THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis

Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructers, Inc.,

Appellant,

v.

TranSystems Corporation,

Respondent.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION AND SUMMARY

In the Order under appeal, the Trial Court determined that, based on the facts in the record before it, that there were no genuine issues of material fact and that Respondent TranSystems Corporation ("TranSystems") was entitled to judgment as a matter of law on Appellant Flatiron Constructors, Inc.'s ("Appellant") causes of action for negligence and breach of contract. In its Motion for Summary Judgment, TranSystems argued that TranSystems was entitled to judgment as a matter of law on all of Appellant's Causes of Action. (R. pp. 141-143.) The Trial Court granted the Motion as to Appellant's causes of action for negligence and breach of contract brought by third-party beneficiary. (R. p. 66.) The Court determined there was no genuine issue of material fact as to those causes of action. (R. p. 51.) The Trial Court's findings were supported by the evidence in the record. It does not appear that Appellant challenges the finding as to its breach of contract claim.

It is vital to remember that, as discussed in detail below, the project at issue is a very expensive, very complicated highway construction project, with the Appellant's original contract price totaling $97,868,086.99, prior to any payments for change orders or extended conditions. (R. p. 683.) With this level of expense, as well as the level of traffic to travel on this highway in Horry County, all entities involved in this project must have clear delineation of duties and obligations, and the respective contracts and specifications provide that clear delineation. In this case, Appellant seeks to cast aside the duties agreed upon by contract, and create new ones in tort, to inure solely to Appellant's benefit. The Trial Court properly refused to recognize such a purported duty, when the agreed-upon terms of construction and the field interaction did not present such obligations.

Between the April, 2023 filing of the Motion and Brief and the August 2023 hearing on the Motion, Appellant filed no motions or affidavits seeking delay for further discovery, and it served

no notices of depositions on TranSystems. Following the hearing, the Trial Court found no reason to delay ruling for further discovery, noting that Appellant filed no Rule 56(f), SCRCP, affidavit, and that Appellant failed to seek additional discovery during the four months that the Motion for Summary Judgment was pending. (R. pp. 52-53.) Ultimately, Appellant filed a Motion to Reconsider, stating it "had not had a full and fair opportunity to complete needed discovery." (R. p. 153.) Based on the arguments presented by Appellant in that Motion to Reconsider, TranSystems noted that Appellant had in its own document production evidence demonstrating that there was no genuine issue of material fact as to Appellant's contention that Marty Long of TranSystems held the position of S.C. Department of Transportation's ("SCDOT") Resident Construction Engineer ("RCE"); clearly, Appellant well understood Mr. Long was only a TranSystems employee, not an SCDOT employee, much less the SCDOT RCE. (R. pp. 160-165.) Only after TranSystems noted the procedure for seeking delay under Rule 56(f), SCRCP, did Appellant file an affidavit pursuant to Rule 56(f). (R. pp. 1115-1178.) This affidavit was filed over four months after the hearing on the Motion for Summary Judgment, and the Trial Court properly refused to consider the patently untimely affidavit. In denying the Motion to Reconsider, the Trial Court noted that "the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered." (R. p. 68.)

The Trial Court properly and thoroughly considered the record before it and properly found no genuine issues of material fact as to any alleged duty in tort on the part of TranSystems to Appellant, or any real or intended contractual relationship sufficient to create contractual liability. Accordingly, the grant of partial summary judgment was proper, and the Trial Court's Orders should be affirmed in full.

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT CORRECTLY INTERPRET *TOMMY L. GRIFFIN I* AS HOLDING THAT THE EXISTENCE OF A "SPECIAL RELATIONSHIP" FOR PURPOSES OF TORT DUTY MUST BE DETERMINED BY FACT SPECIFIC CIRCUMSTANCES ON A CASE-BY-CASE BASIS?

II. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT RELATED TO THE PERSON HOLDING THE DUTIES OF RESIDENT CONSTRUCTION ENGINEER FOR SCDOT AS SET FORTH IN THE RELEVANT CONTRACT DOCUMENTS?

III. BECAUSE THE EXISTENCE OF DUTY FOR NEGLIGENCE AND NEGLIGENCE-BASED CONTRACT ACTIONS ARE DEPENDENT ON THE FACTS OF EACH CASE, HAS APPELLANT PRESENTED FACTS SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO ANY DUTY OWED BY RESPONDENT TRANSYSTEMS TO APPELLANT?

IV. DID APPELLANT WAIVE ANY OBJECTIONS TO AN ALLEGEDLY PREMATURE RULING BY FAILING TO REQUEST ANY DISCOVERY OR FILE ANY MOTION SEEKING A DELAY IN RULING PRIOR TO THE HEARING ON TRANSYSTEMS' MOTION FOR SUMMARY JUDGMENT?

V. HAS APPELLANT FAILED TO PRESERVE FOR APPELLATE REVIEW ANY DISPUTES RELATED TO TRANSYSTEMS' OBTAINING SUMMARY JUDGMENT ON APPELLANT'S CLAIMS FOR BREACH OF CONTRACT BROUGHT BY THIRD PARTY BENEFICIARY?

VI. HAS APPELLANT IMPERMISSIBLY RAISED NEW ARGUMENTS ON APPEAL WHICH WERE NOT PRESENTED TO THE TRIAL COURT?

COUNTER-STATEMENT OF THE CASE

Appellant appeals the Court of Common Pleas' grant of partial summary judgment to TranSystems based on its finding that there were no issues of genuine material fact and that TranSystems was entitled to judgment as a matter of law on Appellant's causes of action for negligence and breach of contract, based on the lack of any duty owed by TranSystems to Appellant, under the facts and circumstances of this case. When the Trial Court conducted the hearing of TranSystems' Motion on August 7, 2023, Appellant's claims against TranSystems had been pending for nearly five years. (R. p. 71.) Although the parties agreed to two stays of the case, for a period of approximately twenty-one months, to allow Appellant to present contract claims to SCDOT, Appellant eventually elected to proceed with discovery in the case. (*See* R. pp. 1-2; *see also* R. pp. 3-4.)

Following the expiration of the agreed-upon stay, on November 19, 2020, TranSystems filed a Motion to Stay Proceedings, based on the argument that Appellant's claims were premature unless or until it obtained a final determination of its claims against Horry County and SCDOT under the Construction Contract. (R. p. 108.) In briefing, TranSystems argued that Appellant would not be harmed by the Trial Court's staying the case until completion of the resolution of underlying construction contract claims Appellant brought against Horry County and SCDOT. (R. p. 225.) Additionally, TranSystems sought a protective order, delaying discovery until Appellant's completion of the prosecution of its construction contract claims due to the burden and expense of TranSystems' replying to the pending requests. (R. p. 226.) Appellant opposed the Motion to Stay, arguing that Appellant's claims were ripe for adjudication and discovery should proceed. (R. pp. 265-267.) The Trial Court denied TranSystems' Motion to Stay and compelled TranSystems to respond to discovery. (R. pp. 8-9; R. p. 5.)

On October 11, 2021, the parties struck the case from the active docket, pursuant to Rule 40(j), SCRCP. (R. pp. 1197-1198.) The Parties restored the case to the active docket on September 27, 2022. (R. pp. 12-13.)

TranSystems filed its Motion for Summary Judgment, which is the subject of this appeal, and its Brief in Support on April 4, 2023, over six months after the restoration of the case and four full months before the Trial Court conducted a hearing on the Motion. (R. p. 166, lines 1-25.) In the time between the filing of the Motion and the hearing on it, Appellant noticed no depositions, served no additional discovery, and filed no Motions seeking a delay of the hearing for any specific discovery. In fact, Appellant filed no pleading related to the Motion until July 28, 2023, which was set by Judge Curtis as the deadline for submission of briefs. (R. p. 880.) In that filing, Appellant submitted an affidavit of Louis Hutcherson, which had been executed a full 30 days prior, which did not expressly state that Hutcherson believed that Marty Long of TranSystems acted as Resident Construction Engineer for SCDOT, instead saying Long "held himself out" as SCDOT's Resident Construction Engineer. (R. p. 916, ¶ 3.)[1] This case had been pending five years before Appellant first presented the argument that Long held the position of SCDOT in this affidavit and briefing. At the time that Appellant elicited and filed this Affidavit testimony in 2023, it had within its own production February 25, 2016 email correspondence in which Hutcherson himself stated:

> You would believe that Marty [Long], the designated RCE has actual authority; that per the Specifications he has express authority; and the position title alone provides apparent authority; but, **in actuality he does not possess, and nor will he demonstrate, any authority – as evidenced in the e-mail below.**

[1] Long held a title within TranSystems as Resident Construction Engineer, but he never held that title within SCDOT.

(R. p. 165.) (Emphasis added.) In the email at issue, Hutcherson was responding to a February 25, 2016 email in which Marty Long wrote:

> On this project, since I'm a consultant, anywhere it says RCE you can replace it with the word District which would be Jason or Travis. With that said you can show it to Travis at the bi-weekly meeting or run it by his office if you need an answer sooner.

(R. p. 165.) Appellant did not disclose this correspondence from Mr. Hutcherson either in connection with his affidavit or in arguing the existence of an issue of fact as to Hutcherson. Further, in its opposition briefing, Appellant misstated the burden of proof, contending that TranSystems bore the burden of proof on causes of action brought by Appellant. (R. p. 886.)

In response to Appellant's new and astonishing argument that Long served as RCE for SCDOT, TranSystems filed a Reply, which contained correspondence from Travis Patrick, the actual SCDOT Resident Construction Engineer to Lou Hutcherson, which bore Patrick's title. (R. pp. 975-999.) As noted on the Bates labels for those exhibits, these emails were obtained from within Appellant's own document production. (*See id.*; R. p. 956.)

Throughout the hearing on TranSystems' Motion for Summary Judgment, Appellant argued an incorrect factual standard for summary judgment, stating, wrongly that "if Flatiron demonstrates even a scintilla of evidence in support of its claim, summary judgment must be denied." (R. p. 23, lines 17-19.) During the hearing, Appellant's counsel used the word "scintilla" nine times. (R. p. 188, line 14-p. 209, line 25.) At the time of the hearing, Rule 56, SCRCP, clearly stated that summary judgment should be rendered if the admissible evidence presented "show[s] that there is no **genuine** issue as to any **material fact** and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. The Trial Court applied the proper legal standard and awarded TranSystems partial summary judgment on the causes of action for breach of contract and negligence. (R. p. 66.)

Stated simply, South Carolina's rule is clear as to design professionals' duties owed to third parties – "[w]hether such a duty exists will depend on the facts and circumstances of each case." *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55-56, 463 S.E.2d 85, 89 (1995). The Trial Court evaluated, in detail, the facts and circumstances of this case, and determined that TranSystems owed no professional duty to Appellant. (R. p. 66.)

On November 22, 2023, the Trial Court issued a Form 4 Order finding that Appellant had no special relationship and requesting counsel for TranSystems to submit a proposed order. (R. pp. 14-15.) TranSystems expressly objects to this court's consideration of the Proposed Order submitted in response to the Form 4 Order, because that is not properly part of the record – only the executed Order is properly part of the Record on Appeal. Further, any implication by Appellant that it was improper for the Trial Court to request the Proposed Order is also improper.

Appellant filed a Motion to Reconsider on December 1, 2023, prior to the Trial Court entering a final order on the Motion for Summary Judgment. (R. p. 153.) In the supporting brief for that Motion, Appellant argued that documents received from TranSystems on October 6, 2023 contained documents relevant to the "special relationship" determination. (R. pp. 1028-1031.) In that memo, Appellant failed to disclose to the Trial Court that the documents identified were already contained in Appellant's own document production. (*See* R. pp. 156-157; *see also* pp. 160-164.) On December 7, 2023, TranSystems filed a Motion to Strike the Motion to Reconsider, arguing that Appellant's Motion was premature, and that the Rule 60 Motion based on newly discovery evidence was improper. (R. pp. 155-156.) Further, in that Motion to Strike, TranSystems notified the Trial Court that Lou Hutcherson's own written correspondence demonstrated that he knew that Marty Long was not RCE for SCDOT. (R. pp. 157-158; p. 165.)

Only following the Motion to Strike the Motion to Reconsider did Appellant first offer an affidavit pursuant to Rule 56(f), explaining reasons for delay, with that document filed on December 12, 2023, over eight months after the Motion for Summary Judgment was filed, four months after oral argument, and twenty days after the Court issued a Form 4 Order. (R. p. 1124.)

On December 27, 2023, the Trial Court entered its Order granting TranSystems partial summary judgment on the causes of action for negligence and breach of contract. (R. p. 42.) On the same date, the Trial Court issued its Order denying Appellant's Motion to Reconsider, finding that alteration of the Order granting Partial Summary Judgment was unwarranted. (R. p. 69.) Appellant filed no Motion to Reconsider the December 27, 2023, Order granting Partial Summary Judgment to TranSystems.

COUNTER-STATEMENT OF THE FACTS

Appellant correctly states that the dispute in this case arises out of the construction of the Carolina Bays Parkway extension in Horry County. Horry County contracted with Appellant to serve as General Contractor for the Project (the "Construction Contract"). (R. pp. 684-685.) Horry County, rather than SCDOT, is identified as the party with whom Appellant contracted. (R. pp. 684-685.) The Construction Contract required Appellant to comply with the 2007 SCDOT Standard Specifications for Highway Construction (the "Standard Specifications"). (R. p. 684.) Further, the Construction Contract required Appellant to follow a specified claims procedure to pursue compensation for changed contractual requirements, weather-related delays, or increased costs not the fault of Appellant. (R. p. 325.)[2]

Horry County, the Project's Owner, contracted with SCDOT to administer the Project for Horry County, as part of an Intergovernmental Agreement (the "IGA") among Horry County, SCDOT, and the South Carolina Transportation Infrastructure Bank ("SCTIB"). (R. p. 772.) Under the IGA, SCDOT was required to "oversee all planning, design, engineering, right-of-way acquisition, contract administration, inspection, awarding of contracts, the review and payment of contracts, construction for the Project and each Component Project, and any related or necessary activities or functions of the Project." (R. p. 781, § 5.1.) At the conclusion of the Project, SCDOT's State Highway Engineer was required to "recommend to the SCDOT Commission the acceptance of the Extension Project into the State Highway System, as defined by S.C. Code Ann. Section 57-5-10." (R. p. 785, § 5.7.)

Horry County contracted TranSystems (in the "TSC Contract") to provide Construction, Engineering, Inspection and Testing Services ("CEIT Services") for the Project. (*See* R. p. 806.)

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[2] For the claims procedure, *see* R. pp. 767-770.

TranSystems' CEIT Services were supervised by the RCE provided by SCDOT. (*See* R. p. 825.) SCDOT's RCE had final decision-making authority over TranSystems' CEIT Services. (*See* R. p. 825; *see also* p. 763, § 105.1.) The Standard Specifications expressly required Plaintiff to "[p]erform the work and furnish materials in reasonably close conformity with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances shown on the Plans or indicated in the Specifications." (R. pp. 764-765, § 105.3(1).) Final review and approval of conformity of Plaintiff's Project construction work was performed by SCDOT's RCE, and the RCE made the final determination as to whether SCDOT would accept any non-conforming construction. (R. pp. 764-765, §105.3(2-3).) Further, it is undisputed that SCDOT reviewed all of TSC's evaluations of Plaintiff's Project work, and SCDOT made all final decisions regarding Plaintiff's Project work. Only SCDOT had this authority.

The limits on TranSystems' authority were clearly enumerated in the TSC Contract, particularly in the Scope of Services incorporated therein. That Scope stated that "SCDOT and Horry County desire to hire a **Consultant** to perform Construction Engineering and Inspection (CEI) services for the [Carolina Bays] project," and it lists the duties included. (R. p. 825.) (Emphasis added.) That scope also clearly subjected TranSystems to the authority of the RCE for SCDOT, noting:

> Consultant shall provide a Project Engineer over the project. This person will be responsible for the day-to-day operation and administration of the project. The project will be the Project Engineer's sole responsibility. **SCDOT's Resident Engineer or his designee will provide daily supervision on the project and will make final decisions when necessary.** The Project Engineer will report directly to SCDOT's Resident Engineer or his designee.

(R. p. 825.) (Emphasis added.) The Construction Contract mirrored this delineation of authority, in its Standard Specifications, noting:

> Authorized representatives of the RCE may inspect all work done and all materials furnished. ... The RCE's representative has the authority to reject defective material and to suspend any work that is being improperly performed **subject to the final decision of the RCE.** The RCE's representative is not authorized to alter or waive provisions of the [Construction] Contract, to approve or accept any portion of the work, or to issue instructions contrary to the Plans and the Specifications. In no case will the RCE's representative act as superintendent or perform other duties for the Contractor or interfere with the management of the work by the Contractor's superintendent. **Do not construe advice given by the RCE's representative as in any way binding on the RCE or the [SCDOT] or as releasing the Contractor from the fulfillment of the terms of the [Construction] Contract.**

(R. p. 974, § 105.9.) (Emphasis added.)

Appellant focuses significant effort in arguing that TranSystems performed various design functions, based on a term in the TSC Contract which TSC disputed by affidavit. Peter Strub, Senior Vice President for TranSystems, presented testimony via affidavit, dated April 3, 2023, and served on Appellant on April 4, 2023, that "TranSystems never prepared, signed, or sealed any design plans for the [Carolina Bays] Project." (R. pp. 834-835.) Strub also testified that TranSystems never entered any contract with Appellant, that TranSystems never considered Appellant to be a client, and that TranSystems never intended Appellant to be a third-party beneficiary of the TSC Contract. (R. p. 835.) Appellant never produced any admissible evidence showing that TranSystems performed such design services, even failing to produce any design drawings prepared by TranSystems, nor did it produce any evidence to contradict Strub's testimony that TranSystems did not consider Appellant to be a client or a third-party beneficiary of the TSC Contract. Regardless, Appellant has produced no expert testimony identifying any alleged error or omission in the design drawings.

Despite Appellant's arguments to the contrary, SCDOT's Standard Specifications clearly define "RCE," in the SCDOT 2007 Standard Specifications which apply to the Construction

Contract, as an SCDOT official. (R. pp. 969-972, § 101.2.) Those Standard Specifications further explicitly define the role of the SCDOT RCE, stating:

> Unless otherwise specified elsewhere in these specifications, **the RCE will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract.**
>
> The RCE has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor for failure to correct unsafe conditions for its workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders of the RCE; for periods as the RCE deems necessary due to unsuitable weather; for conditions considered unsuitable for prosecution of the work; or for any other conditions or reason that the RCE deems to be in the public interest. No additional compensation is paid to the Contractor because of such suspensions of work.
>
> The RCE is not authorized to increase the obligation of the Department [of Transportation] under the Contract except as provided herein.

(R. p. 973, § 105.1.) (Emphasis added.)

Appellant relies nearly exclusively on affidavit testimony of Lou Hutcherson to attempt to create a genuine issue of material fact as to who held the role of SCDOT RCE; however, the Hutcherson Affidavit is more significant for what it does not say than for what it does say. In six pages of testimony that Appellant held without filing with the Trial Court for a month, Hutcherson never testified that he believed that Marty Long was SCDOT's RCE. (*See* R. pp. 916-921.) Further, Hutcherson never testified that TranSystems held out Long to be SCDOT's RCE, or that SCDOT or Horry County ever held out Long to be SCDOT's RCE. (*See* R. pp. 916-921.) Hutcherson's affidavit misstates TranSystems' role, which was clearly spelled out in the TSC Contract, as well as the Standard Specifications which were part of the Construction Contract. (R. p. 916; p. 974, § 105.9.)

In Reply to the Hutcherson Affidavit, TranSystems provided the Trial Court with a document from Appellant's own production, in which SCDOT's actual RCE, Travis Patrick, P.E., instructs Hutcherson to remove all concrete around SC-707 Bent 1, and which Patrick signs as "**Resident Construction Engineer, District 5 Special Projects, South Carolina Department of Transportation.**" (R. pp. 978-979.) (Emphasis added.) In that email, Patrick's signature notes his title and demonstrates his authority to instruct Appellant to demolish non-compliant construction. (*Id.*) Further, TranSystems provided the Trial Court with electronic and hard copy correspondence directly between Hutcherson and Patrick, in which Patrick raises specific issues with foundations (signing with his title of Resident Construction Engineer), as well as Hutcherson's responses to those concerns. (R. pp. 978-981.) Additionally, during Hutcherson's employment on the Carolina Bays Project, Travis Patrick was recognized as SCDOT's 2016 Resident Construction Engineer of the Year, as announced in SCDOT's public newsletter, *The Connector.* (R. p. 999.)

Appellant continued to press the issue of alleged confusion as to the identity of the SCDOT RCE in its Motion to Reconsider, arguing that it did not have enough evidence to determine the RCE. (*See* R. pp. 153-154; *see also* pp. 1023-1024.) In so doing, Appellant argued that it had newly discovered documents from subsequent production by TranSystems. (R. pp. 1028-1032.) Appellant failed to notify the Court that all but one of the documents identified as "new evidence" under Rule 60, SCRCP, was contained within Appellant's own production. (R. pp. 156-157; pp. 160-164.) In the Motion to Reconsider, Appellant argued that because Marty Long used the title Resident Construction Engineer in his employment with TranSystems, that the Trial Court should find an issue of fact as to whether he was RCE for SCDOT. (*See* R. pp. 153-154; *see also* pp. 1023-1024.) In response to this argument, TranSystems provided the Trial Court with additional

documents, contained within Appellant's own production, eliminating any confusion as to whether Hutcherson knew that Travis Patrick was RCE for SCDOT. Specifically, TranSystems provided the Trial Court with the February 25, 2016 email that Hutcherson wrote to one Appellant's executives, responding to Marty Long stating that he was a consultant, and RCE items should be directed to Jason or Travis [Patrick], saying:

> You would believe that Marty [Long], the designated RCE has actual authority; that per the Specifications he has express authority; and the position title alone provides apparent authority; but, **in actuality he does not possess, and nor will he demonstrate, any authority – as evidenced in the e-mail below.**

(R. p. 165.) (Emphasis added.)

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." *Town of Hollywood v. Floyd,* 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.*, *citing* Rule 56(c), SCRCP. "In ruling on a motion for summary judgment, the evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." *McClanahan v. Richland Cnty. Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood,* 403 S.C. at 477, 744 S.E.2d at 166.

"[T]he 'mere scintilla' standard does not apply under Rule 56(c)." *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine." *Oblachinski v. Reynolds,* 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011).

While serving as an Acting Justice for our Supreme Court, one of our state's most experienced trial judges presented the question correctly:

> In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual or proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law.

Madison v. Babcock Ctr, Inc., 371 S.C. 123, 135-6, 638 S.E.2d 650, 656 (2006) (Cole, Acting Justice, for the Court) (internal citations omitted).

"Under the present rules, a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, LLC v. Town of Mount Pleasant,* 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Pursuant to Rule 220(c), SCACR, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. Rule 220(c), SCACR; *I'On,* 338 S.C. at 420-21, 526 S.E.2d 716, 723. This court is free to rely upon any additional sustaining grounds to affirm the ruling of the Trial Court.

Our Supreme Court has clearly stated:

> In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it ... has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, 338 S.C. at 421-22, 526 S.E.2d at 724.

A "moving party [seeking summary judgment], who in the posture of the case does not have the burden of proof, [is] not required to present affidavits to negate [the nonmoving party's] claims. [The moving party] can simply sustain its burden by simply pointing to the lack of evidence presented by [the nonmoving party] to support its case." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones and Goulding, Inc.,* 351 S.C. 459, 471, 570 S.E.2d 197, 203 (Ct. App. 2002) ("*Tommy L. Griffin II*").

ARGUMENT

As an initial matter, it is important to note what Appellant seeks in this appeal – to extend a duty of care in tort to a design professional retained by the Owner specifically to review the quality of work performed by Appellant under its contract with the Owner and report to SCDOT which made all final decisions concerning acceptance of and payment for Appellant's work for the Owner. TranSystems served as a consultant to Horry County, responsible for analyzing and reviewing Appellant's work and reporting to SCDOT. (R. pp. 806, 825.) There is no privity of contract between Appellant and TranSystems, and, in fact, TranSystems' role is to verify the quality of work performed by Appellant. (R. pp. 806, 825.) Appellant argues that TranSystems was too diligent in representing the interests of its client, Horry County, and its taxpayers and the motoring public of South Carolina. (*See* R. pp. 846-850 (repeatedly noting "overzealous inspection" and "unreasonable review").) In essence, Appellant seeks to limit TranSystems' performance of its obligations to its client, by imposing limits on the standard of inspection. This is not an actionable duty in tort, and it conflicts with existing law in South Carolina, as described below.

I. THE TRIAL COURT CORRECTLY INTERPRETED *TOMMY L. GRIFFIN I* AS HOLDING THAT THE EXISTENCE OF A "SPECIAL RELATIONSHIP" FOR PURPOSES OF TORT DUTY MUST BE DETERMINED BY FACT-SPECIFIC CIRCUMSTANCES ON A CASE-BY-CASE BASIS.

Stated directly, Appellant's legal argument begins with a fundamental misstatement of South Carolina law – our courts have never made a blanket statement that a contractor can sue an engineer for purely economic loss. It is possible under certain circumstances, but not under the circumstances of this case. Interestingly, Appellant conceded in filings with the Trial Court that whether a duty exists is dependent on the facts of a case, but it takes the contrary position in this appeal that *Tommy L. Griffin I* requires a finding of duty. (*See, e.g.,* R. p. 1021; *see also* Appellant's Initial Brief, pp. 19 – 20.)

A. Whether a Duty of Care Exists is Dependent on the Facts and Circumstances of Each Case.

It is undisputed that Appellant's claims are for a purely economic loss. In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) ("*Tommy L. Griffin I*"), the Supreme Court of South Carolina evaluated whether design professionals owe duties in tort to third parties. The Supreme Court explicitly and clearly stated that "**[w]hether such a duty exists will depend on the facts and circumstances of each case.**" *Id.* at 55-6, 463 S.E.2d at 89 (emphasis added). Appellant presents a patently incorrect argument when it contends that "an engineer who has construct supervisory responsibilities, such as the power to inspect work and halt construction progress, has a special relationship with the contractor, giving rise to an extra-contractual duty on the engineer's part no to negligently supervise the work." (Appellant's Initial Brief, pp. 19 – 20.) This contention by Appellant both misstates the facts of this case, as clearly established by the record, as well as the law of South Carolina. As noted in the Standard Specifications, only SCDOT's RCE has authority to suspend the work or to withhold payments to Flatiron. (R. p. 763, § 105.1.)

Our Supreme Court has expressly held that whether a design professional owes a duty to a third-party is based on a fact specific case-by-case analysis, which the Trial Court performed. The Trial Court clearly applied the correct standard in stating that a fact specific analysis was required in this case.

B. The Facts of This Case Are Substantially Different Than in *Tommy L. Griffin I.*

In *Tommy L. Griffin I,* the engineer at issue prepared plans and specifications for a sewer project, and it had the right to directly inspect and order the immediate and permanent stop of work, with the engineer being the final decision-making authority for construction. *Tommy L.*

Griffin I, 320 S.C. 49, 56, 462 S.E.2d 85, 89 (1995). By contrast, in this case, the TSC Contract expressly states that TranSystems was hired as "a Consultant to perform Construction Engineering and Inspection (CEI) services for [the Carolina Bays Extension] project, to include but not limited to [sic], construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the [Construction Contract] requirements." (R. p. 825.) Further, TranSystems reported directly to SCDOT's Resident Engineer, which was defined as RCE in the Standard Specifications. (*See id.*) Under the Construction Contract, SCDOT's RCE, not TranSystems, had authority to decide, with finality, all questions regarding quality and acceptability of materials, the work performed, interpretation of the Plans and Specifications, and payment to Appellant, as well as disputes and rights between contractors and acceptable fulfillment of the Construction Contract by Appellant. (R. p. 763, § 105.1.)

Boldly, Appellant simultaneously argues there is insufficient evidence to compare the design professional's contract in *Tommy L. Griffin I* to the present case, and it later provides this Court with a chart explaining why the facts in that same case are similar enough to this case to require this court to find the existence of a duty. (*See* Appellant's Initial Brief, p. 26; *accord,* Appellant's Initial Brief p. 39.) Doublespeak aside, the facts in the Supreme Court's opinion in *Tommy L. Griffin I* are more than sufficient to show they are materially different than this case:

1. In *Tommy L. Griffin I,* the engineer designed and supervised the project for Charleston County. *Tommy L. Griffin I,* 320 S.C. at 51, 463 S.E.2d at 86. In our case, SCDOT's RCE had supervisory authority for acceptance and rejection of work. (R. p. 763, § 105.1.) Further, TranSystems has denied performing any design. (R. p. 806.)

Appellant has not produced any design drawing or certification prepared by TranSystems to oppose this sworn testimony.

2. In *Tommy L. Griffin I*, the plaintiff alleged the engineer wrongfully closed the job for a month and made demands on the plaintiff that were not in the contract. *Tommy L. Griffin I,* 320 S.C. at 51-52, 463 S.E.2d at 86-87. In our case, the SCDOT RCE had all final decision authority, and was the only entity with authority to interpret the Construction Contract or to make a final decision to halt construction. (R. pp. 969, 972, § 101.2; p. 974, § 105.9; p. 825.)

The central and obvious difference between the *Tommy L. Griffin I* case and this case is that the engineer in *Tommy L. Griffin* had ultimate decision-making authority, while TranSystems referred matters to the SCDOT RCE, who had final authority.

Similarly, Appellant's reliance upon *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital,* 344 S.C. 426, 544 S.E.2d 838 (2001), is misplaced. In that case, the Supreme Court found a trial court's grant of summary judgment to an architect to be premature. *Id.* at 433, 544 S.E.2d at 842. There, the Supreme Court noted that the Architect was required to approve payments, and he approved payments knowing that subcontractors were unpaid, and that the Architect had the ability to modify the Contractor's retainage. *Id.* None of those facts exist in this case, and it is clear that TranSystems did not have the ability or duty to approve payments to Appellant, with the Standard Specifications to the Construction Contract noting that "the RCE will decide all questions that may arise regarding the quality and acceptability of materials furnished, the work performed, the rate of progress on the work; the interpretation of the Plans and Specifications; acceptable fulfilment of the Contract by the Contractor; disputes and mutual rights between Contractors; and compensation for the work." (R. p. 973, § 101.2.) The facts of *Cullum*

are inapposite to this case; so it does not provide applicable precedent. Accordingly, the Trial Court properly considered the facts of this case, and not cases involving significantly different facts, to determine whether TranSystems owed Appellant any negligence duty. Similarly, Appellant's reliance on *Nash Corp. v. Tindall,* 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007) is misplaced. *Nash* involves choice of law and the Statute of Repose issues, but it does not address the existence of duties owed by design professionals to third parties.

Appellant's arguments that TranSystems' inspections caused Appellant to suffer additional expense are red herrings, and should not impact this court's analysis. Duty is necessary to create liability, and duty must be determined by the court based on the facts of each individual case. *Tommy L. Griffin I,* 320 S.C. at 55-6, 463 S.E.2d at 89. The Construction Contract included a claims procedure which allowed for recovery of payment for unnecessary work or work which altered the terms of the Construction Contract, which would naturally include expense caused by Owner's consultants.[3] (R. pp. 767-770.) The lack of duty owed by TranSystems to Appellant with regard to payment and supervision becomes abundantly clear by the written terms setting forth the authority of the SCDOT RCE, stated in the Construction Contract, which defines RCE as an SCDOT official, and which states "the RCE will determine the amount of and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the [Construction] Contract." (R. pp. 969-972, § 101.2.) Further, the IGA which formed the basis for the Project required SCDOT, and not TranSystems, to "oversee all planning, design, engineering, right-of-way acquisition, contract administration, inspection, awarding of contracts, the review and

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[3] Despite Appellant's protestations to the contrary, TranSystems' role as agent and consultant for Horry County helps prove why it has no tort duty to Appellant – Appellant may seek, and has sought, relief under its construction contract with Horry County, which includes claims based on the conduct of both SCDOT and TranSystems.

payment of contracts, construction for the Project and each Component Project, and any related or necessary activities or functions of the Project." (R. p. 781, § 5.1.)

C. South Carolina Law Requires a Finding of No Duty Owed By TranSystems to Appellant in This Case.

As noted, *supra*, *Tommy L. Griffin I* properly holds that whether a tort duty exists between a design professional and a third party is determined by the court based on the facts and circumstances of each case. *Tommy L. Griffin I*, 320 S.C. at 55-6, 463 S.E.2d at 89. Frankly, Appellant has ignored this reality of South Carolina law throughout this action, resulting in the Trial Court properly granting TranSystems' Motion for Summary Judgment.

Appellant has identified no circumstance where an appellate court in South Carolina has evaluated the duty owed by a CEIT services provider to a contractor, where that CEIT provider was in privity with an Owner.[4] The undersigned represents that he has found no such case. Accordingly, the Trial Court properly performed its own evaluation of duty, as required by *Tommy L. Griffin I.* That Appellant argues that *Tommy L. Griffin I* is directly on-point hurts its credibility on the case-specific analysis. As explained, *supra,* the facts of this case differ significantly from *Tommy L. Griffin I.* The Trial Court properly found in its order that "South Carolina's courts have not explicitly stated a test to evaluate whether there is a special relationship sufficient to create a negligence duty in these circumstances, but other states' courts have." (Order Granting Partial S.J, p. 14.) In fact, in its Order, the Trial Court is addressing a clear error of law in Appellant's Brief, in which Appellant argues that *Tommy L. Griffin I* requires a finding of duty in this case.

The Trial Court reviewed law of other states in an effort to develop a test for the existence of a special relationship, in part because our Supreme Court stated in *Tommy L. Griffin I* noted that

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[4] It is undisputed that Appellant identified no case from South Carolina in briefing or argument that stated that a CEI services provider owes a tort duty to a party outside privity.

professionals, even design professionals, owe duties separate from contracts "when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the client **arising separate and distinct from any contractual duties between the parties or with third parties.**" *Tommy L. Griffin I,* 320 S.C. at 55, 463 S.E.2d at 89 (emphasis added). The only proper reading of *Tommy L. Griffin I* is that a court must evaluate the facts of a specific case to determine whether a duty exists. This reading of *Tommy L. Griffin I* is consistent with Vermont's Supreme Court finding that for tort claims to lie for economic losses, there must be "a special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor." *Long Trail House Condo. Ass'n v. Engelberth Constr., Inc.,* 192 Vt. 322, 329, 59 A.3d 752, 757 (Vt. 2012), *quoting Springfield Hydroelectric Co. v. Copp,* 172 Vt. 311, 316, 779 A.2d 67, 71 (Vt. 2001). As in South Carolina, in Vermont, if "neither privity of contract, nor a special relationship, existed between the parties... [there is no basis to] permit a finding of duty on the part of defendants." *Id.* (internal citations omitted). Accordingly, the Vermont standard does, in fact, apply in South Carolina. *Accord Tommy L. Griffin I,* 320 S.C. at 55, 463 S.E.2d at 89.

In this case, the Trial Court made a case specific factual analysis, and found no special duty. It was not error to make the analysis, which is expressly required by *Tommy L. Griffin I.* Appellant's priggish arguments about application of precedent ignore that the Trial Court was required to evaluate whether there was a special relationship and that it considered persuasive authority in the process.

D. South Carolina's Engineering Regulations Barred the Trial Court from Finding a Special Relationship Between Appellant and TranSystems.

In its Order Granting Partial Summary Judgment, the Trial Court properly found that South Carolina law required the Trial Court to refuse to find a negligence duty owed by TranSystems to Appellant, because it would create an impermissible conflict of interest.

The South Carolina State Board of Registration for Professional Engineers and Land Surveyors has enacted Rules of Professional Conduct as an "exercise of the police power vested in the South Carolina State Board of Registration for Professional Engineers and Surveyors by virtue of the acts of the legislature." S.C. Code Ann. Regs. § 49-300(C); *see also* S.C. Code Ann. § 40-22-60 (authorizing Board to promulgate regulations to carry out duties). Those Rules of Professional Conduct require engineers to "at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public and ... [to] conduct their practice to fulfill this obligation." S.C. Code Ann. Regs. § 49-301(A). These regulations require engineers to "conscientiously strive to avoid conflicts of interest with employer or client" and to "disclose the circumstances to their employer or client when such conflicts become unavoidable." S.C. Code Ann. Regs. § 49-304. Were the Trial Court to find that there is a special relationship owed by TranSystems, a CEI services provider, to Appellant, a contractor whose work TranSystems has specifically been retained to review, the Trial Court would create an impermissible conflict between TranSystems' duty to its client and the public at large and a new purported duty to a third party, whose work TranSystems explicitly contracted to review. (*See, e.g.*, R. p. 825 (defining scope of work for TranSystems).)

Here, the *Tommy L. Griffin I* case is helpful. In that case, the engineer agreed with client and contractor to prepare plans for the contractor to use, to interpret the construction contract, and to supervise the work as a final authority, much as SCDOT did in the IGA. (*See Tommy L. Griffin*

I, 320 S.C. at 51, 463 S.E.2d at 86-7; *compare to* R. p. 781, § 5.1) This agreed-upon tripartite relationship in *Tommy L. Griffin I* is not unlike a real estate closing, where a lawyer assumes certain duties to buyer and seller, when both give informed consent for him to do so. Such was not the agreement or the understanding in the Project at issue. TranSystems agreed to review the work of Appellant, and to report its findings to SCDOT's RCE, who had final authority to make findings and decisions binding Appellant. (R. p. 825.) In *Tommy L. Griffin I* itself, our Supreme Court analogizes the recognition of duty for design professionals to that of attorneys to third-parties. That comparison is helpful here, because "[g]enerally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Argoe v. Three Rivers Behavioral Ctr. and Psychiatric Sols.,* 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (internal quotations omitted). "Further, an attorney owes no duty to a non-client unless he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of representation of his client." *Id.* (internal quotations omitted).

The attorney standard for duties to third parties is the same as the standard for design professionals, as the Supreme Court hinted in *Tommy L. Griffin I.* In that case, by providing designs and undertaking ultimate supervision of the contractor, an engineer assumed a duty. TranSystems assumed no such duty in this case, and there has been no evidence presented that TranSystems acted in its own interest or outside the scope of its contract. Appellant simply disagrees with how TranSystems performed its scope of work.

II. THE TRIAL COURT PROPERLY FOUND THAT APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT RELATED TO THE PERSON HOLDING THE DUTIES OF RESIDENT CONSTRUCTION ENGINEER FOR SCDOT AS SET FORTH IN THE RELEVANT CONTRACT DOCUMENTS.

Just as Appellant misconstrues *Tommy L. Griffin I*, Appellant completely ignores *Tommy L. Griffin II*, which states that a party moving for summary judgment on an issue where it does not bear the burden of proof is not required to submit evidence to prove the nonmoving party's failure to create a genuine issue of material fact. *Tommy L. Griffin II,* 351 S.C. at 471, 570 S.E.2d at 203 (affirming grant of summary judgment to engineer based on absence of expert testimony). Accordingly, this court should disregard all contentions that TranSystems failed to carry an initial burden of demonstrating the absence of a genuine issue of material fact. (*See, e.g.,* Appellant's Brief, p. 19.)

As noted in the Statement of Facts, Appellant's Construction Contract clearly states that the Project is governed by SCDOT's 2007 Standard Specifications for Highway Construction. (R. p. 684.) In fact, the Construction Contract noted that "[t]his project is to be constructed under the South Carolina Department of Transportation's Specifications for Highway Construction Edition of 2007" ... subject to modifying provisions contained in the Construction Contract. (R. p. 321.) Those Standard Specifications defines the abbreviation "RCE" as contained in the Standard Specifications, as an SCDOT Official, with the title of "Resident Construction Engineer." (R. p. 972, § 101.2.)

A. The Construction Contract is Unambiguous as to the Status of RCE as an SCDOT Official, and the Parol Evidence Rule Bars Consideration of Extrinsic Evidence on the Issue.

The Standard Specifications, including the portion identifying the RCE, are incorporated into the Construction Contract. (R. p. 684.) The Construction Contract is unambiguous (through

the Standard Specifications) that the RCE is an SCDOT official, not a consultant to SCDOT. In fact, the Standard Specifications actually contain provisions noting the authority of consultants to SCDOT's RCE. (R. p. 974, § 105.9.) Appellant attempts to contradict the unambiguous language of its Construction Contract by cherry-picking parol evidence, in the form of selected email correspondence and documents in which Marty Long identifies himself as RCE for TranSystems. This is patently incorrect.

"Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of an integrated agreement." *Penton v. J.F. Cleckley & Co.,* 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). Such evidence becomes admissible only when a contract is ambiguous, to ascertain the true meaning and intent of the parties to the contract. *Id.* In this case, there is no ambiguity that SCDOT's RCE was anyone other than an SCDOT official; therefore, Appellant cannot utilize parol evidence to attempt to create an issue of fact on that point. Accordingly, both the Hutcherson Affidavit, and the documents submitted are insufficient to create any genuine issue of material fact as to whether Marty Long of TranSystems held the status of SCDOT RCE.

B. Even if the Construction Contract Were Ambiguous, Which It is Not, Appellant Failed to Provide Sufficient Evidence to Create a Genuine Issue of Material Fact as to Whether Marty Long Acted as SCDOT's RCE.

Again, Appellant's arguments as to alleged issues of material fact are built upon an incorrect premise – TranSystems was not required to take any affirmative act other than pointing out the absence of a genuine issue of material fact, to require Appellant to state specific facts showing a genuine issue for trial. *Tommy L. Griffin II,* 351 S.C. at 203, 570 S.E.2d at 471.

As this court has stated:

> The moving party [seeking summary judgment] may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Once the party moving for summary

> judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. The nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Bennett v. Investors Title Ins. Co., 370 S.C. 578, 588-89, 635 S.E.2d 649, 654 (Ct. App. 2006) (internal citations omitted).[5] In seeking summary judgment and citing Rule 56, SCRCP, TranSystems asserted the absence of a genuine issue of material fact as to duty, arguing the contracts establish the duties owed. (*See, e.g.*, R. pp. 295-296.)

Although Appellant incorrectly argued at the hearing on TranSystems' Motion for Summary Judgment that it need produce a mere scintilla of evidence to defeat TranSystems' Motion, it is clear that the actual standard is that of a "genuine issue of material fact." *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Federal courts have analyzed what constitutes a genuine issue of material fact under the Federal Rules' nearly identical provision for summary judgment. The Supreme Court of the United States has held that "the substantive law [of a state] will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A factual dispute is only genuine if a reasonable jury could return a verdict for the nonmoving party on the fact at issue. *Id.* On both materiality and the genuine issue of fact, Appellant's argument clearly fails. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "[I]t is not sufficient for a party to create an inference [from the evidence] that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd,* 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

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[5] Appellant also mis-stated the evidentiary standard to the Trial Court, arguing that TranSystems bore the burden of proof on a motion for summary judgment, even though a plaintiff always bears the burden of proof for its causes of action. (R. p. 886.)

1. To create an issue of material fact, Appellant must show that Long and/or TranSystems had agency authority to act at RCE for SCDOT, which it has not done.

As discussed above, it is clear from the Standard Specifications that RCE, as defined in the Standard Specifications is an "SCDOT official." (R. pp. 969-972.) Accordingly, to create an issue of fact that Long and/or TranSystems, who are both outside of SCDOT, held the role of RCE, Appellant must demonstrate that TranSystems (through Marty Long) assumed agency authority to act as RCE for SCDOT. If it were RCE for SCDOT, TranSystems would have legal authority for its decisions to bind Horry County and SCDOT, with regard to the Construction Contract. For that to happen, which it did not, Long would have to have had either actual or apparent agency authority to act as RCE for SCDOT. Long had neither, and Appellant has introduced no evidence to demonstrate that Long had actual or apparent agency authority to act as RCE for SCDOT. "A true agency relationship may be established by evidence of actual or apparent authority." *R&G Constr., Inc. v. Lowcountry Reg. Transp. Auth.,* 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000).

In most cases, the question of agency authority centers on whether the principal can be bound by the acts of the purported agent. It is the same in this case, even though Appellant is not attempting to bind SCDOT to Long's actions – to show that Long assumed the role of RCE for SCDOT, contrary to the express terms of the Standard Specifications incorporated into the Construction Contract, Appellant must show that Long obtained that authority through some form of legal agency. Long, and therefore TranSystems, have a duty to Appellant only if Long held a role substantially similar to that of the engineer in *Tommy L. Griffin I.* It is clear from the Standard Specifications, incorporated into the Construction Contract that the RCE was an SCDOT official, not an outside consultant. (R. pp. 969-972, § 101.2.) Accordingly, there must be some evidence

outside the Construction Contract or TSC Contract to create a genuine issue of material fact on this point.

a. It is undisputed that Long did not have actual authority as RCE for SCDOT.

In this complex construction project, actual authority is created by the contracts at issue. The Standard Specifications, incorporated into the Construction Contract, make it clear to Appellant that neither Long nor TranSystems had actual authority as RCE to halt construction or to make pay decisions. (R. p. 684; pp. 969, 972, § 101.2; p. 973, § 105.1; p. 974, § 105.9.) In fact, Travis Patrick of SCDOT directly communicated with Appellant's Project Manager, Lou Hutcherson, identifying himself as SCDOT's RCE, and giving instructions in that capacity. (R. p. 976; pp. 978-981.) Tellingly, Lou Hutcherson noted in internal correspondence for Appellant that he knew that Long did not have SCDOT RCE authority, after Long expressly stated that he did not have that authority. (R. p. 165.)

"[A]ctual authority is that which is expressly conferred upon the agent by the principal." *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP,* 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). Appellant has identified no evidence in the record to create any issue of fact, much less a genuine issue of fact, as to whether Long or TranSystems had actual authority to act as RCE for SCDOT. In fact, the contracts, the correspondence, and Hutcherson's own statements make it clear that Long and/or TranSystems had no such authority. Even if agency is normally a factual issue, a plaintiff must provide some facts tending to prove agency for there to be a jury question, and Appellant has clearly failed to do so. *C.f. Froneberger v. Smith,* 406 S.C. 37, 50, 748 S.E.2d 625, 631-32. (Ct. App. 2013) (noting that plaintiff must produce evidence of agency to create an issue of fact).

b. Appellant has provided no evidence that TranSystems was vested with apparent authority to act as RCE for SCDOT.

There is no evidence in the record to create any issue of fact as to whether Long and/or TranSystems had apparent authority to act as RCE for SCDOT. Appellant has identified no circumstance in which SCDOT held out Long and/or TranSystems as RCE for SCDOT, and Hutcherson's affidavit does not state that SCDOT held out TranSystems or Long as RCE for SCDOT. (*See* R. pp. 916-921.) Additionally, in electronic correspondence contained within Appellant's electronic project file and written and/or received by Hutcherson, the sole witness offered by Appellant in an effort to create an issue of fact as to TranSystems' role, it is clear that Hutcherson knew that Long and TranSystems did not have authority from SCDOT to act as RCE, and that Long so advised Hutcherson. (R. pp. 978-981; pp. 983-999; p. 165.) Hutcherson further explicitly stated that he knew that Long did not have and would not use the SCDOT RCE authority. (R. p. 165.)

"The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it has placed the agent is such a position that persons of ordinary prudence, reasonably knowledgeable with business usage and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Orphan Aid Soc'y. v. Jenkins,* 294 S.C. 106, 109, 362 S.E.2d 885, 887 (Ct. App. 1987). "Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal." *Id.* Importantly, "[t]he authority of an officer of a corporation is not inherent in his title or position." *Id.* at 110, 362 S.E.2d at 887. Accordingly, Marty Long's job title alone does not create an issue of material fact.

"The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that of the principal and the third party." *R&G Constr.,*

supra, 343 S.C. at 432-33, 540 S.E.2d at 118. The only evidence that Appellant has offered in an effort to establish that Long and TranSystems acted as RCE for SCDOT are emails from Long to Flatiron, and an affidavit alleging that Long "held himself out as RCE." (R. pp. 923-949; p. 916.) This is patently insufficient to create a genuine issue of material fact, because "an agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn v. Leventis,* 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005). "To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant." *Frasier v. Palmetto Homes of Florence, Inc.,* 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996). To create liability under an agency theory, a party must show "that he reasonably relied on the indicia of authority *originated by the principal* and such reliance effected a change of position by the third party." *C.f. Frasier,* 323 S.C. at 245, 473 S.E.2d at 868. In *Frasier,* the court addressed a principal being bound by the actions of an agent; however, in this case, Appellant seeks to impute liability by creating a duty for TranSystems by arguing TranSystems assumed an agency role. The same guidelines apply as in *Frasier*. Appellant has failed to demonstrate either that SCDOT held out Long as SCDOT RCE or that Appellant relied on any such representation. Accordingly, the record clearly demands a finding that neither Long nor TranSystems had apparent authority to act as SCDOT RCE, and that there is no genuine issue of fact as to that finding.

2. Even Applying the Summary Judgment Standard for Factual Review, There Is No Genuine Issue of Fact as to Whether Long Was SCDOT's RCE for the Project.

The facts are clear – there is no inference to be drawn from the Hutcherson Affidavit other than that he contends that Marty Long (not TranSystems and not SCDOT) "held himself out as SCDOT's Resident Construction Engineer." (R. pp. 916-921.) There is no reasonable inference

to be drawn that, either: (1) Hutcherson believed that Long was RCE for SCDOT; or (2) that SCDOT waived its RCE authority in favor of Long/TranSystems.

This court is required to review ambiguities, conclusions, and inferences in the light most favorable to the non-moving party; however, it is not required to make unsupported conclusions or inferences. *C.f. Singleton v. Sherer,* 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). Even viewing the facts in the light most favorable to Appellant, it is not reasonable to infer that Hutcherson believed that Long acted as RCE for SCDOT, because: (1) he never provided that testimony, despite a clear opportunity to do so; and (2) in a contemporaneous writing, Hutcherson acknowledged that he knew that Marty Long did not have and would not exercise the authority of RCE for SCDOT, after Long wrote that he did not have such authority. (R. pp. 978-981; pp. 983-999; p. 165.)

Appellant's argument that Exhibit 7 to the Brumfield Affidavit creates a genuine issue of material fact is incorrect. First, this email was internal between TranSystems and SCDOT, so it provided no notice to Appellant. (R. pp. 943-945.) Further, it is undisputed that Long's title with TranSystems was Resident Construction Engineer – the email does not say that Thompson believed TranSystems was RCE for SCDOT. Finally, the email reflects TSC's actual authority under the Construction Contract. As a Representative of the SCDOT RCE, 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.**"[6] (R. p. 974, § 105.9.) (Emphasis added.) This understanding is further supported by Exhibit 6 to the Brumfield Affidavit, where Travis Patrick, who is expressly identified as the SCDOT Resident Construction Engineer in email

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[6] As repeatedly noted, the Standard Specifications incorporated into the Construction Contract clearly identify RCE, for purposes of the Standard Specifications, as an "SCDOT official." (R. pp. 969-972, § 101.2.)

correspondence with Hutcherson, is listed directly above Marty Long in a chart showing job responsibilities, showing that Long's work was subject to review by Patrick. (R. p. 942; pp. 978-979.) This is completely consistent with the identification of roles of SCDOT RCE and RCE Representative in the Standard Specifications. (R. p. 973, § 105.1; p. 974, § 105.9.) Further, Long's email stating SCDOT has stopped work serves as further acknowledgement of his understanding that only SCDOT's RCE had final authority to stop work.

The Trial Court properly refused to make an unreasonable inference in its findings of fact. Because Hutcherson never testified that he believed Long was SCDOT was RCE, and because Hutcherson had documents proving that Long was, in fact, not RCE for SCDOT, the Trial Court properly found no genuine issue of material fact on this point, and granted partial summary judgment to TranSystems on the issue. Frankly, it is insulting to the Trial Court for Appellant to argue that the Trial Court's analysis of the Hutcherson Affidavit "is inconsequential substantively [and] inappropriate procedurally." (Appellant's Initial Brief, p. 37.) The Hutcherson Affidavit is inconsequential, in that it fails to address the actual potential material issues, perhaps because Hutcherson's own statements in writing prove that Hutcherson knew that Long neither believed nor acted as though Long had the authority of SCDOT's RCE. (R. p. 165.)

III. BECAUSE THE EXISTENCE OF DUTY FOR NEGLIGENCE AND NEGLIGENCE-BASED CONTRACT ACTIONS ARE DEPENDENT ON THE FACTS OF EACH CASE, APPELLANT FAILED TO PRESENT FACTS SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO ANY DUTY OWED BY RESPONDENT TRANSYSTEMS TO APPELLANT.

Our Supreme Court has unambiguously stated that whether a design professional owes a duty to a third party outside of a contract "will depend on the facts and circumstances of each case." *Tommy L. Griffin I,* 320 S.C. at 55-6, 463 S.E.2d at 89. Throughout its Brief, and throughout its opposition to TranSystems' Motion for Summary Judgment, Appellant incorrectly argues that

Tommy L. Griffin I creates some binding precedent requiring the recognition of a duty. This is patently incorrect. Fourteen years after *Tommy L. Griffin I* allowed for some duties owed by design professionals to third parties, our Supreme Court again noted that it is "cautious in permitting negligence actions where there is neither personal injury nor property damage." *Sapp v. Ford Motor Co.,* 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). Because the existence of a legal duty is a question for the court's determination, the Trial Court properly applied caution and consideration to whether TranSystems owed any negligence duty to Plaintiff. *See Madison, supra,* 371 S.C. at 136, 638 S.E.2d at 656 (noting that court must determine as a matter of law whether law recognizes particular duties).

The Trial Court properly held, and Appellant has not challenged, that, upon review of the record, "Plaintiff has not and cannot identify any statute, contract, status, or property interest which creates a negligence duty owed by [TranSystems] to Appellant." (R. p. 54.) This closely follows Judge Clifton Newman's prior holding that, under South Carolina law, "a legal duty exists if created by statute, contract, status, property interest, or other special circumstance or relationship." *McCarthy v. Keowee Falls Inv. Group, LLC,* 2013 WL 9921457, at *3 (S.C. Ct. Common Pleas, 2013), *citing McCullough v. Goodrick & Pennington Mort. Fund. Inc.,* 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007) and *Hendricks v. Clemson Univ.,* 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). The sole question remaining is whether there is any special relationship sufficient to create a negligence duty owed by TranSystems to Appellant, and Appellant failed to create a genuine issue of material fact on that question.

Stated directly, all evidence or assertions made by Appellant in opposition to TranSystems' Motion for Summary Judgment fail to create a genuine issue of material fact as to whether

TranSystems owed a duty to Appellant.[7] Each of Appellant's assertions of facts generating duty are easily refuted in the record:

1. Appellant contends that TranSystems assumed duties via engineering certifications. (R. pp. 888-889.) At the time Appellant contended that there was an issue of fact on this point, TranSystems had, well over three months earlier, filed an Affidavit, which stated that TranSystems never performed any of this work. (R. p. 835.) Appellant produced no testimony, provided no documents, and provided no certifications or other documents to contradict the testimony offered by TranSystems through Peter Strub. Accordingly, there is no genuine issue of material fact as to this claim.

2. Appellant contends that TranSystems' duties under the TSC Contract with Horry County created duties owed to Appellant. (R. pp. 889-890.) The Trial Court considered this, and noted that SCDOT, through its RCE, had ultimate authority for interpretation of Appellant's duties. (R. p. 51.) As noted in Section I of TranSystems' argument, the Trial Court properly applied persuasive authority, as well as controlling South Carolina authority contained in the Rules of Professional Conduct for Engineers, to determine that there was no special relationship created by TranSystems contracting with Horry County to serve as a Consultant for SCDOT in testing, reporting, and evaluating Appellant's compliance with the Construction Contract, subject to the final authority of SCDOT's RCE. (R. pp. 55-62; p. 826; *see* Section I, *supra.*) Appellant has identified no fact indicating that TranSystems assumed any actionable duty to Appellant through the TSC Contract.

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[7] The weakness of Appellant's factual assertions is revealed by their repeated references to the incorrect "mere scintilla" standard in an effort to defeat TranSystems' Motion.

3. Appellant argues, patently incorrectly, that TranSystems assumed the role of SCDOT's RCE. (R. pp. 890-892.) As noted in Section II, *supra,* there is no issue of material fact as to that issue, and the Trial Court properly found there to be no genuine issue of material as to whether TranSystems acted as SCDOT's RCE. (R. pp. 54-55; *see also* Argument Section II, *supra.*)

4. Appellant incorrectly argues that TSC's interaction with Appellant on the Project creates a tort duty. (R. pp. 892-893.) It is unclear how this differs from Appellant's argument regarding TranSystems' duties under the TSC Contract, because all of TranSystem's interactions were based on its obligations under the TSC Contract. In fact, Appellant has not identified any facts in opposition to TranSystems' Motion for Summary Judgment indicating that TranSystems ever acted outside of the scope of the TSC Contract. Appellant merely argues that TranSystems did the work in its scope too-stringently or over-zealously. This does not create a tort duty.

Other than incorrectly asserting that *Tommy L. Griffin I* is the same fact pattern as this case and therefore creates a tort duty owed by TranSystems to Appellant, Appellant has not introduced any facts sufficient to create a genuine issue of material fact as to the existence of any duty owed by TranSystems to Appellant. Accordingly, the Trial Court's finding should be affirmed.

IV. THE TRIAL COURT CORRECTLY HELD THAT APPELLANT WAIVED OBJECTIONS TO AN ALLEGEDLY-PREMATURE RULING BY FAILING TO REQUEST ANY DISCOVERY OR FILE ANY MOTION SEEKING A DELAY IN RULING PRIOR TO THE HEARING ON TRANSYSTEMS' MOTION FOR SUMMARY JUDGMENT.

Appellant incorrectly argues that *Baughman v. Am. Tel. and Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991), a thirty-three year old case, requires this Court to find that the Trial Court prematurely granted partially summary judgment to TranSystems. This Court very recently has elaborated on that opinion in *Covil Corp. v. Pennsylvania National Mutual Insurance Co.,* 436

S.C. 85, 870 S.E.2d 191 (Ct. App. 2022), noting that a party arguing that summary judgment is premature must demonstrate that additional discovery would uncover additional, relevant evidence. *Id.* at 92, 870 S.E.2d at 195. In *Covil*, this Court properly recognized that Rule 56, SCRCP, requires a party opposing summary judgment to rely not merely on allegations of pleadings but to provide evidence, by affidavit or as otherwise allowed under the rule, to set forth specific facts showing there is a genuine issue for trial. *Id., citing* Rule 56(e), SCRCP. There, the trial court granted summary judgment filed less than two months after the plaintiff filed an initial complaint. *Id.* at 89-90, 870 S.E.2d at 193-4. As the *Covil* court noted, the appropriate means of doing so is the filing of an affidavit, allowed under Rule 56(f), SCRCP, stating the evidence likely to be obtained with further discovery. Appellant failed to do so in this case, until a full four months after oral argument on the hearing at issue. (R. p. 1124.)

Further, Appellant incorrectly argues that the Trial Court relied solely on cases where discovery deadlines had elapsed. This argument completely ignores the Trial Court's reference to *Matter of Estate of Smith,* 419 S.C. 111, 796 S.E.2d 158 (Ct. App. 2016), which is the central case cited in support of the denial of delay. In that case, the Court of Appeals affirmed a grant of summary judgment to a defendant, where, unlike in this case, the opposing counsel had actually scheduled depositions of witnesses at the time of the hearing, and where the counsel opposing summary judgment had presented a motion for continuance at the hearing on the motion. *Id.* at 114-5, 796 S.E.2d at 159-60. In concurrence with the Court of Appeals' ruling, Judge Few noted that Rule 56(f), SCRCP, "provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment." *Id.* at 120, 796 S.E.2d at 162 – 163 (Few, A.J., concurring). "When a party seeks additional time, but fails to comply with the Rule

setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request." *Id.* at 120-21, 796 S.E.2d at 163 (Few, A.J., concurring). Appellant challenges the ability to rely on the Few concurrence as persuasive authority, despite the fact that the majority (made up of Judge Few and Judge Konduros), affirmed summary judgment, despite the nonmoving party formally seeking additional time via a motion for continuance. Ironically, Appellant argues that Judge Lockemy's dissent requires equal persuasive authority. (Appellant's Initial Brief, pp. 45 – 46, FN 6.) In Judge Lockemy's dissent, he seems to acknowledge that Rule 56(f), SCRCP, requires affidavits explaining the need for further testimony, where, as in this case, the nonmoving party submits affidavits opposing the motion for summary judgment. *Id.* at 123, 796 S.E.2d at 164 (Lockemy, C.J. dissenting). Further, the Lockemy dissent noted that the Court of Appeals repeatedly affirmed denials of requests for further discovery, where the requests came a year or more after cases were filed. *Id.* at 123-24, S.E.2d at 164-65 (Lockemy, C.J., dissenting.) Finally, the Lockemy dissent centered on the pending noticed depositions at the time of the summary judgment hearing in the *Estate of Smith* case, and there were no such pending depositions in this case. *Id.* Even the Lockemy dissent supports a denial of further discovery in this case.

In this case, the issues related to duty and agency would have been representations by SCDOT to Appellant, within Appellant's control, as well as Appellant's communications with TranSystems and Appellant's employee's interactions with TranSystems, all of which are within Appellant's control. In the four months that the Motion for Summary Judgment was pending, Appellant was free to notice depositions, serve additional requests or subpoenas, or to file an affidavit telling the Trial Court what additional discovery it needed to complete to fully respond; however, Appellant did none of those things. It should not now argue the Trial Court abused its

discretion in ruling, when it failed to notify the Trial Court of additional discovery in a manner explicitly provided in the Rules. *See* Rule 56(f), SCRCP.

Appellant offers no authority for its argument that a trial court must consider a Rule 56(f) affidavit submitted four months after the hearing at issue, and eleven days after the filing of a Motion to Reconsider, in part, because it is a ridiculous proposition. "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Mem. Hosp., Inc. v. Hagen,* 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994). Extended to another degree, a party cannot use a brief in opposition to a motion to strike a motion to reconsider to present an issue he could have presented both prior to judgment and at a motion to reconsider but did not. *Id.* In fact, Appellant failed to offer an affidavit pursuant to Rule 56(f) until five days after TranSystems noted that Appellant failed to avail itself of the procedure available under Rule 56(f), SCRCP. (R. p. 158.) There is no reasonable basis whereby the Trial Court should be required to reopen a decision four months after oral argument to address a patently untimely affidavit filed by Appellant.

V. APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW ANY ISSUES RELATED TO TRANSYSTEMS' OBTAINING SUMMARY JUDGMENT ON APPELLANT'S CLAIMS FOR BREACH OF CONTRACT BY THIRD PARTY BENEFICIARY.

Appellant does not raise any specific objection to the Trial Court's grant of summary judgment on the cause of action for breach of contract by third party beneficiary. "Ordinarily, no point will be considered which is not raised in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR; *see Brown v. Odom,* 425 S.C. 420, 436, 823 S.E.2d 183, 191 (Ct. App. 2019) (FN 5) (noting issue is unpreserved if appellant failed to include that issue in statement of issues on appeal).

Even if the issue were preserved and argued, the Trial Court properly granted the Motion as to this cause of action. TranSystems presented affidavit testimony from Peter Strub, who executed the TSC Contract for TranSystems, stating that he never considered Appellant to be a third party beneficiary of the TSC Contract. (R. p. 835.) It is undisputed that Appellant was not a party to the TSC Contract.

"The [typical] elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel and Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). "The presumption that [a] contract is not enforceable by a [non-party to the contract] may be overcome [only] by showing that [the non-party] was intended to be the direct beneficiary of the contract." *See Touchberry v. City of Florence*, 295 S.C. 47, 48-9, 367 S.E.2d 149, 150 (1988). "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). "[Only] if a contract is made for the benefit of a third [party], may [that third party] enforce the contract[, and the third party can only enforce the contract] if [both] of the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third [party]." *Id.* Stated directly, "[a] third-party beneficiary is a party that the contracting parties intended to **directly** benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (emphasis added). Courts look to the terms of the contracts under which parties assert third-party beneficiary status, to determine if there is an intended third-party beneficiary, but they review the at-issue contract in its entirety, rather than relying on select phrases out of context. *See Beverly v. Grand Strand Reg. Med. Ctr., LLC*, 435 S.C. 594, 599-600, 869

S.E.2d 812, 815 (2022) (holding operative terms of Institutional Agreement clearly indicate intent to provide insureds with a direct benefit). For example, our courts have recognized named beneficiaries in a will to be intended third-party beneficiaries of a contract to draft a will, noting that the primary purpose of a contract to draft a will is to benefit the named beneficiaries of that will. *Fabian v. Lindsay*, 410 S.C. 475, 488-9, 765 S.E.2d 132, 139-40 (2014).

The plain, unambiguous language of the Project Contracts demonstrate that neither Horry County nor TranSystems intended for Appellant to be a direct beneficiary of the TSC Contract, and TranSystems has produced affirmative evidence that Appellant was not and is not a third-party beneficiary of the TSC Contract. (*See* R. pp. 834-835.) "The construction of a contract [or contracts] is a matter of law." *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 435 S.C. 594, 604, 869 S.E.2d 812, 817 (2022). As a matter of law, this is an appropriate matter for redress through a Motion for Summary Judgment. *See* Rule 56, SCRCP. Based on the absence of contrary evidence, the Trial Court properly granted summary judgment as to this cause of action.

VI. APPELLANT HAS IMPERMISSIBLY RAISED NEW ARGUMENTS ON APPEAL WHICH WERE NOT PRESENTED TO THE TRIAL COURT.

To be considered and ruled upon in an appeal:

> The losing party [in the trial court, the appellant,] must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, LLC, supra, 338 S.C. at 422, 526 S.E.2d at 724. In Section V of its argument, Appellant contends that the Trial Court erroneously found that TranSystems was an agent of Horry County. (Initial Appellate Brief, pp. 46 – 47.) TranSystems argued this position at summary judgment. (R. p. 294; *see also* p. 814 (requiring TranSystems to indemnify Horry County for liability it creates

for Horry County); p. 825.) Appellant did not oppose this position by presenting any facts to show that TranSystems was not Horry County's agent.[8] Although Appellant argued that agency is normally a question of fact, it presented no admissible facts to contradict TranSystems' evidence offered. Appellant's objection to a finding that TranSystems was an agent of SCDOT was based on the absence of a contract between SCDOT and TranSystems. (R. pp. 908-909.) By contrast, the record contains the TSC Contract, which clearly authorized TranSystems to take certain actions on behalf of Horry County. Appellant neither presented facts to contest the TSC Contract, nor did it argue a lack of agency between TranSystems and Horry County. Further, it did not move to reconsider that issue. Appellant neither raised the issue of agency status as to Horry County, nor did it obtain a ruling on that issue. Accordingly, Appellant cannot raise this issue for the first time on appeal. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

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[8] In its Brief in Opposition, Appellant contested that TranSystems was SCDOT's agent, but it offers no affidavits or other evidence to contest TranSystems' status as agent of Horry County. (R. p. 183, lines 4-25 (Atkinson discussing agency issue); pp. 204-205 (Reid contesting agency as to SCDOT.) By contrast, TranSystems presented the TSC Contract, which designated the scope of services for which TranSystems was to act on Horry County's behalf. (R. pp. 805-832.)

CONCLUSION

The Trial Court properly performed its duty under *Tommy L. Griffin I,* by making a fact specific inquiry to determine whether TranSystems owed any tort duty to Appellant. Given the complexity of the project, the number of parties, and the amount of money involved, the applicable contracts must provide the initial delineation of duties. The Trial Court properly held that, based on the limits of TranSystems' authority under the Standard Specifications, as well as the clear authority of the SCDOT RCE, TranSystems owed no tort duty to Appellant.

Our Supreme Court has held that "whether ... a duty exists [between a design professional and a third party] will depend on the facts and circumstances of each case." *Tommy L. Griffin I,* 320 S.C. at 55-56, 463 S.E.2d at 89. Appellant's entire appellate argument is built upon the flawed premise that *Tommy L. Griffin I* mandates a finding that TranSystems owes tort duties to Appellant. In reality, there appears to be no South Carolina case interpreting whether a design professional providing CEI services to an owner owes any tort duty to a third-party contractor. Accordingly, *Tommy L. Griffin I* merely mandates that a trial court evaluate the facts and circumstances of this specific case and determine whether TranSystems had actionable duties to and Appellant.

In this case, the Trial Court evaluated the admissible evidence concerning whether TranSystems had actionable duties to Appellant, and it properly found that TranSystems owed no such duties to Appellant, largely because TranSystems' owed duties to its client, Horry County, and to the general public to meticulously observe and inspect the work done by Appellant and report to SCDOT. Had the Trial Court found that TranSystems did owe a duty, it would have created a conflict of interest impermissible under the Rules of Professional Conduct for Engineers. Appellant failed to create any genuine issue of material fact as to whether TranSystems assumed an actionable duty, or as to who held the title of RCE for SCDOT. Appellant waived any review of the grant of summary judgment as to Appellant's cause of action for breach of contract by third-

party beneficiary, and Appellant failed to preserve for review any objections to the finding that TranSystems was Horry County's agent for the Project. Finally, by failing to timely file a Rule 56(f), SCRCP, affidavit prior to any hearing on TranSystems' Motion for Summary Judgment, or within four months of the completion of that hearing, Appellant waived any argument that it should have been allowed further discovery prior to the Trial Court ruling on TranSystems' Motion for Summary Judgment.

Accordingly, for the reasons set forth above, the Trial Court's Order of December 27, 2023, should be AFFIRMED IN ITS ENTIRETY.

August 26, 2024

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In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis

Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructers, Inc.,

Appellant,

v.

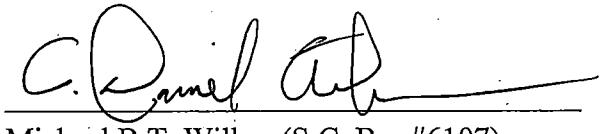
TranSystems Corporation,

Respondent.

CERTIFICATE OF COUNSEL

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

August 26, 2024



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