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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

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

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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.

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**REPLY BRIEF  
IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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## **RELEVANT FACTUAL BACKGROUND**

The Court of Appeals applied the incorrect summary judgment standard by ignoring evidence that created a genuine dispute of material fact. It consistently focused on the evidence supporting the movants and drew the inferences therefrom in their favor. In this way, the Court of Appeals' decision is in conflict with this Court's longstanding precedent governing summary judgment.

Like the Court of Appeals, Respondents, in their Return Brief, float over the fact that Craig Briner, Greenhawk's President and key decisionmaker at the relevant time, and Eastwood's Rule 30(b)(6) designee, Joe Polite, both agreed as to the material terms of the agreement. First, description: Greenhawk would develop and sell back the lots at River Falls and Brooks Creek to Eastwood. Second, price: The price would be whatever was required for Greenhawk to receive a 20% IRR. As for timing, takedown schedules had not been finalized, but Greenhawk and Eastwood had a course of dealing that demonstrated take down schedules were not only immaterial, but would change throughout the course of development. What is more, Briner testified that the lots in Brooks Creek would be purchased all at once the final plat was approved by the government, so no takedown schedule was required.

The only two material terms of the agreement were definite, and Eastwood acted in accordance with that agreement. Eastwood expended considerable resources in pursuit of the parties' agreement, to include transferring valuable land to Greenhawk for no consideration. Eastwood's partial performance of the parties' agreement removed the agreement from the Statute of Frauds all together, but the Court of Appeals failed to address that argument at all.

**I. There is ample, material evidence showing a definite agreement between parties through multiple writings.**

The record is replete with evidence creating a genuine dispute of material fact on price and description. The evidence also showed that timing was not an essential term between Greenhawk and Eastwood.

In 2013, Eastwood, through its then Vice President of Land, Joe Dority, identified the real property at issue in this case and placed all of the affected tracts under contract to purchase, including the payment of earnest money deposits. (R. p. 959, at 58:2–4). The purpose of that effort was to prevent others from gaining access to the property. The two properties were located off of Gold Hill Road in York County, South Carolina. One parcel was approximately 12 acres and the other was 51 acres. (R. pp. 156-174).

In anticipation of their purchase, Eastwood began preliminary development work on the Properties for the joint benefit of Greenhawk and Eastwood, including engineering, site design, and municipal related permitting. While the preliminary work was ongoing, Eastwood’s Dority entered into an agreement with Greenhawk’s Craig Briner regarding both properties. Pursuant to that agreement, Eastwood would assign its rights to purchase the properties to Greenhawk, Greenhawk would develop the properties in accordance with Eastwood’s specifications, and Greenhawk would sell completed lots to Eastwood. (R. p. 1314, at 71:12–23; p. 1208, ll. 1–13; p. 1263; p. 959, at 58:2–59:25).

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. 1100-1101, ll. 31–32). 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. 952, at 37:7–38:1). In the 2013–2014 time frame, through the middle of 2018, Mr. Briner was the sole person responsible for Greenhawk’s land development activities. Once he had authority to proceed from Mr. Agarwal and Mr. DesVergers, Greenhawk’s other managers at the time, no one else at Greenhawk had knowledge of what arrangements were made with Eastwood or other developers. (R. p. 949, at 18:13–25).

Mr. Briner’s deposition testimony confirms the Eastwood-Greenhawk agreement:

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. 1328-1329, at 129:12–130:5).

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; p. 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. 1328-1329, at 129:12–130:5; 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).

**II. The record had substantial evidence of Eastwood's partial performance pursuant to the parties' agreement.**

The Court of Appeals completely ignored the substantial performance by Eastwood, performance that can only be explained in light of the parties' agreement.

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 acquired by Greenhawk did not encompass the area where SCDOT dictated the entrance had to be. To satisfy SCDOT and facilitate development of River Falls, Eastwood paid \$55,741 for the 2316 square feet of land, or .055 acres, needed to move River Falls' entrance on Gold Hill Road. (*See*, Helms Settlement Statement, R. pp. 1389-1390; Deed from Caroline Helms to Eastwood Development Corp, R. pp. 1402-1406). The cost of that sliver of land equated to a cost per acre of over \$900,000. The land owner was apparently aware

of the predicament Eastwood and Greenhawk were in and used that to her advantage. (*See* June 10, 2014 Email from Joe Dority to Craig Briner, R. pp. 1412-1413). In addition to an exorbitant purchase price, 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, R. pp. 1391-1392, ¶3). In 2018, Eastwood transferred the sliver of land to Greenhawk for no cash consideration. (R. p. 960, at 61:17–62:8; p. 1327, at 122:1–4; p. 1331, at 141:21–24; pp. 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.

Eastwood did not just assign contractual rights to purchase land: it gave additional land to Greenhawk to advance the unwritten contract. 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, R. pp. 1389-1390; Deed from Caroline Helms to Eastwood Development Corp, R. pp. 1402-1406; Quitclaim Deed from Eastwood to Greenhawk, 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, R. pp. 1391-1392, ¶3). 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.

Beyond the transfer of property interests, Eastwood made other significant investments in the Properties. Over the initial course of the contract, Eastwood expended over \$570,000 and was not compensated for almost \$360,000 in predevelopment and entitlement costs. (R. 1333, at 146:9–12). Those costs were to be treated as an earnest money deposit—i.e., a down payment—on the

finished lots that were to be sold to Eastwood. (R. p. 892; p. 1333, at 146:9–12). Eastwood’s former Vice President for Land Acquisition, Joe Dority, spent significant time monitoring and driving the River Falls project. Mr. Dority was never compensated for that work by Greenhawk, because Greenhawk and Eastwood understood the benefit his work brought to both of them in the form of finished lots.

Eastwood is a for-profit business—it does not give away land or money to other for-profit businesses. These actions are only explainable in the context of the parties agreement.

### **ARGUMENT**

This Court should grant certiorari because the Court of Appeals’ decision is in conflict with Supreme Court precedent. *See* Rule 242(b)(3), SCAR.

#### **I. The Court of Appeals identified the correct standard, but failed to properly apply it.**

When viewing the evidence above in a light most favorable to Eastwood, there is a genuine dispute of material fact as to whether either (1) a contract for the sale of the lots existed in multiple writings, or (2) Eastwood partially performed under the agreement and thus took it outside the Statute of Frauds. This was not evidence of an “agreement to agree”—it was evidence of an enforceable, definite contract.

The Court of Appeals should have viewed “*all* evidence in the light most favorable to the non-moving party.” *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002) (emphasis added) (quoting *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001)). Instead, the Court of Appeals picked the best evidence in support of Respondents’ position and drew inferences in their favor. For example, the Court of Appeals stated the following:

- “Eastwood's documents, emails, and the testimony of its employees Joe Dority and Joe Polite show Eastwood did not have a contract with Greenhawk.” *Eastwood Constr. Partners, LLC v. GHD Brooks Creek*, 24-UP-281, Op. No. 2022-290, 2024 WL 3595536, at \*2 (S.C. Ct.App. filed July 31, 2024);
- “When asked if the pro forma constituted an offer from Greenhawk to sell lots to Eastwood, Polite answered it was a “discussion.” Craig Briner, who was Greenhawk's President, stated Greenhawk prepared the pro formas as part of its negotiations with Eastwood. *Id.*

Both of these points demonstrate the Court of Appeals' inappropriate application of the summary judgment standard.

On the first point, it is true that Messrs. Polite and Dority gave testimony to the effect that there was no unitary, written memorialization of the Parties' agreement. That fact is not in dispute. However, Mr. Polite and Dority were both clear that they believed the parties had an enforceable agreement. Furthermore, as noted above, when Mr. Dority spoke in his capacity as Eastwood's 30(b)(6) designee, he made clear that the parties had an agreement with definite terms, and Craig Briner's own testimony comports with that agreement.

Instead of focusing on the portions of nonlawyers' testimony about a “contract,” the Court of Appeals should have focused on the testimony of Briner and Dority as Eastwood's 30(b)(6) designee. Drawing the inference in favor of Eastwood, it is clear there was at least a genuine dispute of material fact as to whether an enforceable contract existed.

On the second point regarding pro formas, once again the Court of Appeals failed to look at all of the evidence and thus ignored material evidence creating a genuine dispute of material fact. While there is no question that the final price in dollars had not been set, as the Court of Appeals noted, there was substantial evidence showing that the method of pricing the lots was final. Briner and Polite both agreed that the various pricing factors would be set to ensure that Greenhawk received a 20% IRR.

The agreement of Eastwood's 30(b)(6) designee and Greenhawk's former president was completely ignored by the Court of Appeals. Instead, the Court focused on testimony confirming the undisputed fact that an exact price in dollars had not been set. This was an inappropriate application of the summary judgment standard.

Finally, because the Court of Appeals inappropriately applied the summary judgment standard to Eastwood's first argument regarding multiple writings, it failed to address Eastwood's other argument that it had partially performed under the parties' agreement, thus taking the entire agreement out of the Statute of Frauds. *Eastwood Constr. Partners*, 2024 WL 3595536, at \*2. In doing so, the Court of Appeals, once again, ignored substantial evidence in favor of the nonmoving party and drew a conclusion, not just an inference, in favor of the moving party.

## **II. Time was not an essential term to Eastwood or Greenhawk.**

Respondents are incorrect in their insistence that time is an essential term.

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.***

*Id.* at 412–13, 49 S.E.2d at 593 (emphasis added).<sup>1</sup>

As with the pricing agreement, the Court of Appeals, despite material evidence to the contrary, concluded that timing was an essential term between Eastwood and Greenhawk when the parties themselves had shown that takedown schedules changed throughout the course of development and after a formalized contract.

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, at 153:1–17; pp. 1079-1085).

Furthermore, no takedown schedule was needed in the first place. Briner testified that there would be only a single takedown, not a schedule of takedowns in series. (R. pp. 1037 - 1062). Further, the lots could only be sold after the government approved the final plat, an event

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<sup>1</sup> Contrary to the assertion in Respondents’ Return Brief, Eastwood cited the *Speed* Court’s decision in its entirety. (*See* Cert. Pet., at 14).

completely out of the control of the parties. 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. Time was not an essential term.

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.

### **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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