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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Trial Court Judge

Court of Common Pleas Case No. 2022-CP-26-06116
Appellate Court Case No. 2024-000171

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

Despite the voluminous record and pages of briefing, the issue in this case is simple: Do two parties, despite not having a contractual relationship, nonetheless have a "special relationship" resulting in a legal duty? In answering this question, the Court has the aid of another case – *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (hereinafter *Tommy L. Griffin I*) – addressing this same question on nearly identical facts. In that case, our state supreme court focused on the power and authority that one party had over another, which created a "special relationship." Respondent – in 56 pages of briefing – has not been able to point to any meaningful distinction between this case and *Tommy L. Griffin I*, which would justify a different result. In fact, the one fact that TSC says is that the "central" distinction is nowhere to be found in the case.

Viewing the evidence in the light most favorable to FCI – as required in the posture of summary judgment – there is, at minimum, a genuine issue of material fact as to whether TSC possessed the same power and authority over FCI as did the parties in *Tommy L. Griffin I*. As a result, the trial court erred in granting summary judgment.

I. The Parties Agree that the *Tommy L. Griffin I* Facts and Circumstances Test Applies

In South Carolina, an engineer – such as TSC – who has a special relationship with a contractor – such as FCI – may owe a duty not to negligently perform such that the contractor suffers economic loss. The South Carolina Supreme Court in *Tommy L. Griffin I* established that the "facts and circumstances" of each case must be considered to determine the existence of the special relationship creating the duty. The Parties agree that this test applies.[1]

[1] As stated in FCI's Initial Brief, any reliance by TSC on foreign law regarding this standard should be disregarded. *See* FCI Initial Brief at 21-24.

The courts in *Tommy L. Griffin I* and its progeny, like *Cullum Mechanical Construction. Co. v. S.C. Baptist Hospital*, 344 S.C. 426, 544 S.E.2d 838 (2021), identify which facts and circumstances are material to the special relationship analysis. According to the South Carolina Supreme Court in *Tommy L. Griffin I*, the relevant facts were that the "[e]ngineer designed the project specifically for the County of Charleston. Engineer **supervised** the construction. Engineer had the right, among other rights, to **inspect** the construction and to **halt** construction." 320 S.C. at 56, 463 S.E.2d at 89 (emphasis added). In *Cullum*, as the Court of Appeals noted, the architect did not have the power to halt construction. *Cullum Mech. Const., Inc. v. S.C. Baptist Hosp.*, 336 S.C. 423, 432, 520 S.E.2d 809, 814 (Ct. App. 1999), *rev'd,* 344 S.C. 426, 544 S.E.2d 838 (2001). However, the Supreme Court clarified that the architect did have the power to approve and withhold payment applications from the general contractor. *See Cullum*, 344. S.C. at 429, 544 S.E.2d at 840. The key facts in *Cullum* related to the architect's administration of the contractual payment process and its effect on the payment of subcontractors. *Id*.

Tommy L. Griffin I and *Cullum*, read individually and collectively, reveal that the facts and circumstances material to the special relationship are those concerning the engineer's authority and control over the contractor. This is what matters. This is what is material. The rest is noise.

II. TSC Failed to Meet its Initial Burden, but Even so, FCI Met its Burden to Overcome Summary Judgment by Showing a Genuine Issue of Material Fact

TSC's initial burden on summary judgment is to demonstrate an absence of any genuine issue of material fact. TSC's burden can be satisfied by "'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1990)). TSC has not met its burden because it merely

"asserted" such an absence of evidence.[2] TSC Initial Brief at 31. TSC cannot meet its burden, as shown by the ample evidence before the Court of the special relationship between TSC and FCI. *See* FCI Initial Brief at 38-40. Instead, TSC presents a series of straw man arguments immaterial to the special relationship analysis. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). TSC's arguments are insufficient to meet its initial burden on summary judgment.

Even if TSC met its initial burden (which it did not), to survive summary judgment FCI need not prove the ultimate issue of the existence of a duty. TSC's assertion that "Appellant argues that *Tommy L. Griffin I* requires a finding of a duty in this case" neither comports with FCI's well-settled burden on summary judgment nor FCI's argument on appeal. TSC Initial Brief at 26. FCI need only demonstrate a genuine issue of material fact concerning the special relationship between TSC and FCI.[3] *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301

[2] One need only look at the pages TSC spends interpreting the different evidence in this matter to see that the "absence of evidence" argument is a red herring. TSC's true argument is that the Court should adopt its interpretation of the evidence. However, this stands the summary judgment standard on its head.

[3] TSC's repeated claim that FCI cites an improper scintilla standard is puzzling and false. *See* TSC Initial Brief at 8, 18, 31, & 40. FCI never cited the scintilla standard when it was inapplicable. This includes each of FCI's nine uses of the word "scintilla" at the SJ hearing. *See* TSC Initial Brief at 8. *Kitchen Planners*, decided on August 23, 2023, thirteen (13) days *after* the SJ Hearing, clarified that the scintilla standard no longer applied in South Carolina. 440 S.C. 456, 460, 892 S.E.2d 297, 300. The Parties each briefed the trial court on the change in law. *See* TSC's Notice of Change in Law; *see also* FCI's Response to TSC's Notice of Change in Law. As such, TSC is well aware of the change and the reason why FCI cited to the "scintilla" standard prior to August 23, 2023. Since the date *Kitchen Planners* was decided, FCI has not once used the word "scintilla" in any briefing, including in its Initial Brief on appeal. TSC's repeated false accusation that FCI misused the scintilla standard should be disregarded. Since *Kitchen Planners* was decided, the only party to use the word "scintilla" has been TSC.

(2023); *see also e.g.*, *Cullum*, 344. S.C. at 432-33, 544 S.E.2d at 841-42. The alignment of **material** facts regarding authority and control in *Tommy L. Griffin I* and in the instant case can mean only one thing – summary judgment in TSC's favor is improper. A chart comparing the material facts is reproduced below:

Tommy L. Griffin I	**FCI v. TSC**
Engineer **contracted** to be the **design engineer** and **supervised the project** for the County of Charleston. 320 S.C. at 51, 463 S.E.2d at 86.	TSC was contractually responsible for "**all project plan and specification reviews**. . . involved in the production of the project plans and specifications." *See* Engineer Certification. TSC was "**responsible for the day-to-day operation and administration of the project**." Scope of Services, p. 21.
"Engineer wrongfully **closed the job** for nearly a month . . .." 320 S.C. at 51, 463 S.E.2d at 86.	TSC had "the authority to **reject defective material** and to **suspend any work** that is being improperly performed . . .." Specifications § 105.9.1. TSC also "**repeatedly exercised its right to reject or stop FCI's work**." Hutcherson Affidavit, ¶ 11.
"Engineer **made demands of [Contractor]** which were not in the contract." 320 S.C. at 51, 463 S.E.2d at 86-87.	"**TSC demanded** significant additional information exceeding . . . requirements. . . . Due to the **control TSC possessed on the Project**, FCI was forced to give time and effort even to clearly meritless **demands made by TSC**." Hutcherson Affidavit, ¶ 14. "TSC **rejected FCI's work** based upon **erroneous interpretation of the Project specifications** – which occurred on multiple occassions . . . ." *Id*., ¶ 10. "**TSC often made unilateral decisions in the field** . . . **that delayed, hindered or otherwise negatively impacted FCI's work**." *Id.* ¶ 10.
"Engineer **supervised the construction**." 320 S.C. at 56, 463 S.E.2d at 89.	"**TSC oversaw all aspects of FCI's performance of [Work].**" Hutcherson Affidavit ¶ 5. "**TSC's field oversight of FCI's work** . . . included, without limitation . . . **providing direction** as to whether FCI . . . could proceed with the work, **must stand down, and/or perform rework**." *Id*. ¶ 6 TSC was "**responsible for the day-to-day operation and administration of the project**." Scope of Services, p. 21. "**TSC wielded substantial influence and power over FCI** and impacted the progression and completion of FCI's work on the Project." Hutcherson Affidavit, ¶ 8.

"Engineer had the right, among other rights, to **inspect the construction** and to **halt construction**." 320 S.C. at 56, 463 S.E.2d at 89.	TSC had the right to "**inspect all work done and all materials furnished** . . . [and] the authority to **reject defective material** and to **suspend any work** that is being improperly performed . . . ." Specifications § 105.9.1. TSC "on multiple occasions . . . **rejected FCI's work** . . . ." Hutcherson Affidavit, ¶ 10. TSC also "**repeatedly exercised its right to reject or stop FCI's work**." Hutcherson Affidavit, ¶ 11.

The *Tommy L. Griffin I* court focused on the power and authority held by the engineer. The Court should do the same here. Particularly when viewed in the light most favorable to FCI, the substantial record, including the Project Contracts, Hutcherson Affidavit, and other documentary evidence, demonstrates that there is, at a minimum, a genuine issue of material fact regarding the existence of a special relationship and duty owed by TSC to FCI. Therefore, the trial court order dismissing FCI's negligence claim should be reversed.

III. On its Face, *Tommy L. Griffin I* is Not Distinguishable in Any Material Way From the Facts and Circumstances in this Case

Given all of the similarities between *Tommy L. Griffin I* and the facts in the present case, how can TSC say that the situation here is materially different? TSC's attempts to distinguish *Tommy L. Griffin I* fall flat. TSC claims that the "central and obvious difference between the *Tommy L Griffin I* case and this case is that the engineer . . . had ultimate decision-making authority . . . ." TSC Initial Brief at 23. TSC doubles down on this factual distinction, stating that in *Tommy L. Griffin I*, "the engineer agreed with the client and contractor . . . to supervise the work as a final authority." TSC Initial Brief at 28. **But, nowhere in the published *Tommy L. Griffin I* opinion, the subsequently published *Tommy L. Griffin II* opinion, or in the underlying briefing in that dispute did the Supreme Court, Court of Appeals, or parties ever claim or describe the engineer's final decision-making authority.** Consequently, as this "central" distinction asserted by TSC is actually imagined, TSC's argument must fail like a bridge without a central pillar.

TSC claims a difference from *Tommy L. Griffin I* in that the engineer performed design services. This, however, was not a requirement to find a special relationship. The contractor's complaints in *Tommy L. Griffin I* only concerned the engineers supervisory duties.[4] Further, the facts and circumstances creating a special relationship need not be identical to those before the court in *Tommy L. Griffin I* to find a genuine issue of material fact.[5] Tellingly, the South Carolina Supreme Court in *Cullum* applied *Tommy L. Griffin I* and found that an architect with certain control and authority over payments to subcontractors may owe a duty to those subcontractors to use reasonable care in the administration of that contractual authority. Thus, the material facts and circumstances in *Cullum*, which precluded summary judgment, were related to the architect's authority and control over the payment process. *See Cullum*, 344 S.C. at 433, 544 S.E.2d at 842. The engineer in *Tommy L. Griffin I* and the architect in *Cullum* were both "design professionals," but their design performance was not **material** to the special relationship analysis.

The power held by these design professionals was important to a finding that a special relationship may have been created and was key to the harm alleged by the plaintiffs. In *Tommy L. Griffin I*, the contractor complained, among other things, that "Once construction began . . . Engineer wrongfully closed the job for nearly a month . . . made demands of [the contractor] which were not in the contract . . . erroneously interpreted the contract to the county." 320 S.C. at 51, 463

[4] The contractor alleged that the engineer was negligent because it "closed the job for nearly a month due to false allegation of OSHA violations, made demands of [the contractor] that were not in the contract . . . [and] erroneously interpreted the contract." *Tommy L. Griffin I*, 320 S.C. at 51-52, 463 S.E.2d at 86-87. The Supreme Court's ruling was disjunctive, holding that the engineer "owed a duty to the contractor not to negligently design **or** negligently supervise the project. *Id*. (emphasis added).

[5] Nor must an "appellate court in South Carolina" have issued a decision evaluating the specific circumstance of "a duty owed by a CEIT services provider to a contractor, where that CEIT provider was in privity with an Owner" to support the finding of a genuine issue of material fact concerning a special relationship. TSC Initial Brief at 25-26.

S.E.2d at 86. TSC's powers and FCI's complaints about TSC's negligent wielding of those powers are similar to the facts and circumstances in *Tommy L. Griffin I*. *See* FCI Initial Brief at 38-40. Whether TSC actually performed its contractual design obligations is inconsequential to the special relationship analysis.

IV. TSC's Authority and Control over FCI's Work is Material Irrespective of Whether TSC is the "SCDOT RCE"

As held in *Tommy L. Griffin I* and *Cullum*, the facts and circumstances material to the existence of a special relationship are those that show TSC's authority or control over FCI's work. As reflected in the chart above, the record is replete with evidence of TSC's authority and control over FCI's work, including Mr. Hutcherson's first-hand knowledge of TSC's authority on the Project, TSC's obligations under the Project Contracts, and TSC's concession that it was the RCE Representative. Though holding the title of "SCDOT RCE" with "final decision-making authority" would indicate that TSC possessed significant authority over FCI's work, the absence of that title is not dispositive of that authority.[6] Indeed, while denying it was the "SCDOT RCE," TSC has conceded that it operated "as a Representative of the SCDOT RCE . . . had 'the authority to reject defective material and suspend any work that is being improperly performed subject to the final decision of the [SCDOT] RCE." TSC Initial Brief at 37[7]; *see also* TSC Reply at 8. As

[6] TSC's contention that FCI "must demonstrate that TSC . . . assumed agency authority to act as RCE for SCDOT" should be disregarded. TSC Initial Brief at 32. The key analysis is the authority wielded by TSC, not whether TSC wielded such authority as SCDOT's agent. *See e.g. Lawlor v. Scheper*, 232 S.C. 94, 97 101 S.E.2d 269, 271 (1957) ("[a]n agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity"); *see also Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 396 S.E.2d 122 (Ct. App. 1990) (If an agent's conduct "involves a duty to third persons – a duty imposed by law arising out of the circumstances – then such third person has a right of action against the agent, if the [agent] fails in performing this duty, and the contractual relation to the principal does not interpose a defense"). This appeal does not concern an attempt by FCI to hold SCDOT liable for TSC's tortious actions. Therefore, TSC's alleged agency relationship with SCDOT is irrelevant here.

[7] Alteration of the contract language was made by TSC and is not present in the original contract.

set out in FCI's Initial Brief, the RCE Representative had expansive authority under the Project Contracts. *See* FCI Initial Brief at 28. As such, even without the "SCDOT RCE" title, TSC had authority and control material to the special relationship analysis. Regardless of the title TSC held, FCI presented compelling evidence of TSC's exercise of significant authority and control over FCI's work. This authority was consistent with the authority wielded by the engineer in *Tommy L. Griffin I* and, at a minimum, establishes a genuine issue of material fact precluding summary judgment.

V. The Court Must Draw All Reasonable Inferences in FCI's Favor and Against TSC

The majority of TSC's argument on appeal is not that there is an absence of evidence. Rather, TSC goes on at considerable length to *interpret* the summary judgment evidence in its favor to argue FCI has not met its burden of demonstrating a genuine issue of material fact. Of course, summary judgment evidence and all reasonable inferences drawn from it must be made in favor of the non-moving party and against the moving party. *See Grimsley v. S.C. L. Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015); *see also True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). Therefore, TSC's efforts to reverse the interpretive standard on summary judgment, if appropriate by any measure, actually demonstrate the existence of a genuine issue of material fact concerning a special relationship between TSC and FCI.

FCI's former Project Manager, Lou Hutcherson, supplied testimony about TSC's authority on the Project based on his firsthand knowledge of the day-to-day activities of the Project. *See* Hutcherson Affidavit ¶¶ 3-8 & 10-11. TSC's Initial Brief does not refute that TSC, in fact, wielded this authority or exercised such control over FCI's work. In fact, it concedes that TSC had some of the same authority Mr. Hutcherson testified to in his affidavit. *See* TSC Initial Brief at 36 ("TranSystems had 'the authority to reject defective material and suspend any work that is being improperly performed subject to the final decision of the [SCDOT] RCE.'"). TSC instead ignores

almost all of Mr. Hutcherson's sworn testimony about TSC's control and authority and instead argues that Mr. Hutcherson does not testify that he subjectively believes that TSC had the very authority that Mr. Hutcherson described in the affidavit. Such a narrow interpretation of Mr. Hutcherson's affidavit regarding his subjective belief about Martin Long's job title is contrary to the facts and circumstances test in *Tommy L. Griffin I* and is an improper interpretive inference on summary judgment.[8]

TSC also argues for its own narrow and selective interpretation of Mr. Hutcherson's February 25, 2016 email, claiming that the email shows Mr. Hutcherson "knew" that TSC lacked SCDOT RCE authority. TSC Initial Brief at 9, 16-17, 33-35, 37-38. This skewed reading in TSC's favor is inappropriate on summary judgment and wrong. As described in FCI's initial brief, reading the email in context shows that Mr. Hutcherson is not merely describing TSC's lack of authority. FCI Initial Brief at 42-43. Instead, Mr. Hutcherson is frustrated at Mr. Long's refusal to exercise his authority and is lamenting the effect of that refusal to his colleagues. *Id*. Again, whether TSC was the "SCDOT RCE" is inconsequential to the special relationship status. However, Mr. Hutcherson states that Mr. Long is "the designated RCE" and has authority consistent with that designation. TSC asks this Court to ignore this declaration from Mr. Hutcherson and to instead make an out-of-context reading of only the second half of the email, interpreting the evidence in TSC's favor. Again, this inverts the interpretive standards on summary judgment.[9]

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[8] Further, FCI doubts highly that TSC would accept Mr. Hutcherson's subjective "belief" as material and dispositive of the existence of TSC's duty to FCI. TSC's criticism lacks merit. Mr. Hutcherson's testimony regarding TSC's day-to-day authority and control over FCI's work is unrebutted.

[9] Additionally, TSC's argument about contract interpretation should be disregarded. FCI does not seek to interpret the Project Contracts. The parol evidence rule is, therefore, not implicated.

Finally, TSC's efforts throughout its briefing below and on appeal do not contribute to meeting TSC's burden to demonstrate an absence of evidence. Instead, TSC's efforts to put forth alternative interpretations of the evidence make clear that, at a minimum, there is a genuine issue of material fact concerning the existence of TSC's duty to FCI, precluding summary judgment. The trial court's summary dismissal of FCI's negligence claim should be reversed.

VI. No Conflict of Interest Exists or Would be Created by Following South Carolina Supreme Court Precedent in *Tommy L. Griffin I*.

TSC argues that the Court's enforcement of the precedent in *Tommy L. Griffin I* and its progeny will create a conflict of interest for engineers under the Rules of Professional Conduct for Professional Engineers. There is simply no basis for this.

First, if a finding of a "special relationship" in this case would create such a conflict, why would the same not be true in *Tommy L. Griffin I*? TSC has not addressed this.[10] Nor does TSC provide any legal support for its argument. There is none.

Second, TSC does not explain how a duty to act in a non-negligent way towards third parties prevents an engineer from fulfilling its obligations to protect the safety, health, property, and welfare of the public. FCI does not accuse TSC of doing its job too well – as TSC repeatedly suggests – but of delaying submittal reviews, imposing improper procedures, giving contradictory assessments, and wrongfully interpreting applicable specifications, all to the harm of FCI. The trial court's reliance on this non-existent conflict of interest was in error.

[10] The South Carolina Supreme Court in *Tommy L. Griffin I* did not "hint" that "the attorney standard for duties to third parties is the same as the standard for design professionals." TSC Initial Brief at 29. However, both attorneys and design professionals owe a duty to third parties with which they have a special relationship and are not "immune" from liability for violating that duty. *See Tommy L. Griffin I*; *see also Argoe v. Three Rivers Behavioral Ctr. and Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).

VII. Failure to Consider FCI's SCRCP 56(f) Affidavit was an Abuse of Discretion

The trial court refused to consider FCI's affidavit testimony regarding the need for additional time for discovery on the basis that the affidavit was not in technical conformity with SCRCP Rule 56(f). This was in error. In *Baughman*, the court did not require "strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court." *Baughman*, 306 S.C. at 112 n. 4, 410 S.E.2d at 544 n. 4. FCI properly argued before the court that summary judgment was premature because more discovery was needed. FCI Opposition, pp. 7, 24, 27 & 34; *see also* SJ Hearing Transcript at 23:22-26:4. The trial judge did not rule upon FCI's request at the hearing. Following the hearing and prior to the SJ Order, FCI repeatedly requested additional time and filed an SCRCP 56(f) affidavit supporting this request. *See* FCI's Motion for Reconsideration, at 2-5 & 11-20; FCI's Opposition to Motion to Strike, at 5-6 & 10-11; Reid 56(f) Affidavit. Under such circumstances, failure to consider FCI's SCRCP 56(f) affidavit citing strict compliance with the time requirements of SCRCP 56(f) is unwarranted.[11]

Further, the trial court refused even to consider FCI's SCRCP 56(f) affidavit. This constitutes an abuse of discretion. The SJ Order, issued after FCI's SCRCP 56(f) affidavit was filed, found that "Plaintiff filed no affidavits pursuant to Rule 56(f), SCRCP, prior to or at the hearing on the Motion for Summary Judgment." SJ Order at 12. In short, the trial court failed to consider the affidavit except to find that it was not filed prior to the SJ Hearing. The trial court "was mandatorily required to at least evaluate and consider the affidavit" *Schmidt v. Courtney*, 357

[11] Our courts have made clear that where an issue is raised to the trial court and, when the trial court does not rule on the issue, raised again in a post-order motion, the issue is preserved for appellate review. *See*, *e.g.*, *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006).

S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003). Failure to do so is an abuse of discretion. *Id*.[12]

VIII. The Trial Court's Agency Findings were Improper on Summary Judgment and FCI Did Not Waive Objections to Such Findings

TSC argues that FCI has not presented facts sufficient to overcome the SJ Order's agency finding[13], but this is not the issue FCI raised on appeal. *See* FCI Initial Brief at 46-47; *see also* TSC Initial Brief at 46-7. FCI did not substantively challenge the factual finding of agency; rather, it challenged the propriety of such a finding in this case on summary judgment. *See* FCI Initial Brief at 46-47. FCI contends that an agency determination on summary judgment was inappropriate as such a finding is (i), unrelated to the special relationship analysis, (ii) contrary and prejudicial to claims remaining before the trial court, and (iii) premature on summary judgment. *See Id*.

First, as stated above, agency is irrelevant to the negligence claim because it is immaterial to the special relationship analysis. Second, a ruling that agency authority existed directly conflicts with the lower court's decision not to grant summary judgment on tortious interference because such an agency relationship would constitute a defense to that claim. Finally, agency is a question of fact and, therefore, premature on summary judgment.

[12] At the time of the SJ Hearing, TSC had not completed its document production and did not do so until two months after the hearing. *See* FCI Initial Brief at 14.

[13] FCI does not substantively address agency on appeal for reasons addressed in its Initial Brief and in this Reply. It should be noted, however, that, TSC argues simultaneously that FCI has not presented facts sufficient to establish agency (TSC Initial Brief at 32-38) and claims FCI has not presented facts sufficient to establish a lack of agency (TSC Initial Brief at 46-47). TSC should be estopped from taking such inconsistent positions. *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004).

IX. FCI Does Not Appeal the Trial Court's Summary Judgment Ruling on FCI's Breach of Contract Claim (Count II).

To the extent necessary, FCI confirms that it does not seek review of the Trial Court's summary judgment ruling on FCI's Breach of Contract Claim (Count II).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Trial Court.

Respectfully submitted,

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