to finalize their costs. (*Id.* R. p. 973 (114), ll. 2–24). Greenhawk's yet-determined costs were the only variable, a variable that would be identified in the future. Contrary to Respondents' assertions, (see Resp. Br., at 16), Eastwood is not asking any court to step into the role of a negotiator—the terms are certain.

5. The Circuit Court drew the wrong inference as to the October 31, 2018 proposed written lot purchase agreement.

Finally, the Circuit Court drew an improper inference as to Eastwood's decision not to act on the proffered October 31, 2018 Brooks Creek lot purchase agreement. (R. p. 34). Because the proposed lot purchase agreement was delivered before significant costs were allocated, the pricing method agreed to between the parties could not have been applied at that time. The Circuit Court instead drew the improper inference that Eastwood rejected the offer and therefore relinquished its claim to the Brooks Creek property.

In the wake of the impact fees, on October 31, 2018, Greenhawk sent a draft lot purchase agreement ("LPA") to Eastwood to memorialize their agreement for the Brooks Creek lots, which it believed were nearing completion. (R. p. 1309 (53), ll. 7 – 12). Eastwood did not respond to the October 2018 LPA because there were key cost items that were not yet accounted for. Chief among those were the new impact fees. (R. pp. 1239, l. 13 – 1340, l. 12; 1272 - 1274).

In fact, it is now clear that the lot price offered by Greenhawk in October 2018 was not in accordance with Greenhawk's and Eastwood's agreement that Greenhawk would sell lots at cost plus a 20% markup. (R. pp. 1112 - 1114). Rather the lot price was identical to the price Greenhawk was given in an unsolicited offer from another homebuilder, NVR, an offer Greenhawk specifically declined because of its agreement with Eastwood. (R. p. 976 (125), l. 12 – (126), l. 23). The draft

contract called for lot prices of $76,000 without regard to the impact fees. However, Greenhawk's internal pro forma for Brooks Creek used an assumed $77,000 per lot price to yield a 27% profit based on its known and estimated costs. (R. pp. 1140 - 1144). Using those same costs, a $76,000 lot price would yield a 25.5% return. A 20% return would have the lot price less than $71,000. (R. pp. 1106 - 1111). Greenhawk never offered Eastwood a lot price of $71,000. (*Id.* R. pp. 1110 - 1111).

At no point did Eastwood tell Greenhawk that it no longer wished to buy lots at Brooks Creek. (R. p. 1241, ll. 6–9).[6] Eastwood did not reject the October 2018 draft written contract and expected a final memorialization of the agreement once all costs were accounted for—this is why Joe Polite was shocked when another Eastwood employee erroneously implied that the Brooks Creek contract had been terminated. (R. p. 1411). At no time did Greenhawk follow up with Eastwood about Brooks Creek. (R. p. 1332, l. 14 – (145), l. 3). At no time did Greenhawk terminate the relationship with Eastwood and at no time did Greenhawk tell Eastwood it was preparing to sell the lots to a third-party – Tri Pointe – on terms never offered to Eastwood. (R. p. 1332 (144)).

Shortly after the impact fee case concluded, Joe Polite called Craig Briner about Brooks Creek and River Falls. During the call, both Briner and Polite agreed that Eastwood and Greenhawk had a contract. (R. p. 1238, ll. 8 – 24). Polite confirmed the conversation by email, and Briner did not respond or disagree. (R. pp. 1263; 987, ll. 4 – 8).[7]

[6] In fact, the only written record at Greenhawk of the alleged rejection was made in June 2020, after this lawsuit was commenced, and was prepared "for the file."
[7] Briner now says he disagrees. (R. p. 987 (170)).

Viewing this evidence in a light most favorable to Eastwood, the appropriate conclusion is that Eastwood and Greenhawk were still waiting on the Impact Fee to be allocated in the costs, meaning the pricing method could not yet be applied.

6. The Circuit Court misapplied the summary judgment standard.

The Circuit Court consistently misapplied the Rule 56 standard in granting Respondents' Motions for Partial Summary Judgment. For this reason, the Circuit Court's Partial Summary Judgment Orders should be reversed.

B. EASTWOOD CAME FORWARD WITH FAR MORE THAN A MERE SCINTILLA OF MATERIAL EVIDENCE.

In addition to drawing all inferences in favor of Respondents, the Circuit Court also ignored the significant material evidence Eastwood brought forward before the close of discovery. Eastwood's evidence extended far beyond a "mere scintilla;" Eastwood had material evidence. That is all that was required. "[A] scintilla of evidence is ***any material evidence*** which, taken as true, would tend to establish the issue in the mind of a *reasonable juror*." *Lemmons*, 431 S.C. at 200, 847 S.E.2d at 479 (emphasis added).

1. The Eastwood-Greenhawk Contract was attested to by both parties.

Eastwood came forward with sworn testimony from both Greenhawk's president at the time the Contract was formed and Eastwood's 30(b)(6) designee that established the terms of the Eastwood-Greenhawk contract.

Craig Briner was Greenhawk's president when Eastwood and Greenhawk first entered into their contract. Briner testified unequivocally that he was the person at Greenhawk with the authority to enter the contract with Eastwood. He confirmed that the terms of the agreement with Eastwood were reached in conjunction with the approval by Greenhawk to enter into the transaction, accept the assignment of the land purchase contracts, and close the purchase. (R. pp.

949 (18), ll. 15–25; 960 (64), l. 2 – 961 (65), l. 5). 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. (Briner Dep., at R. p. 958 (56), ll. 7–20; 962 (70), ll. 11 – 13; 963 (75), ll. 7 – 16; 972 (112), ll. 11–16; 1300 (16), ll. 19–21; 1302 (23), ll.18–21; 1306 (39), ll. 6–18; 1308 (49), ll. 8 – 12; 1320 (101), l. 12 – 1322 (102), 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 (55), l. 6 – (56), l. 20). Briner, the man who could indisputably bind Greenhawk when the Eastwood-Greenhawk contract was formed, (R. p. 948 (18), l. 6 – (19), l. 19), testified that the agreement existed.

Eastwood's 30(b)(6) designee corroborated Mr. Briner's testimony. 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]f 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. 1328 (129), l. 12 – 1329 (130), l. 5).

In its Order granting TRI Pointe's Motion for Partial Summary Judgment, the Circuit Court incorrectly stated that Eastwood came forward only with the pro formas as evidence of Eastwood and Greenhawk's pricing method. TRI Pointe Order, at 5. This incorrect statement ignores the sworn testimony of Eastwood's 30(b)(6) representative and Greenhawk's former President. This error is another example of the Circuit Court misapplying the Rule 56 standard.

Despite providing sworn testimony from both Parties that the contract existed, and all material terms had been agreed to, the Circuit Court still found that Eastwood had failed to come

forward with a mere scintilla of evidence supporting the existence of the Eastwood-Greenhawk Contract. This was error and should be corrected by this Court.

2. Multiple writings satisfied the Statute of Frauds.

Respondents contend that the writings Eastwood produced are insufficient to satisfy the Statute of Frauds. (Resp. Br., at 13–14). It is not disputed that the parties and description of the properties are sufficiently depicted in various writings. (*See Id*.). Respondents contend, instead, that there is no writing setting out the price. This argument ignores the numerous pro formas exchanged between Eastwood and Greenhawk.

An email constitutes a sufficient writing from the individual to be charged. *See, e.g.*, *Rainsford v. Apex Bank*, No. CV 8:16-03521-MGL, 2017 WL 3307647, at *3 (D.S.C. Aug. 3, 2017) (finding plausible claim involving email describing transfer of land and reversing dismissal of complaint by bankruptcy court); *Stevens v. Publicis, S.A.*, 50 A.D.3d 253, 254–55, 854 N.Y.S.2d 690, 692 (2008). In this case, the pro formas were sent on behalf of Briner, Greenhawk's president. (Briner Dep., Exs. 91–93, 96 ("Craig was good with this.")). These pro formas supported the Eastwood-Greenhawk pricing method, as described more fully *supra*. These pro formas were agreed to by the party to be charged. At the summary judgment stage, these writings were sufficient.

3. Eastwood came forward with pro formas supporting the existence of the contract.

Not only did Eastwood come forward with testimonial evidence of its pricing agreement with Greenhawk, but it also came forward with pro formas supporting that testimony as well as the take down schedule.

This price agreement within the Eastwood-Greenhawk agreement 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, ll. 2 – 8). In other words, after all costs were accounted for, Eastwood would pay a lot price and on a takedown schedule that allowed Greenhawk to reach the 20% IRR mark. (Eastwood 30(b)(6), at 129:12–130:5; Briner Dep., at 958 (56), ll. 7 – 20; 962 (70), ll. 11 – 13; 963 (75), ll. 7 – 16; 972 (112), ll. 11–16; 973 (116), l. 22 – 974 (117), l. 7). 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). All that was left was to solve for the costs once the costs were known on the projects. (R. p 973 (114), ll. 6–15).

It is true that the pro formas do not consistently peg the IRR at 20%, but those documents were all close to the percentage testified to by Polite and Briner and reveal a pricing mechanism that, when viewed in a light most favorable to Eastwood, is sufficiently definite. Once the costs were known, the price would be determined to generate the IRR of 20%. Respondents and the Circuit Court misunderstand the relevance and purpose of the pro formas. They show the mechanism for generating the price; no one testified that the expected return would be anything but 20%. After costs are known, it is just a math exercise to generate a price that yields a 20% return; no further agreement is necessary.

"If the contract is silent on price . . . the agreement is not indefinite if a formula or method for ascertaining the price is understood and agreed upon." *Trident*, 272 F. Supp. 2d at 576 (quoting *S. Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 621–22 (D.S.C. 1968)). 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); *see also 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); *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).

The Eastwood-Greenhawk method had not yet yielded an exact dollar amount, but it was arguably more precise than methods accepted in this and other jurisdictions.

4. Eastwood came forward with significant evidence supporting its joint venture claims.

Eastwood also came forward with evidence supporting its joint venture claim, evidence the Circuit Court ignored. Specifically, the pricing method agreed to by Eastwood and Greenhawk ensured that the two parties would share in the profits and losses from the River Falls and Brooks Creek ventures.

"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).

Here, the incomplete record established that Eastwood and Greenhawk were working for a common purpose. Eastwood made what was essentially gratuitous assignment of the contracts to buy both Properties to Greenhawk. Eastwood later transferred land it paid a high price for without

asking for anything in return from Greenhawk. Joe Dority was Greenhawk's uncompensated man on the ground in Tega Cay. He worked to coordinate engineering services, wetland services, and meeting with Tega Cay officials. Pro formas were regularly exchanged between Greenhawk and Eastwood and sensitive financial information shared as they worked to finalize pricing and costs.

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 Circuit Court to grant summary judgment on this claim.

5. Eastwood came forward with more than a mere scintilla of evidence.

Eastwood came forward with significant evidence that created a genuine dispute of material fact. It produced sworn testimony from both parties to the Eastwood-Greenhawk contract. It produced documentary evidence of the pricing method. It produced evidence of its joint venture with Greenhawk. The Circuit Court ignored this evidence when it granted Respondents' motions. By law, "any material evidence" is enough. *Lemmons*, 431 S.C. at 200, 847 S.E.2d at 479. Eastwood easily satisfied that minimal standard.

C. THE CIRCUIT COURT IMPROPERLY GRANTED PARTIAL SUMMARY JUDGMENT BEFORE THE CLOSE OF DISCOVERY.

Contrary to Respondents' contentions, Eastwood did not seek an extension of discovery to engage in a fishing expedition. Instead, it only asked for a delay long enough to depose two of Greenhawk's three decision makers during the time Eastwood and Greenhawk entered into their agreement. Despite being presented with information about essential, specific discovery, the

Circuit Court proceeded to grant summary judgment rather than delay ruling in order to allow Eastwood to complete the minimal remaining discovery to which it was entitled.

Rule 56(f), SCRCP, allows a trial court to defer summary judgment until essential discovery is complete:

> 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).

Discovery was not complete by the December 10, 2021 hearing, nor is it complete now. The incomplete discovery includes essential testimony and documents from Greenhawk's owner and decision makers, not trivial matters.

There is no dispute that Mr. Agarwal is the final decision maker, financial backer, and leader of Greenhawk. (*See, e.g.*, R. pp. 948 (15), ll. 17 – 20; 948 (16), ll. 16 – 19; 949 (18), ll. 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.* R. 949 (19), ll. 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.

Further, Eastwood also did not have a chance to depose another key decision maker, Matt DesVergers. Matt DesVergers was one of the three decision makers in 2013/2014 when the Properties were assigned to Greenhawk and the contract with Eastwood was agreed to. (R. p. 419, ¶21). Mr. DesVergers was not named in Greenhawk's responses to Eastwood's interrogatories, and his significance was not clear from the documents produced.[8] (*Id.*). Greenhawk's failure to timely identify relevant decisions makers was a failure the Circuit Court should have allowed Eastwood to remedy before considering, let alone rendering, judgment.

CONCLUSION

For these reasons, Eastwood respectfully asks this Court to reverse the Circuit Court's orders dated January 14, 2022, and February 15, 2022, granting TRI Pointe and Greenhawk's motions for partial summary judgment.

[Signature block to follow]

[8] Sajjan Agarwal was also not listed in Greenhawk's responses, but Eastwood was able to surmise his importance from other sources.

Respectfully submitted,

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October 26, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-000290
Case No. 2020-CP-46-02006

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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

October 26, 2022

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