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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, Circuit Court Judge

Case No. 2022-CP-26-06116

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation, Respondent.

RECORD ON APPEAL - VOLUME 1

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**ORDER STAYING PROCEEDINGS**
Plaintiff,	)	**PENDING AGENCY REVIEW**
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	
	)	

By joint motion of Plaintiff Flatiron Constructors, Inc. and Defendant TranSystems Corporation it is

ORDERED, ADJUDGED AND DECREED this proceeding is stayed pending the South Carolina Department of Transportation's review relating to the claims asserted in this litigation. The stay shall remain in place for no more than one year from the date of execution of this Order.

ELECTRONICALLY FILED - 2018 Dec 04 4:05 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

ELECTRONICALLY FILED - 2018 Dec 04 4:05 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS Transystems Corporation

Case Number: 2018CP2602633

Type: Order/Stay

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

ELECTRONICALLY FILED - 2019 Nov 26 10:48 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**ORDER EXTENDING STAY OF PROCEEDINGS PENDING AGENCY REVIEW**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	
	)	

By joint motion of Plaintiff Flatiron Constructors, Inc. and Defendant TranSystems Corporation it is

ORDERED, ADJUDGED AND DECREED the stay of this proceeding is extended through September 30, 2020.

ELECTRONIC SIGNATURE PAGE FOLLOWING
[South Carolina Electronic Filing Policies and Guidelines § 6(a)]

ELECTRONICALLY FILED - 2019 Nov 26 10:48 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS Transystems Corporation

Case Number: 2018CP2602633

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2602633

Flatiron Constructors Inc
PLAINTIFF(S)

Transystems Corporation
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Plaintiff's Motion to Compel responses to Plaintiff's First Request for Production is granted. Defendant has 20 days from the date of this order to respond.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/09/2021 .

Carter B Reid for Flatiron Constructors Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2021 Apr 09 1:10 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2021 Apr 09 1:10 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

ELECTRONICALLY FILED - 2021 Apr 09 1:10 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS Transystems Corporation

Case Number: 2018CP2602633

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

ELECTRONICALLY FILED - 2021 Apr 14 9:00 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**ORDER DENYING DEFENDANT'S MOTION TO STAY AND FOR A PROTECTIVE ORDER**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

THIS MATTER came before the Court on March 17, 2020, upon Defendant TranSystems Corporation's Motion to Stay and for a Protective Order and Plaintiff Flatiron Constructors' Opposition and Motion to Compel; and

IT APPEARING to the Court that staying this matter is no longer appropriate based on the arguments set forth in Plaintiff's Brief dated March 5, 2021; it is hereby

ORDERED that Defendant's request to renew the Stay that expired on September 30, 2020 is DENIED, as is Defendant's request for a Protective Order; and it is also

ORDERED that Plaintiff's Motion to Compel Discovery Responses is GRANTED. Defendant shall respond to Plaintiff's First Request for Production within twenty (20) days from the date of the Form 4 Order which was entered on April 9, 2021.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE FOLLOWING
[South Carolina Electronic Filing Policies and Guidelines § 6(a)]

ELECTRONICALLY FILED - 2021 Apr 14 9:00 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS Transystems Corporation

Case Number: 2018CP2602633

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**ORDER DENYING**
Plaintiff,	)	**CONTINUANCE OF TRIAL DATE**
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Due to the age of this case and limitations on designating cases complex, the parties' joint motion for continuance is DENIED.

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ELECTRONICALLY FILED - 2021 Oct 06 3:12 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2018CP2602633

Type: Order/Other

Chief Administrative Judge
Court of Common Pleas, 15th Judicial Circuit
s/Benjamin H. Culbertson, Judge Code 2148

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**ORDER RESTORING CASE TO DOCKET PURSUANT TO S.C. R. CIV. P. 40(j)**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

This matter is before the Court on Plaintiff's Motion to Restore this case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure and in accordance with the Consent Order signed by the parties on October 6, 2021, signed by Judge Culbertson on October 8, 2021, and filed by the Court on October 11, 2021.

NOW, THEREFORE, IT IS ORDERED that the above-captioned action be restored to the active trial roster in Horry County Court of Common Pleas and the Clerk of Court is directed to assign a new civil case number.

IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE FOLLOWING
[South Carolina Electronic Filing Policies and Guidelines § 6(a)]

ELECTRONICALLY FILED - 2022 Sep 27 3:51 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633
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ELECTRONICALLY FILED - 2022 Sep 27 3:51 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633
ELECTRONICALLY FILED - 2022 Sep 27 4:00 PM - HORRY - COMMON PLEAS - CASE#2022CP2606116

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2018CP2602633

Type: Order/Restore Case To Active Docket

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2606116

Flatiron Constructors Inc
PLAINTIFF(S)

TranSystems Corporation
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Defendant TranSystems Corp.'s Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART. I find summary judgment is appropriate as to Plaintiff Flatiron Construction's causes of action for negligence, and for breach of contract. I find TranSystems has established it had no special relationship with Plaintiff and owed no duty of care to Plaintiff, and that Plaintiff was not an intended third party beneficiary of the contract between Defendant and Horry County. Defendant's attorney is to draft a proposed order consistent with its Memo in Support of Summary Judgment and email it to all attorneys of record before e-filing it for my review. I find there are genuine issues of material fact for a jury pertaining to Plaintiff's causes of action for tortious interference with contract and UTPA. Summary judgment is therefore denied as to those causes of actions.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/21/2023 .

Carter B Reid for Flatiron Constructors Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2023 Nov 22 9:46 AM - HORRY - COMMON PLEAS - CASE#2022CP2606116

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2023 Nov 22 9:46 AM - HORRY - COMMON PLEAS - CASE#2022CP2606116

ELECTRONICALLY FILED - 2023 Nov 22 9:46 AM - HORRY - COMMON PLEAS - CASE#2022CP2606116

Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2022CP2606116

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
	)	
	)	
Flatiron Constructors, Inc.,	)	
	)	
Plaintiff,	)	
	)	**ORDER**
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	

This matter is before the Court on the Motion of Defendant TranSystems Corporation (hereinafter, "TSC") for Summary Judgment on each cause of action alleged by Plaintiff Flatiron Constructors, Inc. ("Plaintiff"). The Court conducted a hearing via WebEx on this Motion on August 7, 2023, attended by C. Daniel Atkinson and Michael B.T. Wilkes for TSC, and Carter Reid and Andy Goldsmith for Plaintiff. For the reasons set forth below, TSC's Motion is GRANTED as to Plaintiff's causes of action for negligence and breach of contract and is DENIED as to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

INTRODUCTION

Because this claim involves purely economic losses, the scope of any duties owed by TSC must be determined entirely from the three contracts setting forth obligations among Horry County, Plaintiff, TSC, and the South Carolina Department of Transportation ("SCDOT"), and by any South Carolina law which creates extra-contractual duties. Because the language of each of those contracts is clear and unambiguous, and because there are no extra-contractual duties, a summary judgment ruling as to the negligence and breach of contract claims is proper at this stage.

Plaintiff's First Cause of Action, alleging Negligence against TSC, fails as a matter of law, because TSC owes no duty of care to Plaintiff. TSC contracted with Horry County to provide certain construction, engineering, inspection and testing services ("CEIT" services), but TSC had no contract with Plaintiff. TSC's contract with Horry County does not and may not create a "special relationship" between TSC and Plaintiff which would impose duties on TSC to Plaintiff in negligence. Plaintiff's Second Cause of Action, alleging Breach of Contract as a purported third-party beneficiary, fails as a matter of law, because the plain, unambiguous language of the various Highway Project Contracts[1] demonstrates that neither Horry County nor TSC intended for Plaintiff to be a third-party beneficiary of the TSC Contract, and because Plaintiff has failed to introduce sufficient evidence to create a genuine issue of material fact supporting its claim to be an intended third-party beneficiary of the TSC Contract. As to Plaintiff's Third Cause of Action, alleging Tortious Interference with Contract, and Plaintiff's Fourth Cause of Action for Violation of the S.C. Unfair Trade Practices Act, the Court finds there are genuine issues of material fact for a jury pertaining to those causes of action, and it therefore denies TSC's Motion for Summary Judgment as to those causes of action.

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides that the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. In determining whether a triable issue of fact exists, the court must view the evidence and all inferences which can reasonably be drawn from that evidence in the light most favorable to the nonmoving party. *Quail Hill, LLC v.*

[1] The "Highway Project Contracts" is a collective reference to the IGA, the TSC Contract, and the Construction Contract, as defined in the Court's Findings of Relevant Fact, *infra*.

Cty. of Richland, 387 S.C. 223, 234, 692 S.E.2d 499. 505 (2020). In this case, TSC seeks summary judgment solely on claims affirmatively brought by Plaintiff, on which Plaintiff bears the burden of proof. Accordingly, TSC, as the party moving for summary judgment, may discharge its initial burden by showing that: (1) there is an absence of evidence to establish the nonmoving party's case; or (2) the undisputed evidence conclusively negates the nonmoving party's case. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (S.C. Ct. App. 2002). Then, the nonmoving party must set forth specific evidence showing that there is a genuine issue for trial. *Id*. But, the nonmoving party may not carry that burden by creating an unreasonable inference or an issue of fact that is not genuine. *Kagan v. Simchon*, 429 S.C. 516, 523, 839 S.E.2d 106, 109 (S.C. Ct. App. 2020). Although Plaintiff argued in opposition to this Motion that it need produce only a "mere scintilla" of evidence to defeat a Motion for Summary Judgment, our Supreme Court clarified the issue during the pendency of this Motion, stating:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled.

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463-4, 892 S.E.2d 297, 301 (2023).

"In construing a contract [or contracts], the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). "The parties' intention must, in the first instance, be derived from the language of the contract [or contracts]." *Id.* (internal citations omitted). "To discover the intention of [contracts], the court must first look to [their] language – if the language

is perfectly plain and capable of legal construction, [the contracts' language] alone determines the [documents'] force and effect. Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* at 498, 649 S.E.2d at 501 (internal citations omitted). "If [the contracts'] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [the contracts'] language determines the [instruments'] force and effect." *Id.* at 499, 649 S.E.2d at 502. "Where [agreements are] clear and capable of legal interpretation, the courts['] only function is to interpret [their] lawful meaning, discover the intention[s] of the parties as found within the [agreements], and give effect to [them]. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). "The interpretation of unambiguous contract is a question of law." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "Inasmuch as the construction of the subject contract [or contracts] can be determined by consideration of the plain and unambiguous language of the contract [or contracts], it becomes a question of law to be resolved by the court and is thus no bar to the grant of summary judgment." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 474, 570 S.E.2d 197, 205 (Ct. App. 2002) ("*Tommy L. Griffin II*"); *see also* Rule 56, SCRCP. "Similarly, whether a contract is ambiguous is a question of law." *Miles*, 393 S.C. at 117, 711 S.E.2d at 883.

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-5, 677 S.E.2d 32, 36 (Ct. App. 2009).

RELEVANT PROCEDURAL HISTORY

Plaintiff filed its initial Complaint on April 26, 2018; however, it nearly immediately moved with TSC to stay the case, to allow Plaintiff to pursue a claim against SCDOT and/or Horry County, via the claim procedure set forth in the Specifications.[2] Pursuant to joint motions, the Court entered its December 4, 2018, Order staying this case for one year, and then entered its November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so TSC then filed its Answer to Plaintiff's Amended Complaint. The parties engaged in limited written discovery, including an exchange of Interrogatories and Requests for Production, and a production of files. On November 19, 2020, TSC filed a Motion to Stay Proceedings Pending Final Determination of Construction Contract, wherein TSC sought a stay of this case until SCDOT, Horry County, and Plaintiff resolved claims pending among them, determining what amount Plaintiff was owed under its Construction Contract for the Project. On December 16, 2020, Plaintiff filed an Objection to TSC's Motion to Stay, and on March 5, 2021, Plaintiff filed a Brief in Opposition to TSC's Motion to Stay, in which Plaintiff stated "imposition of another stay in this long-delayed action would unnecessarily prejudice [Plaintiff]'s interest in the expedient resolution of its claim." (Plaintiff's Brief in Opposition to Motion to Stay, p. 1.) Plaintiff included an entire section in that brief entitled "The Instant Action is Ripe." (Brief in Opposition to Motion to Stay, p. 6.) In that same brief, Plaintiff argued "no grounds exist for issuance of a Protective Order to shield [TSC] from needed discovery." (Brief in Opposition to Motion to Stay, p. 8.) The undersigned conducted a hearing on the Motion on March 17, 2020. Based in part on the arguments of Plaintiff, the undersigned issued an Order dated April 14, 2021,

[2] The claims procedure is set forth in Exhibit C to TSC's Brief in Support of TSC's Motion for Summary Judgment.

which denied TSC's requested stay and which compelled TSC to respond to discovery. (Order dated April 14, 2021.)

The Parties agree that they have exchanged hundreds of thousands of documents in discovery to-date. On October 11, 2021, the Court struck the case from the active docket, pursuant to Rule 40(j), SCRCP. It was restored to the active docket on September 27, 2022.

TSC filed this Motion for Summary Judgment, along with its supporting brief, on April 4, 2023. The Clerk issued a notice of hearing to all parties on July 7, 2023, and the Court conducted its hearing on August 7, 2023. No party filed a motion seeking continuance of the hearing, based on the need for further discovery.

FINDINGS OF RELEVANT FACT

Because this is Motion for Summary Judgment, the Court applies the Rule 56 standard in making findings of fact – it views all facts in the light most favorable to Plaintiff, and it will draw all reasonable inferences in favor of Plaintiff.

This case arises out of the construction of the Carolina Bays Parkway in Horry County, South Carolina (the "Project"). The Court takes judicial notice that the Project, as a highway in a highly-traveled area, was required to be safe for public use and to perform without failure. On June 20, 2007, Horry County 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"). 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." (IGA, p. 10, § 5.1.) The IGA serves as a contract between Horry

County, the Owner, and SCDOT, for SCDOT to provide oversight of design and construction. The intent of those parties is clear from the document; therefore, there is no need to consider outside evidence to interpret this unambiguous agreement. 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." (IGA, p. 14, § 5.7.) Accordingly, based on the applicable standard of review, the Court finds that Horry County intended for SCDOT to provide oversight of design and construction for the Project.

On December 15, 2011, Horry County contracted TranSystems Corporation ("TSC") (in the "TSC Contract") to provide Construction, Engineering and Inspection Services ("CEIT Services") for the Project. TSC was not the engineer of record, and TSC's CEIT Services were supervised by the Resident Construction Engineer ("RCE") provided by SCDOT. SCDOT's RCE had final decision-making authority over TSC's CEIT Services.[3] (Standard Specifications, § 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." (Standard Specifications, § 105.3(1).) Final review and approval of conformity of Plaintiff's Project construction work was performed by the SCDOT RCE, and the SCDOT RCE made the final determination as to whether SCDOT would accept any non-conforming construction. (Standard Specifications, §105.3(2-3).) Further, it is undisputed that SCDOT

[3] Although the TSC Contract references design services, TSC never provided any design services for the Project. (*See* Affidavit of Peter Strub, P.E., filed with TSC's Brief in Support as Exhibit F.) Plaintiff failed to introduce any evidence creating a genuine issue of material fact as to whether demonstrating that TSC provided any design services.

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.

On November 7, 2013, Horry County contracted with Plaintiff to serve as General Contractor for the Project (the "Construction Contract"). Plaintiff performed its services pursuant to the Construction Contract, which stated that the Project was governed by SCDOT's 2007 Standard Specifications for Highway Construction (the "Standard Specifications"). The Construction Contract provides a specified claims procedure, whereby Plaintiff could pursue compensation for changed contractual requirements, weather-related delays, or other increased costs which were not the fault of Plaintiff. (TSC Brief in Support, Exhibit A, p. FIC000013908.)

In its Brief in Opposition, Plaintiff argues that there was an issue of fact as to whether Marty Long of TSC was the SCDOT RCE empowered to make binding decisions; however, the Court finds that Plaintiff's arguments and evidence fail to establish a genuine issue of material fact in this regard. Specifically, SCDOT's Standard Specifications identify the "RCE" as a SCDOT official, known as "Resident Construction Engineer." (Standard Specifications, § 101.2.) Further, the Affidavit of Louis Hutcherson, Plaintiff's former Project Engineer, offered by Plaintiff in an effort to create a genuine issue of material fact, does not expressly or implicitly state that he believed Long was the SCDOT RCE or that Long had the authority of the SCDOT RCE, it states that Long "held himself out as South Carolina Department of Transportation's ("SCDOT") Resident Construction Engineer ("RCE") on the Project." (Hutcherson Affidavit, ¶ 3.)[4] This affidavit is as important for what it does not say as for what it does say, because Hutcherson does not testify that he thought that Long was the SCDOT RCE or that he had the authority of the

[4] The Court notes that, although the Hutcherson Affidavit was filed with the Court on July 28, 2023, it was executed by Mr. Hutcherson on June 28, 2023, providing Plaintiff with five weeks to provide a more definitive statement or clarify any vagaries in his testimony.

SCDOT RCE. It is not a reasonable inference to conclude that Hutcherson believed that Long was the SCDOT RCE, because Hutcherson had the ability to offer that testimony if that were his belief. Further, any potential inferences from the Affidavit that Long was the SCDOT RCE are contradicted by documents produced by Plaintiff in this case, and which were in Plaintiff's possession during construction, wherein Hutcherson received emails in which Travis M. Patrick, P.E., directly identified himself by signature as "Resident Construction Engineer, District 5 Special Projects, South Carolina Department of Transportation." (Exhibit 2 to TSC Reply Brief.) On November 2, 2015, Patrick wrote to Hutcherson in his capacity as SCDOT RCE, and Hutcherson responded directly. (Exhibit 3 to TSC Reply Brief.) Stated simply, the Hutcherson Affidavit is not specific enough to create a genuine issue of material fact, and its vagueness is further repudiated by Hutcherson's own correspondence, which is in the record for this Motion. If Hutcherson believed Long was RCE for SCDOT, he could and should have expressly said so in his affidavit. He did not, and it is no reasonable inference to conclude he meant something he did not say when he crafted his own affidavit. Specifically, the Hutcherson Affidavit is clear in what it does not say, and it fails to establish a genuine issue of material fact that creates any ambiguity in the Highway Project Contracts which control the rights, authorities and duties of the respective parties to those contracts and their respective, relevant performances under those contracts.

The Construction Contract required Plaintiff to "[g]ive the work the constant attention necessary to facilitate the progress thereof, and cooperate with the RCE, the RCE's authorized representatives and inspectors [to include firm providing CEIT Services], and other Contractors in every way possible." (Standard Specifications, § 105.5(2).) Based on Plaintiff's Complaint, Plaintiff contends that it suffered damage, in part, because TSC imposed too strict a standard of review for repair procedures and installation by Plaintiff, and because TSC allegedly took too

much time to review some submittals. Both the TSC Contract and the Project's Specifications make it clear that SCDOT's RCE had the final decision-making authority for all installation and repair procedures and for approval of submittals. The Specifications also provide a designated claims procedure by which Plaintiff can claim compensation from the Owner, Horry County, for delays or scope changes attributable to Horry County. (Amended Complaint, ¶¶ 23, 30.) In its Answers to TSC's Interrogatories, Plaintiff identified multiple areas where it contends that TSC engaged in "overzealous," "unreasonable," or too-rigorous inspections of Plaintiff's work. (*See* Plaintiff's Answers to TSC's Interrogatory 9, 10, 11.) It is also clear that TSC is an agent of Horry County; therefore, Horry County would face contractual exposure for contract changes caused by TSC. Additionally, the TSC Contract required TSC to indemnify and hold harmless Horry County and SCDOT "from claims and liability due to negligent acts of [TSC], its subcontractors, agents or employees in connection with the prosecution and completion of the work covered by [the TSC Contract]." (TSC Contract, Paragraph M.)

The three contracts at issue – the IGA, the TSC Contract, and the Construction Contract – contain no ambiguity or any evidence that any of the contracted parties thereto intended for Plaintiff to be a third-party beneficiary of the TSC Contract or of the IGA. These agreements clearly defined the roles of Plaintiff, Horry County, SCDOT, and TSC, and the agreements explicitly described the rights and obligations of each.

CONCLUSIONS OF LAW

This case is ripe for summary judgment because the unambiguous contracts and the lack of any genuine issue of fact as to whether TSC owed Plaintiff duties under negligence theory or in contract; therefore, Plaintiff has no legal basis for its claim for negligence or its claim as the purported third-party beneficiary of Horry County's Contract with TSC.

1. The Existence of a Special Relationship, Giving Rise to a Legal Duty, or Lack Thereof, Is An Issue of Law for Determination by the Court.

"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). Even if the case proceeded past the summary judgment stage, this Court would have to determine whether TSC owed any duty to Plaintiff, as a matter of law. As one of the State's most experienced Circuit Judges noted while serving as an Acting Justice for our Supreme Court, "[t]he 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 ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 135-6, 638 S.E.2d 650, 656 (2006) (Cole, Acting Justice, for the Court). Accordingly, it is entirely appropriate, and, in fact, necessary, for the Court to determine whether TSC owed any duty to Plaintiff in negligence, as a matter of law.

2. TSC's Motion Is Ripe for Consideration.

Before the hearing, Plaintiff did not file a motion to continue the hearing on TSC's Motion for Summary Judgment, or a motion seeking specific discovery prior to the Court's ruling on TSC's Motion for Summary Judgment.

In motions practice two years prior to TSC's filing its Motion for Summary Judgment, Plaintiff argued that it was necessary and proper for discovery to proceed in this case, and Plaintiff filed motions compelling TSC to engage in discovery. Even without considering the two years the case was stayed, Plaintiff had two and a half years to conduct discovery on the issue of duty, prior to the Court's hearing of the Motion. In *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 164-5 (2012), our Supreme Court considered the propriety of a defendant's motion to enlarge time for discovery to challenge summary judgment, which is a case where the party

opposing summary judgment filed a motion, unlike the present case. The Supreme Court found that the trial judge did not err by denying the motion, noting the defendant filed the motion after the discovery deadline, and that the defendant failed to file affidavits to support his request for discovery extension, pursuant to Rule 56(f), SCRCP.

In a concurring opinion for the Court of Appeals, now-Justice Few noted:

> Rule 56(f) of the South Carolina Rules of Civil Procedure provides 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. Pursuant to Rule 56(f), the non-moving party or counsel may submit an affidavit stating the reasons "he cannot … present by affidavit facts essential to justify his opposition" to the motion. 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.

Matter of Estate of Smith, 419 S.C. 111, 120-1, 796 S.E.2d 158, 163 (Ct. App. 2016) (Few, A.J., concurring).

In this case, Plaintiff filed no affidavits pursuant to Rule 56(f), SCRCP, prior to or at the hearing on the Motion for Summary Judgment. Further, during the four-month pendency of TSC's Motion for Summary Judgment, there is no evidence that Plaintiff noticed any depositions or served any supplemental discovery, on issues for which it allegedly needed information, despite having received TSC's Brief in Support at the time TSC filed its Motion for Summary Judgment. Finally, in the month between notice of the hearing on TSC's Motion for Summary Judgment and the actual hearing, Plaintiff filed no affidavits pursuant to Rule 26(f), SCRCP. Accordingly, and as recommended by the concurring opinion in *Estate of Smith*, the Court finds no legal basis to delay the hearing of and ruling on TSC's Motion, in a case that has been pending for five years. The Motion is ripe for determination as a matter of law.

3. Plaintiff's First Cause of Action, Alleging Negligence, Fails Because TSC Owed No Duty of Care to Plaintiff.

Plaintiff's claims are solely economic losses; therefore, this Court must evaluate the potential application of the economic loss rule to limit Plaintiff's claims based on negligence theory. As Judge Clifton Newman recognized in the *McCarthy* case, 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, 2013 WL 9921457 at *3 (S.C. Ct. Common Pleas, 2013) (citing *McCullough v. Goodrich & Pennington Mort. Fund. Inc.*, 373 S.C. 43, 47-8, 644 S.E.2d 43, 46 (2007) and *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003)).

In South Carolina, courts evaluate negligence claims under the economic loss rule by evaluating "whether or not the alleged tortfeasor acted in a way that violated a legal duty aside from his [potential] contractual duties." *Colleton Prep. Acad., Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 189, 666 S.E.2d 247, 251 (2008). "Tort law . . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Sapp v. Ford Motor Co*., 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). Our Supreme Court has noted that South Carolina's courts "are cautious in permitting negligence actions where there is neither personal injury nor property damage." *Id.* at 149, 687 S.E.2d at 50.

Plaintiff has not and cannot identify any statute, contract, status, or property interest which creates a negligence duty owed by TSC to Plaintiff; so the remaining question is whether there is a special circumstance or relationship which creates such a negligence duty. There is none. Although Plaintiff argued that there is a genuine issue of material and relevant fact as to whether Marty Long was RCE for SCDOT, the Court finds as a matter of law that there is no genuine issue of material fact as to that argument, and that Long was not RCE for SCDOT, as defined in

SCDOT's Standard Specifications, which are incorporated into Plaintiff's contract with Horry County.

"Whether a defendant owes a plaintiff a duty of care is a matter of law for [a court] to determine." *McCarthy*, *supra*, at *3 (citing *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011)). First, as is clear from review of the plain language of the three contracts at issue – the IGA, the TSC Contract, and the Construction Contract (collectively the "Project Contracts") – TSC assumed no duties to Plaintiff under any contract or by any property status. The remaining question is whether there is any special relationship between TSC and Plaintiff giving rise to any TSC negligence duty to Plaintiff.

a. There Is No Special Relationship Giving Rise to Any Negligence Duty.

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. In assessing when to recognize negligence duties for purely economic losses, Idaho's Supreme Court has held that "[u]nless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (Idaho 2005), *abrogated on other grounds by BrunoBuilt, Inc. v. Briggs Eng'g, Inc.*, 2023 WL 2375766 (Idaho 2023). Like South Carolina does, Idaho recognizes an exception to this rule where a "special relationship" exists between the parties. *Id.* at 301, 108 P.3d at 1001; *see, e.g.*, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995) ("*Tommy L. Griffin I*") (recognizing special relationship exception to economic loss rule). South Carolina's courts have recognized that "whether such a [special-relationship-based] duty exists will depend on the facts and circumstances of each case." *Id.* In

this case, there is no need for further inquiry into facts or circumstances, because the unambiguous conditions are set forth in the plain, unambiguous Project Contracts.

Idaho's Supreme Court provides this guidance:

> There are only two situations in which this Court has found the special relationship exception applies. One situation is where a professional or quasi-professional performs personal services. *McAlvain v. General Ins. Co.*, 97 Idaho 777, 780. 554 P.2d 955, 958 (1976). In *McAlvain*, an insured expressly requested his insurance agent provide complete insurance coverage on the insured's business inventory. The insurance agent knew or should have known the amount of insurance that was needed to completely cover the value of the inventory. A fire destroyed the inventory and the insurance coverage was insufficient to cover the loss.
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> . . .
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> The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function. *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995) (wherein group was the only entity in Idaho authorized to certify seed potatoes and was held liable for erroneous certification).

Blahd, 141 Idaho at 301-2, 108 P.3d at 1001-02. Although Idaho's courts have recognized that there may be unique circumstances which require a different allocation of risk, Idaho has never applied this exception in any circumstance. *Id.* at 302, 108 P.3d at 1002. The Idaho court specifically noted that it refused to apply the unique circumstance exception to residential construction, because it was an everyday occurrence. *Id.* For the same reason, highway construction, which is a routine, and hopefully soon even-more-routine occurrence in South Carolina, does not provide a basis for a special relationship exception.

Under the Idaho standard, there is no basis for negligence liability for TSC to Plaintiff for economic losses. TSC provided no personal services to Plaintiff, as clearly demonstrated by the Project Contracts; rather, TSC provided services to only *Horry County* and under SCDOT's

ultimate supervision. Additionally, TSC made no representations of having unique qualifications such that it made representations to the public at large, and there is no evidence that TSC engaged in any unique work. The Project Contracts clearly give all decision-making authority to SCDOT, and the Project Contracts demonstrate that SCDOT and TSC actions were to protect the interests of Horry County and its citizens.

Like Idaho's courts, Vermont's courts have considered what facts can create a special relationship sufficient to justify an exception to the economic loss rule. As do South Carolina courts, Vermont's courts hold that "[t]he economic loss rule 'prohibits recovery in tort for purely economic losses.' " *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.*, 192 Vt. 322, 327, 59 A.3d 752, 755 (2012). Vermont's Supreme Court noted that privity is not required for application of the economic loss rule, and that special relationship claims require "a special relationship, which creates a duty of care independent of contract obligations. The key is not whether one is licensed in a particular field; rather, the determining factor is the type of relationship created between the parties." *Id.* at 328-9, 59 A.3d at 756-7. In evaluating whether there is a special relationship based on professional status, the question becomes whether the defendant offered a specialized professional service and whether the plaintiff relied on (or reasonably could rely on) the defendant to provide it with a professional service. *EBWS, LLC v. Britly Corp.*, 181 Vt. 513, 525, 928 A.2d 497, 508 (2007).

Under the Vermont standard, Plaintiff could not rely on TSC to provide professional services to it, or for its benefit, because TSC was ethically prohibited from providing services to Plaintiff. Horry County hired TSC as a third-party CEIT services provider; so its exact duties were to provide critical, *independent* review for TSC's client, Horry County, of the work performed by Plaintiff under the Construction Contract. As supported by both the Idaho and Vermont standards,

the Court finds that TSC did not have any special relationship with Plaintiff, sufficient to create negligence duties owed by TSC to Plaintiff.

b. Recognition of a Negligence Duty Would Create an Impermissible Conflict of Interest.

South Carolina law also requires this Court to refuse to recognize any duty in negligence owed by TSC to Plaintiff, because doing so would create an improper and impermissible conflict of interest in TSC's provision of CEIT Services to Horry County for the Project. While professional engineers can have certain types of duties imposed on them under law, those duties are and must be limited to ones that comply with the Rules of Professional Conduct for Engineers. S.C. Code Ann. Regs. § 49-300.

Under South Carolina law, other than as required to protect public health and safety, a professional engineer may limit the scope of his responsibility by contract. *C.f. Tommy L. Griffin II*, 351 S.C. 459, 474, 570 S.E.2d 197, 204-5 (finding that unambiguous contract determined JJG's scope of duty regarding water line testing requirements). The General Assembly has authorized the S.C. Board of Engineers and Land Surveyors (the "Board") to promulgate regulations defining licensure requirements for engineers. S.C. Code Ann. § 40-22-60. The Board adopted the Rules of Professional Conduct for Engineers, "[i]n order to safeguard the life, health, property and welfare of the public and to establish a high standard of integrity, skills, and practice in the profession of engineering . . . ," which are "binding upon every person holding a certificate of registration as a Professional Engineer." S.C. Code of Regs. § 49-300. "The Rules of Professional Conduct delineate specific obligations engineers . . . must meet," and engineers are "deemed to be familiar with [the Rules'] several provisions and to understand them." S.C. Code of Regs § 49-300(D). S.C. Code Ann. Regs. § 49-301(A) provides that the primary obligation of engineer is to

"protect the safety, health, property and welfare of the public" and that engineers "shall conduct their practice to fulfill this obligation."

The Board has clearly stated that "[t]he Engineer shall avoid conflicts of interest;" however, the duty Plaintiff seeks to impose on TSC creates a conflict of interest. S.C. Code of Regs § 49-304. Conflicts of interest are not a situation where engineers must make a close ethical call, and this Court must refuse to recognize a duty that would impose ethical conflicts of interests for engineers, by pitting engineers' duties to clients and the public against purported implied duties to non-clients whose work the engineers review on behalf of clients. The Project Contracts make it clear that TSC's role is to inspect the work of Plaintiff; therefore, Plaintiff and TSC are not in aligned interest – TSC's role is to test, evaluate and report to SCDOT Plaintiff's work to ensure it meets *Horry County's* construction requirements as determined by SCDOT. Further, the TSC Contract makes it clear that TSC must indemnify and hold harmless Horry County and SCDOT, if TSC or its employees, subcontractors or agents act in a manner to create liability for Horry County or SCDOT to Plaintiff. This language in the TSC Contract clearly demonstrates that Horry County did not intend for TSC to assume duties that Horry County and/or SCDOT owed under the Construction Contract. Rather, Horry County and SCDOT merely required TSC to indemnify them if TSC's actions, as agent for Horry County, created liabilities for Horry County or SCDOT to Plaintiff. To recognize duties owed by TSC to Plaintiff in this circumstance would create an impermissible conflict of interest in TSC's competing duties to Horry County, its client, and Plaintiff. The parties to the Highway Construction Contracts agreed on a procedure to allocate risk and duty, and this Court cannot and will not modify that allocation by recognizing non-existent negligence duties.

In this case, Plaintiff has recourse, through the Construction Contract and Standard Specifications, for alleged unfair interpretation or overzealous enforcement of its obligations under the Construction Contract, and for any other claims Plaintiff has related to work performed by TSC in its CEIT services; but that recourse is against Horry County.[5] To allow recourse against TSC would create an impermissible conflict of interest in TSC's duties. Accordingly, for this additional reason, this Court must find that TSC had no special relationship with Plaintiff which would support a duty of TSC to Plaintiff in negligence. Under South Carolina law, this Court also must refuse to recognize a duty of an engineer to avoid doing "too good" of a job for its client, Horry County, and the public, because such a requirement would clearly conflict with all engineers' duties to avoid a conflict of interest and to safeguard the public. Specifically, by the Rules of Professional Conduct for their profession, engineers are barred from accepting compensation, financial or otherwise, from more than one party for services for the same project, or for services pertaining to the same project, unless fully disclosed to all parties. S.C. Code of Regs. § 49-304(B). The logic for this rule is clear – an engineer, much like a lawyer, cannot be beholden to two principals. For the same reason, an engineer cannot simultaneously owe a duty to a client of utmost good faith and diligence in performing inspections, while simultaneously owing some duty imposed by law to not be "too diligent" or "too zealous" in performing inspections.

[5] As noted in TSC's Brief in Support of TSC's Motion for Summary Judgment, on November 1, 2022, Plaintiff filed suit against Horry County and SCDOT alleging damages relating to the Project. Additionally, SCDOT's Supplemental Specifications set forth a specific claim procedure for Plaintiff to follow in asserting claims for additional compensation, with very specific requirements for action. (Exhibit C to TSC's Brief in Support of TSC's Motion for Summary Judgment.) The Court takes judicial notice that Plaintiff dismissed its claims against Horry County and SCDOT, without prejudice, on June 22, 2023, through a filing with the Horry County Clerk of Court.

c. In Addition to Persuasive Authority from Idaho and Vermont, and Ethical Requirements of South Carolina, Existing South Carolina Authority Requires This Court to Find No Negligence Duty Owed by TSC to Plaintiff.

As noted in *Tommy L. Griffin I*, this Vermont standard is also applicable in South Carolina. In *Tommy L. Griffin I* (and in similar cases), a contractor relied on design plans presented by the engineer, and it also relied on findings by the engineer regarding construction. Such circumstances do not exist in this case – TSC prepared no plans, and Plaintiff had no right to rely on TSC's observations and reporting, because TSC had no final decision-making authority. Plaintiff could rely only on the decisions of the *SCDOT* Resident Construction Engineer. Accordingly, there is no special relationship between Plaintiff and TSC sufficient to give rise to any duty owed by TSC to Plaintiff related to its CEIT services.

Although Plaintiff contends that *Tommy L. Griffin I* holds that an engineer owes duties to contractors outside of privity to not negligently perform inspections, that is not the duty Plaintiff seeks to impose on TSC. The claims in *Tommy L. Griffin I* were for *errors* in design and supervision of the Project, which were duties expressly assumed by Jordan, Jones & Goulding, Inc., in its contract for engineering services.[6] In that case, the Supreme Court recognized that "[w]hether a … [negligence] duty exists will depend on the facts and circumstances of each case." *Id.* at 55-56. There, the engineer had extremely broad duties set forth in the engineer's contract, but, here, TSC had narrow contractual duties and no final decision-making authority. In *Tommy L. Griffin I*, the defendant engineer under its contract for services had the right to halt construction

[6] The closest analog to JJG's role in *Tommy L. Griffin I* is the role played by SCDOT, not TSC. SCDOT, not TSC, was authorized 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." (IGA, p. 10, § 5.1.)

and the duty to approve pay applications submitted by the contractor, neither of which TSC had vis-à-vis this Project. In fact, the duties recognized by the Supreme Court in *Tommy L. Griffin I* arose from the contract for services of the engineer in that case, but here the TSC Contract does not have similar provisions. Accordingly, JJG's negligence duty was defined in its contract while no such terms exist in the TSC Contract in this case.

"Duty [of care] is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445, 451 (Md. 2017) (quoting W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts § 53, at 358 (5th ed. 1984)). "To determine whether a tort duty exists in a particular context, [a court must] examine: (1) the nature of the harm likely to result from a failure to exercise due care, and (2) the relationship that exists between the parties." *Id.* (internal quotations omitted). Here, the relationship between TSC and Plaintiff is defined entirely and limited by the Project Contracts. None of the Project Contracts impose any duty on TSC vis-à-vis Plaintiff. Duties run from Horry County to Plaintiff and potentially from SCDOT to Plaintiff, but not from TSC to Plaintiff. TSC acted as Horry County's consultant to SCDOT, which had final decision-making authority. Had Plaintiff wished to impose some negligence duty on TSC, it could have attempted to negotiate contract terms with Horry County that did so, or it could have refused to enter any contract which did not impose duties on TSC; however, Plaintiff did neither. In the *Balfour Beatty* case, *supra*, the Maryland Court of Appeals determined that "the complex web of contracts that typically undergirds a public construction project should govern [the determination of duty for negligence liability] because parties have a sufficient opportunity to protect themselves (and anticipate their liability) in negotiating these contracts." *Balfour Beatty*, 155 A.3d at 460.

For this reason, Plaintiff's cause of action for negligence fails as a matter of law, and TSC is entitled to summary judgment on Plaintiff's negligence claim.

4. Plaintiff's Second Cause of Action for Breach of a Contract for a Third-Party Beneficiary Fails, Because There is No Evidence that Plaintiff Was an Intended Third-Party Beneficiary of 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 TSC intended for Plaintiff to be a direct beneficiary of the TSC Contract, and TSC has produced affirmative evidence that Plaintiff was not and is not a third-party beneficiary of the TSC Contract. (*See* Strub Affidavit.) Further, as noted in the Court's Findings of Relevant Fact, the IGA was executed six years prior to the Construction Contract, and the TSC Contract was executed nearly two years prior to execution of the Construction Contract. Neither document recognizes duties owed to any General Contractor to be retained in the future. "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.

The TSC Contract sets forth TSC's duties thereunder – to evaluate and test Plaintiff's work and Plaintiff's compliance with the plans, specifications, Project schedule, and terms of the Construction Contract, and to report the findings of the tests to SCDOT, who was managing the Project for Horry County. TSC's work was solely for Horry County's benefit. Every TSC criticism of Plaintiff's work is potentially to Plaintiff's *detriment*, because Plaintiff may incur costs or delay in re-performing work. Accordingly, Plaintiff was not and never could be a third-party beneficiary of TSC's obligations under the TSC Contract. The Project's timeline also proves that Plaintiff was not a third-party beneficiary of the TSC Contract, because TSC executed the TSC Contract nearly two years before Plaintiff was even identified as the Contractor. (Construction

Contract, p. 1.) Accordingly, Plaintiff's claim for breach of contract for a third-party beneficiary fails as a matter of law. TSC's Motion for Summary Judgment as to Plaintiff's Second Cause of Action is granted.

5. **TSC's Motion for Summary Judgment as to Plaintiff's Third Cause of Action for Tortious Interference with Contract is Denied.**

The Court finds that there are genuine issues of material fact for a jury pertaining to Plaintiff's claim for tortious interference with contract; therefore, TSC's Motion is denied as to this cause of action.

6. **TSC's Motion for Summary Judgment as to Plaintiff's Fourth Cause of Action Asserting UTPA Violations by TSC is Denied.**

The Court finds that there are genuine issues of material fact for a jury pertaining to Plaintiff's claim for violations of the South Carolina Unfair Trade Practices Act; therefore, TSC's Motion is denied as to this cause of action.

CONCLUSION

South Carolina's State and local governments spend hundreds of millions of dollars each year creating and improving our highway system for the benefit and safety of our citizens and the State's visitors. Plaintiff is bound by its Construction Contract with Horry County and has rights thereunder regarding the performance of Horry County and its agents like TSC. Horry County has a duty to its citizens to construct highways safely and economically in conjunction with the SCDOT, and this is accomplished by defining the complex roles of all parties by law and contract, including without limitation project plans and specifications. Horry County retained TSC to perform CEIT services in conjunction with SCDOT's services and SCDOT's responsibility to require Plaintiff to fully, properly, and timely perform its Construction Contract duties for the benefit of Horry County and its citizens. While this can be described as cooperative effort of all Project parties, TSC was contractually and ethically obligated to Horry County to evaluate

elements of Plaintiff's work and report to SCDOT, including criticisms of Plaintiff's work. TSC did not design the Project or have final decision-making authority. In its limited CEIT role, TSC provided information to Horry County and SCDOT so they could decide whether Horry County would accept and pay for Plaintiff's work under the Construction Contract. TSC was prohibited from serving two principals on this Project, which could influence the performance of its duties to Horry County and endanger the public.

In these circumstances, TSC cannot have a "special relationship" with and for the benefit of Plaintiff; TSC was not and could not have been limited in its duty to Horry County to critique Plaintiff's performance of its duties under Construction Contract. Accordingly, TSC has no duty to Plaintiff in negligence; so the Court must grant TSC summary judgment on Plaintiff's negligence cause of action.

For the same reasons, and because the plain, unambiguous language of the Project Contracts shows no intention of either TSC or Horry County to make Plaintiff a third-party beneficiary of the TSC Contract, Plaintiff's third-party beneficiary claim fails as a matter of law.

The Court finds there are genuine issues of material fact for a jury pertaining to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

Accordingly, TSC's Motion for Summary Judgment is GRANTED as to Plaintiff's causes of action for negligence and breach of contract for the benefit of a third-party beneficiary. TSC's Motion for Summary Judgment is DENIED as to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

IT IS SO ORDERED.

[JUDICIAL SIGNATURE TO FOLLOW]

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
Flatiron Constructors, Inc., Plaintiff, v. TranSystems Corporation, Defendant.	)	**ORDER**

This matter is before the Court on the Motion of Defendant TranSystems Corporation (hereinafter, "TSC") for Summary Judgment on each cause of action alleged by Plaintiff Flatiron Constructors, Inc. ("Plaintiff"). The Court conducted a hearing via WebEx on this Motion on August 7, 2023, attended by C. Daniel Atkinson and Michael B.T. Wilkes for TSC, and Carter Reid and Andy Goldsmith for Plaintiff. For the reasons set forth below, TSC's Motion is GRANTED as to Plaintiff's causes of action for negligence and breach of contract and is DENIED as to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

INTRODUCTION

Because this claim involves purely economic losses, the scope of any duties owed by TSC must be determined entirely from the three contracts setting forth obligations among Horry County, Plaintiff, TSC, and the South Carolina Department of Transportation ("SCDOT"), and by any South Carolina law which creates extra-contractual duties. Because the language of each of those contracts is clear and unambiguous, and because there are no extra-contractual duties, a summary judgment ruling as to the negligence and breach of contract claims is proper at this stage.

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Plaintiff's First Cause of Action, alleging Negligence against TSC, fails as a matter of law, because TSC owes no duty of care to Plaintiff. TSC contracted with Horry County to provide certain construction, engineering, inspection and testing services ("CEIT" services), but TSC had no contract with Plaintiff. TSC's contract with Horry County does not and may not create a "special relationship" between TSC and Plaintiff which would impose duties on TSC to Plaintiff in negligence. Plaintiff's Second Cause of Action, alleging Breach of Contract as a purported third-party beneficiary, fails as a matter of law, because the plain, unambiguous language of the various Highway Project Contracts[1] demonstrates that neither Horry County nor TSC intended for Plaintiff to be a third-party beneficiary of the TSC Contract, and because Plaintiff has failed to introduce sufficient evidence to create a genuine issue of material fact supporting its claim to be an intended third-party beneficiary of the TSC Contract. As to Plaintiff's Third Cause of Action, alleging Tortious Interference with Contract, and Plaintiff's Fourth Cause of Action for Violation of the S.C. Unfair Trade Practices Act, the Court finds there are genuine issues of material fact for a jury pertaining to those causes of action, and it therefore denies TSC's Motion for Summary Judgment as to those causes of action.

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides that the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. In determining whether a triable issue of fact exists, the court must view the evidence and all inferences which can reasonably be drawn from that evidence in the light most favorable to the nonmoving party. *Quail Hill, LLC v.*

[1] The "Highway Project Contracts" is a collective reference to the IGA, the TSC Contract, and the Construction Contract, as defined in the Court's Findings of Relevant Fact, *infra*.

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Cty. of Richland, 387 S.C. 223, 234, 692 S.E.2d 499. 505 (2020). In this case, TSC seeks summary judgment solely on claims affirmatively brought by Plaintiff, on which Plaintiff bears the burden of proof. Accordingly, TSC, as the party moving for summary judgment, may discharge its initial burden by showing that: (1) there is an absence of evidence to establish the nonmoving party's case; or (2) the undisputed evidence conclusively negates the nonmoving party's case. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (S.C. Ct. App. 2002). Then, the nonmoving party must set forth specific evidence showing that there is a genuine issue for trial. *Id*. But, the nonmoving party may not carry that burden by creating an unreasonable inference or an issue of fact that is not genuine. *Kagan v. Simchon*, 429 S.C. 516, 523, 839 S.E.2d 106, 109 (S.C. Ct. App. 2020). Although Plaintiff argued in opposition to this Motion that it need produce only a "mere scintilla" of evidence to defeat a Motion for Summary Judgment, our Supreme Court clarified the issue during the pendency of this Motion, stating:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled.

Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463-4, 892 S.E.2d 297, 301 (2023).

"In construing a contract [or contracts], the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). "The parties' intention must, in the first instance, be derived from the language of the contract [or contracts]." *Id.* (internal citations omitted). "To discover the intention of [contracts], the court must first look to [their] language – if the language

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is perfectly plain and capable of legal construction, [the contracts' language] alone determines the [documents'] force and effect. Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* at 498, 649 S.E.2d at 501 (internal citations omitted). "If [the contracts'] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [the contracts'] language determines the [instruments'] force and effect." *Id.* at 499, 649 S.E.2d at 502. "Where [agreements are] clear and capable of legal interpretation, the courts['] only function is to interpret [their] lawful meaning, discover the intention[s] of the parties as found within the [agreements], and give effect to [them]. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). "The interpretation of unambiguous contract is a question of law." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "Inasmuch as the construction of the subject contract [or contracts] can be determined by consideration of the plain and unambiguous language of the contract [or contracts], it becomes a question of law to be resolved by the court and is thus no bar to the grant of summary judgment." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 474, 570 S.E.2d 197, 205 (Ct. App. 2002) ("*Tommy L. Griffin II*"); *see also* Rule 56, SCRCP. "Similarly, whether a contract is ambiguous is a question of law." *Miles*, 393 S.C. at 117, 711 S.E.2d at 883.

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-5, 677 S.E.2d 32, 36 (Ct. App. 2009).

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RELEVANT PROCEDURAL HISTORY

Plaintiff filed its initial Complaint on April 26, 2018; however, it nearly immediately moved with TSC to stay the case, to allow Plaintiff to pursue a claim against SCDOT and/or Horry County, via the claim procedure set forth in the Specifications.[2] Pursuant to joint motions, the Court entered its December 4, 2018, Order staying this case for one year, and then entered its November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so TSC then filed its Answer to Plaintiff's Amended Complaint. The parties engaged in limited written discovery, including an exchange of Interrogatories and Requests for Production, and a production of files. On November 19, 2020, TSC filed a Motion to Stay Proceedings Pending Final Determination of Construction Contract, wherein TSC sought a stay of this case until SCDOT, Horry County, and Plaintiff resolved claims pending among them, determining what amount Plaintiff was owed under its Construction Contract for the Project. On December 16, 2020, Plaintiff filed an Objection to TSC's Motion to Stay, and on March 5, 2021, Plaintiff filed a Brief in Opposition to TSC's Motion to Stay, in which Plaintiff stated "imposition of another stay in this long-delayed action would unnecessarily prejudice [Plaintiff]'s interest in the expedient resolution of its claim." (Plaintiff's Brief in Opposition to Motion to Stay, p. 1.) Plaintiff included an entire section in that brief entitled "The Instant Action is Ripe." (Brief in Opposition to Motion to Stay, p. 6.) In that same brief, Plaintiff argued "no grounds exist for issuance of a Protective Order to shield [TSC] from needed discovery." (Brief in Opposition to Motion to Stay, p. 8.) The undersigned conducted a hearing on the Motion on March 17, 2020. Based in part on the arguments of Plaintiff, the undersigned issued an Order dated April 14, 2021,

[2] The claims procedure is set forth in Exhibit C to TSC's Brief in Support of TSC's Motion for Summary Judgment.

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which denied TSC's requested stay and which compelled TSC to respond to discovery. (Order dated April 14, 2021.)

The Parties agree that they have exchanged hundreds of thousands of documents in discovery to-date. On October 11, 2021, the Court struck the case from the active docket, pursuant to Rule 40(j), SCRCP. It was restored to the active docket on September 27, 2022.

TSC filed this Motion for Summary Judgment, along with its supporting brief, on April 4, 2023. The Clerk issued a notice of hearing to all parties on July 7, 2023, and the Court conducted its hearing on August 7, 2023. No party filed a motion seeking continuance of the hearing, based on the need for further discovery.

FINDINGS OF RELEVANT FACT

Because this is Motion for Summary Judgment, the Court applies the Rule 56 standard in making findings of fact – it views all facts in the light most favorable to Plaintiff, and it will draw all reasonable inferences in favor of Plaintiff.

This case arises out of the construction of the Carolina Bays Parkway in Horry County, South Carolina (the "Project"). The Court takes judicial notice that the Project, as a highway in a highly-traveled area, was required to be safe for public use and to perform without failure. On June 20, 2007, Horry County 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"). 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." (IGA, p. 10, § 5.1.) The IGA serves as a contract between Horry

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County, the Owner, and SCDOT, for SCDOT to provide oversight of design and construction. The intent of those parties is clear from the document; therefore, there is no need to consider outside evidence to interpret this unambiguous agreement. 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." (IGA, p. 14, § 5.7.) Accordingly, based on the applicable standard of review, the Court finds that Horry County intended for SCDOT to provide oversight of design and construction for the Project.

On December 15, 2011, Horry County contracted TranSystems Corporation ("TSC") (in the "TSC Contract") to provide Construction, Engineering and Inspection Services ("CEIT Services") for the Project. TSC was not the engineer of record, and TSC's CEIT Services were supervised by the Resident Construction Engineer ("RCE") provided by SCDOT. SCDOT's RCE had final decision-making authority over TSC's CEIT Services.[3] (Standard Specifications, § 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." (Standard Specifications, § 105.3(1).) Final review and approval of conformity of Plaintiff's Project construction work was performed by the SCDOT RCE, and the SCDOT RCE made the final determination as to whether SCDOT would accept any non-conforming construction. (Standard Specifications, §105.3(2-3).) Further, it is undisputed that SCDOT

[3] Although the TSC Contract references design services, TSC never provided any design services for the Project. (*See* Affidavit of Peter Strub, P.E., filed with TSC's Brief in Support as Exhibit F.) Plaintiff failed to introduce any evidence creating a genuine issue of material fact as to whether demonstrating that TSC provided any design services.

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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.

On November 7, 2013, Horry County contracted with Plaintiff to serve as General Contractor for the Project (the "Construction Contract"). Plaintiff performed its services pursuant to the Construction Contract, which stated that the Project was governed by SCDOT's 2007 Standard Specifications for Highway Construction (the "Standard Specifications"). The Construction Contract provides a specified claims procedure, whereby Plaintiff could pursue compensation for changed contractual requirements, weather-related delays, or other increased costs which were not the fault of Plaintiff. (TSC Brief in Support, Exhibit A, p. FIC000013908.)

In its Brief in Opposition, Plaintiff argues that there was an issue of fact as to whether Marty Long of TSC was the SCDOT RCE empowered to make binding decisions; however, the Court finds that Plaintiff's arguments and evidence fail to establish a genuine issue of material fact in this regard. Specifically, SCDOT's Standard Specifications identify the "RCE" as a SCDOT official, known as "Resident Construction Engineer." (Standard Specifications, § 101.2.) Further, the Affidavit of Louis Hutcherson, Plaintiff's former Project Engineer, offered by Plaintiff in an effort to create a genuine issue of material fact, does not expressly or implicitly state that he believed Long was the SCDOT RCE or that Long had the authority of the SCDOT RCE, it states that Long "held himself out as South Carolina Department of Transportation's ("SCDOT") Resident Construction Engineer ("RCE") on the Project." (Hutcherson Affidavit, ¶ 3.)[4] This affidavit is as important for what it does not say as for what it does say, because Hutcherson does not testify that he thought that Long was the SCDOT RCE or that he had the authority of the

[4] The Court notes that, although the Hutcherson Affidavit was filed with the Court on July 28, 2023, it was executed by Mr. Hutcherson on June 28, 2023, providing Plaintiff with five weeks to provide a more definitive statement or clarify any vagaries in his testimony.

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SCDOT RCE. It is not a reasonable inference to conclude that Hutcherson believed that Long was the SCDOT RCE, because Hutcherson had the ability to offer that testimony if that were his belief. Further, any potential inferences from the Affidavit that Long was the SCDOT RCE are contradicted by documents produced by Plaintiff in this case, and which were in Plaintiff's possession during construction, wherein Hutcherson received emails in which Travis M. Patrick, P.E., directly identified himself by signature as "Resident Construction Engineer, District 5 Special Projects, South Carolina Department of Transportation." (Exhibit 2 to TSC Reply Brief.) On November 2, 2015, Patrick wrote to Hutcherson in his capacity as SCDOT RCE, and Hutcherson responded directly. (Exhibit 3 to TSC Reply Brief.) Stated simply, the Hutcherson Affidavit is not specific enough to create a genuine issue of material fact, and its vagueness is further repudiated by Hutcherson's own correspondence, which is in the record for this Motion. If Hutcherson believed Long was RCE for SCDOT, he could and should have expressly said so in his affidavit. He did not, and it is no reasonable inference to conclude he meant something he did not say when he crafted his own affidavit. Specifically, the Hutcherson Affidavit is clear in what it does not say, and it fails to establish a genuine issue of material fact that creates any ambiguity in the Highway Project Contracts which control the rights, authorities and duties of the respective parties to those contracts and their respective, relevant performances under those contracts.

The Construction Contract required Plaintiff to "[g]ive the work the constant attention necessary to facilitate the progress thereof, and cooperate with the RCE, the RCE's authorized representatives and inspectors [to include firm providing CEIT Services], and other Contractors in every way possible." (Standard Specifications, § 105.5(2).) Based on Plaintiff's Complaint, Plaintiff contends that it suffered damage, in part, because TSC imposed too strict a standard of review for repair procedures and installation by Plaintiff, and because TSC allegedly took too

much time to review some submittals. Both the TSC Contract and the Project's Specifications make it clear that SCDOT's RCE had the final decision-making authority for all installation and repair procedures and for approval of submittals. The Specifications also provide a designated claims procedure by which Plaintiff can claim compensation from the Owner, Horry County, for delays or scope changes attributable to Horry County. (Amended Complaint, ¶¶ 23, 30.) In its Answers to TSC's Interrogatories, Plaintiff identified multiple areas where it contends that TSC engaged in "overzealous," "unreasonable," or too-rigorous inspections of Plaintiff's work. (*See* Plaintiff's Answers to TSC's Interrogatory 9, 10, 11.) It is also clear that TSC is an agent of Horry County; therefore, Horry County would face contractual exposure for contract changes caused by TSC. Additionally, the TSC Contract required TSC to indemnify and hold harmless Horry County and SCDOT "from claims and liability due to negligent acts of [TSC], its subcontractors, agents or employees in connection with the prosecution and completion of the work covered by [the TSC Contract]." (TSC Contract, Paragraph M.)

The three contracts at issue – the IGA, the TSC Contract, and the Construction Contract – contain no ambiguity or any evidence that any of the contracted parties thereto intended for Plaintiff to be a third-party beneficiary of the TSC Contract or of the IGA. These agreements clearly defined the roles of Plaintiff, Horry County, SCDOT, and TSC, and the agreements explicitly described the rights and obligations of each.

CONCLUSIONS OF LAW

This case is ripe for summary judgment because the unambiguous contracts and the lack of any genuine issue of fact as to whether TSC owed Plaintiff duties under negligence theory or in contract; therefore, Plaintiff has no legal basis for its claim for negligence or its claim as the purported third-party beneficiary of Horry County's Contract with TSC.

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1. The Existence of a Special Relationship, Giving Rise to a Legal Duty, or Lack Thereof, Is An Issue of Law for Determination by the Court.

"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). Even if the case proceeded past the summary judgment stage, this Court would have to determine whether TSC owed any duty to Plaintiff, as a matter of law. As one of the State's most experienced Circuit Judges noted while serving as an Acting Justice for our Supreme Court, "[t]he 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 ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 135-6, 638 S.E.2d 650, 656 (2006) (Cole, Acting Justice, for the Court). Accordingly, it is entirely appropriate, and, in fact, necessary, for the Court to determine whether TSC owed any duty to Plaintiff in negligence, as a matter of law.

2. TSC's Motion Is Ripe for Consideration.

Before the hearing, Plaintiff did not file a motion to continue the hearing on TSC's Motion for Summary Judgment, or a motion seeking specific discovery prior to the Court's ruling on TSC's Motion for Summary Judgment.

In motions practice two years prior to TSC's filing its Motion for Summary Judgment, Plaintiff argued that it was necessary and proper for discovery to proceed in this case, and Plaintiff filed motions compelling TSC to engage in discovery. Even without considering the two years the case was stayed, Plaintiff had two and a half years to conduct discovery on the issue of duty, prior to the Court's hearing of the Motion. In *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 164-5 (2012), our Supreme Court considered the propriety of a defendant's motion to enlarge time for discovery to challenge summary judgment, which is a case where the party

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opposing summary judgment filed a motion, unlike the present case. The Supreme Court found that the trial judge did not err by denying the motion, noting the defendant filed the motion after the discovery deadline, and that the defendant failed to file affidavits to support his request for discovery extension, pursuant to Rule 56(f), SCRCP.

In a concurring opinion for the Court of Appeals, now-Justice Few noted:

> Rule 56(f) of the South Carolina Rules of Civil Procedure provides 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. Pursuant to Rule 56(f), the non-moving party or counsel may submit an affidavit stating the reasons "he cannot … present by affidavit facts essential to justify his opposition" to the motion. 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.

Matter of Estate of Smith, 419 S.C. 111, 120-1, 796 S.E.2d 158, 163 (Ct. App. 2016) (Few, A.J., concurring).

In this case, Plaintiff filed no affidavits pursuant to Rule 56(f), SCRCP, prior to or at the hearing on the Motion for Summary Judgment. Further, during the four-month pendency of TSC's Motion for Summary Judgment, there is no evidence that Plaintiff noticed any depositions or served any supplemental discovery, on issues for which it allegedly needed information, despite having received TSC's Brief in Support at the time TSC filed its Motion for Summary Judgment. Finally, in the month between notice of the hearing on TSC's Motion for Summary Judgment and the actual hearing, Plaintiff filed no affidavits pursuant to Rule 26(f), SCRCP. Accordingly, and as recommended by the concurring opinion in *Estate of Smith*, the Court finds no legal basis to delay the hearing of and ruling on TSC's Motion, in a case that has been pending for five years. The Motion is ripe for determination as a matter of law.

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3. Plaintiff's First Cause of Action, Alleging Negligence, Fails Because TSC Owed No Duty of Care to Plaintiff.

Plaintiff's claims are solely economic losses; therefore, this Court must evaluate the potential application of the economic loss rule to limit Plaintiff's claims based on negligence theory. As Judge Clifton Newman recognized in the *McCarthy* case, 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, 2013 WL 9921457 at *3 (S.C. Ct. Common Pleas, 2013) (citing *McCullough v. Goodrich & Pennington Mort. Fund. Inc.*, 373 S.C. 43, 47-8, 644 S.E.2d 43, 46 (2007) and *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003)).

In South Carolina, courts evaluate negligence claims under the economic loss rule by evaluating "whether or not the alleged tortfeasor acted in a way that violated a legal duty aside from his [potential] contractual duties." *Colleton Prep. Acad., Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 189, 666 S.E.2d 247, 251 (2008). "Tort law . . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Sapp v. Ford Motor Co*., 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). Our Supreme Court has noted that South Carolina's courts "are cautious in permitting negligence actions where there is neither personal injury nor property damage." *Id.* at 149, 687 S.E.2d at 50.

Plaintiff has not and cannot identify any statute, contract, status, or property interest which creates a negligence duty owed by TSC to Plaintiff; so the remaining question is whether there is a special circumstance or relationship which creates such a negligence duty. There is none. Although Plaintiff argued that there is a genuine issue of material and relevant fact as to whether Marty Long was RCE for SCDOT, the Court finds as a matter of law that there is no genuine issue of material fact as to that argument, and that Long was not RCE for SCDOT, as defined in

SCDOT's Standard Specifications, which are incorporated into Plaintiff's contract with Horry County.

"Whether a defendant owes a plaintiff a duty of care is a matter of law for [a court] to determine." *McCarthy*, *supra*, at *3 (citing *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011)). First, as is clear from review of the plain language of the three contracts at issue – the IGA, the TSC Contract, and the Construction Contract (collectively the "Project Contracts") – TSC assumed no duties to Plaintiff under any contract or by any property status. The remaining question is whether there is any special relationship between TSC and Plaintiff giving rise to any TSC negligence duty to Plaintiff.

a. There Is No Special Relationship Giving Rise to Any Negligence Duty.

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. In assessing when to recognize negligence duties for purely economic losses, Idaho's Supreme Court has held that "[u]nless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (Idaho 2005), *abrogated on other grounds by BrunoBuilt, Inc. v. Briggs Eng'g, Inc.*, 2023 WL 2375766 (Idaho 2023). Like South Carolina does, Idaho recognizes an exception to this rule where a "special relationship" exists between the parties. *Id.* at 301, 108 P.3d at 1001; *see, e.g.*, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995) ("*Tommy L. Griffin I*") (recognizing special relationship exception to economic loss rule). South Carolina's courts have recognized that "whether such a [special-relationship-based] duty exists will depend on the facts and circumstances of each case." *Id.* In

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this case, there is no need for further inquiry into facts or circumstances, because the unambiguous conditions are set forth in the plain, unambiguous Project Contracts.

Idaho's Supreme Court provides this guidance:

> There are only two situations in which this Court has found the special relationship exception applies. One situation is where a professional or quasi-professional performs personal services. *McAlvain v. General Ins. Co.*, 97 Idaho 777, 780. 554 P.2d 955, 958 (1976). In *McAlvain*, an insured expressly requested his insurance agent provide complete insurance coverage on the insured's business inventory. The insurance agent knew or should have known the amount of insurance that was needed to completely cover the value of the inventory. A fire destroyed the inventory and the insurance coverage was insufficient to cover the loss.
>
> . . .
>
> The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function. *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995) (wherein group was the only entity in Idaho authorized to certify seed potatoes and was held liable for erroneous certification).

Blahd, 141 Idaho at 301-2, 108 P.3d at 1001-02. Although Idaho's courts have recognized that there may be unique circumstances which require a different allocation of risk, Idaho has never applied this exception in any circumstance. *Id.* at 302, 108 P.3d at 1002. The Idaho court specifically noted that it refused to apply the unique circumstance exception to residential construction, because it was an everyday occurrence. *Id.* For the same reason, highway construction, which is a routine, and hopefully soon even-more-routine occurrence in South Carolina, does not provide a basis for a special relationship exception.

Under the Idaho standard, there is no basis for negligence liability for TSC to Plaintiff for economic losses. TSC provided no personal services to Plaintiff, as clearly demonstrated by the Project Contracts; rather, TSC provided services to only *Horry County* and under SCDOT's

ultimate supervision. Additionally, TSC made no representations of having unique qualifications such that it made representations to the public at large, and there is no evidence that TSC engaged in any unique work. The Project Contracts clearly give all decision-making authority to SCDOT, and the Project Contracts demonstrate that SCDOT and TSC actions were to protect the interests of Horry County and its citizens.

Like Idaho's courts, Vermont's courts have considered what facts can create a special relationship sufficient to justify an exception to the economic loss rule. As do South Carolina courts, Vermont's courts hold that "[t]he economic loss rule 'prohibits recovery in tort for purely economic losses.' " *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.*, 192 Vt. 322, 327, 59 A.3d 752, 755 (2012). Vermont's Supreme Court noted that privity is not required for application of the economic loss rule, and that special relationship claims require "a special relationship, which creates a duty of care independent of contract obligations. The key is not whether one is licensed in a particular field; rather, the determining factor is the type of relationship created between the parties." *Id.* at 328-9, 59 A.3d at 756-7. In evaluating whether there is a special relationship based on professional status, the question becomes whether the defendant offered a specialized professional service and whether the plaintiff relied on (or reasonably could rely on) the defendant to provide it with a professional service. *EBWS, LLC v. Britly Corp.*, 181 Vt. 513, 525, 928 A.2d 497, 508 (2007).

Under the Vermont standard, Plaintiff could not rely on TSC to provide professional services to it, or for its benefit, because TSC was ethically prohibited from providing services to Plaintiff. Horry County hired TSC as a third-party CEIT services provider; so its exact duties were to provide critical, *independent* review for TSC's client, Horry County, of the work performed by Plaintiff under the Construction Contract. As supported by both the Idaho and Vermont standards,

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the Court finds that TSC did not have any special relationship with Plaintiff, sufficient to create negligence duties owed by TSC to Plaintiff.

b. Recognition of a Negligence Duty Would Create an Impermissible Conflict of Interest.

South Carolina law also requires this Court to refuse to recognize any duty in negligence owed by TSC to Plaintiff, because doing so would create an improper and impermissible conflict of interest in TSC's provision of CEIT Services to Horry County for the Project. While professional engineers can have certain types of duties imposed on them under law, those duties are and must be limited to ones that comply with the Rules of Professional Conduct for Engineers. S.C. Code Ann. Regs. § 49-300.

Under South Carolina law, other than as required to protect public health and safety, a professional engineer may limit the scope of his responsibility by contract. *C.f. Tommy L. Griffin II*, 351 S.C. 459, 474, 570 S.E.2d 197, 204-5 (finding that unambiguous contract determined JJG's scope of duty regarding water line testing requirements). The General Assembly has authorized the S.C. Board of Engineers and Land Surveyors (the "Board") to promulgate regulations defining licensure requirements for engineers. S.C. Code Ann. § 40-22-60. The Board adopted the Rules of Professional Conduct for Engineers, "[i]n order to safeguard the life, health, property and welfare of the public and to establish a high standard of integrity, skills, and practice in the profession of engineering . . . ," which are "binding upon every person holding a certificate of registration as a Professional Engineer." S.C. Code of Regs. § 49-300. "The Rules of Professional Conduct delineate specific obligations engineers . . . must meet," and engineers are "deemed to be familiar with [the Rules'] several provisions and to understand them." S.C. Code of Regs § 49-300(D). S.C. Code Ann. Regs. § 49-301(A) provides that the primary obligation of engineer is to

"protect the safety, health, property and welfare of the public" and that engineers "shall conduct their practice to fulfill this obligation."

The Board has clearly stated that "[t]he Engineer shall avoid conflicts of interest;" however, the duty Plaintiff seeks to impose on TSC creates a conflict of interest. S.C. Code of Regs § 49-304. Conflicts of interest are not a situation where engineers must make a close ethical call, and this Court must refuse to recognize a duty that would impose ethical conflicts of interests for engineers, by pitting engineers' duties to clients and the public against purported implied duties to non-clients whose work the engineers review on behalf of clients. The Project Contracts make it clear that TSC's role is to inspect the work of Plaintiff; therefore, Plaintiff and TSC are not in aligned interest – TSC's role is to test, evaluate and report to SCDOT Plaintiff's work to ensure it meets *Horry County's* construction requirements as determined by SCDOT. Further, the TSC Contract makes it clear that TSC must indemnify and hold harmless Horry County and SCDOT, if TSC or its employees, subcontractors or agents act in a manner to create liability for Horry County or SCDOT to Plaintiff. This language in the TSC Contract clearly demonstrates that Horry County did not intend for TSC to assume duties that Horry County and/or SCDOT owed under the Construction Contract. Rather, Horry County and SCDOT merely required TSC to indemnify them if TSC's actions, as agent for Horry County, created liabilities for Horry County or SCDOT to Plaintiff. To recognize duties owed by TSC to Plaintiff in this circumstance would create an impermissible conflict of interest in TSC's competing duties to Horry County, its client, and Plaintiff. The parties to the Highway Construction Contracts agreed on a procedure to allocate risk and duty, and this Court cannot and will not modify that allocation by recognizing non-existent negligence duties.

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In this case, Plaintiff has recourse, through the Construction Contract and Standard Specifications, for alleged unfair interpretation or overzealous enforcement of its obligations under the Construction Contract, and for any other claims Plaintiff has related to work performed by TSC in its CEIT services; but that recourse is against Horry County.[5] To allow recourse against TSC would create an impermissible conflict of interest in TSC's duties. Accordingly, for this additional reason, this Court must find that TSC had no special relationship with Plaintiff which would support a duty of TSC to Plaintiff in negligence. Under South Carolina law, this Court also must refuse to recognize a duty of an engineer to avoid doing "too good" of a job for its client, Horry County, and the public, because such a requirement would clearly conflict with all engineers' duties to avoid a conflict of interest and to safeguard the public. Specifically, by the Rules of Professional Conduct for their profession, engineers are barred from accepting compensation, financial or otherwise, from more than one party for services for the same project, or for services pertaining to the same project, unless fully disclosed to all parties. S.C. Code of Regs. § 49-304(B). The logic for this rule is clear – an engineer, much like a lawyer, cannot be beholden to two principals. For the same reason, an engineer cannot simultaneously owe a duty to a client of utmost good faith and diligence in performing inspections, while simultaneously owing some duty imposed by law to not be "too diligent" or "too zealous" in performing inspections.

[5] As noted in TSC's Brief in Support of TSC's Motion for Summary Judgment, on November 1, 2022, Plaintiff filed suit against Horry County and SCDOT alleging damages relating to the Project. Additionally, SCDOT's Supplemental Specifications set forth a specific claim procedure for Plaintiff to follow in asserting claims for additional compensation, with very specific requirements for action. (Exhibit C to TSC's Brief in Support of TSC's Motion for Summary Judgment.) The Court takes judicial notice that Plaintiff dismissed its claims against Horry County and SCDOT, without prejudice, on June 22, 2023, through a filing with the Horry County Clerk of Court.

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c. In Addition to Persuasive Authority from Idaho and Vermont, and Ethical Requirements of South Carolina, Existing South Carolina Authority Requires This Court to Find No Negligence Duty Owed by TSC to Plaintiff.

As noted in *Tommy L. Griffin I*, this Vermont standard is also applicable in South Carolina. In *Tommy L. Griffin I* (and in similar cases), a contractor relied on design plans presented by the engineer, and it also relied on findings by the engineer regarding construction. Such circumstances do not exist in this case – TSC prepared no plans, and Plaintiff had no right to rely on TSC's observations and reporting, because TSC had no final decision-making authority. Plaintiff could rely only on the decisions of the *SCDOT* Resident Construction Engineer. Accordingly, there is no special relationship between Plaintiff and TSC sufficient to give rise to any duty owed by TSC to Plaintiff related to its CEIT services.

Although Plaintiff contends that *Tommy L. Griffin I* holds that an engineer owes duties to contractors outside of privity to not negligently perform inspections, that is not the duty Plaintiff seeks to impose on TSC. The claims in *Tommy L. Griffin I* were for *errors* in design and supervision of the Project, which were duties expressly assumed by Jordan, Jones & Goulding, Inc., in its contract for engineering services.[6] In that case, the Supreme Court recognized that "[w]hether a … [negligence] duty exists will depend on the facts and circumstances of each case." *Id.* at 55-56. There, the engineer had extremely broad duties set forth in the engineer's contract, but, here, TSC had narrow contractual duties and no final decision-making authority. In *Tommy L. Griffin I*, the defendant engineer under its contract for services had the right to halt construction

[6] The closest analog to JJG's role in *Tommy L. Griffin I* is the role played by SCDOT, not TSC. SCDOT, not TSC, was authorized 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." (IGA, p. 10, § 5.1.)

and the duty to approve pay applications submitted by the contractor, neither of which TSC had vis-à-vis this Project. In fact, the duties recognized by the Supreme Court in *Tommy L. Griffin I* arose from the contract for services of the engineer in that case, but here the TSC Contract does not have similar provisions. Accordingly, JJG's negligence duty was defined in its contract while no such terms exist in the TSC Contract in this case.

"Duty [of care] is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445, 451 (Md. 2017) (quoting W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts § 53, at 358 (5th ed. 1984)). "To determine whether a tort duty exists in a particular context, [a court must] examine: (1) the nature of the harm likely to result from a failure to exercise due care, and (2) the relationship that exists between the parties." *Id.* (internal quotations omitted). Here, the relationship between TSC and Plaintiff is defined entirely and limited by the Project Contracts. None of the Project Contracts impose any duty on TSC vis-à-vis Plaintiff. Duties run from Horry County to Plaintiff and potentially from SCDOT to Plaintiff, but not from TSC to Plaintiff. TSC acted as Horry County's consultant to SCDOT, which had final decision-making authority. Had Plaintiff wished to impose some negligence duty on TSC, it could have attempted to negotiate contract terms with Horry County that did so, or it could have refused to enter any contract which did not impose duties on TSC; however, Plaintiff did neither. In the *Balfour Beatty* case, *supra*, the Maryland Court of Appeals determined that "the complex web of contracts that typically undergirds a public construction project should govern [the determination of duty for negligence liability] because parties have a sufficient opportunity to protect themselves (and anticipate their liability) in negotiating these contracts." *Balfour Beatty*, 155 A.3d at 460.

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For this reason, Plaintiff's cause of action for negligence fails as a matter of law, and TSC is entitled to summary judgment on Plaintiff's negligence claim.

4. Plaintiff's Second Cause of Action for Breach of a Contract for a Third-Party Beneficiary Fails, Because There is No Evidence that Plaintiff Was an Intended Third-Party Beneficiary of 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

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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 TSC intended for Plaintiff to be a direct beneficiary of the TSC Contract, and TSC has produced affirmative evidence that Plaintiff was not and is not a third-party beneficiary of the TSC Contract. (*See* Strub Affidavit.) Further, as noted in the Court's Findings of Relevant Fact, the IGA was executed six years prior to the Construction Contract, and the TSC Contract was executed nearly two years prior to execution of the Construction Contract. Neither document recognizes duties owed to any General Contractor to be retained in the future. "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.

The TSC Contract sets forth TSC's duties thereunder – to evaluate and test Plaintiff's work and Plaintiff's compliance with the plans, specifications, Project schedule, and terms of the Construction Contract, and to report the findings of the tests to SCDOT, who was managing the Project for Horry County. TSC's work was solely for Horry County's benefit. Every TSC criticism of Plaintiff's work is potentially to Plaintiff's *detriment*, because Plaintiff may incur costs or delay in re-performing work. Accordingly, Plaintiff was not and never could be a third-party beneficiary of TSC's obligations under the TSC Contract. The Project's timeline also proves that Plaintiff was not a third-party beneficiary of the TSC Contract, because TSC executed the TSC Contract nearly two years before Plaintiff was even identified as the Contractor. (Construction

Contract, p. 1.) Accordingly, Plaintiff's claim for breach of contract for a third-party beneficiary fails as a matter of law. TSC's Motion for Summary Judgment as to Plaintiff's Second Cause of Action is granted.

5. **TSC's Motion for Summary Judgment as to Plaintiff's Third Cause of Action for Tortious Interference with Contract is Denied.**

The Court finds that there are genuine issues of material fact for a jury pertaining to Plaintiff's claim for tortious interference with contract; therefore, TSC's Motion is denied as to this cause of action.

6. **TSC's Motion for Summary Judgment as to Plaintiff's Fourth Cause of Action Asserting UTPA Violations by TSC is Denied.**

The Court finds that there are genuine issues of material fact for a jury pertaining to Plaintiff's claim for violations of the South Carolina Unfair Trade Practices Act; therefore, TSC's Motion is denied as to this cause of action.

CONCLUSION

South Carolina's State and local governments spend hundreds of millions of dollars each year creating and improving our highway system for the benefit and safety of our citizens and the State's visitors. Plaintiff is bound by its Construction Contract with Horry County and has rights thereunder regarding the performance of Horry County and its agents like TSC. Horry County has a duty to its citizens to construct highways safely and economically in conjunction with the SCDOT, and this is accomplished by defining the complex roles of all parties by law and contract, including without limitation project plans and specifications. Horry County retained TSC to perform CEIT services in conjunction with SCDOT's services and SCDOT's responsibility to require Plaintiff to fully, properly, and timely perform its Construction Contract duties for the benefit of Horry County and its citizens. While this can be described as cooperative effort of all Project parties, TSC was contractually and ethically obligated to Horry County to evaluate

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elements of Plaintiff's work and report to SCDOT, including criticisms of Plaintiff's work. TSC did not design the Project or have final decision-making authority. In its limited CEIT role, TSC provided information to Horry County and SCDOT so they could decide whether Horry County would accept and pay for Plaintiff's work under the Construction Contract. TSC was prohibited from serving two principals on this Project, which could influence the performance of its duties to Horry County and endanger the public.

In these circumstances, TSC cannot have a "special relationship" with and for the benefit of Plaintiff; TSC was not and could not have been limited in its duty to Horry County to critique Plaintiff's performance of its duties under Construction Contract. Accordingly, TSC has no duty to Plaintiff in negligence; so the Court must grant TSC summary judgment on Plaintiff's negligence cause of action.

For the same reasons, and because the plain, unambiguous language of the Project Contracts shows no intention of either TSC or Horry County to make Plaintiff a third-party beneficiary of the TSC Contract, Plaintiff's third-party beneficiary claim fails as a matter of law.

The Court finds there are genuine issues of material fact for a jury pertaining to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

Accordingly, TSC's Motion for Summary Judgment is GRANTED as to Plaintiff's causes of action for negligence and breach of contract for the benefit of a third-party beneficiary. TSC's Motion for Summary Judgment is DENIED as to Plaintiff's causes of action for tortious interference with contract and violation of the South Carolina Unfair Trade Practices Act.

IT IS SO ORDERED.

[JUDICIAL SIGNATURE TO FOLLOW]

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Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2022CP2606116

Type: Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA)) **COUNTY OF HORRY**)	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** Civil Action Number 2022-CP-26-06116
Flatiron Constructors, Inc., Plaintiff, vs. TranSystems Corporation, Defendant.	**Order Denying Plaintiff's Motion to Reconsider**

This matter is before the Court upon Plaintiff's Motion for Reconsideration pursuant to Rule 59(e), SCRCP. The Motion asks this Court to alter, amend, or reconsider its order granting in part Defendant's Motion for Summary Judgment.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004). A party may wish to file such a motion when he believes the court misunderstood, failed to fully consider, or failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. *Elam,* 361 S.C. at 24, 602 S.E.2d at 779.

After reviewing the applicable law and considering the arguments raised in the Motion and Defendant's Memo in Opposition, 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.

Accordingly, the Court concludes that altering, amending, or reconsidering its prior Order is unwarranted, and the issues raised in the Motion do not change the Court's reasoning or conclusions. As such, Plaintiff's Rule 59(e) Motion is denied.

IT IS SO ORDERED.

_____
The Honorable Kristi F. Curtis

December 27, 2023
Conway, South Carolina.

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Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2022CP2606116

Type: Order/Amend

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-_____**
Flatiron Constructors, Inc.	)	**SUMMONS**
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Transystems Corporation	)	
	)	
Defendant.	)	

TO: ABOVE-NAMED DEFENDANT

YOU ARE HEREBY summoned and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices, 55 Beattie Place, Suite 1050, Greenville, South Carolina 29601 within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully Submitted,

s/L. Franklin Elmore
L. Franklin Elmore (SC Bar No. 1889)
Elmore Goldsmith, P.A.
55 Beattie Place, Suite 1050 (29601)
Post Office Box 1887
Greenville, South Carolina 29602
Telephone: (864) 255-9500
Facsimile: (864) 255-9505
felmore@elmoregoldsmith.com
Counsel for Flatiron Constructors, Inc.

April 26, 2018
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-_____**
Flatiron Constructors, Inc.	)	
	)	**COMPLAINT**
Plaintiff,	)	**(Non-Jury Trial Demanded)**
	)	
v.	)	
	)	
Transystems Corporation	)	
	)	
Defendant.	)	

COMES NOW the Plaintiff, Flatiron Constructors, Inc. ("Flatiron"), and would respectfully allege and show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Flatiron is a corporation organized under the laws of Delaware, is authorized to do business in the State of South Carolina and is engaged in the business of construction in the State of South Carolina.

2. Transystems Corporation ("Transystems") is a corporation organized under the laws of Missouri, is authorized to do business in the State of South Carolina and is engaged in the business of engineering and project management services, including inspection services, in the State of South Carolina.

3. This dispute involves the construction of the extension of South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, such construction being located in the County of Horry, South Carolina.

4. This Court has jurisdiction over the parties and the subject matter of this action, and venue is proper in the County of Horry, South Carolina.

ELECTRONICALLY FILED - 2018 Apr 26 9:20 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

ELECTRONICALLY FILED - 2018 Apr 26 9:20 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

FACTUAL BACKGROUND

5. On or about December 15, 2011, Horry County entered into contract with Transystems (the "CA Contract"), to provide construction engineering and inspection services for the Project.

6. Pursuant to the CA Contract, Transystems was responsible for processing Project submittals provided by Flatiron.

7. Pursuant to the CA Contract, Transystems was responsible for performing inspections and quality acceptance testing for the Project in accordance with the requirements set forth in the South Carolina Department of Transportation ("SCDOT") Construction Manual, 2004 edition, and the SCDOT Standard Specifications, 2007 edition ("Specification").

8. On or about December 6, 2013, Flatiron entered into contract with Horry County, South Carolina (the "Construction Contract"), to construct an extension to South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, project files numbers 26.036775A, 26.036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4 and 26.036775A.5 (hereinafter the "Project").

9. Flatiron began construction on the Project in March 2014.

10. At all times relevant to this action, Transystems was aware of the Project schedule requirements and the CA Contract required Transystems to ensure that the work of the contractor was progressing in accordance with the proposed Project schedule.

11. At all times relevant to this action, Transystems was aware that Flatiron required timely review and approval of Project submittals so as not to impede or delay Flatiron's work.

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12. Transystems delayed the review and approval of Flatiron submittals and added submittal review procedures not contemplated by the Specification, thereby causing delays to Flatiron's work.

13. On or about March 30, 2017, Transystems notified Flatiron that certain metal bearing plates for a bridge bents were not approved for installation due to small areas of rust within the bearing plate bolt holes resulting from minimal defects on the bearing plate surfaces.

14. On March 30, 2017, the same day, Flatiron submitted an industry standard repair procedure to Transystems for review.

15. The bearing plates affected a steel erection schedule activity that was scheduled to start on April 3, 2017.

16. Transystems rejected Flatiron's proposed repair procedure on April 5, 2017 and subsequently failed to timely approve additional proposed repair procedures thereby delaying the Project.

17. Transystems finally approved a repair protocol for the bearing plate rust issue but the approved protocol was not commercially available.

18. Upon failure of the approved repair protocol, Transystems ultimately agreed to Flatiron's original proposed repair protocol for the bearing plate rust issues after several months delay to the associated schedule activities and the Project.

19. The Project plans contained certain details showing installation of anchor bolts in the concrete caps for the bridge bents, such details making it difficult to insure proper positioning of the anchor bolts during the concrete pour.

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20. Flatiron submitted alternate industry standard means and methods for installation of the anchor bolts to Transystems for approval but Transystems rejected Flatiron's proposed means and methods.

21. During the concrete pour, some anchor bolts became slightly misaligned and Flatiron undertook industry standard practices to correct the anchor bolt alignment.

22. Transystems directed Flatiron to stop work on the corrective action and required Flatiron to submit numerous repair procedures for Transystems' approval.

23. Transystems ultimately approved a repair procedure which utilized methodology substantially similar to the means and methods that Flatiron proposed to use for the original installation of the anchor bolts.

24. Transystems' failure to approve Flatiron's original means and methods for installation of the anchor bolts and subsequent approval of repair procedures that were substantially similar to the means and methods originally proposed by Flatiron delayed the progress of the Project.

25. Throughout the construction of the Project to date, Transystems has substantially impeded Flatiron's progress of the Project by instituting unreasonable inspection protocols not contemplated by the Specification, directing changes to means and methods, and directing changes to plans and specifications.

26. As a result of Transystems' actions, the completion of the Project has been delayed thereby causing the Project to be completed beyond the contractual completion time, thereby subjecting Flatiron to increased costs and expenses including, but not limited to extended field and home office overhead costs; extended labor and equipment costs; subcontractor costs and assessment of liquidated damages.

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FOR A FIRST CAUSE OF ACTION
(Negligence)

27. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

28. Transystems through its involvement in the construction administration and inspection of the Project owed a professional duty to Flatiron to not negligently supervise or negligently design the project, such duty arising separate and distinct from any contractual duties between Transystems and Horry County.

29. The progress of the Project has been delayed as a direct result of the negligence and/or gross negligence of Transystems in one or more of the following particulars in addition to those referenced above:

a. In failing to properly perform contract administration duties;

b. In failing to properly inspect and observe the construction in accordance with the standards and procedures set forth in the SCDOT Construction Manual, 2004 edition, and the Specification;

c. In unreasonably refusing to allow or approve the use of industry standard means and methods;

d. In failing to review submittals in timely manner so as not to impede the progress of the construction activities and delay critical path schedule activities;

e. In instituting additional procedures and inspection protocols not contemplated by the Specification;

f. In unreasonably refusing to accept Flatiron's Notice of Claims;

g. In failing to provide engineering services in a manner consistent with locally accepted standards for professional skill and care; and

h. In such other manners as may be discovered prior to trial.

30. As a result of the negligent, grossly negligent acts and omissions of Transystems, Flatiron has suffered, and will continue to suffer, damages and losses as heretofore alleged.

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31. Flatiron is entitled to judgment against Transystems Flatiron's actual, consequential, special, punitive and compensatory damages in an amount to be proven at trial.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(Third Party Beneficiary)

32. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

33. Transystems' failure to timely and properly perform the contract administration and inspection work for the Project constitutes a breach of its agreement with Horry County, for which Flatiron is an intended beneficiary.

34. As a direct and proximate result of the Transystems' breach, the Project has been delayed causing Flatiron to incur extended field and home office overhead costs; extended labor and equipment costs; and has caused the Project to be completed beyond the contractual completion time thereby subjecting Flatiron to the assessment of liquidated damages and increased costs and expenses.

35. Flatiron is entitled to recover from Transystems an amount to be proven at trial for Flatiron's extended field and home office overhead costs; extended labor and equipment costs; liquidated damages as may be assessed by the Owner; and to be indemnified for any loss or expense incurred as a result of delay caused by Transystems and its attorney fees and costs.

FOR A THIRD CAUSE OF ACTION
(Tortious Interference with Contract)

36. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

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37. Transystems' failure to perform it duties under the CA Contract in accordance with the procedures and standards set forth in the SCDOT Construction Manual, 2004 edition, and the Specification was without justification.

38. Transystems was aware of the existence of the Construction Contract between Flatiron and Horry County and Transystems' failure to timely perform it duties under the CA Contract was an intentional procurement of a breach of the Construction Contract.

39. As a direct and proximate result of the Transystems' tortious interference, the Project was delayed causing Flatiron to incur extended field and home office overhead costs; extended labor and equipment costs; and has caused the Project to be completed beyond the contractual completion time subjecting Flatiron to liquidated damages and increased costs and expenses.

40. Flatiron is entitled to recover from Transystems an amount to be proven at trial for Flatiron's extended field and home office overhead costs; extended labor and equipment costs; liquidated damages as may be assessed by the Owner; and its attorney fees and costs and punitive damages.

FOR A FOURTH CAUSE OF ACTION AGAINST
(South Carolina Unfair Trade Practices)

41. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

42. Transystems:

a. Failed to properly perform contract administration duties;

b. Failed to properly inspect and observe the construction in accordance with the standards and procedures set forth in the SCDOT Construction Manual, 2004 edition, and the Specification;

c. Unreasonably refused to allow or approve the use of industry standard means and methods;

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d. Failed to review submittals in timely manner so as not to impede the progress of the construction activities and delay critical path schedule activities;

e. Instituted additional procedures and inspection protocols not contemplated by the Specification;

f. Unreasonably refused to accept Flatiron's Notice of Claims; and

g. Failed to provide engineering services in a manner consistent with locally accepted standards for professional skill and care.

43. The above described actions of Transystems constitute unfair or deceptive acts or practices in the conduct of trade or commerce that has an adverse impact upon the public interest.

44. Transystems is still in business in the State of South Carolina such that its deceptive acts or practices are capable of repetition.

45. Upon information and belief, Transystems willfully or knowingly committed the acts.

46. Transystems' unfair and deceptive acts constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq*.

47. As a direct and proximate result, Flatiron has suffered, and will continue to suffer, damages and losses as heretofore alleged.

48. Flatiron is entitled to a judgment of treble their actual, consequential and special damages, prejudgment interest, post judgment interest, and attorney's fees and costs in an amount to be determined at trial.

WHEREFORE, Flatiron respectfully requests that this Court enter an Order:

(1) For damages on each of the theories pled herein above;

(2) For punitive damages in the amount to be determined by the Court;

(3) For prejudgment interest at the legal rate;

(4) For attorney's fees;

(5) For costs of Court; and

(6) For such other and further relief as this Court deems just and proper.

Respectfully Submitted,

s/L. Franklin Elmore
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April 26, 2018
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 Apr 26 9:20 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

ELECTRONICALLY FILED - 2018 May 10 10:27 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**AMENDED SUMMONS**
Plaintiff,	)	
	)	
v.	)	
	)	
Transystems Corporation	)	
	)	
Defendants.	)	

TO: ABOVE-NAMED DEFENDANT

YOU ARE HEREBY summoned and required to answer the Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices, 55 Beattie Place, Suite 1050, Greenville, South Carolina 29601 within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully Submitted,

s/L. Franklin Elmore
L. Franklin Elmore (SC Bar No. 1889)
Elmore Goldsmith, P.A.
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Counsel for Flatiron Constructors, Inc.

May 10, 2018
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 May 10 10:27 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**AMENDED COMPLAINT**
Plaintiff,	)	**(Non-Jury Trial Demanded)**
	)	
v.	)	
	)	
Transystems Corporation	)	
	)	
Defendants.	)	

COMES NOW the Plaintiff, Flatiron Constructors, Inc. ("Flatiron"), and would respectfully allege and show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Flatiron is a corporation organized under the laws of Delaware, is authorized to do business in the State of South Carolina and is engaged in the business of construction in the State of South Carolina.

2. Transystems Corporation ("Transystems") is a corporation organized under the laws of Missouri, is authorized to do business in the State of South Carolina and is engaged in the business of engineering and project management services, including inspection services, in the State of South Carolina.

3. This dispute involves the construction of the extension of South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, such construction being located in the County of Horry, South Carolina.

4. This Court has jurisdiction over the parties and the subject matter of this action, and venue is proper in the County of Horry, South Carolina.

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FACTUAL BACKGROUND

5. On or about December 15, 2011, Horry County entered into contract with Transystems (the "CA Contract"), to provide construction engineering and inspection services for the Project.

6. Pursuant to the CA Contract, Transystems was responsible for processing Project submittals provided by Flatiron.

7. Pursuant to the CA Contract, Transystems was responsible for performing inspections and quality acceptance testing for the Project in accordance with the requirements set forth in the South Carolina Department of Transportation ("SCDOT") Construction Manual, 2004 edition, and the SCDOT Standard Specifications, 2007 edition ("Specification").

8. On or about December 6, 2013, Flatiron entered into contract with Horry County, South Carolina (the "Construction Contract"), to construct an extension to South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, project files numbers 26.036775A, 26.036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4 and 26.036775A.5 (hereinafter the "Project").

9. Flatiron began construction on the Project in March 2014.

10. At all times relevant to this action, Transystems was aware of the Project schedule requirements and the CA Contract required Transystems to ensure that the work of the contractor was progressing in accordance with the proposed Project schedule.

11. At all times relevant to this action, Transystems was aware that Flatiron required timely review and approval of Project submittals so as not to impede or delay Flatiron's work.

12. Transystems delayed the review and approval of Flatiron submittals and added submittal review procedures not contemplated by the Specification, thereby causing delays to

Flatiron's work and resulting in additional costs, including, but not limited to extended use of the work trestle system.

13. On or about March 30, 2017, Transystems notified Flatiron that certain metal bearing plates for the bridge bents which had previously been inspected and accepted by Transystems were not approved for installation due to superficial flash rust on the bearing plate surfaces.

14. On March 30, 2017, the same day, Flatiron submitted an industry standard repair procedure to Transystems for review.

15. The bearing plates affected a steel erection schedule activity that was scheduled to start on April 3, 2017.

16. Transystems rejected Flatiron's proposed repair procedure on April 5, 2017 and subsequently failed to timely approve additional proposed repair procedures thereby delaying the Project.

17. After implementing the only repair procedure Transystems would approve, Flatiron had to grind an area of the same bearing plate required for installation. Transystems' repair procedure for this area was the repair procedure initially proposed by Flatiron before the issue became a delay to the project.

18. The Project plans contained certain details showing installation of anchor bolts in the bearing plates for the concrete caps for the bridge bents. The plan details failed to take into account the allowable fabrication tolerances of the anchor bolts and bearing plates which caused the anchor bolts to not fit into the bearing plate resulting in the improper positioning of the anchor bolts during the concrete pour.

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19. Flatiron submitted alternate industry standard means and methods for installation of the anchor bolts to Transystems for approval but Transystems rejected Flatiron's proposed means and methods.

20. During the concrete pour, some anchor bolts became slightly misaligned and Flatiron undertook industry standard practices to correct the anchor bolt alignment.

21. Transystems directed Flatiron to stop work on the corrective action and required Flatiron to submit numerous repair procedures for Transystems' approval.

22. Transystems ultimately approved a repair procedure which only utilized methodology radically different than the standard procedure for such items and at great expense to Flatiron and delay to the project.

23. Throughout the construction of the Project to date, Transystems has substantially impeded Flatiron's progress of the Project by instituting unreasonable inspection protocols not contemplated by the Specification, directing changes to means and methods, and directing changes to plans and specifications including, but not limited to the following:

a. Rather than taking a representative sample of reinforcing steel from the manufacturer's production batch, which is standard industry procedure, Transystems required Flatiron to remove samples from completed rebar cages thereby destroying the finished cage and requiring rework and associated costs;

b. Transystems unreasonably required Flatiron to pour extra linear feet of concrete on the drilled shafts in addition to performing the standard inspection of the concrete as it arrive from the concrete plant, causing Flatiron to undertake a manual and very labor-intensive process to remove the extra linear foot delay Flatiron's drill shaft production rate;

c. Transystems erroneously interpreted the minimum specification for concrete placement rate to apply to each column location. Transystems would only allow and required Flatiron to pour only one column at a time thereby unreasonably dictating Flatiron's means and methods and delaying Flatiron's concrete column production rate;

d. Requiring Flatiron to maintain wireless data transmission equipment to monitor mass concrete pours that was not required by the contract or specifications.

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Although it was not required, Flatiron had initially provided a wireless monitoring system as a convenience to Flatiron and the Project. When this voluntary wireless data transmission equipment temporarily malfunctioned, readings could still be obtained and observed by looking at the monitor which was all that ws required by the specifications. Transystems directed to Flatiron to not perform any additional mass concrete pours until a plan was in place to prevent the malfunction of the wireless equipment that ws not required, and to revise its Mass Concrete Placement Plan causing significant delay to subsequent concrete pours;

e. By instituting numerous and continuous rebar inspections above and beyond specification requirements and industry standards;

f. By mandating unreasonable standards for tolerances for girder alignment above and beyond the tolerances required by the specifications or allowed by industry standards; and

g. In such other and further manners as may be discovered prior to trial.

24. As a result of Transystems' actions, the completion of the Project has been delayed thereby causing the Project to be completed beyond the contractual completion time, thereby subjecting Flatiron to increased costs and expenses including, but not limited to extended field and home office overhead costs; extended labor and equipment costs; subcontractor costs and assessment of liquidated damages.

25. Flatiron's performance on the Project was impacted by other issues beyond Flatiron's control including, but not limited to, floods arising from the October 2015 tropical storm system and subsequent high-water levels that continued into the spring of 2016; additional work beyond the original scope of work; utility relocation work at the Enterprise Road portion of the Project.

26. Horry County has refused to approve payment for extra work and requests for extensions of time to which Flatiron is duly entitled.

27. Transystems also directed Flatiron to perform additional work which extended the the time for completion of the project. Transystems has not recommended that Flatiron be

compensated for the additional work it dFrected flatiron to perform or recommended that Flatiron be granted a time extension for the extra work it performed.

FOR A FIRST CAUSE OF ACTION AGAINST TRANSYSTEMS
(Negligence)

28. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

29. Transystems through its involvement in the construction administration and inspection of the Project owed a professional duty to Flatiron to not negligently supervise or negligently design the project, such duty arising separate and distinct from any contractual duties between Transystems and Horry County.

30. The progress of the Project has been delayed as a direct result of the negligence and/or gross negligence of Transystems in one or more of the following particulars in addition to those referenced above:

a. In failing to properly perform contract administration duties;

b. In failing to properly inspect and observe the construction in accordance with the standards and procedures set forth in the SCDOT Construction Manual, 2004 edition, and the Specification;

c. In unreasonably refusing to allow or approve the use of industry standard means and methods;

d. In failing to review submittals in timely manner so as not to impede the progress of the construction activities and delay critical path schedule activities;

e. In instituting additional procedures and inspection protocols not contemplated by the Specification;

f. In unreasonably refusing to accept Flatiron's Notice of Claims;

g. In failing to provide engineering services in a manner consistent with locally accepted standards for professional skill and care; and

h. In such other manners as may be discovered prior to trial.

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31. As a result of the negligent, grossly negligent acts and omissions of Transystems, Flatiron has suffered, and will continue to suffer, damages and losses as heretofore alleged.

32. Flatiron is entitled to judgment against Transystems Flatiron's actual, consequential, special, punitive and compensatory damages in an amount to be proven at trial.

FOR A SECOND CAUSE OF ACTION AGAINST TRANSYSTEMS
(Breach of Contract)
(Third Party Beneficiary)

33. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

34. Transystems' failure to timely and properly perform the contract administration and inspection work for the Project constitutes a breach of its agreement with Horry County, for which Flatiron is an intended beneficiary.

35. As a direct and proximate result of the Transystems' breach, the Project has been delayed causing Flatiron to incur extended field and home office overhead costs; extended labor and equipment costs; and has caused the Project to be completed beyond the contractual completion time thereby subjecting Flatiron to the assessment of liquidated damages and increased costs and expenses.

36. Flatiron is entitled to recover from Transystems an amount to be proven at trial for Flatiron's extended field and home office overhead costs; extended labor and equipment costs; liquidated damages as may be assessed by the Owner; and to be indemnified for any loss or expense incurred as a result of delay caused by Transystems and its attorney fees and costs.

FOR A THIRD CAUSE OF ACTION AGAINST TRANSYSTEMS
(Tortious Interference with Contract)

37. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

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38. Transystems' failure to perform it duties under the CA Contract in accordance with the procedures and standards set forth in the SCDOT Construction Manual, 2004 edition, and the Specification was without justification.

39. Transystems was aware of the existence of the Construction Contract between Flatiron and Horry County and Transystems' failure to timely perform it duties under the CA Contract was an intentional procurement of a breach of the Construction Contract.

40. As a direct and proximate result of the Transystems' tortious interference, the Project was delayed causing Flatiron to incur extended field and home office overhead costs; extended labor and equipment costs; and has caused the Project to be completed beyond the contractual completion time subjecting Flatiron to liquidated damages and increased costs and expenses.

40. Flatiron is entitled to recover from Transystems an amount to be proven at trial for Flatiron's extended field and home office overhead costs; extended labor and equipment costs; liquidated damages as may be assessed by the Owner; and its attorney fees and costs and punitive damages.

FOR A FOURTH CAUSE OF ACTION AGAINST TRANSYSTEMS
(South Carolina Unfair Trade Practices)

41. Each and every allegation set forth above is incorporated herein by reference as fully as if repeated verbatim.

42. Transystems:

a. Failed to properly perform contract administration duties;

b. Failed to properly inspect and observe the construction in accordance with the standards and procedures set forth in the SCDOT Construction Manual, 2004 edition, and the Specification;

c. Unreasonably refused to allow or approve the use of industry standard means and methods;

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d. Failed to review submittals in timely manner so as not to impede the progress of the construction activities and delay critical path schedule activities;

e. Instituted additional procedures and inspection protocols not contemplated by the Specification;

f. Unreasonably refused to accept Flatiron's Notice of Claims; and

g. Failed to provide engineering services in a manner consistent with locally accepted standards for professional skill and care.

43. The above described actions of Transystems constitute unfair or deceptive acts or practices in the conduct of trade or commerce that has an adverse impact upon the public interest.

44. Transystems is still in business in the State of South Carolina such that its deceptive acts or practices are capable of repetition.

45. Upon information and belief, Transystems willfully or knowingly committed the acts.

46. Transystems' unfair and deceptive acts constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq*.

47. As a direct and proximate result, Flatiron has suffered, and will continue to suffer, damages and losses as heretofore alleged.

48. Flatiron is entitled to a judgment of treble their actual, consequential and special damages, prejudgment interest, post judgment interest, and attorney's fees and costs in an amount to be determined at trial.

WHEREFORE, Flatiron respectfully requests that this Court enter an Order:

(1) For damages on each of the theories pled herein above;

(2) For punitive damages against Transystems in the amount to be determined by the Court;

(3) For prejudgment interest at the legal rate;

(4) For attorney's fees;

(5) For costs of Court; and

(6) For such other and further relief as this Court deems just and proper.

Respectfully Submitted,

s/L. Franklin Elmore

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Counsel for Flatiron Constructors, Inc.

May 10, 2018
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 May 10 10:27 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**JOINT MOTION TO STAY PROCEEDINGS PENDING AGENCY REVIEW**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	
	)	

Plaintiff Flatiron Constructors, Inc. ("Flatiron") and Defendant TranSystems Corporation ("TranSystems") jointly move the Court for an Order staying this case pending the South Carolina Department of Transportation's ("SCDOT") Agency Review.

This dispute involves the extension of South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707 ("Carolina Bays Parkway"). The owner is Horry County.

On or about December 15, 2011, Horry County entered into contract with TranSystems (the "CA Contract"), to provide construction engineering and inspection services for the Project.

On or about December 6, 2013, Flatiron entered into contract with Horry County, South Carolina (the "Construction Contract"), to construct an extension to South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, project files numbers 26.036775A, 26.036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4 and 26.036775A.5 (the "Carolina Bays Parkway Project").

The South Carolina Department of Transportation ("SCDOT") is administering the Carolina Bays Parkway Project for Horry County.

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SCDOT has requested that both parties stay this litigation pending SCDOT's agency evaluation and review of claims asserted.

This Motion is made in good faith and not for the purpose of delay.

WHEREFORE, Flatiron and TranSystems respectfully request that this Joint Motion to Stay Proceedings Pending Agency review be granted.

We jointly move this 7th day of September 2018.

s/L. Franklin Elmore
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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**CERTIFICATE OF SERVICE**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	
	)	

I hereby certify that I have this 7th day of September, 2018, served **Joint Motion to Stay Proceedings Pending Agency Review** and ***proposed* Order** via e-mail and by depositing copies thereof in envelopes bearing sufficient postage in the United States mail, at Greenville, South Carolina addressed to the following persons at the following address which is the last address known to me:

Michael B.T. Wilkes, Esquire
J. Alexander Joyner, Esquire
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Melanie Harper, CP
Certified Paralegal for L. Franklin Elmore

ELECTRONICALLY FILED - 2019 Nov 22 3:57 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**JOINT MOTION TO EXTEND STAY OF PROCEEDINGS PENDING AGENCY REVIEW**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Plaintiff Flatiron Constructors, Inc. ("Flatiron") and Defendant TranSystems Corporation ("TranSystems") jointly move the Court for an Order Extending the Stay in this case pending the South Carolina Department of Transportation's ("SCDOT") Agency Review. The grounds for this Motion are as follows:

1. There is currently a stay of this case pending the SCDOT's evaluation and review of Flatiron's claims against SCDOT, which claims are related to Flatiron's claims asserted in this civil action.

2. The stay is set to expire on December 4, 2019.

3. The SCDOT has not yet completed its agency evaluation and review of Flatiron's claims asserted for which the current stay is in place. Flatiron has made request for adjustments of contract amounts and extensions of time under Section 105.16 of the SCDOT Standard Specifications, applicable to Flatiron's contract with SCDOT. SCDOT must complete that agency evaluation, and then there is a review and appeal process available. The completion of that process will define, and perhaps limit, issues to be decided in this civil action. Counsel for Flatiron is informed and believes that the process of agency review and potential appeals could take 10 – 11 months to complete.

4. This Motion is made in good faith and not for the purpose of delay.

WHEREFORE, Flatiron and TranSystems respectfully request that this Joint Motion to Extend the Stay of Proceedings Pending Agency review be granted. Flatiron and TranSystems request that the current stay be extended through September 30, 2020 to allow completion of the contract dispute resolution process by SCDOT.

We jointly move this 22nd day of November 2019.

s/L. Franklin Elmore
L. Franklin Elmore (SC Bar No. 1889)
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felmore@elmoregoldsmith.com
Counsel for Flatiron Constructors, Inc.

s/C. Daniel Atkinson
Michael B.T. Wilkes (SC Bar No. 6107)
C. Daniel Atkinson (SC Bar No. 72721)
J. Alexander Joyner (SC Bar No. 101771)
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Counsel for TranSystems Corporation

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**CERTIFICATE OF SERVICE**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

I hereby certify that I have this 22nd day of November, 2019, served **Joint Motion to Extend Stay of Proceedings Pending Agency Review** and ***proposed* Order** in accordance with South Carolina Electronic Filing Policies and Guidelines Section 4(e)(2) and (3) to the following counsel:

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Counsel for TranSystems Corporation

Melanie Harper

Melanie Harper, CP
Certified Paralegal for L. Franklin Elmore

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP2602633

Official File Stamp:	11-22-2019 03:57:32 PM
Court:	CIRCUIT COURT Common Pleas Horry
Case Caption:	Flatiron Constructors Inc VS Transystems Corporation
Document(s) Submitted:	Motion/Other Service/Certificate Of Service Proposed Order/Other
Filed by or on behalf of:	L. Franklin Elmore

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Charles Daniel Atkinson for Transystems Corporation
Michael B.T. Wilkes for Transystems Corporation
L. Franklin Elmore for Flatiron Constructors Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2020 Nov 13 11:50 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. NO. 2018-CP-26-02633
	)	
Flatiron Constructors, Inc.	)	
	)	**DEFENDANT TRANSYSTEMS CORPORATION'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	

Defendant TranSystems Corporation ("TranSystems") hereby Answers the Amended Complaint of Plaintiff Flatiron Constructors, Inc. ("Flatiron") as follows:

FOR A FIRST DEFENSE

Paragraphs 1-48 Correspond to the Like-Numbered Paragraphs in Flatiron's Amended Complaint

1. Admitted upon information and belief.

2. Admitted.

3. Admitted.

4. This paragraph contains a legal conclusion, to which no response by TranSystems is required. To the extent a response by TranSystems is deemed to be required, TranSystems denies the allegations contained in this paragraph.

5. TranSystems admits that it entered into a contract with Horry County on or about December 15, 2011, and craves reference to that contract for its scope of services contemplated therein, and denies all allegations in this paragraph to the extent inconsistent therewith.

6. TranSystems craves reference to its December 15, 2011, contract (the "TranSystems Contract") for its scope of services contemplated therein, and denies all allegations in this paragraph to the extent inconsistent therewith. TranSystems further craves reference to the

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2007 SCDOT Standard Specifications ("Standard Specs") and the Flatiron Contract, which incorporated the Standard Specs, for the full description of the submittal process.

7. TranSystems craves reference to the TranSystems Contract for its scope of services contemplated therein, and denies all allegations in this paragraph to the extent inconsistent therewith.

8. Admitted.

9. Admitted upon information and belief.

10. TranSystems craves reference to the TranSystems Contract for its scope of services contemplated therein, and denies all allegations in this paragraph to the extent inconsistent therewith.

11. TranSystems craves reference to the TranSystems Contract for its scope of services contemplated therein, and denies all allegations in this paragraph to the extent inconsistent therewith.

12. Denied.

13. TranSystems admits that it notified Flatiron that certain metal bearing plates were not in compliance with Project Specifications and referred the issue to the Resident Construction Engineer ("RCE") for the S.C. Department of Transportation ("SCDOT") for review and decision.

14. TranSystems admits only that Flatiron submitted a proposed repair procedure for review by both TranSystems and the SCDOT RCE.

15. TranSystems admits that the SCDOT RCE's determination of whether the bearing plates met the Project Specifications affected the steel erection activity.

16. Denied.

17. Denied.

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18. TranSystems craves reference to the Project plans for the details contained therein. TranSystems was not the Project design engineer; therefore, it played no role in preparation of Project plans.

19. Denied.

20. TranSystems admits that certain anchor bolts became misaligned during a concrete pour.

21. Denied.

22. Denied.

23. Denied, including subparts.

24. Denied.

25. TranSystems admits that some weather events impacted the Project Schedule.

26. TranSystems is informed and believes that Flatiron has made various claims under its Construction Contract with Horry County for additional payment, and has received some additional payment.

27. Denied.

28. TranSystems incorporates its responses to the preceding paragraphs, to the extent consistent herewith.

29. TranSystems craves reference to applicable South Carolina law, and denies the allegations in this paragraph to the extent inconsistent therewith. TranSystems denies owing any duties of design, because TranSystems was not the Project designer.

30. Denied, including subparts.

31. Denied.

32. Denied.

33. TranSystems hereby incorporates its responses to the preceding paragraphs, to the extent consistent herewith.

34. Denied.

35. Denied.

36. Denied.

37. TranSystems incorporates its responses to the preceding paragraphs, to the extent consistent herewith.

38. TranSystems denies any failure to properly perform duties in accordance with the TranSystems Contract.

39. TranSystems admits only that it was aware of the Construction Contract between Flatiron and Horry County. The remaining allegations of Paragraph 39 are denied.

40. Denied.

40[sic]. Denied.

41. TranSystems incorporates its responses to the preceding paragraphs, to the extent consistent herewith.

42. Denied, including subparts.

43. Denied.

44. TranSystems admits only that it continues to conduct business within the State of South Carolina. The remaining allegations of Paragraph 44 are denied.

45. Denied.

46. Denied.

47, Denied.

48. Denied.

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49. TranSystems denies the allegations contained in the paragraph of Flatiron's Amended Complaint beginning with "WHEREFORE," including subparts.

50. TranSystems denies each and every allegation in Flatiron's Amended Complaint not specifically and expressly admitted above.

FOR A SECOND DEFENSE

51. Flatiron's alleged damages were caused by its own negligence, and such negligence is pled in complete defense of Flatiron's claims, or, in the alternative, in proportionate reduction of its claims.

FOR A THIRD DEFENSE

52. Flatiron's alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God, and such is pled in complete defense of Flatiron's claims.

FOR A FOURTH DEFENSE

53. Flatiron's claims are barred by the economic loss doctrine.

FOR A FIFTH DEFENSE

54. Flatiron's claims may be barred by the equitable doctrines of waiver, estoppel, and/or laches, including without limitation estoppel based on Flatiron's claims under its Construction Contract with Horry County and the decisions and settlements made pursuant thereto and/or Flatiron's failure to assert its rights thereunder.

FOR A SIXTH DEFENSE

55. TranSystems is entitled to a setoff for any compensation received by Flatiron for the damages alleged in its Amended Complaint.

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FOR A SEVENTH DEFENSE

56. Flatiron's claims against TranSystems may be barred by the doctrine of accord and satisfaction and/or satisfaction and release.

FOR AN EIGHTH DEFENSE

57. Flatiron's claims against TranSystems are barred, because those claims are not ripe for adjudication, due to pending certified claims and requests for equitable adjustment, asserted by Flatiron against SCDOT and/or Horry County.

FOR A NINTH DEFENSE

58. Flatiron's claims against TranSystems are barred by the Statute of Limitations.

FOR AN TENTH DEFENSE

59. Flatiron's claims fail to state claims against TranSystems for which relief can be granted; therefore, Flatiron's claims should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A ELEVENTH DEFENSE

60. Punitive damages as currently awarded in the State of South Carolina are violative of the United States and South Carolina Constitutions. Further, any award of punitive damages is subject to the limitations set forth in S.C. Code Ann. § 15-32-530.

FOR A TWELFTH DEFENSE

62. TranSystems reserves the right to assert additional defenses as discovery proceeds.

WHEREFORE, TranSystems prays that Flatiron's Complaint be dismissed with prejudice, for the costs of this action, for a trial by jury, and for such other relief as the Court deems just and proper.

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WILKES LAW FIRM, P.A.

November 13, 2020

s/ C. Daniel Atkinson
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Attorneys for Defendant TranSystems Corporation.

ELECTRONICALLY FILED - 2020 Nov 19 1:27 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**DEFENDANT'S MOTION TO STAY PROCEEDINGS PENDING FINAL DETERMINATION OF CONSTRUCTION CONTRACT OBLIGATIONS AND MOTION FOR PROTECTIVE ORDER**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	
	)	

Defendant TranSystems Corporation ("TranSystems") moves this Court for an order staying further action in this case pending the determination, termination or expiration of Flatiron Constructors Inc.'s claims under its Construction Contract with Horry County for the subject highway and road project (the "Flatiron Claims"), including without limitation the South Carolina Department of Transportation's ("SCDOT") Agency Review of the Flatiron Claims and any subsequent judicial process. Additionally, TranSystems moves this Court for a Protective Order, pursuant to Rule 26(c), SCRCP, preventing TranSystems from being obligated to respond to Flatiron's Requests for Production until the Court rules on this Motion to Stay and through the period of any further stay the court may order. The grounds for these Motions are as follows:

1. This case involves claims related to construction of the Carolina Bays Highway Project (the "Project") in Horry County by Plaintiff Flatiron Constructors, Inc. ("Flatiron") pursuant to its Construction Contract with Horry County (the "Construction Contract"), which was and is being administered for Horry County by SCDOT pursuant to the Intergovernmental Agreement for the Project between and among Horry County, SCDOT and South Carolina Transportation Infrastructure Bank.

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2. Pursuant to joint motions, the Court entered a December 4, 2018, Order staying this case for one year, and then entered a November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so Defendant has filed its answer to Flatiron's Amended Complaint.

3. On or about July 17, 2019, while this case was stayed, Flatiron filed a Certified Claim with SCDOT relating to Project bearing and anchor bolts, seeking payment of about $4,200,000. On September 3, 2020, the SCDOT Dispute Review Board issued a decision awarding Flatiron about $41,000, but Flatiron rejected that proposed award, rendering it non-binding. Accordingly, this Flatiron claim remains contested, with the next step available to Flatiron being non-jury litigation in the S.C. Court of Common Pleas.

4. On or about February 3, 2020, Flatiron submitted a Certified Claim to SCDOT relating to Project concrete deck cracking, seeking payment of about $11,000,000. On September 3, 2020, the Dispute Review Board entered a decision awarding Flatiron about $4,100,000; and Flatiron has made a deck claim settlement agreement with SCDOT based on that sum, and a corresponding Project Change Order was entered.

5. On or about July 8, 2020, Flatiron submitted to SCDOT a Global Request for Equitable Adjustment ("REA"), seeking payment of about $31,000,000, including claims for direct Project costs and delay. On August 19, 2020, SCDOT rejected the REA claims; however, it is unclear whether Flatiron intends to seek further payment of the REA claims under its Construction Contract.

6. Flatiron's claims in its Amended Complaint include at least many of the Flatiron Claims described in Paragraphs 3-5 above.

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7. In their November 22, 2019, Joint Motion for Extension of Stay, the parties stated that "SCDOT must complete that agency evaluation, and then there is a review and appeal process available. The completion of that process will define, and perhaps limit, issues to be decided in this civil action." (Joint Motion to Extend Stay, p. 1.) This statement is still accurate, and this case should be stayed.

8. Until Flatiron has obtained a final determination of the Flatiron Claims under its Construction Contract, or the expiration or termination of those claims, Flatiron has suffered no damages, and its claims against TranSystems are not ripe; therefore, there presently is no justiciable controversy in this civil action. TranSystems has raised this objection in its Answer to Flatiron's Amended Complaint. TranSystems also contends that Flatiron is limited by law and contract to asserting the Flatiron Claims under its Construction Contract. Accordingly, TranSystems has no duty to Flatiron, the alleged breach of which could support any of its causes of action in this case; and TranSystems will move for summary judgment on this legal issue, if and when the case is prosecuted on the merits after any further stay. Allowing Plaintiff to complete the prosecution of the Flatiron Claims will limit the issues to be discovered and decided in this case, and may render this case moot.

9. Additionally, Flatiron served TranSystems with Requests for Production of Documents on October 19, 2020, and its responses are presently due on November 23, 2020. A copy of the Requests for Production is filed herewith as Exhibit A, and it is incorporated herein by reference. Responding to Flatiron's Requests for Production will require production of voluminous documents and significant expense, in a case not ripe for adjudication. Requiring discovery in a case that is not yet justiciable constitutes an undue burden and expense on TranSystems. Accordingly, pursuant to Rule 26(c), TranSystems hereby moves this Court for a

protective order, delaying TranSystems' obligation to respond to discovery requests in this matter until such time as this court rules on TranSystems' Motion to Stay and through the period of a further stay, if the court further stays this case.

10. These Motions are made in good faith and are not for the purpose of delay. Pursuant to Rule 11, SCRCP, the undersigned counsel hereby certify that they have conferred with counsel for Flatiron prior to filing these Motions. The parties were unable to resolve TranSystems' requests for relief requested herein.

WHEREFORE, TranSystems respectfully requests that this Motion for Stay of Proceedings and Motion for Protective Order be granted.

WILKES LAW FIRM, P.A.

November 19, 2020

s/ Michael B.T. Wilkes

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Attorneys for Defendant TranSystems Corporation.

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ELECTRONICALLY FILED - 2020 Nov 19 1:27 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

October 19, 2020

Via Email and U.S. Mail

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Re: *Flatiron Constructors, Inc. v. TranSystems Corporation*
C.A. No. 2018-CP-26-02633

Dear Counsel:

In connection with the above case, enclosed please find Flatiron Constructors, Inc.'s First Requests for Production to TranSystems Corporation.

Thank you for your attention. Should you have any questions, please do not hesitate to contact us.

Very truly yours,

ELMORE GOLDSMITH KELLEY & DEHOLL, P.A.

Melanie Harper

Melanie Harper, CP
Certified Paralegal to L. Franklin Elmore

/mh
Enc.

ELECTRONICALLY FILED - 2020 Nov 19 1:27 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**FLATIRON CONSTRUCTORS, INC.'S**
Plaintiff,	)	**FIRST REQUESTS FOR PRODUCTION**
	)	**TO TRANSYSTEMS CORPORATION**
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Flatiron Constructors, Inc.("Flatiron") hereby propounds and serves, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the following Requests for Production that TranSystems Corporation ("TranSystems") is requested to answer separately, in writing and under oath, within thirty (30) days from service thereof.

DEFINITIONS AND INSTRUCTIONS

A. As used herein, the terms "you" and "your" refer to the party to whom these requests are directed, and your divisions, departments, subsidiaries, affiliated corporations and predecessors or successors in interest, in whole or in part, their executives, officers, attorneys, employees, agents, and all other persons acting or purporting to act on your behalf.

B. As used herein the terms "Flatiron" and "TranSystems" are recognized to mean the specific persons or entities named as parties in this action, and their respective divisions, departments, subsidiaries, affiliated corporations and predecessors or successors in interest, in whole or in part, their executives, officers, attorneys, employees, agents, and all other persons acting or purporting to act on behalf of their divisions, departments, subsidiaries, affiliated agencies and predecessors or successors.

C. As used herein, the term "Parties" shall mean and refer to TranSystems and Flatiron.

D. As used herein, the term "Project" or "Carolina Bays" shall mean and refer to the construction of an extension to South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, project files numbers 26.036775A, 26.036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4 and 26.036775A.5 including bridges over South Carolina Highway 707 and the intercoastal Waterway

E. "Document" or "correspondence" is used in the broad sense and includes, but is not limited to, all originals, non-identical copies and drafts of the following items, whether printed or otherwise recorded or reproduced by hand, computer, or machine: every writing or record of every other type and description that is or has been in your possession, control, or custody or which you have knowledge, including, but not limited to, emails, text messages, contracts, agreements, communications, correspondence, memoranda, notes, records, reports, invoices, summaries or records of telephone or personal conversations, diaries, work papers, graphs, minutes or records of meetings or conferences, appraisals, reports or summaries of negotiations, publications, pictures, voice recordings, computer records, schedules or transcripts, progress schedules and tabulations on both printed and machine readable media, every copy of any such writing or record where the original is not in your possession, custody or control; and every copy of every such writing or record which contains any commentary or notations whatsoever that do not appear on the original regardless of whether designated "confidential," "privileged" or otherwise. Without in any way limiting the generality of the foregoing, the term "document" also includes all electronic media (hard drive, diskette, tape, optical disk, or other such medium and specifically including all backup and archive tapes and copies) containing information relating to and/or pertaining to any

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of the matters referred to in these requests, specifically including without limitation all electronic mail or "e-mail" messages (by whatever name called) pertaining to such matters.

F. "Identify" when used with reference to any natural person, means to state: (i) the full name and present or last known business or residence address of such person; (ii) his or her present or last known business affiliation; (iii) his or her present telephone number, with area code prefix; and (iv) his or her position and business affiliation, including a description of his or her duties or responsibilities at the time of or during the period in question.

G. As used herein with reference to a document, the term "identify" means to state the date, author, type of document, all recipients of the document, and its present location or custodian.

H. As used herein with reference to an oral communication, conference or meeting, the term "identify" shall mean to state the date of the communication, conference, or meeting, the identity of all parties to the communication, conference or meeting, and the general substance of what was said and/or transpired.

I. As used herein, the terms "related," "relating to" and "concerning" separately and individually mean directly or indirectly mentioning, describing, referring or pertaining to, involving in any way, being connected with, reflecting upon, or embodying a stated subject matter.

J. As used herein, the term "or" is inclusive, referring to any one or more of the disjoined words or phrases listed.

K. As used herein, the terms "and" and "all" also include "each and every."

L. As used herein, the term "currently" means as of the date of your responses. If you do not currently possess responsive information or documents but believe that such information or documents may become available in the future, please state when such information or documents will be available.

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M. In the event that any information or documents requested herein to be identified or produced have been lost, destroyed or discarded or if you maintain that any such information or documents are no longer in your possession, custody and/or control, then identify such information and/or documents and the contents thereof, describe the disposition of said information and/or documents, including the date of disposition, the reason for such disposition and the name of the person who ordered or authorized such disposition.

N. All discovery requests are continuing so as to require further and supplemental response pursuant to S.C. R. Civ. P. 26 (e) or disclosure if TranSystems learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to Flatiron; or, if you discover, receive or generate additional responsive information and/or documents between the time of your original discovery response and the time of the trial of this matter.

O. If you refuse to produce any information or document on a claim of privilege or any other basis, describe the factual basis for your refusal to answer or produce, including any claim of privilege, in sufficient detail to permit the court to adjudicate the validity of your refusal to answer or produce. To the extent you assert a privilege against disclosure of information or production of a document, in addition, set forth for the following information:

(a) The date, title, type of documents and its length;
(b) The author, writer, preparer, sender and addressee(s) or copyee(s);
(c) A general description of its subject matter;
(d) The exact grounds on which the objections to production are based; and
(e) The identity of the person now in possession of the document or a copy of the document.

FORM OF PRODUCTION OF ELECTRONICALLY STORED INFORMATION

The documents are requested to be produced in native format.

ELECTRONICALLY FILED - 2020 Nov 19 1:27 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. A complete copy of TranSystems's Project file.

2. Any and all written or recorded statements, reports and affidavits of persons who are witnesses to facts relating to this litigation.

3. All correspondence to, from, or among Doug Kennedy and Marty Longby regarding or relating to the Project or Flatiron's performance on the Project.

4. All correspondence to, from, or among Robbie Isgett, Claude Ipock, or Todd Stegall regarding the inspections performed by TranSystems on the Project.

5. All correspondence to, from, or among TranSystems, Horry County, South Carolina ("Horry County"), and/or the South Carolina Department of Transportation ("SCDOT") regarding anchor bolts on the Project.

6. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding POT bearings on the Project.

7. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding concrete placement on the Project.

8. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding rebar cages on the Project.

9. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding girder alignment on the Project.

10. All documents and/or reports prepared or generated by or received by TranSystems relating to the Project and Flatiron's performance on the Project.

11. All correspondence to, from, or among TranSystems, Horry County, and/or SCDOT regarding or relating to the Project or Flatiron's performance on the Project, including but

not limited to emails and text messages both internally at TranSystems and externally, sent or received by any person with an email domain name of "@transystems.com" to or from any person with an email domain name of " @HorryCounty.org" or "@scdot.org."

12. All personal diaries or daily logs of any TranSystem employee regarding the Project.

13. All audio recordings or minutes of any meetings or other documents concerning the Project, including but not limited to all meetings between TranSystems, SCDOT, and/or Horry County.

14. Any and all documents including, but not limited to, correspondence, e-mails, text messages, audio recordings, memoranda, instruction or policy manuals, daily reports, journals, purchase orders, invoices, contracts, subcontracts, change orders, meeting minutes, written agreements, accounting documents, job cost reports, back charges, photographs, plats, sketches, blueprints, architectural drawings, shop drawings, calendars, schedules, CPM analysis, or other documents relating to Flatiron's work at the Project , any person or entity who supplied labor and/or materials to TranSystems or on TranSystems' behalf, and/or any other entity involved in the Project.

15. All submittal logs created, maintained or received by TranSystem or within its care, custody or control.

16. All evaluations, analysis or reports prepared or performed by or for TranSystems' relating to any claim asserted by TranSystems or by Flatiron relating to the Project.

17. All self-performed or third-party evaluations or assessments of TranSystems' performance on the Project in TranSystems' care, custody or control

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18. All documents regarding any inspection(s) made of any portion of the work involved on the Project.

19. All documents related to any test or study conducted which reflects any problems, difficulties or deficiencies related to the Project.

20. Any and all documents relating to any investigations into the following Project items:

a. girder alignment;

b. POT bearings;

c. anchor bolts;

d. concrete placement; and

e. rebar cages.

Respectfully submitted,

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Counsel for Flatiron Constructors, Inc.

October 19, 2020
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**CERTIFICATE OF SERVICE**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

I hereby certify that I have this 19th day of October, 2020 served **Flatiron Constructors, Inc.'s First Requests for Production to TranSystems Corporation** via email and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, at Greenville, South Carolina addressed to the following persons at the following address which is the last address known to me:

Michael B.T. Wilkes, Esquire
C. Daniel Atkinson, Esquire
J. Alexander Joyner, Esquire
Wilkes Law Firm, P.A.
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Counsel for TranSystems Corporation

Melanie Harper

Melanie Harper, CP
Certified Paralegal for L. Franklin Elmore

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	**PLAINTIFF'S MOTION TO COMPEL DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION**
Plaintiff,	)	
v.	)	
TranSystems Corporation,	)	
Defendant.	)	

Flatiron Constructors, Inc. ("Flatiron"), by and through its undersigned counsel and as authorized by Rule 37 of the South Carolina Rules of Civil Procedure, respectfully moves this Honorable Court for an order compelling Defendant TranSystems' response to Flatiron's First Requests for Production served on October 19, 2020. *See* **Ex. A**, Pl.'s First Req. for Produce.

BACKGROUND

This case involves Flatiron's claims arising from construction of the Carolina Bays Highway Project (the "Project") in Horry County. Flatiron contracted with Horry County to construct the Project in accordance with the provided terms, plans and specifications ("Contract"). The South Carolina Department of Transportation ("SCDOT") administered the Contract as authorized by the Intergovernmental Agreement executed by Horry County, SCDOT, and South Carolina Transportation Infrastructure Bank. Horry County executed a separate contract with TranSystems Corporation ("TranSystems") pursuant to which TranSystems provided Project construction engineering and inspection services, among other things.

As alleged in Flatiron's Amended Complaint filed on May 10, 2018, TranSystems, inter alia, breached its professional standard of care, over-inspected Flatiron's work, delayed the review and approval of Flatiron submittals and wrongfully added submittal review procedures not

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contemplated by the Contract. TranSystems' errors and omissions caused Flatiron to incur costly delays as well as significant additional direct and indirect costs. *See* Am. Compl. ¶ 12. On October 4, 2018, at the Parties' behest, this Court stayed the instant action. The Court continued the stay through September 30, 2020 by Order dated November 26, 2019. The stay expired on September 30, 2020.

Following expiration of the stay, Flatiron served TranSystems its First Requests for Production on October 19, 2020. Approximately three weeks later, TranSystems filed its Answer to Flatiron's Amended Complaint. Approximately a month after receiving Flatiron's discovery request, on November 19, 2020, TranSystems moved this Court for yet another stay seeking to suspend all activity in the case. The Defendant also moved for a protective order seeking to evade its obligation to respond to Flatiron's Requests for Production. Flatiron understands that the Court has not yet docketed TranSystems' Motion to Stay Proceedings Pending Final Determination of Construction Contract and Motion for Protective Order ("TranSystems' Motions"). However, Flatiron vehemently opposes TranSystems' Motions and respectfully requests that this Motion to Compel be docketed to be heard with those Motions.

In sum, Flatiron propounded legitimate Requests for Production upon TranSystems more than seventy-five days ago. Yet, without a protective order and without any agreement of counsel, TranSystems has refused to respond to those Requests. Flatiron respectfully requests that the Court now issue an Order compelling them to do so.

ARGUMENT

Rule 34 of the South Carolina Rules of Civil Procedure obligates a party to respond to requests for production within thirty (30) days of service. *See* Rule 34(b), SCRCP. Should a party fail to respond in accordance with Rule 34, Rule 37 permits the discovering party to move the

court for an order compelling a response. *See* Rule 37(a)(2), SCRCP. Here, TranSystems waited until the day its response was due to move this Court for a protective order suspending the Defendant's obligation to respond to Flatiron's First Requests for Production. The stay of this matter expired September 2020. Moreover, no protective order has been issued. Since November 19, 2020, TranSystems has simply arrogated to itself the authority to discard the applicable Rules of Civil Procedure and to stymie the progress of this litigation. Flatiron beseeches the Court to now direct the Defendant to respond to the discovery.

No legitimate grounds exist for imposing yet another stay on Flatiron's efforts to hold TranSystems responsible for its errors and omissions. TranSystems is not a party to Flatiron's Contract with Horry County. Furthermore, resolution of any disputes between Flatiron and Horry County/SCDOT will not resolve the instant lawsuit. Flatiron has legitimate, sustainable claims against TranSystems that are ripe for adjudication and are not dependent upon Flatiron's resolution of issues with Horry County or SCDOT. Unless and until TranSystems satisfies those claims, it should, at least, respond to Flatiron's Requests for Production.

This matter has been stagnant long enough. Flatiron filed its Amended Complaint two-and-a-half years ago, and the initial stay expired early last Fall. The court should not allow TranSystems, of its own volition, to delay matters. The Defendant has ignored the mandate of Rule 34 to Flatiron's detriment. It should be ordered to respond immediately to the Plaintiff's long-outstanding Requests for Production.

For the foregoing reasons, Flatiron respectfully requests that this Court:

1. Enter an order compelling Defendant TranSystems to respond immediately to Plaintiff's First Requests for Production served on October 19, 2020;

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2. Grant Flatiron an award of the costs and attorney's fees associated with the filing of this Motion to Compel as authorized by Rule 37(a)(4); and,

3. Grant any further relief this Court deems just and reasonable.

The undersigned hereby certifies pursuant to S.C. R. Civ P. 11(a) that consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

s/L. Franklin Elmore
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Counsel for Flatiron Constructors, Inc.

January 11, 2021
Greenville, South Carolina

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EXHIBIT A

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**FLATIRON CONSTRUCTORS, INC.'S**
Plaintiff,	)	**FIRST REQUESTS FOR PRODUCTION**
	)	**TO TRANSYSTEMS CORPORATION**
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Flatiron Constructors, Inc.("Flatiron") hereby propounds and serves, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the following Requests for Production that TranSystems Corporation ("TranSystems") is requested to answer separately, in writing and under oath, within thirty (30) days from service thereof.

DEFINITIONS AND INSTRUCTIONS

A. As used herein, the terms "you" and "your" refer to the party to whom these requests are directed, and your divisions, departments, subsidiaries, affiliated corporations and predecessors or successors in interest, in whole or in part, their executives, officers, attorneys, employees, agents, and all other persons acting or purporting to act on your behalf.

B. As used herein the terms "Flatiron" and "TranSystems" are recognized to mean the specific persons or entities named as parties in this action, and their respective divisions, departments, subsidiaries, affiliated corporations and predecessors or successors in interest, in whole or in part, their executives, officers, attorneys, employees, agents, and all other persons acting or purporting to act on behalf of their divisions, departments, subsidiaries, affiliated agencies and predecessors or successors.

C. As used herein, the term "Parties" shall mean and refer to TranSystems and Flatiron.

D. As used herein, the term "Project" or "Carolina Bays" shall mean and refer to the construction of an extension to South Carolina Highway 31 from South Carolina Highway 544 to South Carolina Highway 707, project files numbers 26.036775A, 26.036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4 and 26.036775A.5 including bridges over South Carolina Highway 707 and the intercoastal Waterway

E. "Document" or "correspondence" is used in the broad sense and includes, but is not limited to, all originals, non-identical copies and drafts of the following items, whether printed or otherwise recorded or reproduced by hand, computer, or machine: every writing or record of every other type and description that is or has been in your possession, control, or custody or which you have knowledge, including, but not limited to, emails, text messages, contracts, agreements, communications, correspondence, memoranda, notes, records, reports, invoices, summaries or records of telephone or personal conversations, diaries, work papers, graphs, minutes or records of meetings or conferences, appraisals, reports or summaries of negotiations, publications, pictures, voice recordings, computer records, schedules or transcripts, progress schedules and tabulations on both printed and machine readable media, every copy of any such writing or record where the original is not in your possession, custody or control; and every copy of every such writing or record which contains any commentary or notations whatsoever that do not appear on the original regardless of whether designated "confidential," "privileged" or otherwise. Without in any way limiting the generality of the foregoing, the term "document" also includes all electronic media (hard drive, diskette, tape, optical disk, or other such medium and specifically including all backup and archive tapes and copies) containing information relating to and/or pertaining to any

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of the matters referred to in these requests, specifically including without limitation all electronic mail or "e-mail" messages (by whatever name called) pertaining to such matters.

F. "Identify" when used with reference to any natural person, means to state: (i) the full name and present or last known business or residence address of such person; (ii) his or her present or last known business affiliation; (iii) his or her present telephone number, with area code prefix; and (iv) his or her position and business affiliation, including a description of his or her duties or responsibilities at the time of or during the period in question.

G. As used herein with reference to a document, the term "identify" means to state the date, author, type of document, all recipients of the document, and its present location or custodian.

H. As used herein with reference to an oral communication, conference or meeting, the term "identify" shall mean to state the date of the communication, conference, or meeting, the identity of all parties to the communication, conference or meeting, and the general substance of what was said and/or transpired.

I. As used herein, the terms "related," "relating to" and "concerning" separately and individually mean directly or indirectly mentioning, describing, referring or pertaining to, involving in any way, being connected with, reflecting upon, or embodying a stated subject matter.

J. As used herein, the term "or" is inclusive, referring to any one or more of the disjoined words or phrases listed.

K. As used herein, the terms "and" and "all" also include "each and every."

L. As used herein, the term "currently" means as of the date of your responses. If you do not currently possess responsive information or documents but believe that such information or documents may become available in the future, please state when such information or documents will be available.

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M. In the event that any information or documents requested herein to be identified or produced have been lost, destroyed or discarded or if you maintain that any such information or documents are no longer in your possession, custody and/or control, then identify such information and/or documents and the contents thereof, describe the disposition of said information and/or documents, including the date of disposition, the reason for such disposition and the name of the person who ordered or authorized such disposition.

N. All discovery requests are continuing so as to require further and supplemental response pursuant to S.C. R. Civ. P. 26 (e) or disclosure if TranSystems learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to Flatiron; or, if you discover, receive or generate additional responsive information and/or documents between the time of your original discovery response and the time of the trial of this matter.

O. If you refuse to produce any information or document on a claim of privilege or any other basis, describe the factual basis for your refusal to answer or produce, including any claim of privilege, in sufficient detail to permit the court to adjudicate the validity of your refusal to answer or produce. To the extent you assert a privilege against disclosure of information or production of a document, in addition, set forth for the following information:

(a) The date, title, type of documents and its length;
(b) The author, writer, preparer, sender and addressee(s) or copyee(s);
(c) A general description of its subject matter;
(d) The exact grounds on which the objections to production are based; and
(e) The identity of the person now in possession of the document or a copy of the document.

FORM OF PRODUCTION OF ELECTRONICALLY STORED INFORMATION

The documents are requested to be produced in native format.

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REQUESTS FOR PRODUCTION OF DOCUMENTS

1. A complete copy of TranSystems's Project file.

2. Any and all written or recorded statements, reports and affidavits of persons who are witnesses to facts relating to this litigation.

3. All correspondence to, from, or among Doug Kennedy and Marty Longby regarding or relating to the Project or Flatiron's performance on the Project.

4. All correspondence to, from, or among Robbie Isgett, Claude Ipock, or Todd Stegall regarding the inspections performed by TranSystems on the Project.

5. All correspondence to, from, or among TranSystems, Horry County, South Carolina ("Horry County"), and/or the South Carolina Department of Transportation ("SCDOT") regarding anchor bolts on the Project.

6. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding POT bearings on the Project.

7. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding concrete placement on the Project.

8. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding rebar cages on the Project.

9. All correspondence to, from, or among TranSystems, Horry County and/or SCDOT regarding girder alignment on the Project.

10. All documents and/or reports prepared or generated by or received by TranSystems relating to the Project and Flatiron's performance on the Project.

11. All correspondence to, from, or among TranSystems, Horry County, and/or SCDOT regarding or relating to the Project or Flatiron's performance on the Project, including but

not limited to emails and text messages both internally at TranSystems and externally, sent or received by any person with an email domain name of "@transystems.com" to or from any person with an email domain name of " @HorryCounty.org" or "@scdot.org."

12. All personal diaries or daily logs of any TranSystem employee regarding the Project.

13. All audio recordings or minutes of any meetings or other documents concerning the Project, including but not limited to all meetings between TranSystems, SCDOT, and/or Horry County.

14. Any and all documents including, but not limited to, correspondence, e-mails, text messages, audio recordings, memoranda, instruction or policy manuals, daily reports, journals, purchase orders, invoices, contracts, subcontracts, change orders, meeting minutes, written agreements, accounting documents, job cost reports, back charges, photographs, plats, sketches, blueprints, architectural drawings, shop drawings, calendars, schedules, CPM analysis, or other documents relating to Flatiron's work at the Project , any person or entity who supplied labor and/or materials to TranSystems or on TranSystems' behalf, and/or any other entity involved in the Project.

15. All submittal logs created, maintained or received by TranSystem or within its care, custody or control.

16. All evaluations, analysis or reports prepared or performed by or for TranSystems' relating to any claim asserted by TranSystems or by Flatiron relating to the Project.

17. All self-performed or third-party evaluations or assessments of TranSystems' performance on the Project in TranSystems' care, custody or control

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18. All documents regarding any inspection(s) made of any portion of the work involved on the Project.

19. All documents related to any test or study conducted which reflects any problems, difficulties or deficiencies related to the Project.

20. Any and all documents relating to any investigations into the following Project items:

a. girder alignment;

b. POT bearings;

c. anchor bolts;

d. concrete placement; and

e. rebar cages.

Respectfully submitted,

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Counsel for Flatiron Constructors, Inc.

October 19, 2020
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**CERTIFICATE OF SERVICE**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

I hereby certify that I have this 19th day of October, 2020 served **Flatiron Constructors, Inc.'s First Requests for Production to TranSystems Corporation** via email and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, at Greenville, South Carolina addressed to the following persons at the following address which is the last address known to me:

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C. Daniel Atkinson, Esquire
J. Alexander Joyner, Esquire
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Melanie Harper, CP
Certified Paralegal for L. Franklin Elmore

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**JOINT MOTION FOR ORDER**
Plaintiff,	)	**DESIGNATING CASE AS COMPLEX**
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Defendant TranSystems Corporation ("TSC"), and Plaintiff Flatiron Constructors, Inc. ("FIC") (TSC and FIC are referenced from time to time collectively hereafter as the "Parties") move for an Order of the Chief Administrative Judge designating this matter as Complex.

RELEVANT PROCEDURAL HISTORY

Plaintiff filed this Action on April 26, 2018; however, pursuant to joint motions, the Court entered a December 4, 2018, Order staying this case for one year, and then entered a November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so TranSystems filed its answer to Flatiron's Amended Complaint. On November 19, 2020, TranSystems filed its Motion to Stay, and its Motion for Protective Order seeking relief from responding to discovery propounded by Flatiron, pending resolution of the Motion to Stay. On January 11, 2021, Flatiron filed a Motion to Compel against TranSystems, seeking an Order compelling TranSystems to respond to Flatiron's First Requests for Production, the same discovery for which TranSystems sought a protective order. The Court denied TSC's Motion for Stay via an order dated April 9, 2021, and, in that order, the Court compelled TSC to begin responding to FIC's Requests to Produce. FIC first served Requests to Produce on October 19, 2020, and FIC has not served Interrogatories in this case, to-date. TSC first served FIC with Interrogatories and

Requests to Produce on May 28, 2021. To-date, the Parties have produced over 200,000 electronic files in discovery, and both Parties continue to retrieve, review and produce electronic files pursuant to a Stipulation and an agreed-upon ESI Protocol. The Parties have not yet conducted any depositions.

RELEVANT FACTS

This case involves claims related to construction of a portion the Carolina Bays Highway Project (the "Project") in Horry County by FIC, pursuant to its Construction Contract with Horry County (the "Construction Contract"), in the original amount of $97,868,087 and dated December 6, 2013, which was administered for Horry County by SCDOT pursuant to the Intergovernmental Agreement for the Project between and among Horry County, SCDOT and South Carolina Transportation Infrastructure Bank. On December 15, 2011, Horry County contracted with TranSystems, and the Scope of that contract included the following: "The SCDOT and Horry County desire to hire Consultant [TranSystems] to perform Construction Engineering and Inspection Services (CEI) for the above described project to include, but not limited to, construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the contract requirements." TranSystems also executed an Engineer Certification for the Project Plans and Specifications ("Certification") which, among other things, references "full responsibility for all project plan and specification reviews." However, TranSystems' contract does not identify it as the engineer of record for the Project. The Parties disagree about the interpretation and legal effect of TranSystems' Contract including the Certification.

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Flatiron alleges, and TranSystems denies, Flatiron incurred damages in its completion of the Construction Contract, because of TranSystems' breach of the standard of care in performance of its CEI Services.

On or about July 17, 2019, while this case was stayed, Flatiron submitted a Certified Claim with SCDOT relating to Project bearing and anchor bolts. On September 3, 2020, the SCDOT Dispute Review Board issued a decision, but Flatiron rejected that proposed award, rendering it non-binding. On or about February 3, 2020, Flatiron submitted a Certified Claim to SCDOT relating to Project concrete deck cracking. On September 3, 2020, the Dispute Review Board entered a decision, after which Flatiron made a deck claim settlement agreement with SCDOT, and a corresponding Project Change Order was entered.

On January 19, 2021, Flatiron submitted a Certified Claim with SCDOT in the amount of $32,381,491, which has not been heard by the SCDOT Dispute Review Board or resolved, and is therefore still pending. On August 16, 2021, Flatiron served its answer to TranSystem's Interrogatory 4 and attached Exhibit B (attached hereto as Ex. 1), which states Flatiron's current actual damage claim in this civil action in the amount $35,286,392, which is inclusive of many of the elements of damage in Flatiron's Certified Claim.

MOTION FOR COMPLEX CASE DESIGNATION

The Parties jointly move this Court for an Order, pursuant to S.C. Supreme Court Order 2006-07-26-01, designating this case as complex, assigning the matter to a specific judge for handling all matters, and setting a trial date not before March 21, 2023. As noted in the procedural history and relevant factual summary, this case involves a very large dispute relating to construction of a major highway, and it will involve discovery from multiple companies, various government agencies, and numerous experts. The Parties anticipate calling over twenty (20)

witnesses at trial, and the Parties anticipate that a trial will exceed two weeks. Additionally, this Action involves complex legal and procedural issues, including, but not limited to, TranSystems' contentions that it owes no duty to Flatiron and that the trial of this case should not occur until Flatiron has obtained a final determination of its Certified Claims and the additional amount, if any, which Horry County owes to Flatiron under the Construction Contract as well as Flatiron's contentions that TranSystems owes Flatiron a duty which TranSystems breached causing Flatiron damages beyond what may be recovered from Horry County. The Parties submit that judicial economy will be achieved by having all future case decisions made by the same judge.

This Motion is based on the pleadings and South Carolina law.

We so move for an Order designating this case as complex:

WILKES LAW FIRM, P.A.

October 1, 2021

s/ C. Daniel Atkinson
Michael B. T. Wilkes (S.C. Bar 6107)
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J. Alexander Joyner (S.C. Bar 101771)
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- And -

C. Daniel Atkinson (S.C. Bar 72721)
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(864) 591-1113

Attorneys for Defendant TranSystems Corporation

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We Consent and Join in the Motion for an Order designating the matter as complex:

s/ Carter B. Reid
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Attorneys for Flatiron Constructors Inc.

ELECTRONICALLY FILED - 2021 Oct 04 8:57 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

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Flatiron Construction
Carolina Bays Project

Category	Damages	Mark Up	Total
A. Direct Costs			
Bridges			
I. Bearings	$ 225,098	$ 36,944	$ 262,042
II. Bridge Support	752,336	123,475	875,811
III. Concrete	1,872,972	307,397	2,180,369
IV. Formwork	4,174,860	685,189	4,860,049
V. Girders	448,174	73,556	521,730
Subtotal	***$ 7,473,439***	***$ 1,226,561***	***$ 8,700,000***
Paving			
VI. Paving	$ 2,949,933	$ 484,151	$ 3,434,084
Subtotal	***$ 2,949,933***	***$ 484,151***	***$ 3,434,084***
Additional Direct Costs			
VII. Extended Maintenance	$ 365,408	$ 59,972	$ 425,380
VIII. Hurricane Impact Costs	2,790,452	457,976	3,248,429
IX. Additional Mobilizations	178,581	29,309	207,890
X. Salvage Loss	2,407,318	395,095	2,802,413
Subtotal	***$ 5,741,760***	***$ 942,353***	***$ 6,684,113***
Outstanding Claims			
XI. Pot Bearing Metalization	$ 95,616	$ 11,824	$ 107,440
XII. Anchor Bolts	439,870	80,711	520,581
XIII. Deck Replacement	1,692,221	277,732	1,969,953
XIV. Traffic Control	121,583	19,955	141,538
Subtotal	***$ 2,349,290***	***$ 390,221***	***$ 2,739,511***
Direct Cost - Subtotal	***$ 18,514,422***	***$ 3,043,285***	***$ 21,557,708***
B. Time Related Costs			
XI. Overhead - Extended	$ 5,367,868	880,989	6,248,856
XII. Additional Management and Oversight	2,124,009	-	2,124,009
Overhead - Subtotal	***$ 7,491,876***	***$ 880,989***	***$ 8,372,865***
C. Cost of Capital			
Cost of Capital is 13% of Total Direct and Overhead	$ 3,380,819	$ -	3,380,819
Subtotal	***$ 3,380,819***		***$ 3,380,819***
D. Liquidated Damages			
Remaining Liquidated Damages ($5,000 x 395 Days)	$ 1,975,000	$ -	1,975,000
Subtotal	***$ 1,975,000***		***1,975,000***
Total	**$ 31,362,118**	**$ 3,924,274**	**$ 35,286,392**

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**JOINT MOTION TO STRIKE FROM DOCKET PURSUANT TO S.C. R. CIV. P. 40(j)**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Pursuant to South Carolina Rule of Civil Procedure 40(j), Plaintiff Flatiron Constructors, Inc. and Defendant TranSystems Corporation (hereinafter collectively referred to as the "Parties"), by and through their undersigned counsel, hereby agree in writing to strike the above-captioned case from the trial docket by mutual consent. The Parties agree that their claims may be restored upon motion made within one (1) year of today; that the statute of limitations shall be tolled as to the Parties during the time the case is stricken, and, that any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. This action has not previously been stricken pursuant to Rule 40(j), SCRCP.

Respectfully submitted on this the 6th day of October, 2021.

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Attorneys for TranSystems Corporation

ELECTRONICALLY FILED - 2021 Oct 07 5:19 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

ELECTRONICALLY FILED - 2022 Sep 22 4:22 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**PLAINTIFF'S MOTION TO RESTORE CASE TO DOCKET PURSUANT TO S.C. R. CIV. P. 40(j)**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Plaintiff Flatiron Constructors, Inc. hereby moves to restore the above-captioned case to the active roster. The grounds for this Motion are as follows:

1. This case was stricken from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure by Consent Order signed by the parties on October 6, 2021, signed by Judge Culbertson on October 8, 2021, and filed by the Court on October 11, 2021.

2. Pursuant to the Joint Motion to Strike from Docket Pursuant to S.C. R. Civ. P. 40(j) signed on October 6, 2021 and filed on October 7, 2021, and the Consent Order referenced above, the parties agreed their claims would be restored upon Motion made within one year of October 6, 2021.

Wherefore, Plaintiff requests that the Court grant this motion, restore the case to the active roster, and assign a new civil case number.

Respectfully submitted,

s/Mason A. Goldsmith, Jr.

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Counsel for Plaintiff

September 22, 2022
Greenville, South Carolina

ELECTRONICALLY FILED - 2023 Apr 04 8:27 AM - HORRY - COMMON PLEAS - CASE#2022CP2606116

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
	)	
	)	
Flatiron Constructors, Inc.,	)	
	)	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	

Pursuant to Rule 56, SCRCP, Defendant TranSystems Corporation ("TSC") hereby moves for an Order granting it summary judgment on all of Plaintiff's claims against TSC concerning this Horry County Highway Project. The bases for this Motion are set forth in TSC's Brief in Support of Motion for Summary Judgment, which is filed herewith and which is incorporated herein by reference.

First Cause of Action: Negligence: TSC owes no legal duty of care to Plaintiff in contract or tort, because Plaintiff's claims are for purely economic losses, and there is no contractual relationship or special relationship to create tort duties owed by TSC to Plaintiff. This Motion is based on the plain, unambiguous language of the TSC Contract with Horry County, Plaintiff's Contract for Construction with Horry County, and the Intergovernmental Agreement among Horry County, the S.C. Department of Transportation, and the S.C. Transportation Infrastructure Bank. It is entirely within the province of this Court to interpret these Highway Project Contracts and determine that TSC is entitled to judgment as a matter of law that it has no duty in tort to Plaintiff.

Second Cause of Action: Breach of Contract – Third-Party Beneficiary: TSC moves for summary judgment on Plaintiff's claim for breach of contract as a purported third party beneficiary, because the plain, unambiguous language of the TSC Contract, the Flatiron

Construction Contract, and the Intergovernmental Agreement demonstrate that neither Horry County nor TSC intended Plaintiff to be a third party beneficiary of the TSC Contract.

Third Cause of Action: Tortious Interference with Contract: TSC is entitled to summary judgment on Plaintiff's cause of action for tortious interference with contractual relations, because TSC's actions were pursuant to the TSC Contract, and therefore privileged and not subject to tortious interference claims. Stated directly, TSC did exactly what Horry County hired it to do, evaluate Flatiron's work for Horry County and its citizens.

Fourth Cause of Action: S.C. Unfair Trade Practices: Plaintiff's cause of action for violations of the S.C. Unfair Trade Practices Act fails, because engineering is a regulated industry not subject to the UTPA, and because Plaintiff's allegations constitute mere negligence, not actionable under the UTPA.

This Motion is based upon the pleadings, Plaintiff's Answers to TSC's Interrogatories, South Carolina law, the Affidavit of Peter Strub filed herewith, TSC's Brief filed herewith, including all exhibits incorporated therein, and any affidavits and briefs to be filed hereafter.

Pursuant to Rule 11, SCRCP, the undersigned certifies that there was no duty of consultation prior to filing this Motion, because this is a Motion for Summary Judgment.

WILKES ATKINSON & JOYNER, LLC

April 4, 2023

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ELECTRONICALLY FILED - 2023 Apr 04 8:27 AM - HORRY - COMMON PLEAS - CASE#2022CP2606116

ELECTRONICALLY FILED - 2023 Oct 04 4:29 PM - HORRY - COMMON PLEAS - CASE#2022CP2606116

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
	)	
	)	
Flatiron Constructors, Inc.,	)	
	)	
Plaintiff,	)	**DEFENDANT'S AMENDED MOTION EXTENSION TO RESPOND TO PLAINTIFF'S INTERROGATORIES**
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	

Pursuant to Rule 6(b), SCRCP, Defendant TranSystems Corporation ("TSC") moves this Court for an Order granting TSC a twenty-nine (29) day extension to respond to Plaintiff's Interrogatories to TSC (the "Interrogatories"), as well as Plaintiff's Requests for Production to TSC (the "Requests"). Plaintiff served the Interrogatories and Requests on TSC via email on August 31, 2023; so its responses to the Interrogatories and Requests presently are due on October 5, 2023. On September 28, 2023, the undersigned counsel for TSC emailed Plaintiff's counsel and requested an extension of time to respond to the Interrogatories and Requests until November 3, 2023. On September 29, 2023, the undersigned discussed this request with Plaintiff's counsel, who took the request under advisement, but has not yet responded.

This request for extension is made before the deadline and for good cause, as follows: The parties have produced over 2,000,000 pages of documents in this case so far. Pursuant to a settlement agreement in a separate civil action in which Plaintiff sued Horry County and the South Carolina Department of Transportation (SCDOT) for over $40,000,000 on this same Highway Project, SCDOT has produced to Plaintiff its entire Project file; but Plaintiff has not yet provided that entire SCDOT to TSC in response to TSC's Request for Production in this case. The SCDOT file probably exceeds 1,000,000 pages. Plaintiff's Interrogatories and Requests are extensive and

include questions asking for the identification of various documents in the answers. Responding to Plaintiff's Interrogatories and Requests will require considerable time and effort.

Pursuant to Rule 11, SCRCP, the undersigned certifies that he consulted with Carter Reid, counsel for Plaintiff, via email and then telephone as stated above prior to filing this Motion; but Plaintiff has not yet consented to the requested extension.

WILKES ATKINSON & JOYNER, LLC

October 4, 2023

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Attorneys for TranSystems Corporation

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ELECTRONICALLY FILED - 2023 Oct 18 3:21 PM - HORRY - COMMON PLEAS - CASE#2022CP2606116

STATE OF SOUTH CAROLINA COUNTY OF HORRY Flatiron Constructors, Inc., Plaintiff, v. TranSystems Corporation, Defendant.	IN THE COURT OF COMMON PLEAS Case No. 2022-CP-26-06116 **JOINT MOTION TO ESTABLISH COMPLEX CASE DESIGNATION AND TIME FOR TRIAL**

1. We, the undersigned counsel for all parties who have appeared in this action, hereby move for an order designating this case as complex and asking that the trial of the case take place on or after July 30, 2024. We understand that if this motion is granted, continuances will not be granted after the date established herein except under exceptional circumstances.

2. At present, we feel that it is too early in the case to achieve settlement. Defendant filed a Motion for Summary Judgment, which is under advisement. A hearing was held on August 7, 2023. Prior to the hearing, the court issued an order committing the Parties to participate in mediation within 90 days of the Court's ruling on Defendant's dispositive motion. We realize that if this case should be settled after being called for trial, we will be performing a disservice to other counsel who have cases following this case on the active trial roster, and we will endeavor to settle this case, if at all, before the noted trial date.

3. We submit the following information for use of the court in support of this motion:

(a) Nature of the case

This case involves claims related to the construction of the Carolina Bays Highway Project (the "Project") in Horry County. Horry County contracted the South Carolina Department of Transportation ("SCDOT") to administer the Project as part of an Intergovernmental Agreement

(the "IGA") among Horry County, SCDOT, and the South Carolina Transportation Infrastructure Bank ("SCTIB"). On December 6, 2013, SCDOT, on behalf of Horry County, awarded the Project to Plaintiff Flatiron Constructors, Inc. ("FCI") in the amount of $97,868,087. Horry County also directly contracted with Defendant TranSystems Corporation ("TSC") (the "TSC Contract") to provide Construction, Engineering, and Inspection Services ("CEI Services") for the Project. The Parties disagree about the interpretation and legal effect of TSC's Contract, including the certification.

FCI alleges, and TSC denies, FCI incurred damages in completing the Construction Contract because TSC breached the standard of care in the performance of its CEI Services. TSC denies these allegations and argues that no such standard of care applies to it, that its efforts were consistent with its contractual obligations, and that any relief should be sought elsewhere.

To date, more than one million documents have been produced, containing at least twice as many pages and large native files. Despite the extensive files already produced in this matter, more document production remains to be performed. For example, TSC just produced approximately 25,000 additional documents to FCI. Similarly, TSC has asked that FCI produce the files that FCI received from SCDOT following the recent settlement of FCI's claim filed against SCDOT and Horry County on the Project. This production contains tens of thousands of documents. Similarly, FCI anticipates potential third-party document productions from other subconsultants. The scale of this production is commensurate with the complexity of this dispute which involves scores of construction events on a complex, public infrastructure project performed over the course of at least five years (2014 through substantial completion in 2019).

The claims brought by FCI require detailed expert analysis of extensive Project documents provided by SCDOT, Horry County, FCI, TSC, and subconsultants. Expert testimony is required

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to address FCI's allegations of violations of the professional standard of care concerning TSC's multiple construction administration duties, to present critical path scheduling analyses of whether and how any proven violations impacted the Project schedule, and to demonstrate the complex calculations associated with proving any resultant direct and/or indirect damages such as loss of productivity, extended general conditions, and other impacts. The experts that TSC and FCI will retain must conduct a detailed investigation of the continuing document productions and deposition testimony concerning how TSC performed its construction engineering and inspection services and whether it met the applicable standard of care in South Carolina if TSC owed FCI a duty of care. These analyses must cover the entire five-year lifespan of this $100 million Project.

(b) The number of witnesses for the plaintiff

Both FCI and TSC will rely upon the testimony of an exceptionally large number of fact witnesses and experts due to the nature of FCI's claims, the time period over which the Project Work was conducted, and the number of different people and entities involved in the construction and construction administration (e.g., FCI, TSC, SCDOT, Horry County, subcontractors and subconsultants).

Plaintiff anticipates that it will call at least a dozen fact witnesses to testify. These witnesses include current and former employees of SCDOT, Horry County, FCI, TSC, and select subcontractors and subconsultants who will testify regarding FCI's claims. The Project reached substantial completion in 2019, meaning these fact witnesses now reside in multiple jurisdictions, and many no longer work for the Parties.

FCI also anticipates presenting experts in the standard of care, alleged violations of that standard, construction critical path method scheduling, and construction damages calculations. These experts must analyze nearly two million pages of documents including, but not limited to,

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daily work logs, submittals, RFIs, change orders, notes, meeting minutes, computerized record-keeping systems, project schedules, cost reports, correspondence, contract and subcontract documents as well as extensive email communications between and among dozens of individuals.

(c) The number of witnesses for defendant

TSC anticipates that it will call 12-15 fact witnesses to testify. TSC will also present multiple expert witnesses on engineering duties and scheduling issues.

(d) Anticipated time needed to try the case

The trial is anticipated to take approximately three weeks, depending upon the resolution of pretrial motions. Notably, TSC has requested a jury trial for the case.

(e) Motions pending

On April 04, 2023, TSC filed a motion for summary judgment. The Parties have fully briefed the motion, and a hearing was held on August 7, 2023. The Motion is under advisement with Judge Curtis. There are no other pending motions.

(f) Additional motions anticipated before trial

The Parties anticipate numerous motions related to discovery as well as motions in limine and any other motions that may be necessary to appropriately sculpt this complex construction matter into a case suitable for trial by a jury.

(g) Discovery pending

Although the parties have diligently exchanged discovery over the life of this dispute, there remain certain documents for both Plaintiff and Defendant to produce. Due to administration prerequisites and a recent settlement of claims against the SCDOT and Horry County, FCI just received the full Project file from SCDOT on July 20, 2023. FCI is in the process of preparing the SCDOT file for production to TSC along with any remaining documents received that have yet to

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be produced. The SCDOT Project file alone is 53 GB and contains approximately 50,000 documents. On October 6, 2023, TSC produced a collection of approximately 25,000 documents and has pending responses to interrogatories and requests for production.

(h) Additional discovery contemplated

As written discovery and document productions continue, the Parties have yet to take depositions in this matter. The number of depositions to be taken will match or eclipse the estimated number of witnesses. FCI and TSC will attempt to work together to maximize efficiency and cost-effectiveness in this process. In addition, certain third-party subpoenas may be necessary. For example, third-party subconsultants were also at work on the Project who observed practices and work areas. These may be important to the case. Completion of document production will allow for a more accurate assessment of whether such additional discovery is needed.

(i) Other information which might prove helpful to the court

Although this matter bears a 2022 case number, discovery has not proceeded normally due to the prolonged effort to resolve certain issues with SCDOT and Horry County. During this effort, the Parties to this action acknowledged the benefits of refraining from extensive litigation expense pending the possibility of reducing the costs and complexity of the instant matter. The SCDOT/Horry County matter only concluded in July of 2023, which led to the production of the SCDOT's Project file to FCI. As indicated, FCI is now in the process of providing that file to TSC. From FCI's perspective, the settlement with SCDOT/Horry County did not significantly simplify the case against TSC.

The Parties seek a complex case designation to ensure adequate time to conduct discovery and depositions and to properly prepare for trial. The consideration of discovery, evidentiary, and other potential motions will be greatly enhanced by the participation of an assigned judge through

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a complex case designation. The Parties anticipate significant discovery issues due to the sheer volume of documents and potential fact witnesses involved. As a result of the five-year Project duration, the passage of time since Project completion, and the nature of design and construction work, the fact witnesses in this matter now reside in multiple jurisdictions, and many now work for other employers such that a date certain for trial is necessary to allow for dependable, long-lead-time witness scheduling and coordination. Similarly, significant expert witness testimony is necessary, frequently leading to *Council*-type challenges and prolonged deposition efforts. Finally, the demands of streamlining and managing a complex construction matter into a suitable case for presentation to a jury over the course of approximately three weeks will require a judge fully familiar with the complicated legal and factual issues at play in this matter. For these reasons, the Parties join in respectfully requesting this case be given a complex case designation.

Respectfully submitted this 18th day of October, 2023

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Attorneys for Plaintiff Flatiron Constructors, Inc.

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We Consent and Join in the Motion for an Order designating the matter as complex:

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ELECTRONICALLY FILED - 2023 Dec 01 4:05 PM - HORRY - COMMON PLEAS - CASE#2022CP2606116

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2022-CP-26-06116**
Flatiron Constructors, Inc.,	)	
	)	**PLAINTIFF'S MOTION TO RECONSIDER**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, Flatiron Constructors, Inc. ("FCI"), by and through counsel, moves the Court, pursuant to SCRCP 59(e), to reconsider its Form 4 Order, dated November 22, 2023, partially granting Defendant TranSystems Corporation's ("TSC") Motion for Summary Judgment ("MSJ"). The key issue on summary judgment turns on a complete understanding of the facts and circumstances defining the "special relationship" between TSC and FCI and FCI's third-party beneficiary status to TSC's Engineering Contract. Because FCI has not had a full and fair opportunity to complete needed discovery, the Court's Form 4 Order is premature and should be withdrawn. Moreover, facts and circumstances discovered since the hearing on TSC's MSJ indicate the likelihood that additional discovery will uncover even more relevant evidence. Hence, FCI also moves for reconsideration based upon SCRCP 60.

WHEREFORE, the Plaintiff requests that the Court withdraw its Form 4 Order, dated November 22, 2023 until such time that FCI has a full and fair opportunity to complete discovery.

SIGNATURE BLOCK ON NEXT PAGE

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December 1, 2023
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
	)	
	)	
Flatiron Constructors, Inc.,	)	
	)	**DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S MOTION TO RECONSIDER**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendant.	)	

Pursuant to Rule 11 and Rule 12(f), SCRCP, Defendant TranSystems Corporation ("TSC") moves to strike the Motion to Reconsider of Plaintiff Flatiron Constructors, Inc. ("Plaintiff"), which was filed on December 1, 2023. The basis for this Motion is that the Motion to Reconsider is plainly improper under Rules 59 and 60, SCRCP, and, therefore, the Court should not consider the Motion. The Court's Form 4 Order is not a final order under Rule 59(e), because the Form 4 expressly states that the Court will enter a formal order following the Form 4, because it states: "Defendant's attorney is to draft a proposed order consistent with its Memo in Support of Summary Judgment and email it to all attorneys of record before e-filing it for my review." (November 22, 2023 Order.) Rule 59(e) allows a Motion to Alter or Amend a Judgment; however, the Court has not entered a judgment on the pending motion until it files a formal order, based on the plain language of the Form 4 Order.

Plaintiff's Motion under Rule 60, SCRCP, is plainly improper and should be stricken pursuant to Rule 11, SCRCP. Rule 60 allows relief from a final judgment, which has not been entered in the case. This Motion fails to comply with the plain requirements of Rule 60, namely that there be a final order, and therefore it should be stricken. Additionally, Plaintiff has failed to identify significant new evidence. All but one of the exhibits offered as "new evidence" in

Plaintiff's Motion are contained in Flatiron's own document production: Exhibit F at FIC000160523; Exhibit I at FIC000171728-9; Exhibit I at FIC000153336; and Exhibit J at FIC000176825. Of course, Plaintiff failed to disclose that it previously produced all of these documents in discovery, when it referred to them as "documents produced by TSC on October 6, 2023, after the Hearing on TSC's MSJ." (Brief in Support of Motion to Reconsider, p. 13.) This is not new evidence, as it has been in TSC's files for the entirety of the litigation, and, yet, TSC failed to disclose this to the Court when saying it has new evidence.[1]

TSC expects that Plaintiff is seeking two chances to plead its case, on which the Court has already ruled – (1) a motion to reconsider the Form 4; and (2) a motion to reconsider the formal order. This is improper, and such a motion should be limited to the Court's findings in the formal order it requested. The undersigned today submitted a Proposed Order to the Court, in accordance with the Court's Form 4 of November 22, 2023, after providing the document to opposing counsel via email yesterday, as ordered by the Court.

In addition to the fact that Plaintiff improperly filed the Motion to Reconsider prior to entry of a final order, the Motion violates court rules, because "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., Inv. v. Hagen*, 313 S.C. 497, 499, 443 S.E.2d 399, 400 (Ct. App. 1994). Specifically, Plaintiff attempts to introduce new evidence in the form of snippets of emails from hundreds of thousands of documents, in an effort to create a genuine issue of material fact where none exists. To say that Plaintiff's efforts are misleading is an understatement. The sole affidavit submitted by Plaintiff as to RCE status issue is from Louis Hutcherson. As noted repeatedly in TSC's submissions, Hutcherson does not testify that he believed that TSC's Marty Long was SCDOT's RCE, and the

[1] Copies of the documents bearing Plaintiff's Bates labels are attached hereto as Exhibit 1.

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reason he did not so testify is revealed by Plaintiff's own produced emails from Hutcherson. On February 25, 2016, Hutcherson, then Plaintiff's Project Engineer, emailed Ted Kirk, then Flatiron's Regional Manager, noting that:

> You would believe that Marty, 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 email below. Decisions that the RCE should be making, and can make per the Specifications, are a two, three, four, five, and sometimes six step process.

(FIC000804766, dated February 25, 2016, filed herewith as Exhibit 2.)[2] Hutcherson wrote this email in response to one from Marty Long, in which Long said:

> On this project, since I'm a consultant [presumably noting he is not employed by SCDOT], anywhere it says RCE you can replace it with the word District which would be Jason or Travis [Patrick]. With that said you can show it to Travis at the bi-weekly meeting or run by his office if you need an answer sooner.

(*Id.*) Interestingly, both witnesses who offered the only affidavits that Plaintiff presented in opposition to the Motion for Summary Judgment were party to this email – Hutcherson wrote it, demonstrating his knowledge that Long was not RCE, and Linda Brumfield, then Flatiron's received it. Not surprisingly, neither disclosed this knowledge in their sworn testimony to this Court, and Plaintiff failed to disclose this when contending there was any genuine issue of material fact relating to the pending motion.[3]

---

[2] In her July 7, 2023 Affidavit, Linda Brumfield of Plaintiff testified that Plaintiff maintains its electronic files in the regular course of business, and that it produced its regular records bearing FIC Bates labels.

[3] Rule 56(g), SCRCP, allows a trial court to sanction a party that offers affidavits in opposition to motions for summary judgment in bad faith or solely for the purpose of delay.

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Further, while the rules provide a procedure, under Rule 26(f), SCRCP, for a party to seek a delay for further discovery, Plaintiff failed to file affidavits in support of such a position. Accordingly, Plaintiff cannot raise the issue via a Motion to Reconsider. In a concurring opinion for the Court of Appeals, now-Justice Few noted:

> Rule 56(f) of the South Carolina Rules of Civil Procedure provides 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. Pursuant to Rule 56(f), the non-moving party or counsel may submit an affidavit stating the reasons "he cannot … present by affidavit facts essential to justify his opposition" to the motion. 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.

Matter of Estate of Smith, 419 S.C. 111, 120-1, 796 S.E.2d 158, 163 (Ct. App. 2016)(Few, A.J., concurring). Plaintiff failed to follow that procedure, and it cannot cure this failure by a Motion filed nearly eight months after TSC's Motion for Summary Judgment was filed and four months after the hearing at issue.

For the reasons set forth above, the Court should strike the pending Motion to Reconsider, as improper, untimely, and improperly introducing new evidence.

This Motion is based upon the Court's Form 4 Order of November 22, 2023, the exhibits filed herewith, South Carolina law, and any Memorandum of Authority to be filed hereafter. Pursuant to Rule 11, SCRCP, the undersigned certifies that he had no duty of consultation, because this Motion is in furtherance of a dispositive motion.

WILKES ATKINSON & JOYNER, LLC

December 7, 2023

/s C. Daniel Atkinson
Michael B.T. Wilkes, Esq. (S.C. Bar 6107)
mwilkes@wajlawfirm.com

320 Broad St., Suite 220
Charleston, SC 29401
843.737.6229

- And -

C. Daniel Atkinson (S.C. Bar 72721)
datkinson@wajlawfirm.com
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Phone: (864) 591-1113

Attorneys for TranSystems Corporation

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EXHIBIT 1

Date: Wed, 8 Jan 2014 8:24:28 PM (UTC)

Sent: Wed, 8 Jan 2014 8:23:46 PM (UTC)

Subject: Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).

From: Long, Martin L - TranSystems <MLLong@transystems.com>

To: markunaa@horrycounty.org; albert.parsons@santeecooper.com; Mattison, Bill R <MattisonBR@scdot.org>; billyray.cox@horryelectric.com; brent.barker@htcinc.net; nickersonbg@cecsinc.com; stoutcm@dhec.sc.gov; craig.rivers@meadhunt.com; gilreath@horrycounty.org; dbhoff@transystems.com; Johnson, David L <JohnsonDAV@scdot.org>; Townsend, Dennis L <TownsendDL@scdot.org>; djkennedy@transystems.com; elizabeth.g.williams@usace.army.mil; evelyn.smart@uscg.mil; fhchapman@earthlink.net; crosbyf@horrycounty.org; jposton@gswsa.com; Thompson, Jason D <ThompsonJD@scdot.org>; Hawkins, W Jay <HawkinsWJ@scdot.org>; jeff.burkett@meadhunt.com; jrfisher@transystems.com; Dean, Johnson B <DeanJB@scdot.org>; waitesk@horrycounty.org; beansk@horrycounty.org; DuBose, Kevin W. <DuBoseKW@scdot.org>; parenheimer@pbworld.com; Berry, Kyle <BerryWK@scdot.org>; Quattlebaum, Leah <QuattlebLB@scdot.org>; bourcierl@horrycounty.org; Long, Martin L - TranSystems <MLLong@transystems.com>; michael.cook@meanhunt.com; Barbee, Michael W. <BarbeeMW@scdot.org>; pmstrub@transystems.com; Wells, Regena M - TranSystems <rmwells@transystems.com>; mcdonaldr@pbworld.com; kneecerl@cecsinc.com; rgoodson@flatironcorp.com; Touchberry, Russ T <TouchberRT@scdot.org>; rhoess@horrycounty.org; rutherfords@horrycounty.org; ewcollins@schp.org; sdimoro@flatironcorp.com; gosnells@horrycounty.org; tkirk@flatironcorp.com; Steagall, Todd <SteagallRT@scdot.org>; Mukai, Tom W - TranSystems <twmukai@transystems.com>; twarren@flatironcorp.com; travis.g.hughes@usace.army.mil; Patrick, Travis M <PatrickTM@scdot.org>; vance.langston@twcable.com; Fulton, John W. <FultonJW@scdot.org>;

CC: fchapman@RDA-usa.net;

Attachments: PRECON INVITE LIST.pdf; Carolina Bays Project Agenda.pdf

---

Ladies and Gentlemen

On behalf of Horry County and the SCDOT, we would like to invite you to attend and participate in the Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).

The meeting will be at the following location, date and time:

Date: January 24, 2014
Time: 9:00 AM
Facilitator: Frank Chapman with RDA
Precon: Martin Long with TranSystems
Location: Horry County Government & Justice Center
Multi-Purpose Room B (Second Floor)
1301 Second Avenue, Conway, SC

The agenda for the meeting is attached. Please RSVP by January 17th to Martin Long (mllong@transystems.com) so we can provide enough materials and food for all attendees. Also please provide the names of any additional people from your organization who will be attending so that adequate seating and meal arrangements can be made. (See attached invite list)

If you have any questions, please do not hesitate to contact our office.

Thank you.

Martin Long
RCE
864.915.0741

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EXHIBIT 1

Date: Tue, 9 Feb 2016 2:41:22 PM (UTC)
Sent: Tue, 9 Feb 2016 2:40:41 PM (UTC)
Subject: RE: File 26.036775A - SC 31 Carolina Bays - Pipe Backfill Material Waiver
From: Johnson, David L <JohnsonDAV@scdot.org >
To: CR-Marty Long <mllong@transystems.com>; Zwanka, Merrill E <ZwankaME@scdot.org>; Patrick, Travis M <PatrickTM@scdot.org>;
CC: Waites, Nick <WaitesNT@scdot.org>; Short, Temple K <ShortTK@scdot.org>; Sprott, Mike <SprottMA@scdot.org>; Thompson, Jason D <ThompsonJD@scdot.org>;
Attachments: File 26.036775A - SC 31 Carolina Bays - Pipe Spec Waiver.pdf

Marty/Travis/Merrill:

Please see the attached material waiver for the subject project. Let me know if I need to give you any additional information.

Thanks,

David L. Johnson
District Five Construction Engineer
South Carolina Department of Transportation
3018 East Palmetto Street | Florence, SC | 29503
Office: (843) 629-5222 Fax: (843) 661-4704

From: Short, Temple K
Sent: Thursday, October 15, 2015 11:44 AM
To: D0District Construction Engineers; D0Resident Construction Engineers
Cc: Zwanka, Merrill E; Wheeler, Cruz; Jennings, Ikesha; Waites, Nick; Hawkins, Chad W; Thompson Jr, Jesse U.; Swygert, Terry L
Subject: Material Waiver Process for OMR

In an effort to streamline the dissemination of waiver information to the appropriate OMR personnel and units, please follow the following guidance. OMR is currently accepting material waivers for:

LOI for Borrow: per 2007 standard specs

A-2-4 Coquina for Backfill: per project, based on upcoming revisions to the current spec. Waiver should specify the material being used in lieu of A-1 or A-3 – presumably A-2-4. The test reports will reflect pass or fail for the material specified. If at any time during construction the allowed material appears to not be performing satisfactorily, the RCE can require that A-1 or A-3 material be used instead.

CMRB Method 4 sampling requirements: samples of the CRS-2 and aggregate for the temporary surface course are not required. Samples may still be obtained for information only at the discretion of the RCE. A waiver may be submitted for current projects in lieu of completing a 100.09 for the samples not obtained.

In order to ensure that OMR is properly notified and for project record, the **DCE** should send the waiver/memo to the project **RCE and to Merrill Zwanka, Materials and Research Engineer**. This will ensure that the waiver information gets routed to the appropriate people at OMR. We can then make sure that our folks are informed of these exceptions and that the approval, acceptance, and sample procedures are completed in a timely and accurate manner.

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South Carolina
Department of Transportation

Darlington County
Dillon County
Florence County
Georgetown County
Horry County
Marion County
Marlboro County
Williamsburg County

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MEMORANDUM

TO: M. L. Long, Resident Construction Engineer
T. M. Patrick, District Five Special Projects Engineer
Merrill Zwanka, Materials and Research Engineer

FROM: D. L. Johnson, District Construction Engineer

Johnson, David L
2016.02.09
09:37:36 -05'00'

DATE: February 9, 2016

RE: File 26.036775A – SC 31 Carolina Bays – Pipe Backfill Material Waiver

Based on upcoming revisions to the pipe specification, prime contractor Flatiron Constructors, Incorporated has requested to utilize additional soil classifications for pipe backfill on the subject project. Under the future revision to the SC-M-714 Pipe Specification, the SCDOT will allow A-2-4 and A-2-5 material as pipe backfill. The new specification will also not require wrapping of the pipe backfill unless determined necessary by RCE. The Director of Construction Office has expressed allowance of these alternate materials upon the request of the contractor and acceptance by the respective District Office. A material waiver for A-2-4, A-2-5, and unwrapped pipe backfill to meet the contract requirements of SC-M-714 is hereby GRANTED on the subject project.

If at any time during construction the RCE or the District feels that the waiver materials are not performing adequately in the field, we can revert back with the current pipe specification that requires A-1 or A-3 (wrapped) materials at no additional cost to the Department. The material waiver and/or change back to the original specification are at no additional cost to the Department. The RCE will create a change order to add these changes to the project contract.

If you have any questions or require additional information after reviewing the provided information, you may call me at 843-629-5222.

DLJ:dlj
ec: Nick Waites, Assistant Construction Engineer
Jason Thompson, District Bridge Engineer
File: D5/Florence/DLJ

District Five Engineering
Post Office Box 1911
Florence, South Carolina 29503

Phone: (843) 661-4710
Fax: (843) 661-4704

AN EQUAL OPPORTUNITY
AFFIRMATIVE ACTION EMPLOYER

EXHIBIT 1

Date: Mon, 18 Jul 2016 3:46:46 PM (UTC)
Sent: Mon, 18 Jul 2016 3:45:19 PM (UTC)
Subject: 26.036775A CBP - Question on Reporting
From: Long, Martin L - TranSystems <MLLong@transystems.com>
To: Campbell, Juanita P. <CampbellJP@scdot.org>;

Hello Juanita! I don't know if you're the person to answer this or not but your email was the only one I found. Does the Prime need to list DBE's on the Quarterly Report when they actually start work on the project or when they submit their subhauler request?

Thanks for your help!!

Marty Long
RCE Carolina Bays
864.915.0741

Martin L. Long

TranSystems

Delivering the Transportation Experience for 50 Years

TranSystems
200 Prather Park Dr
Myrtle Beach, SC 29588

Direct: 843-796-9381
Fax: 843-796-9378
Cell: 864-915-0741
www.transystems.com

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EXHIBIT 1

Date: Tue, 18 Jul 2017 9:03:50 PM (UTC)
Sent: Tue, 18 Jul 2017 8:59:08 PM (UTC)
Subject: RE: 60 Day Notice for Work in AICWW (South Carolina)
From: Heck, Justin LT <Justin.C.Heck@uscg.mil>
To: Long, Martin L - TranSystems <MLLong@transystems.com>; Zercher, Jennifer N CIV <Jennifer.N.Zercher@uscg.mil>; Lawrence, Eddie H CIV <Eddie.H.Lawrence@uscg.mil>;
CC: Patrick, Travis M <PatrickTM@scdot.org>; djkennedy@transystems.com;

*** This is an EXTERNAL email. Please do not click on a link or open any attachments unless you are confident it is from a trusted source. ***

Good Afternoon Mr. Long,

D7 Bridges is currently reviewing Mr. McGrath's Construction checklist and will be reaching out to him to ensure all necessary details are provided within the checklist. We should hear something by the end of the week.

Once an updated form is received we will be better equipped to make decisions on whether or not the channel will need to be temporarily closed and for the durations of those closures. Thanks for voicing your concerns.

Regards,

Justin Heck
Sector Charleston
Waterways Management Division
P: 843-740-3184
F: 843-740-3189

---Original Message---
From: mllong@transystems.com [mailto:mllong@transystems.com]
Sent: Monday, July 17, 2017 11:11 AM
To: Zercher, Jennifer N CIV; Heck, Justin LT
Cc: PatrickTM@scdot.org; djkennedy@transystems.com
Subject: [Non-DoD Source] RE: 60 Day Notice for Work in AICWW (South Carolina)

Mr. Heck

Hello. My name is Martin Long and I am the RCE for the SCDOT over the Carolina Bays Parkway project. I did not notice anything on the Contractor's attached application that noted all of the overhead work that will be done after the girders are set. The Contractor will be installing stay-in-place forms, overhangs, bracing, a drainage system and painting to name a few of the operations that will be performed over the active channel.

Will any of the above type work require any type of channel closure, traffic control and/or notifications?

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EXHIBIT 2

Date: Thu, 25 Feb 2016 11:04:58 PM (UTC)
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval
From: Hutcherson, Lou <LHutcherso@flatironcorp.com>
To: Kirk, Ted <tkirk@flatironcorp.com>; Lieberman, Daniel <DLieberman@flatironcorp.com>;
CC: Gaidanowicz, Bryan <BGaidanowicz@flatironcorp.com>; Brumfield, Linda <LBrumfield@flatironcorp.com>; Sanborn, Todd <tsanborn@flatironcorp.com>; Nix, Lisa <LNix@flatironcorp.com>;

Mr. Kirk –

Please see Marty's e-mail below to Lisa this morning validating and confirming my Recovery Plan Issue Item 21.B.; and in addition, if it's a structure issue, you can add time for SCDOT Bridge Division, (and they don't work every day), the Project's EOR, Rocque at CECS, and the respective structure's DOR, whether STV, (ICWW Bridge) or Mead & Hunt, (SC-707 and Enterprise bridges).

You would believe that Marty, 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. Decisions that the RCE should be making, and can make per the Specifications, are a two, three, four, five, and sometimes six step process.

Lou

From: Nix, Lisa
Sent: Thursday, February 25, 2016 10:39 AM
To: Hutcherson, Lou
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

From: mllong@transystems.com [mailto:mllong@transystems.com]
Sent: Thursday, February 25, 2016 10:35 AM
To: Nix, Lisa
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

Lisa

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 or run by his office if you need an answer sooner.

From: Nix, Lisa [mailto:LNix@flatironcorp.com]
Sent: Thursday, February 25, 2016 10:30 AM
To: CR-Marty Long
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

I have purchased only two set of stamps- which we will need both for the construction of the project. The drawing states the RCE is to approve the material and doesn't mention the DOT. If the DOT needs to be involved is it something Travis can look at in the bi-weekly meeting so we don't lose the ones we have?

Thanks,

Lisa Nix

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STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS NONJURY
COUNTY OF HORRY)	
FLATIRON CONSTRUCTORS, INC.,)	TRANSCRIPT
)	
PLAINTIFF,)	OF
)	
vs.)	RECORD
)	
TRANSYSTEMS CORPORATION,)	2022-CP-26-6116
)	
DEFENDANT.)	

August 7th, 2023

B E F O R E:

THE HONORABLE KRISTI F. CURTIS, Judge.

A P P E A R A N C E S:

CARTER REID, MASON A. GOLDSMITH, JR., BRYAN P. KELLY, and WILLIAM CLAYTON
ESQ.
Attorneys for the Plaintiff

C. DANIEL ATKINSON and MICHAEL B.T. WILKES
ESQ.
Attorney for the Defendant

Transcribed by Pamela E. Green, from WebEx

I N D E X

(WHEREUPON, there were no exhibits marked or testimony taken during this hearing.)

P R O C E E D I N G S

THE COURT: Okay. Number 11 on the docket, Flatiron Constructors, Inc. versus TranSystems Corporation.

MR. ATKINSON: Good afternoon, Your Honor. Dan Atkinson here for TranSystems.

MR. GOLDSMITH: Your Honor, this is Andy Goldsmith. I'm here for Flatiron.

THE COURT: Okay.

MR. GOLDSMITH: You wish for me to proceed, Your Honor?

THE COURT: Give me just one sec.

Okay.

THE COURT: I see that---

MR. GOLDSMITH: Okay.

THE COURT: ---this is---

MR. GOLDSMITH: Okay.

THE COURT: ---Case Number 2022-CP-26-6116.

If you'll give me just a sec---

MR. GOLDSMITH: Your Honor, I---

THE COURT: ---to---

MR. GOLDSMITH: Yeah. If I could have a moment also. My co-counsel is not on the webinaire yet and, and he should be. I want to run him down.

THE COURT: Okay. I do see Seth Vincent. I see a, a cell -- looks like a cellphone for him appearing as an

attendee. But I can't make Mr. Vincent a panelist for some reason. It's not allowing me -- well, it looks like it did that time.

MR. GOLDSMITH: Okay. Carter Reid---

THE COURT: It's letting---

MR. GOLDSMITH: ---is who I'm -- I'm looking for Carter Reid and then I've got Bill Clayton who is in-house counsel with Flatiron.

THE COURT: Sure. Go right ahead.

MR. GOLDSMITH: Thank you.

(Pause.)

THE COURT: Okay. So we have Mr. Reid. We have Mr. Goldsmith. We have Mr. Atkinson.

Anybody else that we have with this case?

MR. ATKINSON: Your Honor, my partner, Mike Wilkes, is off camera next to me. But he, he is attending the hearing.

THE COURT: Thank you.

Okay. I see this is TranSystems motion for summary judgment.

So, Mr. Atkinson, that's you, sir.

MR. ATKINSON: Yes, Your Honor.

THE COURT: Okay.

MR. ATKINSON: Thank you.

THE COURT: All right.

MR. ATKINSON: The issue before the Court in this

motion is really a -- it's a straightforward issue of law which is appropriate for resolution in a motion for summary judgment and, and the primary question presented, Your Honor, is did TranSystems owe any duty to Flatiron Constructors in tort for the project at issue.

I know you've got the briefs. I'm not gonna read through the briefs. But the short factual background is this relates to construction of, of Highway -- South Carolina 31 in Horry County. Flatiron Constructors was a -- the general contractor for this project. The project was owned by Horry County. But it was managed by SCDOT with SCDOT eventually to assume control of the highway, and they're various contracts referenced in our brief regarding that.

First was an intergovernmental agreement between Horry County DOT and South Carolina Infrastructure Bank to finance construction and deal with ownership. Then there was the general contract between Flatiron and Horry County and then TranSystems Corporation had a, had a contract with Horry County to provide certain services.

TranSystems' role in the project was as construction engineer, inspection, and testing services provider. You will occasionally see the terms CEI services or CEIT services throughout the briefing.

Importantly, TranSystems never had final authority to

make any decisions and this is briefed thoroughly. But, ultimately -- all decisions, final decisions, rested with the resident construction engineer for the South Carolina Department of Transportation. I'm gonna discuss that in depth because an issue came up in the briefing. But we believe, because the resident construction engineer for DOT had final decision making authority, there is no duty existing in tort from TranSystems to Flatiron to give rise to a negligence claim. You know, we believe this is clear and it's an issue of law.

Flatiron contends, we believe incorrectly, that the Tommy L. Griffin 1 case from 1995 creates a duty. We believe it does not and we believe the facts of this case are significantly different from the Tommy L. Griffin case.

Significantly, as the construction engineering and inspection testing provider, TSC acted as eyes and ears for DOT. But it did not have the authority to make final decisions.

And so I think it's important to refer to the language of the Supreme Court in the Tommy L. Griffin case, and I'm quoting directly, "the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed" and that's from Page 54 of that decision. And then, right after that, the Court says, and

this is important, whether such a duty exists will depend on the facts and circumstances of each case.

We think there are significant and important differences between this case and the Tommy L. Griffin case which dealt with construction of a sewer line. First, despite the allegations in the brief, we see no evidence that Tommy L. Griffin performed any designed services. The contract makes reference to it. But nobody's introduced a signed or sealed drawing or alleged any error in a drawing committed by TranSystems.

It is also clear, as noted in the briefing, that TranSystems did not have final authority to stop construction and that decisions made by TranSystems as preliminary decisions were subject to review by the resident construction engineer of the South Carolina Department of Transportation.

Your Honor, we have provided you with all the specifications in the contract. Importantly, this is from the 2,000 Standard Specification Section 105.1.

The intergovernmental agreement, which is also in the record which was DOT's contract with the owner, Horry County, also is clear at Page 10 Section 5.1. The SCDOT shall oversee all planning, design, engineering, right of way acquisition, contract administration, inspection, awarding of contracts, the renew -- review and approval of

payment of contracts, construction of the project and each component project in any related or necessary activities or functions of the project. This is important because this makes the owner intent clear as to who is in charge and who has authority and responsibility.

We think there's a significant factual misstatement in Page 19 of the Flatiron brief because it says that the TSC contract says nothing about oversight.

Well, the TSC contract doesn't necessarily comment on it. But the intergovernmental agreement could not be clearer than what it says at Page 10. Further, the TSC contract at Page 26 requires, requires TSC to provide office space for their resident construction engineer of DOT to share with TSC, which is fairly persuasive proof that they're not the same person. You wouldn't have to provide office space for yourself.

Section 5.7 of the standard -- of the intergovernmental agreement also states that SCDOT's highway engineers will review the construction prior to acceptance of ownership by SCDOT. This makes a persuasive reason for the Department of Transportation to be in charge of the case.

Your Honor, in -- Tommy L. Griffin opinion builds on precedent from Hill versus Polar Pantries which is a 1950's case which states that there are duties imposed on those who design and construct a project. But, importantly,

TranSystems neither designed nor constructed the project at issue.

We also believe Cullum Mechanical Construction versus Baptist Hospital are material -- is a materially different case which is also cited by the plaintiff. In that case the architect prepared the project manual and was required to review pay applications certifying amounts due and determining performance.

Your Honor, on the intergovernmental agreement, that's the duties of the RSC for SCDOT. Not TranSystems.

The architect had the ability to withhold payment in that case if the general contractor had failed to pay subcontractors and the Court, in that case, also, Supreme Court, also noted that whether there was a duty depends on the facts of the case that found that there was a duty there.

The Court did note that an architect normally would not have a duty regarding payment to subcontractors. But a special -- but the specifications for the project may have given rise to a special duty and that more inquiry was required in that case.

The plaintiff in this case has not identified contract provisions or specifications that give rise to a duty owed by TranSystems to Flatiron. I think, very important, as we discussed what the Court has to consider in this case, Your

Honor, the plaintiff's opposition brief misstates the standard of review for this Court stating that TranSystems has the burden of proof.

Pretty importantly, TranSystems has no counterclaims pending. This motion for judgment -- summary judgment is on direct claims brought by Flatiron against TranSystems. It is clear from the case law cited that the plaintiff bears the burden of proof. They bear the burden of proof at all times in the case.

Under Rule 56 as cited in the Tommy L. Griffin 2 case, once TranSystems says that there's an absence of material fact under Rule 56(e) Flatiron is required to produce admissible evidence to show that there is an issue of fact and we know that's important to consider as the Court moves forward. The case cited in plaintiff's brief stating that the burden of proof landed -- laid with the moving party where summary judgment was granted on a counterclaim, and obviously, on the counterclaim, the defendant would have the burden of proof.

A major issue you'll see in Flatiron's opposition to TranSystems motion is a contention that perhaps TranSystems acted as the resident construction engineer.

Your Honor, there's no genuine issue of fact as to that and it's clear from the contracts who played what role. The standard specifications which are part of Flatiron's

contract at Section 101.2 defines the RCE as a SCDOT official. The documents offered by TranSystems or offered by Flatiron, which were verified by someone who was not directly involved in the project but had oversight of the company, again, as we've discussed in the brief, tend to show that Travis Payne was the RCE for SCDOT.

That's what his email signature says. He's making material decisions instructing Flatiron to tear out items. I think, if you review the affidavit carefully of Louis Hutcherson, which says that quote, and I'm paraphrasing, but that "Marty Long of TranSystems held himself out to be resident construction engineer." He never said that anyone at Flatiron thought Marty Long was resident construction engineer.

Your Honor, if you look at the documents in context, yes, his signature says resident construction engineer which is the title he had with TranSystems. He never represented that he was SCDOT's resident construction engineer. The Travis Patrick emails that were sent to Flatiron have Travis Patrick signing it as resident construction engineer and he's a DOT employee.

Exhibit 2 to our reply briefs shows that the relationship is what we said in the initial brief. I think also, if you look at the affidavit of Hutcherson, if you look at those documents in context, Exhibit 6 to his

affidavit is a flow chart of people's relationship. Right above Martin Long in that flow chart is Travis Patrick who is the resident construction engineer which shows that he has authority over Mr. Long.

With regard to our discussion of that -- the duty argued by plaintiff in this case creates an impermissible conflict, I think Flatiron misstates TranSystems position and what -- if I'm paraphrasing their argument is because Tommy L. Griffin said there wasn't a conflict there, there's not a conflict here, and I think there's an important distinction and the facts of the case are important.

In the Tommy L. Griffin case, the owner agreed to have it's project engineer provide design and supervision and approval of pay apps meaning it approved the relationship. If we think of this in the legal context, it would be at like a client signing a conflict waiver. They acknowledge that this relationship existed and everybody agreed through the contracts that's what would happen.

The contrary is true in -- here in this case, Your Honor. Specifically, the owner in the independent -- in the intergovernmental agreement agreed for SCDOT to be the party overseeing construction, approving pay apps, and having all those roles. TranSystems contract, which is Exhibit E to our brief in support, in it first whereas clause says the county desires to employ consultant, which is TranSystems,

to furnish personnel and render professional engineering services for use and benefit of the county in the development of the project. It does not identify any duties owed or responsibilities assumed with regard to contractors working for the county.

Your Honor, we've cited the professional conduct rules for engineers. But the short summary is an engineer can not have conflicting interests. That might be available, available to be waived by contract. It was not waived in this contract.

I think further evidence, Your Honor, the TSC contract states, and I quote, "SCDOT's resident engineer or his designee will provide daily supervision on the project and will make final decisions when necessary." TranSystems -- it says project manager, it will be the project engineer, will report directly to SCDOT's resident engineer or his designee.

Again, I mention the affidavit -- the affidavits that were offered. They don't create a genuine issue of material fact.

Exhibit 4 to the Brumfield affidavit, which is Exhibit B to plaintiff's brief in opposition, shows that the resident construction engineer was copied on Long's correspondents which is consistent with him having supervisory authority. Exhibit 5 shows Travis Patrick

making decisions related to responsibility for damages to a project because he's the person with that authority.

As I noted before, Exhibit 6 shows Long reports to Patrick. He is his direct report.

Your Honor, I think it's critical to understand -- I know that there's an argument there's an issue of fact. But whether or not there's a duty is an issue of law for the Court's consideration.

We offered in our initial brief a Trial Court opinion from Judge Clifton Newman in the McCarthy versus Keowee Falls Investment Group case and we think it's very persuasive. Obviously, for years Judge Newman presided over the multi-week construction docket and including Horry County. So, he's well familiar with the issues in South Carolina's law -- South Carolina law analyzing them.

Judge Newman, in that order, noted that there were only two exceptions to the Economic Loss Doctrine in construction cases. One is for residential con -- home builder as in the Kennedy versus Columbia Lumber case. And the second, and I'm quoting directly, "in certain circumstances where a non-contracting third party shows a special relationship with the alleged tortfeasor which gives rise to a distinct extra contractual legal duty, he may recover in tort for breach of such duty."

That is in Paragraph 37 of Judge Newman's order and

then Judge Newman further says "in designing construction cases, South Carolina's Courts have found a special relationship only where there's either a close working relationship between project participants or where a third party foreseeably relies on the services of the professional in taking action."

Here the contracts at issue say that there's no duty. Specifically Section 105.9 of the standard specifications to Flatiron's contract tells Flatiron do not construe advice given by the RCE's representative as in anyway binding on the RCE or the department or as releasing the contractor from the fulfillment of terms of the contract. So, they were placed on notice you can't rely on TranSystems. You've got to come to us for a final decision.

Your Honor, there's some discussion in the opposition brief of planned preparation alleging that Flatiron or that TranSystems undertook it. I tell you that's shotgunning an allegation in attempt to create an issue of fact. But the planned preparation arguments really are a red herring. There's no -- been no identified deficiencies by any expert and plaintiff has yet to produce a planned signed or sealed by TranSystems in this case.

Further, in response to arguments in the brief, TranSystems denies all allegations of any errors made by it. But that's not necessary for this phase of the hearing cause

the question is is there a duty. If there's no duty, there's no reason to consider any other elements.

Moving forward from the negligence claims, plaintiff's third party beneficiary claims are built on multiple errors and plaintiff -- or TranSystems is entitled to summary judgment on them.

First, there's a reference in the, in the plaintiff's brief to the Beverly versus Grand Strand Medical Center case. That case, I think importantly for the Court to note at Page 508, notes "the presumption that a contract is not enforceable by a nonparty may be overcome by showing that he was intended to be a direct beneficiary of the contract." That's at Page 508. So, we start with a presumption that there is no third party beneficiary.

Again, plaintiff has stated -- misstated that we have the burden on that issue. We do not. But, regardless, plaintiff must provide some evidence of intent to benefit Flatiron as a third party to survive summary judgment on this case.

I think we need to understand the procedural posture. This case has been pending five years. There've been 2-million documents produced. This motion's been pending for four months. We've had no request for additional information and there simply is no evidence to show that anyone intended TranSystems or intended Flatiron to be a

third party beneficiary of the TranSystems contract with Horry County.

By contrast, in that Beverly case, the party opposing summary judgment showed that the contract -- a, a large number of contract items which were intended to benefit third parties. In fact, the contract was to give insurer's rights at Grand Strand Medical Center. Plaintiff has identified no language which, which makes the TranSystems contract ambiguous as to third parties. It's identified no language which creates third party rights.

Your Honor, in the brief, plaintiff cites the Dawkins versus Fields case. Our view is that case is very supportive of TranSystems position.

One is -- one -- the main holding that I've always perceived from that case is that you can't use an expert to get -- to create an issue of law, that that's uniquely the Court's providence. But the second says that while summary judgment is a drastic remedy, "nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party's not merely engaged in a fishing expedition." Page 69 of that opinion.

There's -- I don't know whatever -- what additional evidence could be discovered to see whether there was an intent that benefited TranSystems as a third party other

than the documents. The documents don't create an ambiguity. So there's no reason to bring in parole evidence. The Court should rule on that as a matter of law.

Moving on to the tortuous interference cause of action, plaintiff's opposition makes what I consider to be a ludicrous contention that TranSystems was not an agent of SCDOT for purposes of this project. I think, when you look at all three contracts, contracts in context as to the intergovernmental agreement, the general contractor for Flatiron and the TranSystems contract, it's clear that TranSystems did have agency authority.

Section 5.1 of the IGA says that reconstruction, and I'm quoting, "reconstruction and construction services shall be obtained from third party consultants or contractors by or on behalf of the county through the procurement process authorized by law applicable to that contract." All contracts with third parties shall be entered into in the name of the county as owner.

So, the fact that the contract was between the county and TranSystems just means that it's complying with the terms of the intergovernmental agreement. In Exhibit E to our brief in support, a document labeled -- the, the TranSystems contract at the header says "IGA consultant basic agreement." That's entered in December of 2011.

It shows that that agreement was tied to the

intergovernmental agreement and there -- and it's received because TSC gets its facts from the South Carolina Department of Transportation's construction director. That contract notes that DOT will provide daily supervision and make final decisions where necessary.

So, Your Honor, plaintiff's contract recognizes this reality because it describes the authority and duties of the or resident construction engineer's representative in Section 105.9 and it states specifically, and I quote, "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 the provisions of the contract to pre -- approve or accept any portion of the work or to issue instructions contrary to the plans and specifications.

In no case where the RCE's representative act as superintendent to perform other duties for the contractor or interfere with the management of the work by the contractor superintendent. This is important. Do not construe advice given by the RCE's representative as in anyway binding on the RCE or the department or as releasing the contractor from the fulfillment of the terms of the contract.

Your Honor, this is clear as to the agency authority and the limits on the scope of the agency and that's in

Flatiron's contract with the owner. That shows the agency authority. If you are an agent, you can not interfere with a contract tortuously because it's treated as though you're a party to the contract.

Our Supreme Court explained this rationale in the Dutch Fork Developers case cited in our brief. "The reason for this privilege, saying that an agent can't interfere with its own contract, is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract instead of holding the principal liable for the breach of the contract." That's at Page 605, Your Honor.

The privilege only doesn't apply if the agent acts outside the scope of its authority. Well, Your Honor, I just read the scope of authority that was represented to Flatiron in the contract and there's been no allegation of work outside of that. It's just that Flatiron objects to how that work was done.

Finally, Your Honor, one of the elements of tortuous interference with contract is a breach of the primary contract.

Your Honor, it's a public document that claims against DOT and Horry County by Flatiron for breach of the contract have been settled and dismissed. So I don't know how there could be a breach of the contract if that's been resolved.

So, that's another element that I think can't be met to survive a motion for summary judgment.

As to the final cause of action, unfair trade practices, I believe plaintiff's own best case description of the factual basis for its UTP claim is fatal to that claim.

In the plaintiff's brief in opposition, it says "TSC's errors and omissions comprise more than a single simple breach of contract or rather that constitute a repeated pattern of professional -- professionally negligent activities causing unwarranted delay and damages to FCI and the incident public infrastructure project." That's at Page 30.

Your Honor, by the Fourth Circuit's analysis of the Unfair Trade Practices Act, they lose. In -- Judge Haynesworth wrote in Clarkson versus Orkin Exterminator Company, 761 F.2d 189, which is a 1985 case, and I'm quoting directly, "there is no support in South Carolina law for the proposition that a service person violates the unfair trade practice statute if he performs his job poorly or overlooks something which should have attracted his attention. An explicit or implicit representation that he performed his job properly, if the thought is negligence or inattention, is simply not the kind of deceptive practices this statute was intended to reach."

Your Honor, that case dealt with termite inspections which I acknowledge is a service provision. There's no reason that the action by a professional is any different than that under law.

Negligence claims are meant to be addressed through negligence claims. Not unfair trade practices claims. There's been nothing that's been alleged to be unfair or misleading in the course of trade. It's an allegation of negligence even where no duty exits. Therefore, we're entitled to summer judgment on that cause of action.

Your Honor, I know I've given you a lot. We refer to the briefs. But if you have any questions I'm happy to answer them.

THE COURT: Thank you, Mr. Atkinson.

Let me hear from Mr. Goldsmith --

MR. GOLDSMITH: Thank you, Judge Curtis.

THE COURT: -- or Mr. Reid.

MR. GOLDSMITH: My co-counsel, Carter Reid, who's in the McLean, Virginia office of Watt Tieder, has taken the lead on drafting the memorandum in opposition. And so I'm gonna, I'm gonna turn this argument over to him. I'm here, I'm here to support him and may have some comments.

THE COURT: Mr. Reid.

MR. REID: Thank you, Your Honor.

Obviously a lot to cover in response to the defendant's

statements.

I, I think, as an initial matter, they're two areas that we need -- in which we need to set the record straight concerning the standard of review on a motion for summary judgment and the procedural history of the case. There is no misunderstanding and I hope no disagreement with regard to the standard of review.

In order to prevail on this motion, TranSystems has the burden of clearly establishing, by the record before the Court, the absence of a triable issue of fact. And all facts in the record and all inferences have to be viewed and taken in the light most favorable to Flatiron as the nonmoving party.

And since this is a drastic remedy, summary judgment, it, it -- the, the Court is to be cautious in invoking it so that no person, Flatiron, no one, is improperly deprived to trial. And if Flatiron demonstrates even a scintilla of evidence in support of its claim, summary judgment must be denied and I think you will see that there is much more than a scintilla of evidence to establish genuine issues of material fact in all of these issues.

This means, among other things, that summary judgment must not be granted until there's a full and fair opportunity to complete discovery.

Now, you heard the defendant -- the movement -- movant

make reference to this case has been pending for five years and, in the reply, they, three separate occasions, talk about five years and suggest inactivity and suggested that there hasn't been a fulsome pursuit of the case in discovery during that time.

Well, Your Honor, you need only look at their own stated relevant procedural history on Page 4 of their motion where they reference that, once the complaint was originally filed, the two parties got together and immediately stayed the action until -- from April of 2018 to September 30th of 2020. There's half that five years right there.

Then Flatiron had to move to compel documents, which this Court granted Flatiron's motion in April of 2021. There's three years of those five years. And TranSystems did not produce any of its documents until June 30 of 2021. Yet the production was deficient.

Now, the parties recognized that the case was very complicated. Multiple depositions needed to be taken. Hundred of thousands of documents needed to be exchanged. And so they jointly moved to place the case on the complex case designation in an effort to bring some scheduling control. The Court denied that joint motion.

So the parties both consented, both signed a, a motion to remove the case from the docket in October of 2021 and

the case was reinitiated in September of 2022 with a new case number.

Now, this accounts for about four and a half years of the five years that allegedly no activity was taking place. Importantly, I have an email from 2022 from Mr. Atkinson's partner, Mr. Wilkes, in which he acknowledges that they have yet to produce 25,000 documents to Flatiron.

Now, Flatiron has not moved again for another motion to compel because, as Mr. Atkinson alluded to, there were negotiations ongoing. There was a DRB process. That's a Dispute Review Board process between Flatiron and SCDOT and Horry County and that was consuming time. And there was this sort of tacit understanding between TranSystems and Flatiron that we would not vigorously pursue this action until we could get some resolution of the claim against SCDOT all the time understanding that TranSystems had yet to produce 25,000 documents at least in this case.

Now, the action against SCDOT and Horry County indeed has been resolved and that just was resolved in June, a month ago. So, we can -- rest assured, Your Honor, based upon the reply and the suggestion that we have not been vigorously pursuing discovery, Flatiron most assuredly will immediately and vigorously pursue and complete discovery and put this case in a position to be tried accordingly.

That said, under the law, we suing -- we submit to the

Court that if the Court has any doubt about any of the issues in this case, it should not render summary judgment. But it should allow the parties to complete discovery and to close those issues out appropriately.

Now, with regard to the professional malpractice claim, this case and the duty that arises for TranSystems to provide Flatiron with engineering services in compliance with the standard of care is right on par, right on all points with the Tommy L. Griffin case, which is the seminal case issued by the South Carolina Supreme Court, binding precedent, that a duty arises if there's a special relationship. And in the Tommy Griffin case, indeed the Court looked at the facts and the circumstances that establish the relationship between the engineer and the contractor.

And although the Court said yeah, the engineer designed and supervised the project, the entire case was focused upon the supervision and the supervision relationship. It was the fact that the engineer in Tommy Griffin inspected the contractor's work, which TranSystems did here. It's because the engineer in Tommy Griffin could hault construction which TranSystems did here. And it established this relationship in which TranSystems controlled and dictated the economic life or death of Flatiron on the project. And TranSystems, therefore, owes Flatiron the same duty that the Supreme

Court found that the engineer owed the contractor in Tommy Griffin.

Now, TranSystems raises the issue of well, we weren't the design engineer. Again, it doesn't really matter whether they were the design engineer because the Tommy Griffin case recognizes a special relationship based upon supervision. The engineer in Tommy Griffin wrongfully closed the job and that's what happened here. The engineer there made demands not in the contract. That's what TranSystems did to Flatiron. The engineer erroneously interpreted the contract.

That's what TranSystems did here and that's all set forth in Mr. Lou Hutcherson, a former project manager for Flatiron who was on the project, and it is the only affidavit you have, Your Honor, by -- from anyone who was on the project. His affidavit sets forth that those were the things that TranSystems did and those are the things that you should be evaluating and reviewing in the context of the Tommy L. Griffin case to show that a duty arose.

In Tommy Griffin at -- under the SE Second citation at Page 89, the Court said, under these circumstances, the engineer owed a duty to the contractor not to negligently design or negligently supervise the engine -- the contractor. That's a disjunstive test. It's not and. It's or.

So, we submit that whether or not TranSystems actually designed anything is of little consequence with regard to the establishment of their duty under the South Carolina precedent.

Now, despite all that, Flatiron certainly has presented more than a scintilla of evidence that TranSystems was a design engineer on the project and it's interesting that when TranSystems wants to establish who the resident construction engineer is, they want to look at the contract and they don't want to pay attention to the facts that are presented in the affidavits in our opposition. But when it comes time to look at whether or not TranSystems was a design engineer, they want to ignore their contract and they want to only look at somewhat innocuous affidavit presented by Mr. Peter Strub of TranSystems.

If you are to look at, at TranSystems contract, you will see that it unambiguously identifies TranSystems as a design engineer. Their exhibit or their summary judgment Exhibit E Page 16 is an executed certification by TranSystems signed in which they accept all responsibility for all project plans and specifications review. They -- details and designs involved in the preparation and production of the project plans, they certify to produce project plans and specifications that will conform with all the guidelines and requirements. They certify that all

project plans and specifications are to be -- will be checked in their entirety.

This is their contract and an Exhibit E to their motion, Page 3, Section 2(c) "certification agreement is attached hereto and specifically made a part hereof." That certification is part of their contract. And then it goes on to say the certification will be executed if agreed by the parties as applicable.

The certification's part of the contract. It was executed by the plain, unambiguous reading of the contract.

It is applicable and what does TranSystems present in response to that?

They present an affidavit from Mr. Strub. At Paragraph 7 he admits that the contract includes the certification. All he says is TranSystems never prepared, signed, or sealed any of the design plans.

Now, he doesn't say anything about the contract being amended to remove the certification. He doesn't say anything about it not being -- his understanding being that it's not part of their contract. He merely says it's part of the contract but we didn't do it.

I submit, Your Honor, that that's at least a scintilla of evidence. Maybe that's -- maybe that was part of the problem that TranSystems wasn't complying with its contract with regard to these design elements. At the very least, a

genuine issue of material fact, a scintilla of evidence has been presented that TranSystems, as it confesses it did not perform its duties under the contract, that it has a design engineer status if that is something that the Court finds important such that the duties, as identified in the Tommy L. Griffin case are part -- are now fully -- it's fully incumbent upon TranSystems to comply with that duty and their failure to do so entitles Flatiron to pursue them for economic lost damages.

Now, as -- another phase of their argument is that they didn't have final authority.

Well, again, there is a genuine issue of material fact. Not only if -- who was the resident construction engineer, the RCE, but who actually exercised the duties of the resident construction engineer.

The mere fact that TranSystems was hired as a consultant does not mean that it wasn't imbued with the duties and it didn't actually perform the duties of the resident construction engineer on the project and we will see that Flatiron presents much more than a scintilla of evidence that indeed TranSystems assumed and performed those duties and -- it's interesting, in a case cited by TranSystems on Page 17 of their original motion, they acknowledge that, that the Court from Indiana says whether the engineer owes a duty is to be termined -- be determined

both by looking at the contract and looking at the actual conduct of the engineer.

Now, we know that TranSystems contract says, that's Exhibit E, Page 21 of their contract, TranSystems will be responsible for the day-to-day operation and administration of the project. Page 21 says they will be responsible for construction management, construction engineering, assurance and acceptance inspection, sampling, testing, determining compliance with the contract requirements.

Despite all these duties out on a massive construction project, TranSystems contends that, at Page 14 of their motion, "Flatiron had no right to rely on any determinations of TranSystems because TranSystems had no final decision making authority."

How is that suppose to work, Your Honor?

TranSystems inspects the work. Says it fails. Oh, you failed inspection.

Does that mean that Flatiron can ignore what TranSystems have said and go ahead and complete the work anyway?

When TranSystems says that the, the work is fine, you can proceed, does that mean Trans -- Flatiron has to stop and not proceed?

No, that's not what it means. It makes no sense on a construction project. Of course, they had authority and

their actual conduct shows it.

If you look at the affidavit of Lou Hutcherson, again, he -- that's at our opposition, Exhibit A. He is the only affiant on the project who saw what was going on on the project, participated in the actual work, and he notes, Paragraph 6, TranSystems had oversight of all Flatiron construction activities including approving or rejecting the work, whether Flatiron could proceed with the work, whether Flatiron must stand down or perform the work.

Paragraph 7. TranSystems was responsible for coordinating and processing the payment applications for the contractor, the submittals, the request for information.

Paragraph 8. TranSystems was in the distinct position to impact, either positively or negatively, Flatiron's performance of its work on the project, Flatiron's cost of performance, and the speed or pace with which the work was completed.

In Paragraph 10, TranSystems was permitted to oversee, inspect, and reject Flatiron's work.

In Paragraph 11, TranSystems repeatedly exercised its right to reject or stop FCI's work.

Now, it's clear from all of that that TranSystems certainly had -- they assumed the duties. Whether or not they had the authority to do it I guess we can try to figure out that because I think SCDOT certainly imbued them with

the authority and the only defense you hear from TranSystems is we were not the RCE.

Well, Your Honor, we submit that there is a genuine issue of material fact with regard to who actually behaved, acted on the project as the RCE. And, again, that stands for resident construction engineer.

It is clear from the evidence that TranSystems Marty Long, his name is Mr. Martin Long, acted as the RCE in relation to Flatiron on the project.

The, the contract itself, it doesn't identify who is serving as the RCA. There's no place -- there no amendment to the contract. There's no special provision that says that Mr. Travis Patrick will serve as the RCE on this project.

No, it just says there will be an RCE and here are the RCE's duties. And if you look at the evidence presented, Mr. Hutcerson's affidavit, again Paragraph 3, that is that Exhibit A to our opposition, Your Honor, TranSystems served as the owners on-site representative to manage the project. Marty Long, of TSC, held himself out as South Carolina's Department of Transportation's resident construction engineer.

If you look at our Exhibit B, which was a custodian of records which we used to present to Your Honor documents which we had received from TranSystems in discovery, Exhibit

2, Marty Long of TranSystems executing bi-weekly, bi-weekly meeting minutes that were distributed to all of the players on the project signing off as "the resident construction engineer."

TranSystems produced, produced an organizational chart which you heard Mr. Atkinson refer to and that -- that's at Exhibit 6 of our Exhibit B. That project chart shows Martin Long of TranSystems as the RCE. It does indeed have Travis Patrick of the SCDOT ahead of Mr. Long but not as the RCE.

Mr. Patrick's title is DS project engineer or D5. I'm sorry. District 5 project engineer. Not the RCE.

So, the fact that that word chart actually shows the distinction is what's important if you're looking at the RCE's issues.

And if you look at Exhibit 9 to our Exhibit B, that is Marty Long sending an email to the SCDOT identifying himself as the RCE. You will see there a quotation. The RCE (me) was consulted on the project.

Only two more, Your Honor.

Exhibit 7 is the SCDOT sending an email to Marty Long that says the stop work call -- "all the stop the work on the project should have been made by the RCE. This type of scenario is what TranSystems has been hired for, project inspection and management."

So that's SCDOT telling Mr. Long, telling TranSystems

that's the RCE. And if, if -- Your Honor, if you have any doubt whatsoever that the -- TranSystems assumed the role of the resident construction engineer on this project, you need only look at Exhibit 4 of our custodian of records affidavit, Exhibit B, and that Exhibit 4 is a letter, December 11th, 2019, a letter on SCDOT letterhead, on SCDOT letterhead signed by Martin Long as the resident construction engineer. And he indeed, as you heard Mr. Atkinson say, he indeed cc'd Travis Patrick. But he didn't cc Travis Patrick, resident construction engineer. He cc'd Travis Patrick, assistant district construction engineer. Different office, different responsibilities, not the RCE.

So, all of the references that you heard from TranSystems to the various provisions of 105, of the contract, and the RCE, there is a genuine issue of material fact as to how many of those duties and responsibilities were assumed and permitted by the SCDOT to be assumed. Indeed, instructed by the SCDOT to be assumed by TranSystems.

So, that is a lot more than a scintilla of evidence that a genuine issue of material fact con -- exists concerning all of those duties and responsibilities that are woven together and recognized under the Tommy L. Griffin case to say TranSystems owed a duty to Flatiron and

violation of that duty entitles Flatiron to pursue TranSystems for economic loss damages.

Now, the conflict of interest issue that you heard -- and I apologize for running through all these. But I feel I need to and they were all brought up.

Con -- it -- it's, it's a misplaced argument. In -- indeed there, there is a -- an ethical obligation on the part of engineers in South Carolina as there are engineers regulated in any state. You have yet to hear a real distinction as to how it could possibly be then that the South Carolina Supreme Court determined that an engineer in Tommy L. Griffin owed a duty not to violate the standard of care, owed that duty to the contractor.

There's no discussion, no arguments, not even in the mind of the South Carolina Supreme Court, to talk about conflict of interest in terms of oh, we shouldn't do this. It's a, it's a, a public issue that we have to be concerned about, an issue of public policy, because there is no conflict.

The whole idea is that the engineer owes a duty to comply with the standard of care. Compliance with the standard of care is an obligation visited upon the engineers by law. They have -- they have a, they have a license. They have to, of course, to pursue them for violating the duty that they owe is not in conflict. It's not, it's not

similar to an attorney who has a conflict of interest trying to represent clients on both sides of a -- of the case. It, it -- it's, it's not even remotely similar to that.

So, TranSystems, you'll see in its brief, refers to this somewhat nebulous concept of it should not be punished for "doing too good a job." That makes no sense, Your Honor.

Violating the applicable standard of care, causing unnecessary delay, and disruption, and additional costs on a public infrastructure project, Your Honor, that's not doing too good a job. That's not doing your job. So, there's no conflict of interest.

I have to say one thing about the reference to -- in the reply brief. For the first time TranSystems raises that Flatiron failed to introduce expert testimony to establish, to identify just exactly what the standard of care was and the breach of the design duty. This is the first time they raise it. That's not the basis for their motion for summary judgment.

The basis for their most -- motion for summary judgment was the absence of a material fact concerning the existence of a duty to come, in a reply, and then for the very first time say and oh, yeah, you haven't given expert testimony -- presented expert testimony on what exactly my standard of care, how you define that standard, and whether or not the

standard was breached. That's not fair. It's particularly not fair if we have 25,000 documents still out there we haven't seen.

So, we respectfully submit you should just discount that particular point.

Third party beneficiary. There is plain language in TranSystems contract that reveals -- that reveals that the contractor, whoever it may be, is a third party beneficiary.

First of all, unlike many of these contracts, there is no restrictive language precluding a third party beneficiary. Instead, there are a multitude of obligations on the part of TranSystems that clearly benefit the contractor.

For example, proper inspection, that benefits the contractor. Day-to-day proper operation and management, that benefits the contractor. Sampling and testing. You have that properly. That's for the contractor. Ensuring that the work of the contractor is progressing in accordance with the proposed schedule. These are all on Page 21 of Exhibit B to their motion.

That clearly benefits the contractor and Mr. Hutcherson's affidavit, Exhibit A to our opposition, notes that TranSystems was responsible for processing submittals, processing pay requests. Nothing benefits the contractor more than appropriate processing of the payment

requests.

This establishes, Your Honor, more than a scintilla of evidence that Flatiron is a third party beneficiary of the TSC's contract with Horry County and, at the very least, Flatiron should get an opportunity to complete its discovery, get all the thousands and thousands of documents that are out there and go and speak with Mr. Strub under oath.

Tortuous interference. Flatiron again has set forth evidence of tortuous interference. There is evidence of multiple, multiple intentional improper acts of TranSystems as set forth in Mr. Hutcherson's affidavit.

Paragraph 20, for example, Mr. Hutcherson talks about how -- what about it. TranSystems delayed Flatiron's completion of the project among other things, and then, if you're to look at Page 4 of TranSystems' initial motion, you will see that indeed Flatiron sued SCDOT and Horry County and Horry County answered and counterclaimed for liquidated damages for delay caused by plaintiff's breach.

Now, that breach was all due to the intentional acts of TranSystems. And with regard to agency, TranSystems asserts the agency's privilege. TranSystems does indeed have a burden of demonstrating agency and certainly, if nothing else, if, as TranSystems contends, it had no authority on this project, you need only look at Mr. Hutcherson's

affidavit that recounts time and time again of authority assumed of decisions made by TranSystems and TranSystems then was clearly -- if, if, if as TranSystems now argues it had no authority, then it was intentionally assuming authority it did not have and acting well beyond the scope of its authority by stopping the work, interrupting work for inspection purposes. All kinds of other interferences for which it had no authority.

So that would clearly be a tortuous interference and no -- yes, it is acting outside of the scope of any agency that it may contend.

Finally, on Unfair Trade Practices Act, these are tortuous acts, Your Honor. They are not breaches of contract.

Again, as TranSystems alleges, if it had no authority to make any decisions, then it was holding itself out to have authority that it did not have and it was acting intentionally and repeatedly with no authority convincing Flatiron that Flatiron -- that TranSystems had authority to stop their work, had authority to tell them what to do. And, and yet they -- now they say they didn't have that authority. And all of that was to Flatiron's detriment. And they have no remorse.

There's not remorse there. Their responses is that they're being assaulted for doing too good a job. That's

not someone who you should be -- you should not be concerned is gonna behave appropriately in the future and they, they reference an exemption that they think they have. But Section 39-5-40 says that, for the purposes of Unfair Trade Practices Act, the burden of proving an exemption is -- shall be upon the person claiming the exemption.

So, when we're talking about burdens, understand that's TranSystems' burden and it hasn't met it.

The, the cases such as the Trident Neuron Imaging Laboratory versus BlueCross BlueShield case, which we cite in our brief, those type -- the types of exemptions, because you have a regulated industry, are for situations like an insurer who declines coverage and he's protected. That ensurer is protected from unfair trade practices attack because the South Carolina Legislature recognizing and agreed that the surety or that the insurance company could decline coverages.

So, there's no excuse under the regulations for engineers for them to just act badly. You know, that is, that is that -- an exception to the Unfair Trade Practice Act.

So, in conclusion, Your Honor, I, I know that I've spoken for quite some time. Flatiron is to be given every benefit, every favorable inference.

We have not completed discovery in this case. We have

much more to do and, under the circumstances, we submit that this very harsh remedy of summary judgment should be rejected and we should allow the case to go forward and, therefore, we respectfully request that you deny the TranSystems motions in all respects.

Thank you.

THE COURT: Mr. Atkinson, do you want to respond briefly, sir?

MR. ATKINSON: I do, Your Honor.

One thing that's very important, Your Honor, Exhibit 4 to Exhibit B to their opposition, there was a reference that Travis Patrick is not listed as, as resident construction engineer.

Your Honor, if you'll note, if you look at that document, that document's from 2019. The name under his says Derrick Tindall, resident construction engineer special projects, because Mr. Patrick got a promotion. Mr. Hutcherson apparently did not read his emails before he gave his affidavit because he received correspondents from Travis Patrick telling him to take action with the signature line Resident Construction Engineer District 5 Special Projects, South Carolina Department of Transportation. That is Exhibit 2 to our reply.

We also introduced a record where Exhibit 4 to our reply, Mr. Patrick was SCDOT's resident construction

engineer of the year during the period, period that Mr. Hutcherson testified under oath that he did not know who the resident construction engineer was.

So, I, I think the standard is not no issue of material fact. It's a genuine issue and you can not create one out of whole cloth.

As to the unfair trade practices argument, Mr. Reid's argument again shows that we are entitled to summary judgment under the Clarkson case. I'm gonna give you that cite one more time. 761 F.2d 189. Negligence is not a basis for an unfair trade practices claim.

Your Honor, I think the arguments presented were somewhat misleading and I don't want to get in the weeds. But what I wanted to be clear is we never said that TranSystems had no authority. We said that they had no final authority and one thing that there was no reference to in the entire presentation from Flatiron was Flatiron's own contract because it told them what they could expect and what they would rely on.

In Section 105.9 of the standard specifications for that contract said you can not rely on that. Mr. Reid said that's unreasonable. That's the law of construction in South Carolina and a, and a contractor is responsible for complying with the contract. They control means and methods. And regardless of what the tester tells them,

they're still liable for the work they do.

TranSystems -- Flatiron, if it disagreed with a ruling of TranSystems, had the right to go to the resident construction engineer. If they didn't, that's a failure to comply with the terms of their contract.

Your Honor, these circumstances are drastically different than Tommy L. Griffin. In Tommy L. Griffin, the position held by Jordan Jones and Golding was that that the resident construction engineer for DOT held here.

So, if we took this to a legal malpractice parallel, it's making a claim against the paralegal when the lawyer has final decision making authority and that's not allowed under our law.

Thank you, Your Honor.

MR. REID: Your -- Your Honor, very briefly if I may?

THE COURT: Very briefly, sir.

MR. REID: Yes.

There has been no indication whatsoever, no presentation by TranSystems, that there was not a designation. We have shown in the letter that's referred to as Exhibit 4 to our Exhibit B that's signed on SCDOT letterhead by Martin Long. You've heard no explanation for why Marty Long on SCDOT letterhead is signing off as resident construction engineer.

There's no affidavit here from Marty Long explaining

that. The only affidavit, the only facts come from Lou Hutcherson concerning the behavior and there is -- it is perfectly within the, the probability, not to mention the -- all of the exhibits and all of the information that yeah, perhaps there was an SCDOT resident construction engineer. But there was also an appointed resident construction engineer, Mr. Marty Long, who assumed duties and made decisions and wrote letters that were to be followed because he was telling everybody he was the resident construction engineer.

So, compliance with the contract on Flatiron's side meant only complying and going to Mr. Marty Long.

So, those are the facts, Your Honor. That's the scintilla of evidence.

Thank you.

THE COURT: Yeah. Y'all certainly have given me a lot to go back and read and look at. I will do that in detail before I issue a ruling and I will notify you of my ruling by email.

MR. REID: Thank you, Your Honor.

MR. ATKINSON: Thank you, Your Honor.

THE COURT: Yeah.

UNIDENTIFIED SPEAKER: Thank you.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Horry County, South Carolina, on the 7th day of August, 2023.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 5th, 2023

PAMELA E. GREEN, Court Reporter

ELECTRONICALLY FILED - 2018 Aug 16 10:05 AM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**AFFIDAVIT OF**
Plaintiff,	)	**KENNETH J. O'CONNELL, P.E.**
	)	
v.	)	
	)	
TranSystems Corporation	)	
	)	
Defendants.	)	

Personally appeared before me, Kenneth J. O'Connell, who after being first dully sworn and deposed and said the following:

1. I am a Registered Professional Engineer in twenty-two states including the State of South Carolina.

2. I am over eighteen years of age and am fully competent to testify to the matters stated in this Affidavit.

3. I have actual professional knowledge and experience in the area of civil engineering as a result of having been actively engaged in the practice of engineering for over thirty-five (35) years and licensed as a Registered Professional Engineer in the State of South Carolina for over twenty-one (21) years.

4. My education, training, and experience are set forth in the attached CV (**Exhibit A**).

5. I have experience in providing construction consulting, engineering and inspection services to public owners for the construction of bridge and roadway projects throughout the United States.

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6. The information and statements contained in this Affidavit are based upon my knowledge, skill, experience, training and education in the field of civil engineering and broad experience in industrial, heavy civil, bridge and highway construction. I have knowledge of and familiar with the standard of care of an engineering firm providing construction consulting, engineering and inspection services to public owners for the construction of bridge and roadway projects.

7. By virtue of my knowledge, skill, experience, training and education in the field of civil engineering and providing construction consulting, engineering and inspection services to public owners for the construction of bridge and roadway projects, I am qualified to review the work of other engineers and engineering firms in the submittal process which occur during the construction of bridges and roadways.

8. O'Connell & Lawrence, Inc. was retained by Flatiron Constructors, Inc. ("Flatiron") to review the project documents concerning the construction of 8.2 miles of new 6 lane roadway including bridges known as the Carolina Bays Parkway Phase 3 project ("Carolina Bays Parkway").

9. While Horry County, South Carolina is the "Owner" of Carolina Bays Parkway, the Project was administered by the South Carolina Department of Transportation ("SCDOT"). Horry County entered into an agreement with TranSystems Corporation ("TranSystems") to provide construction, engineering and inspection services ("CEI Services") during construction of the Carolina Bays Project.

10. To date, I have read and considered all of the Carolina Bays Project documents listed below:

a. SCDOT Request for Proposal including addenda;

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b. SCDOT's Special, Supplementary and Standard Specifications for the Carolina Bays Project;

c. The contract between Flatiron and Horry County, South Carolina;

d. The contract between Horry county and TranSystems for construction, engineering and inspection services for the Carolina Bays Project;

e. Submittal documents between Flatiron and TranSystems;

f. Submittal documents between TranSystems and SCDOT;

g. Submittal correspondence between Flatiron and TranSystems;

h. Submittal correspondence between TranSystems and SCDOT;

i. Conversations with key Flatiron personnel; and,

j. Other select correspondence.

11. Based upon my review of the Carolina Bays Project Documents, Flatiron was required to submit a Drilled Foundation Installation Plan for each of the drill shafts to be installed.

12. Flatiron submitted the Drilled Foundation Installation Plans to TranSystems. Rather than submit the Drill Shaft Foundation Plans to SCDOT's Bridge Design Geotechnical Engineer ("BDGE"); the Resident Construction Engineer ("RCE") and Bridge Construction Engineer ("BCE") as required by SCDOT's specifications for the Carolina Bays Project, TranSystems would more frequently than not, return the Drilled Foundation Installation Plans to Flatiron with TranSystems' comments and requirements for submitting the Drilled Foundation Installation Plans. The net effect of TranSystems' procedure delayed submittals to SCDOT.

13. It is general knowledge within the engineering profession that a civil engineering firm engaged to provide CEI Services should provide timely review of submittals so as not to delay the general contractor's performance.

14. It is also general knowledge within the civil engineering profession that a civil engineering firm should follow the project specifications.

15. Based upon my experience and investigation above described, it is my opinion that TranSystems fell below the standard of care of a civil engineering firm in providing CEI Services and was negligent in at least the following respects:

a. In failing to review submittals in timely manner so as not to impede the progress of the construction activities;

b. In failing to follow the project specifications regarding Drill Shaft Foundation Plans.

16. The issues listed above in which the standard of care was not met are not exhaustive. As further investigation is conducted, or additional information is made available, additional issues or conditions associated with the design and construction phase services of the project may be discovered. I reserve the right to supplement or amend this affidavit and/or my professional opinion after reviewing additional design drawings, records, data, depositions, or other information relating to the Carolina Bays Project.

FURTHER AFFIANT SAYETH NOT.

Kenneth J. O'Connell

Subscribed and sworn to before me,
this 15th day of August, 2018.

Notary Public for State of Maryland
My Commission Expires: 10/2/20

Cynthia L. Schuerholz NOTARY PUBLIC Howard County, Maryland My Comm. Exp. 10-2-2020

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O'C&L
O'CONNELL & LAWRENCE, INC.

KENNETH J. O'CONNELL, Ph.D., P.E., PSP, CFCC

President

EDUCATION:

Ph.D./Civil Engineering, University of Maryland/1991
M.S./Civil Engineering, University of Maryland/1982
B.S./Civil Engineering, University of Maryland/1981

REGISTRATIONS:

P.E./Alabama /#27363-E
P.E./Connecticut/#0032419
P.E./Delaware/#7033
P.E./District of Columbia/#9118
P.E./Florida/#1053
P.E./Georgia/#023639
P.E./Kentucky/#20314
P.E./Maryland/#13975
P.E./Minnesota/#45545
P.E./Missouri/#PE2005000716
P.E./New Jersey/#GE-46190
P.E./New York/#080331
P.E./North Carolina/#022824
P.E./Ohio/#E-61455
P.E./Pennsylvania/#PE-049469R
P.E./South Carolina/#17727
P.E./Tennessee/#116582
P.E./Texas/#122649
P.E./Virginia/#0402031044
P.E./West Virginia/#14611
P.Eng./Ontario/#100510767-01
RPLS/Delaware/#S6-0000708
RPLS/Maryland/#10974
National Council of Examiners for Engineering and Surveying/# 14360
Association for the Advancement of Cost Engineering International (AACEI)/PSP #1105
AACEI – Certified Forensic Claims Consultant (CFCC)/#96
American Council of Engineering Companies (ACEC)/Management Engineer (MgtEng)
ACEC – Expert Witness (EXW)

CAPABILITIES:

Dr. O'Connell has more than 35 years of experience and is a nationally recognized engineering and construction expert. Dr. O'Connell has worked on hundreds of industrial, heavy civil, commercial, building, and highway and bridge projects throughout his 35-year career serving as a consultant, construction manager, and designer. He has provided expert analyses, reports and testimony including evaluation of acceleration, delay, inefficiency and loss of productivity claims as well as specific design issues as to the standard of care. He has conducted numerous seminars on CPM Scheduling, Construction Contract Claims, Project Documentation, Construction Inspection, Claims Avoidance, Contract Interpretation, Constructability, and Contract Negotiations. Moreover, he conducts sophisticated and complex schedule analyses in defense of contractor claims on major public projects for costly compensable contract time extensions and/or costs related to changes in site conditions and design.

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O'C&L
O'CONNELL & LAWRENCE, INC.

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EXPERIENCE:

- MDOT SHA, Numerous Design and CMI Contracts (Statewide, District 3, District 7, and Office of Construction)
- MDTA, Numerous CMI Contracts
- TVA Gallatin Fossil Plant, Gallatin, Tennessee
- Chalk River Laboratories, Atomic Energy of Canada Limited, Ontario, Canada
- Grand Renewable Solar Project, Ontario, Canada
- Grand Renewable Wind Project, Ontario, Canada
- Grand Renewable Transmission Line Project, Ontario, Canada
- Hampton Corners Mine Development, Rochester, New York
- Seymour-Capilano Water Tunnels, Vancouver, British Columbia, Canada
- Fort Huachuca, Solar Photovoltaic Facilities, Sierra Vista, Arizona
- Patapsco Wastewater Treatment Plant Project, Baltimore, Maryland
- Montebello Water Treatment Plant, Baltimore, Maryland
- I-40/I-440 Reconstruction (Design-Build), Raleigh, North Carolina
- IH 35E Managed Lanes Project, Dallas, Texas
- C.W. Bill Young Regional Reservoir, Hillsborough County, Florida
- Piedras Negras Brewery, Coahuila, Mexico
- Governor Printz Interceptors – Section 1, New Castle Delaware
- United States Capitol Dome Restoration Project, Washington, DC
- Pentagon Revolving Door Project (Design-Build), Arlington County, Virginia
- Rocky Pen Run Reservoir, Stafford County, Virginia
- Diamond State Port Corporation, Port of Wilmington, Delaware
- Ford Island Sewer Collection System, Oahu, Hawaii
- Central Artery/Tunnel Project, Boston, Massachusetts
- Laurel Mountain Wind Farm, Elkins, West Virginia
- Chattanooga Volkswagen Assembly Plant, Chattanooga, Tennessee
- Indian River Inlet Bridge Demolition, Delaware
- Port of Anchorage, Anchorage, Alaska
- Maple Leaf Foods, Toronto, Canada
- Union Station, Toronto, Canada
- St. Croix Crossing Project, Minnesota
- Lincoln University Cultural Center, Chester County, Pennsylvania
- Camp Eggers LSA Reconstruction Project (Design-Build), Kabul, Afghanistan
- Long Island East Side Tunnel, New York, New York

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

FLATIRON CONSTRUCTORS, INC.'S OBJECTION TO TRANSYSTEMS CORPORATION'S MOTION TO STAY PROCEEDINGS PENDING FINAL DETERMINATION OF CONSTRUCTION CONTRACT OBLIGATIONS AND MOTION FOR PROTECTIVE ORDER

Plaintiff Flatiron Constructors, Inc. hereby objects to TranSystems Corporation's Motion to Stay Proceedings Pending Final Determination of Construction Contract Obligations and Motion for Protective Order as will be more fully set forth in a detailed response to be filed prior to the hearing on this matter in accordance with and pursuant to the South Carolina Rules of Civil Procedure.

s/L. Franklin Elmore
L. Franklin Elmore (SC Bar No. 1889)
Elmore Goldsmith Kelley & deHoll, P.A.
55 Beattie Place, Suite 1050 (29601)
Post Office Box 1887
Greenville, South Carolina 29602
Telephone: (864) 255-9500
Facsimile: (864) 255-9505
felmore@elmoregoldsmith.com
Counsel for Flatiron Constructors, Inc.

December 16, 2020
Greenville, South Carolina

ELECTRONICALLY FILED - 2021 Mar 05 1:44 PM - HORRY - COMMON PLEAS - CASE#2018CP2602633

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.	)	
	)	**BRIEF IN SUPPORT OF**
Plaintiff,	)	**DEFENDANT'S MOTION TO STAY**
	)	**PROCEEDINGS PENDING**
v.	)	**FINAL DETERMINATION OF**
	)	**CONSTRUCTION CONTRACT**
TranSystems Corporation	)	**OBLIGATIONS AND MOTION FOR**
	)	**PROTECTIVE ORDER**
Defendant.	)	
	)	

Defendant TranSystems Corporation ("TranSystems") submits the following brief in support of its Motion for an order staying further action in this case pending the determination, termination or expiration of Plaintiff Flatiron Constructors Inc.'s ("Flatiron") substantially similar damage claims under its Construction Contract with Horry County for the subject highway and road project (the "Flatiron Claims"), including without limitation the South Carolina Department of Transportation's ("SCDOT") Agency Review of the Flatiron Claims and any subsequent judicial process, and in support of its Motion for Protective Order, pursuant to Rule 26(c), SCRCP, preventing TranSystems from being obligated to respond to Flatiron's Requests for Production until the Court rules on this Motion to Stay and through the period of any further stay the Court may order.

RELEVANT PROCEDURAL HISTORY

Pursuant to joint motions, the Court entered a December 4, 2018, Order staying this case for one year, and then entered a November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so TranSystems has filed its answer to Flatiron's Amended Complaint. On November 19, 2020, TranSystems filed its Motion to Stay, and its Motion for Protective Order seeking relief from responding to discovery propounded by Flatiron,

pending resolution of the Motion to Stay. On January 11, 2021, Flatiron filed a Motion to Compel against TranSystems, seeking an Order compelling TranSystems to respond to Flatiron's First Requests for Production, the same discovery for which TranSystems seeks a protective order. All three pending motions are scheduled to be heard by the Court on March 17, 2021.

RELEVANT FACTS

This case involves claims related to construction of the Carolina Bays Highway Project (the "Project") in Horry County by Flatiron, pursuant to its Construction Contract with Horry County (the "Construction Contract"), which was and is being administered for Horry County by SCDOT pursuant to the Intergovernmental Agreement for the Project between and among Horry County, SCDOT and South Carolina Transportation Infrastructure Bank. TranSystems served as a provider of Construction Engineering and Inspection Services ("CEI Services") for the Project, but it was not the design engineer of record. TranSystems contracted with Horry County to work under supervision of SCDOT to provide CEI Services, including, but not limited to, construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine Flatiron's compliance with the Construction Contract. (Exhibit A, p. 21.) A copy of the TranSystems Contract and TranSystems' Scope of Services, incorporated therein ("TranSystems' Scope") is attached hereto as Exhibit A. Per the TranSystems Contract, SCDOT's Resident Engineer provides direct supervision of the work performed by TranSystems, and SCDOT's made all final decisions when necessary. (Exhibit A, p. 21.),

Flatiron alleges, and TranSystems denies, that TranSystems caused Flatiron to incur additional expense in completion of the Construction Contract, because of TranSystems' performance of its CEI Services. Flatiron has no privity with TranSystems. Further, as noted in

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TranSystems' Scope, SCDOT's Resident Engineer, and not TranSystems, is the person with final decision-making authority for the Project.

On or about July 17, 2019, while this case was stayed, Flatiron filed a Certified Claim with SCDOT relating to Project bearing and anchor bolts, seeking payment of about $4,200,000. On September 3, 2020, the SCDOT Dispute Review Board issued a decision awarding Flatiron about $41,000, but Flatiron rejected that proposed award, rendering it non-binding. Accordingly, this Flatiron claim remains contested, with the next step available to Flatiron being non-jury litigation in the S.C. Court of Common Pleas. On or about February 3, 2020, Flatiron submitted a Certified Claim to SCDOT relating to Project concrete deck cracking, seeking payment of about $11,000,000. On September 3, 2020, the Dispute Review Board entered a decision awarding Flatiron about $4,100,000; and Flatiron has made a deck claim settlement agreement with SCDOT based on that sum, and a corresponding Project Change Order was entered.

On or about July 8, 2020, Flatiron submitted to SCDOT a Global Request for Equitable Adjustment ("REA"), seeking payment of about $31,000,000, including claims for direct Project costs and delay. On August 19, 2020, SCDOT rejected the REA claims; however, it is unclear whether Flatiron intends to seek further payment of the REA claims under its Construction Contract. After TranSystems filed this Motion to Stay, Flatiron on January 19, 2021, filed a Certified Claim with SCDOT based on essentially the same REA damage claims.

Flatiron's damage claims in its Amended Complaint are substantially similar to the damage claims on which Flatiron based its Certified Claims for additional payment under its Construction Contract with Horry County.

In their November 22, 2019, Joint Motion for Extension of Stay, the parties stated that "SCDOT must complete that agency evaluation, and then there is a review and appeal process

available. The completion of that process will define, and perhaps limit, issues to be decided in this civil action." (Joint Motion to Extend Stay, p. 1.) This statement is still accurate, and this case should be stayed.

Flatiron served TranSystems with Requests for Production of Documents on October 19, 2020, which would render TranSystems' responses due on November 23, 2020. Prior to that due date, on November 19, 2020, TranSystems filed a Motion for Protective Order, stating that it was improper for TranSystems to be required to incur substantial expense in responding to Flatiron's discovery requests, which were propounded in a case that was is ripe for adjudication.

ARGUMENT

In this civil action, Flatiron has the burden of proof as to liability and damages. Flatiron does not know whether it has suffered Project damages, or the extent of any Project damages, because Flatiron still is making claims for additional payment in excess of $30,000,000 under its Construction Contract with Horry County, which have not been finally decided, and because those damage claims are substantially similar to its damage claims in this case. This Court does not have jurisdiction to determine Flatiron's Horry County Construction Contract claims, because Flatiron must follow, as it apparently is doing, the Claims Procedure applicable to the Construction Contract. As noted above, the Claims Procedure includes Flatiron's making a certified claim for decision by the SCDOT Dispute Review Board, and then appealing an unsatisfactory decision to the Court of Common Pleas for Richland County for a non-jury trial. (See Exhibit B.)

A. Ripeness

The South Carolina Constitution vests this state's circuit courts with jurisdiction only over "cases." S.C. Const. Ann. Art. V, § 11. Accordingly, "[b]efore any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High School*, 321 S.C. 426, 430, 468

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S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Id.* at 430-32, 468 S.E.2d at 864; *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) ("A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.").

"The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Sloan v. Greenville County*, 356 S.C. 531, 547, 590 S.E.2d 338, 346 (Ct. App. 2003). To be ripe for judicial pronouncement, a claim must be concrete and therefore justiciable. *McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 244 (2002); *Park v. Safeco Ins. Co.*, 251 S.C. 410, 414, 162 S.E.2d 709, 711 (1968). If the rights asserted by a party "are contingent upon the happening of some event which cannot be forecast and which may never take place," courts generally decline to pronounce a declaration. *Park*, 251 S.C. at 414, 162 S.E.2d at 711. An action is not ripe for adjudication merely because "a threat of possible injury currently exists[.]" *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) (citation omitted).

Until Flatiron has obtained a final determination of its claims under the Construction Contract with Horry County, or the expiration or termination of those claims, Flatiron cannot prove whether, or to what extent, it has suffered damages on this Project caused by TranSystems. Accordingly, Flatiron's claims against TranSystems are not ripe; therefore, there presently is no justiciable controversy in this civil action. Tied to the ripeness issue is Flatiron's duty to mitigate damages. *See Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 560, 314 S.E.2d 19, 24 (Ct. App. 1984)(identifying duty to mitigate losses). Flatiron has no damages attributable to TranSystems,

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if Flatiron is fully compensated under the Construction Contract; therefore, Flatiron must obtain a determination of its rights under the Construction Contract before any claim against TranSystems is ripe for judicial determination.

As discussed above, a claim ripens for juridical pronouncement only when it is concrete. *McClanahan*, 350 S.C. at 441, 567 S.E.2d at 244; Park, 251 S.C. at 414, 162 S.E.2d at 711. Claims based on a possible threat of injury or the occurrence of some event that might never occur are not ripe. *Park*, 251 S.C. at 414, 162 S.E.2d at 711; *Waters*, 321 S.C. at 228, 467 S.E.2d at 918. South Carolina courts, like their federal counterparts, use a two-factor test for determining ripeness: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Waters*, 321 S.C. at 227-28, 467 S.E.2d at 918. In this case, both of these factors weigh decidedly in favor of this Court's finding Flatiron's claims against TranSystems are not ripe.

TranSystems has raised this ripeness objection in its Answer to Flatiron's Amended Complaint. TranSystems also contends that Flatiron is limited by law and contract to asserting the Flatiron Claims under its Construction Contract. Accordingly, TranSystems has no duty to Flatiron, the alleged breach of which could support any of its causes of action in this case; and TranSystems will move for summary judgment on this legal issue, if and when the case is prosecuted on the merits after any further stay. Allowing Plaintiff to complete the prosecution of the Flatiron Claims will limit the issues to be discovered and decided in this case, and may render this case moot.

1. Flatiron's Claims Against TranSystems Are Not Fit For Judicial Determination.

Flatiron's claims that it has been damaged as a result of TranSystems' provision of CEI Services for SCDOT/Horry County related to the Construction Contract are not fit for judicial

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determination by this Court. This is because unless and until Flatiron obtains, through the SCDOT claims procedure mandated by the Construction Contract and incorporated specifications, a determination of the amounts owed to Flatiron under the Construction Contract, Flatiron lacks any concrete injury on which to pursue claims against TranSystems. Without an ultimate, enforceable decision on those issues, it remains possible that Flatiron will be fully or partially compensated for its Project work under the Construction Contract. If Flatiron is compensated fully under the Construction Contract, or if Flatiron possesses those rights and chooses not to enforce them against SCDOT/Horry County, then Flatiron has no justiciable claim against TranSystems. Presently, Flatiron's claims against TranSystems are contingent and hypothetical; so its claims are not fit for determination in this Court.

2. No Hardship To Will Result From This Court's Withholding Determination Of Flatiron's Claims Against TranSystems.

The second ripeness factor also favors the stay of this Action, because Flatiron will not face hardship from this Court's properly refusing to determine Flatiron's speculative and uncertain claims. The Construction Contract, the Specifications, and the SCDOT Claims Procedure set forth a cogent, well-recognized, and efficient procedure for the resolution of claims arising from the Construction Contract. In accepting SCDOT/Horry County's award of the Construction Contract, Flatiron specifically agreed to and subjected itself to the resolution of issues regarding that agreement pursuant to SCDOT procedures. Flatiron has at its ready disposal, and has made use of, the contract disputes process required to establish its Construction Contract claims against SCDOT and Horry County, which are necessary to ripen its damage claims against TranSystems. Flatiron cannot claim hardship by being forced to follow the claims resolution procedure to which it agreed. For this additional reason, Flatiron's claims against TranSystems are not ripe for judicial decision.

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B. TranSystems' Motion for Protective Order

If the Court stays this case, TranSystems' Motion for Protective Order and Flatiron's Motion to Compel are moot. Because Flatiron's claims are not ripe, and because responding to Flatiron's Requests for Production would require production of voluminous documents for this multi-year project, requiring discovery in a case that is not yet justiciable would constitute an undue burden and expense on TranSystems. Rule 26(c), SCRCP, allows a party from whom discovery is sought to seek protection from oppression, and undue burden and expense. In this case, Flatiron already has co-represented to the Court the following: "SCDOT must complete that agency evaluation, and then there is a review and appeal process available. The completion of that process will define, and perhaps limit, issues to be decided in this civil action." (Joint Motion to Extend Stay, filed November 22, 2019, p. 1.) Flatiron and SCDOT have not completed that process; so TranSystems should not bear the burden of discovery expense unless and until Flatiron's claims against it are ripe. TranSystems is entitled to an order protecting it from responding to discovery in this action until this action is ripe for adjudication if that ever occurs.

CONCLUSION

For the reasons set forth above, TranSystems' Motion to Stay and Motion for Protective Order should be GRANTED, and Flatiron's Motion to Compel should be denied.

WILKES LAW FIRM, P.A.

March 5, 2021

s/ Michael B.T. Wilkes

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EXHIBIT A

955 Park Street
P. O. Box 191
Columbia, SC 29202-0191
Telephone: (803) 737-1308
Fax: (803) 737-2389

Fax

To: Mr. Jim Fisher	**From:** R. Touchberry
Fax: 843-529-9616	**Pages:** 27 (including cover)
Phone:	**Date:** 12/16/11
Re:	**CC:**

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** **Please Reply**

● **Comments:**

Have a good Christmas!

– Russ

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IGA Consultant
Basic Agreement
TRACK # 06-07(6)

AGREEMENT AND CONTRACT BETWEEN
HORRY COUNTY
AND
TRANSYSTEMS CORPORATION

****

SECTION I. GENERAL RECITALS

THIS AGREEMENT and Contract, made and entered into this 15th day of December, 2011, by and between Horry County, South Carolina, hereinafter referred to as "County", and TranSystems Corporation, a *corporation organized and existing under and by virtue of the laws of the State of Missouri and qualified to do business in the State of South Carolina, with its principal offices in Kansas City, Missouri located at Suite 400, 2400 Pershing Road, Kansas City, MO 64108, hereinafter referred to as "Consultant".

*Joint venture, individual, government agency, corporation, partnership or other. If joint venture, a copy of the Joint Venture Agreement is required as an attachment.

WITNESSETH:

WHEREAS, County desires to employ Consultant to furnish personnel and render professional engineering services for use and benefit of the County in the development of the project as hereinafter more particularly described; and

WHEREAS, the Consultant has represented to the County that the Consultant is experienced and qualified to provide the services contemplated by this Agreement and the County has relied upon such representation; and

NOW, THEREFORE, in consideration of these premises and of the mutual covenants herein set forth, it is agreed by and between the parties hereto as follows:

SECTION II. SCOPE OF SERVICES REQUIRED OF CONSULTANT

A. PROJECT DESCRIPTION. Construction, Engineering and Inspection Services for Extension of SC 31 from SC 544 to SC 707. Project File numbers 26.036775A, 26036775A.1, 26.036775A.2, 26.036775A.3, 26.036775A.4, and 26.036775A.5.

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B. GENERAL STATEMENT OF CONSULTANT'S ASSIGNMENT. For the heretofore described project, Consultant will provide engineering services as described in ATTACHMENT "A", SCOPE OF SERVICES AND SCHEDULE, attached hereto and specifically made a part of this Agreement. Work and liaison will be performed by the Consultant through its North Charleston office in South Carolina located at Suite 220, 4390 Belle Oaks Drive, North Charleston, SC 29405.

C. CERTIFICATION FOR PROJECT PLANS AND SPECIFICATIONS. The County and Consultant may agree to have project plans and specifications provided for by "certification". A "Certification Agreement" is attached hereto and specifically made a part hereof. The "certification" will be executed if agreed by the parties as applicable.

SECTION III. SERVICES OF COUNTY

The County agrees to provide to Consultant, and at no cost to Consultant, the services and data set forth in ATTACHMENT "B", SERVICES OF THE COUNTY, attached hereto and specifically made a part of this Agreement. Liaison for the County will be through the Horry County Engineer or his authorized designee.

SECTION IV. SCHEDULE (TIME OF PERFORMANCE)

The effective date of this Agreement will be the date of execution as shown in Section I. The Consultant shall begin work upon receipt of the County's written notice to proceed.

Consultant will prosecute all phases of the work in an expedient manner, exclusive of required review time by the County, the South Carolina Department of Transportation (hereinafter "Department"), and if applicable the Federal Highway Administration as set forth in ATTACHMENT "A", SCOPE OF SERVICES AND SCHEDULE.

SECTION V. FEE AND COSTS

For the services covered under this Agreement, the Consultant shall be compensated by the County as follows:

A. In the event the extent of the Consultant's studies and work effort during all phases of work set forth can be determined with exactness at the time of negotiation, it is mutually agreed by and between the Consultant and the County that compensation to the Consultant will be on an Lump Sum Basis. Lump sum may also include approved unit cost or per parcel if considered appropriate and approved by the County.

B. In the event the extent of the Consultant's studies and work effort during all phases of work set forth cannot be determined with exactness at the time of negotiation, it is mutually agreed by and between the Consultant and the County that compensation to the

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Consultant will be the basis of the Consultant's actual cost of performing all phases of the work, plus a fixed amount to cover net fee only.

C. For the cost of outside services and associate services as may be necessary and as formally approved by the County, the Consultant shall be reimbursed by the County only for the actual cost to Consultant for such services.

D. For Consultant's services in which payment is on a cost plus fixed fee basis as described above, the actual costs of the Consultant eligible for reimbursement are those directly attributable to the accomplishment of the specific work of the Consultant. These may include:

1. Actual basic salaries of productive personnel for work time directly connected with the project.

2. Payroll Additives eligible for reimbursement.

3. The general operating overhead costs of Consultant as determined by audit of Consultant's operations.

4. The Consultant and their subconsultants shall comply with the Department's Procurement Policy Memorandum (dated February 2, 2011) Implementing FHWA Order 4470.1A, dated October 27, 2010. This memorandum and FHWA Order reference a requirement for an approved Federal Acquisition Regulation (FAR) compliant indirect cost rate to be on file with the Department.

5. Out-of-pocket direct project expenses at actual cost to Consultant. Any non-salary cost identified specifically with the project is a direct charge to the project and is eligible for compensation. Such out-of-pocket costs shall include, but not necessarily be limited to, travel and subsistence for Consultant's personnel on the project, project materials and supplies, telephone and communications, printing and reproductions, and computer services. Automobile mileage will be reimbursed at the actual cost per mile incurred provided such cost per mile does not exceed the rate established by the Internal Revenue Service for the period. Only mileage associated with the business use of vehicles will be reimbursed. Any mileage related to personal use by employees (including transportation to and from work) is unallowable. However, if contractually agreed to in advance, mileage associated with travel to a temporary work location may be reimbursed. Generally, a work location is considered to be temporary if the assignment to the new location is expected to last 1 year or less. Billings for any actual out-of-pocket expenses directly identifiable with the project shall be supported by actual account records, expense accounts, receipts and other miscellaneous supporting materials and shall be made available by Consultant for review and audit by the Department or authorized Department representative.

E. The County shall not reimburse the Consultant for any expenses relating to business development activities, attendance at any special event, function, or ceremony where attendance is for social purposes. This does not include special events, functions or a ceremony in which a written Consultant request and approval has been given to the Consultant to attend for

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the purpose of speaking and/or presenting purposes, or assisting Department staff with preparation and delivery of the function. Consultants are required to certify compliance with this paragraph on all invoices.

F. The amount of compensation set forth in ATTACHMENT "C", ENGINEERING FEE, attached hereto and specifically made a part of this Agreement, shall be the maximum payable by the County without prior written authorization from the County to increase the amount. Any such increase will also be subject to the approval of the Department and/or Federal Highway Administration if federal funds are involved. This Basic Agreement has been subjected to a pre-award audit as considered appropriate by Department auditors.

1. Compensation to consultant under the terms of this Agreement shall not exceed the lump sum maximum amount of N/A.

"or"

2. Compensation to Consultant under the terms of this Agreement shall not exceed $9,633,782.63 for salaries, payroll additives, overhead, direct cost and outside services plus a fixed fee of $372,689.60 (in the event that significant changes in the scope of work occur, the fixed fee may be adjusted to an amount that is fair and reasonable to both the Consultant and County) resulting in a maximum limit of $10,006,472.23.

G. COST RECORDS. The Consultant, and its authorized subcontractors, shall maintain cost records in such manner as to comply with the policies set forth in Federal-Aid Policy Guide, Chapter 1, Subchapter B, Part 172, Administration of Engineering and Design Related Service Contracts (23 CFR 172) and also in 48 CFR 31 of the Federal Acquisition Regulations, OMB Circular A-102, and other directives as appropriate.

H. PURCHASE AND RENTAL/LEASE. The County considers that the Consultant should have the necessary equipment and other items to perform consultant work described in the scope of services. In those cases where it becomes necessary to purchase, lease, or rent equipment or other items with project funds, prior written County approval is required. All equipment and other items approved by the County for purchase with project funds shall become the property of the County at the completion of the project.

I. RELOCATION COSTS. Consultant has represented to County that the Consultant has the necessary personnel to perform the Consultant's scope of services, and the County has relied upon such representation. In those County approved cases where it becomes necessary to relocate an employee, Consultant agrees that reimbursable relocation costs are limited to the costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of no less than 12 months) of an existing employee. Reimbursement eligibility must have prior written approval by the County.

J. OVERTIME, EXTRA-PAY SHIFTS, MULTI-SHIFTS. Where the cost to the County may be affected, this contract should be performed so far as practicable, without the use of overtime, extra-pay shifts, or multi-shifts, and, in particular, without the use of overtime as a regular employment practice. Any required overtime, extra-pay shifts and multi-shifts will be

limited to the minimum needed for accomplishment of the specific work and will require prior written approval by the County.

SECTION VI. MODE OF PAYMENT

A. The Consultant understands and acknowledges that the County is operating under an Intergovernmental Agreement (IGA) between the County and Department. The Consultant shall submit monthly invoices to the Department's assigned Project Manager who in turn will review and recommend payment to and by County.

B. Monthly Invoices. For services performed in this Agreement, Consultant shall be paid monthly based on an approved invoice. Monthly or partial payments, at the discretion of the County, may have appropriate retainage withheld until completion and acceptance of the work.

C. Acceptable Invoices. The County considers an acceptable invoice to include:

1. A breakdown of man-hours by classification and rate
2. A line item for overhead
3. A line item for profit
4. A breakdown for other direct costs
5. A breakdown for subconsultant services
6. Signature of certification by an authorized representative of the firm
7. The Department's Project Manager may request additional certifications relating to work performed.

NOTE: For approved unit cost agreements numbers 1, 2 and 3 may be combined and identified by services, volume and rate. Numbers 4 and 5 shall be by breakdown costs.

D. Certification of prompt payment to subconsultants. Consultant shall certify on each invoice for payment that the charges thereon are true and correct. The submittal of such invoice shall constitute the Consultant's certification that all subconsultants have incurred the charges shown on the invoice, will be paid within seven (7) days upon receipt of payment from the Department, and have been paid for all charges shown on previous invoices.

E. Prompt release of retainage. The Consultant may withhold as retainage up to five (5%) percent of a subconsultant's payment until satisfactory completion of all work items of a subcontract. "Satisfactory completion of all work items of the subcontract" shall mean when the County pays the Consultant for the last work item of the subcontract. The Consultant must release to the subconsultant any retainage withheld within seven (7) calendar days of the date the Consultant receives payment from the County for the last work item of the subcontract.

F. Sanctions for failure to comply. Failure to comply with any of the above prompt payment provisions shall result in one or more of the following sanctions: (1) no further payments being made to the Consultant until compliance is achieved; (2) the Consultant being declared in default of the Contract; (3) the County terminating the Contract in accordance with Section VII, Paragraph (K) of this Agreement.

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SECTION VII. GENERAL PROVISIONS

The County and the Consultant mutually agree as follows:

A. OWNERSHIP OF DOCUMENTS. Basic notes, sketches, charts and other data prepared, furnished or obtained under this Agreement will become the property of the County without restriction or limitation on their use. No material produced in whole or in part under this Agreement will be subject to copyright in the United States or in any other country. The County shall have unrestricted authority to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data, or other materials prepared under this Agreement. The County shall retain ownership of all plans, drawings, specifications and related documents.

B. INFORMATION TECHNOLOGY. All program management systems, software, or information technology products developed or utilized by Consultant for the project shall be able to interface with information technology systems utilized by County and Department. All systems, software or information technology developed for this project shall become the sole property of County and Department upon Contract completion, including any source code. No program management systems, software or information technology products produced in whole or in part under this Agreement will be subject to copyright by Consultant. County and Department shall have unrestricted authority to publish, disclose, distribute and otherwise use, in whole or in part, all program management systems, software, or information technology products prepared by Consultant, or its subconsultants, under this Agreement.

C. FINDINGS CONFIDENTIAL. Any reports, information, data, etc. furnished to or prepared or assembled by the Consultant under this Agreement which the County requests to be kept as confidential will not be made available to any individual or organization by the Consultant without prior written approval of the County.

D. REQUIREMENTS FOR CHECKING AND REVIEWING OF PLANS.

It is the Consultant's responsibility to produce plans that conform with all specifications, guidelines and requirements stated in this Agreement unless a specific deviation has been requested in writing and approved by the County, Department and if applicable the Federal Highway Administration. All plans, whether preliminary or final, submitted to the County and/or Department, shall have been checked in their entirety for completeness, correctness, accuracy and consistency with other details in all respects, and shall have been thoroughly reviewed by the Consultant to be in compliance with these requirements prior to submission to the County and/or Department.

The spaces provided in the title box labeled "By", "CHK'D" and "REVIEWED BY" shall be signed with the initials of the persons who performed those specific functions on that portion of the project at the time of submittal to the County and/or Department. In the event that a print of a partially completed sheet is to be submitted, the initials may be added directly to the print rather than being entered on the original drawing.

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Once plans have been submitted to the County and/or Department, no changes shall be made unless the County and/or Department has been notified of the specific change. However, additions to complete the plans may be made provided the requirements for checking and reviewing are applied. All prints submitted to the County and/or Department shall have the date of submittal stamped on the title sheet.

The County and/or Department will perform a general review of the plans only. The County and/or Department's review does not relieve the Consultant of any responsibility for the completeness, correctness, consistency and accuracy of all information, dimensions, quantities, details, designs and compliance with all specifications, guidelines and requirements of this Agreement. Should any discrepancies, errors or omissions be found at any time, after submittal of the plans, corrections to plans will be made at the Consultant's expense. The Consultant shall not include the cost of corrections of faulty or deficient work on his invoice to the County and/or Department.

Failure to meet any of the above requirements may result in the withholding of payment until plans are deemed acceptable in the opinion of the County and/or Department, or may be deemed just cause for consideration of termination of this Agreement.

E. PROGRESS. The Consultant shall at all times work closely with the designated representatives of the County and Department and shall keep them fully advised as to the status of the work. The Consultant or his authorized representative will be present at all conferences, field inspections and other meetings as may be requested by the County and/or Department. Conferences or consultations may be called at any time by either party to this Agreement. The plans and work of the Consultant will be available to County, and/or Department and if applicable to appropriate representatives of the Federal Highway Administration for review at all times.

F. CONTROL. All work by Consultant is to be done in a manner satisfactory to County and Department and in accordance with the established customs, practices, and procedures of County, Department, State of South Carolina, Federal Highway Administration, including compliance with applicable sections of the Department/Federal Highway Administration STEWARDSHIP AND OVERSIGHT PLAN, dated November 2007 (included herein by reference) and any revisions thereto, and in conformity with the standards adopted by the American Associations of State Highway and Transportation Officials and approved by the Secretary of Transportation as provided in Title 23, U. S. Code, Section 109-B, as amended. The decision of Department is to control in all questions regarding location, type of design, dimension of design and similar questions. Consultant shall signify its approval on all plans, specifications and estimates prepared and delivered under the terms of this Contract.

G. INSPECTION OF WORK. The County and Department shall have access to and the right to inspect all project work and materials during regular business hours of the Consultant. The Consultant and its subcontractors shall keep and preserve all books, documents, papers, accounting records, and other evidence pertaining to costs incurred and make such materials available at its respective offices at reasonable times during the Contract period and for three years from date of final payment under the Contract for inspection by the County,

Department, if applicable any authorized representative of the County, Department and the Federal Highway Administration, and copies thereof shall be furnished if requested.

H. CHANGES IN CONTRACT. The County and/or Department may desire Consultant to render services for changes in connection with this project in addition to that provided for by the express provisions of this Agreement. Such additional services for changes will require a contract modification, setting forth the nature and scope of such additional services and the compensation therefor, as determined by mutual agreement between County and Consultant. Work under such contract modification shall not proceed until formally approved by the County.

I. DELAYS AND EXTENSIONS. The Consultant agrees to prosecute the work continuously and diligently and no charges or claims for damages shall be made by Consultant for any delays or hindrance, from any cause whatsoever during the progress of any portion of the services specified in this Agreement. Such delays or hindrances, if any, may be compensated for by an extension of time for such reasonable period as the County may decide. Time extensions may be granted only for excusable delays such as delays beyond the control and without the fault or negligence of the Consultant.

J. FAILURE TO MAINTAIN SATISFACTORY PROGRESS

The Consultant will proceed with the work in a timely fashion, providing sufficient manpower and resources to meet the commitment to schedules, milestones, and completion dates set forth in the Contract. The County and Department may monitor the progress of the work to determine that the work is progressing sufficiently to meet the commitments agreed to in the Contract.

The Department's Program Manager in consultation with County may make a preliminary finding of delinquency if at anytime the Consultant has not met the schedules, milestones, or completion dates established in the Contract, and it appears unlikely that the work will be completed by the specified date. Upon review of the preliminary finding of delinquency, the Department's Program Development Engineer may issue a Preliminary Notice of Delinquency. The Consultant will have 15 days to present information to the Department as to why the Consultant should not be found delinquent. This information should contain a specific plan of action to meet the Contract schedules, milestones, and completion dates and/or show circumstances beyond the Consultant's control that have directly affected the Consultant's ability to meet the commitments in the Contract. Upon review of the information submitted, the Program Development Engineer will make a determination to place or not place the Consultant in a delinquent status. If a determination of delinquent status is made, the Program Development Engineer will issue a Final Notice of Delinquency. A Consultant receiving a Final Notice of Delinquency may appeal within 15 days to the Department's Director of Preconstruction for a review with County of the delinquent status.

A Consultant receiving a Final Notice of Delinquency shall be disqualified from receiving additional work, whether in the form of a new contract or a modification of an existing contract. The Consultant shall continue in a delinquent status until the project is in compliance with the

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schedule, or until the work required by the Contract is completed. This disqualification will become effective at the end of the 15-day appeal period if the Consultant fails to appeal or on the date of decision if the appeal is denied. A Consultant disqualified under this provision shall be barred from receiving work as an individual, firm, partnership or corporation operating under the same name or a different name.

K. TERMINATION OF CONTRACT.

(a) This Contract may be terminated by the County at any time for the convenience of County by written notice to Consultant specifying the termination date of the Contract. In the event of such termination of the Contract by the County, the Consultant will be compensated on a quantum meruit basis for its work satisfactorily performed through the termination date.

(b) Consultant also has the right to terminate this Contract if the County unreasonably fails to timely provide the service required of County under scope of services or unreasonably fails to make timely payment for consultant services rendered. In the event of such termination which is not the fault of Consultant, County shall pay to Consultant the compensation properly due including reasonable overhead and profit on work performed for services properly performed (prior to the effective date of the termination) and for reasonable reimbursable expenses properly incurred as a result of the termination.

(c) In the event Consultant through any cause fails to perform any of the terms, covenants, or provisions of this Contract on its part to be performed, or if it for any cause fails to make progress in work hereunder in a reasonable manner, or if the conduct of Consultant impairs or prejudices the interest of County, or if Consultant violates any of the terms, covenants, or provisions of this Contract, County shall have the right to terminate this Contract by giving seven (7) days notice in writing of the termination and date of such termination to Consultant. The County shall have the sole discretion to permit the Consultant to remedy the cause of the contemplated termination without waiving the County right to terminate the Contract. All drawings, specifications, and other documents relating to the design or supervision of consultant work shall be surrendered forthwith by Consultant to County. County may take over work to be done under this Agreement and prosecute the work to completion by Contract or otherwise, and Consultant shall be liable to County for all reasonable cost in excess of what the County would have paid the Consultant had there been no termination.

L. DISPUTES. In any dispute concerning a question or fact in connection with the work of this Agreement, or compensation therefor, the decision of the County in the matter shall be final and conclusive for both parties.

M. RESPONSIBILITY FOR CLAIMS AND LIABILITY. The Consultant shall assume certain risks in connection with the performance of this Agreement and shall be liable for and shall indemnify and hold harmless the County, Department and other agencies of government from claims and liability due to negligent acts of the Consultant, its subcontractors, agents or employees in connection with the prosecution and completion of the work covered by this Agreement.

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Consultant shall, until this Agreement has been fully performed or until it has been terminated by County, take out and maintain as a normal business expense Liability and Professional Errors and Omissions Insurance with coverage in the amount not less than customarily carried by any party in the performance of similar work and Public Liability and Property Damage Insurance with coverage in the amount not less than customarily carried by any party in the performance of similar work and in such form and with such insurance carriers as are available to it and acceptable to County. Consultant will secure and maintain such insurance, including vehicular insurance, as will protect it from claims under worker's compensation acts, claims for damages because of bodily injury including personal injury, sickness or disease, or death of any of its employees or of any person other than its employees, and for claims for damages because of injury to or destruction of tangible property including loss of use resulting therefrom.

N. GENERAL COMPLIANCE WITH LAWS. The Consultant and its subcontractors shall at all times observe and comply with all Federal, State and local laws, ordinances and regulations affecting the conduct of the work.

O. SUBLETTING, ASSIGNMENT OR TRANSFER. The Consultant shall not assign, sublet, or transfer any of the work, except as specifically provided for under the terms of this Contract, without prior written consent of the County. Such consent does not release or relieve the Consultant, as principal, from any of its obligations and liabilities under this Agreement.

Subconsultant agreements are attached in ATTACHMENT "C" ENGINEERING FEE. All Contract provisions shall be furnished to all subconsultants and shall apply to all subconsultant agreements.

P. ETHICS ACT. By execution of this Agreement Consultant certifies Consultant is in compliance with South Carolina's Ethics, Government Accountability, and Campaign Reform Act of 1991, as amended. The following statutes require special attention: (a) Offering, giving, soliciting, or receiving anything of value to influence action of public employee – Section 8-13-790, (b) Recovery of kickbacks – Section 8-13-790, (c) Offering, soliciting, or receiving money for advice or assistance of public official – Section 8-13-720, (d) Use or disclosure of confidential information – Section 8-13-725, (e) Persons hired to assist in the preparation of specifications or evaluation of bids – Section 8-13-1150, (f) Solicitation of state employees – Sections 8-13-755, 8-13-760 and 8-13-725.

Q. DRUG FREE WORK PLACE CERTIFICATION. By execution of this Agreement Consultant certifies Consultant will comply with all applicable provisions of The Drug-Free Workplace Act, Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.

R. COVENANT AGAINST CONTINGENT FEES. The Consultant warrants that it has not employed or retained any company or persons, other than a bona fide employee working solely for the Consultant, to solicit or secure this Contract, and that he has not paid or agreed to

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pay any company or person, other than a bona fide employee working solely for the Consultant, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the County shall have the right to annul this Contract without liability or, at its discretion, to deduct from the Contract price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gifts, or contingent fee.

S. TITLE VI. CIVIL RIGHTS ACT OF 1964. During the performance of this Agreement, Consultant, for itself, its assignees and successors in interest agrees as follows:

1. Compliance with Regulations:

Consultant shall comply with the regulations relative to non-discrimination in Federally-assisted programs of the United States Department of Transportation (Title 49, Code of Federal Regulations, Part 21, hereinafter referred to as "Regulations"), which are herein incorporated by reference and made a part of this Agreement.

2. Non-discrimination:

Consultant, with regard to work performed by it after award and prior to completion of the Contract work, shall not discriminate on the grounds of race, religion, color, sex, age, handicap, national origin, or political affiliation in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the Contract covers a program set forth in Appendix B of the Regulations.

3. Solicitations for Subcontracts, including Procurements of Materials and Equipment:

In all solicitations, either by competitive bidding or negotiation made by Consultant for work to be performed under a subcontract, including procurements of materials or lease of equipment, each potential subcontractor or supplier shall be notified by Consultant of Consultant's obligations under this Agreement and the Regulations relative to non-discrimination on the grounds of race, religion, color, sex, age, handicap, national origin, or political affiliation.

4. Information and Reports:

Consultant shall provide all information and reports required by the Regulations, or directions issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the County and/or Department to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of Consultant is in the exclusive possession of another who fails or refuses to furnish this information, Consultant shall so certify to County and/or Department, and shall set forth what efforts it has made to obtain the information.

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5. Sanctions for Non-compliance:

In the event of Consultant's non-compliance with the non-discrimination provisions of this Contract, County shall impose such contract sanctions as it may determine to be appropriate, including, but not limited to:

(a) Withholding of payments to Consultant under the Contract until Consultant complies, and/or

(b) Cancellation, termination or suspension of the Contract, in whole or in part.

6. Incorporation of Provisions:

Consultant shall include the provisions of Paragraphs 1 through 6 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directions issued pursuant thereto. Consultant shall take such action with respect to any subcontract or procurement as County, may direct as a means of enforcing such provisions, including sanctions for non-compliance. Provided, however, that in the event Consultant becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, Consultant may request County to enter into such litigation to protect the interest of the County and, in addition, Consultant may request the United States to enter into such litigation to protect the interest of the United States.

T. MINORITY BUSINESS ENTERPRISE.

(a) Policy. It is the policy of the County to ensure nondiscrimination in the award and administration of federally-assisted contracts and to use Disadvantaged Business Enterprises (DBEs) in all types of contracting and procurement activities according to State and Federal laws. To that end the Department has established a DBE program in accordance with regulations of the United States Department of Transportation found in 49 CFR Part 26. This Contract is subject to the provisions of the Department's DBE program and 49 CFR part 26.

(b) Consultant/Subconsultant assurances. Neither the consultant, nor its subconsultants, shall discriminate on the basis of race, color, national origin or sex in the performance of this Contract. The Consultant shall carry out applicable requirements of 49 CFR part 26 in the award and administration of federally-assisted contracts. Failure by the Consultant, or any of its subconsultants, to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the County deems appropriate. Consultant shall advise its subconsultant of these provisions by including this clause in each of its subcontracts.

(c) Quoter information. At the conclusion of this Contract, the Consultant shall submit to County the names and addresses of all subconsultants who quoted subcontracts for this Contract.

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(d) Reports on Subconsultant payments. At the conclusion of this Contract, the Consultant shall report to County all payments made to subconsultants on this Contract. The report shall include the following information as to each subconsultant: the name and address of the subconsultant and the total payments made to the subconsultant.

U. EQUAL EMPLOYMENT OPPORTUNITY. In connection with the execution of this Contract, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin. Consultant shall comply with Executive Order 11246, as amended by the Executive Order 11375, and as supplemented by Department of Labor Relations (41 CFR, Part 60) (OMB Circular A-102; Attachment O; Part 14C) and shall take affirmative action to ensure that applicants are employed and that employees are treated during their employment without regard to their race, religion, color, sex, or national origin. Such actions will include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay, or other forms of compensation; and selection for training, including apprenticeship.

V. PARTICIPATION BY FOREIGN CONSULTANTS AND SUBCONSULTANTS

The County and Department will not consider for award any proposal submitted by any consultant, and will not consent to subletting any portions of the Contract to any subconsultant, of a foreign country during any period in which such foreign country is listed by the United States Trade Representative as discriminating against U. S. firms in conducting procurements for public works projects.

For the purpose of this Special Provision, any consultant or subconsultant who is a citizen or national of a foreign country or is controlled directly or indirectly by citizens or nationals of a foreign country, shall be considered to be a consultant or subconsultant of such foreign country.

W. COMPLIANCE CONCERNING ILLEGAL ALIENS. By execution of this Agreement the Consultant as the prime consultant does hereby agree:

a) to certify its compliance with the requirements of Chapter 14 of Title 8 of the S.C. Code of Laws regarding Unauthorized Aliens and Public Employment;
b) to provide Department and County with any documents required to establish such compliance upon request; and
c) to register and participate and require agreements from sub-consultants to register and participate in the federal work authorization program to verify the employment authorization of all new employees, or to employ only workers who supply the documents required pursuant to S.C. Code 8-14-20(B)(2).

X. SUCCESSORS AND ASSIGNS. County and Consultant each binds itself, its successors, and assigns to the other party with respect to these requirements, and also agrees that neither party shall assign, sublet, or transfer its respective interest in the Agreement without the written consent of the other.

Y. ENTIRE AGREEMENT. This Agreement with referenced exhibits, and/or attached certifications, and attachments constitutes the entire Agreement between the parties and, except for contract modifications prepared in accordance with provisions thereof, there are no collateral contracts or agreements between the parties relating to this work. The execution of this Agreement by the parties hereto represents the execution of each individual certification hereof. This Agreement and Contract is to be interpreted under the laws of the State of South Carolina.

IN WITNESS WHEREOF, the parties herein have executed this Agreement as of the day and year first written above.

Signed, sealed and executed for the Consultant:

TRANSYSTEMS CORPORATION

WITNESS: Regena M. Wells

By:

Title: Sr. Vice President

Federal ID No: 43-0839725

Signed, sealed and executed for the County:

HORRY COUNTY

WITNESS: Sandra Karigan

By:

Title: Asst. County Administrator/ County Engineer – I&R Division

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EXHIBIT A

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ENGINEER CERTIFICATION FOR PROJECT PLANS AND SPECIFICATIONS

Consultant's Name: TranSystems

Route Number: SC 31

File Number: 26.036775A; A.1 thru A.5

Project Number: N/A

Project Description: Extension of SC 31 from SC 544 to SC 707

In order to advance projects in an expeditious and efficient manner, County hereby assigns to the above-named consulting firm, hereinafter referred to as the Undersigned, and the Undersigned accepts full responsibility for all project plan and specification reviews including the approval of all information, dimensions, quantities, details and designs involved in the preparation and production of the project plans and specifications for the above-named project. In accepting this responsibility, the undersigned makes the following certification:

THE UNDERSIGNED CERTIFIES to be a South Carolina registered engineering firm with absolute authority to accept the responsibility for the project plans and specification involved in the project; and,

THE UNDERSIGNED CERTIFIES to produce project plans and specifications that will conform with all guidelines and requirements stated in this agreement unless a specific deviation has been requested in writing and approved by the County and DEPARTMENT, and, if applicable, the Federal Highway Administration (FHWA); and,

THE UNDERSIGNED CERTIFIES that all project plans and specifications will be checked in their entirety for completeness, correctness, accuracy and consistency with other details in all respects, and will be thoroughly reviewed by the undersigned consulting firm to be in compliance with the requirements in effect at the time of submission to the County; and,

THE UNDERSIGNED CERTIFIES that each project plan sheet submitted on this project will be signed and sealed by a South Carolina Registered Engineer; and,

THE UNDERSIGNED CERTIFIES that all of the work performed under this Contract will be performed in accordance with the special provisions and specifications, and will be performed so as to meet or exceed reasonable standard of care of the profession; and

THE UNDERSIGNED CERTIFIES that by signing and sealing the plans, the undersigned assumes full, complete and conclusive liability for all discrepancies, errors or omissions found at any time in the plans or specifications. Further, that all corrections to the plans or specifications will be made at the consultant's expense and the consultant will not include the cost of corrections of faulty or deficient work on its invoice to the County, and

THE UNDERSIGNED FURTHER CERTIFIES that it agrees that failure to meet any of the above requirements may be deemed just cause, at the discretion of the County, for withholding payment on the Contract and/or termination of the Contract, without damages due to the Undersigned by County.

This Engineering Certification for Project Plans and Specification is attached to and becomes part of the agreement and project, with all terms and conditions of the agreement and project applicable hereto.

Seal

10/24/2011
Date

Firm: TRANSYSTEMS CORPORATION

By: [signature]

Title: SR. VICE PRESIDENT

Template Revised 6/23/2015

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CERTIFICATION OF CONSULTANT

I hereby certify that I am the a duly authorized representative of the Consultant and that neither I nor the above consultant I here represent has:

(a) employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me or the above Consultant) to solicit or secure this Agreement;

(b) agreed, as an express or implied condition for obtaining this Agreement, to employ or retain the services of any firm or person in connection with carrying out the Agreement, or

(c) paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the above Consultant) any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the Contract except as here expressly stated (if any).

(d) been debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department, state department or agency thereof. The Consultant further certifies full compliance with 23 CFR 633 Subpart A of the Federal Code.

I acknowledge that this certificate is to be furnished to the County, Department, the Federal Highway Administration, and the U. S. Department of Transportation, and is subject to applicable State and Federal laws, both criminal and civil.

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CERTIFICATION OF COUNTY

I hereby certify that I am the Harry County Engineer of the State of South Carolina and that the above Consultant or its representative has not been required, directly or indirectly, as an express or implied condition in connection with obtaining or carrying out this Agreement to:

(a) employ or retain, or agree to employ or retain, any firm or person, or

(b) pay, or agree to pay, to any firm, person, or organization, any fee, contributions, donations, or consideration of any kind, except as here expressly stated (if any).

I acknowledge that this certificate is to be furnished to the Federal Highway Administration, and U. S. Department of Transportation, and is subject to applicable State and Federal laws, both criminal and civil.

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Certification for Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, and contracts and subcontracts under grants, subgrants, loans, and cooperative agreements) which exceed $100,000, and that all such subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

ATTACHMENT "A"

SCOPE OF SERVICES

AND SCHEDULE

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SCOPE OF SERVICES

Consultant Engineering and Inspection Services

Carolina Bays Extension

Description

The **Carolina Bays Extension** project will be on new location from SC-544 to SC-707 in Horry County. The project includes nearly 5.0 miles of roadway with approximately 3 miles being PCC pavement, a 3,633 foot bridge over the Intracoastal Waterway, a 225 foot bridge over Enterprise Road, and a 148 foot bridge over SC-707.

Scope of Services

The SCDOT and Horry County desire to hire a Consultant to perform Construction Engineering and Inspection (CEI) Services for the above described project to include, but not limited to, construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the contract requirements. The Consultant will provide services that conform to current state policy and practice of construction engineering including certification of personnel. For the Project, the performance of the services will: ensure that quality materials are being incorporated into the project, ensure that quality workmanship is utilized on the project, ensure that the work of the contractor is progressing in accordance with the proposed schedule, and ensure compliance with applicable state laws regarding environmental issues. Other tasks may be added as deemed necessary by the SCDOT or Horry County.

Project Management

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. This 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. The Project Engineer will be responsible for ensuring an appropriate level of inspection for all phases and aspects of the project. The Project Engineer will direct a staff of Project Inspectors that will carry out the majority of the inspection, sampling, and testing responsibilities on the project. All references to the Project Engineer, staff of inspectors, or to any individual inspector in the scope of services section shall be as Consultant.

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Contract Management & Administration

The Consultant shall provide office engineering, scheduling and administration staff to adequately manage the project to include, but not limited to the tasks as listed below.

1. Document management
    a. Software
    b. Personnel
    c. Interface with Design-Build contractor as necessary
    d. Hard copies and electronic data
    e. Construction submittals & tracking
2. EEO compliance
3. DBE plan and program monitoring
4. Training program
5. Safety program
6. Contractor pay requests and estimate generation
    a. Verification and approvals
7. Partnering and disputes management
8. Construction contract change order generation
9. Project documentation
    a. SiteManager DWR
    b. Photo and video gallery
10. Project schedule
    a. CPM analysis
    b. Schedule approval recommendation
    c. Progress Reports
    d. Updates
11. Contractor submittals
    a. Submittal review Coordination and Tracking
    b. Claims review
    c. Certification of Contractor's inspection personnel
    d. As-Built Plans
12. Resource agency coordination
    a. Environmental mitigation/permit monitoring
    b. Water quality monitoring
    c. Permit requirement tracking
    d. Permit modification tracking
13. Right-of-way coordination
    a. Acquisition schedule/Special provision adherence
    b. Relocation, demolition and clearing activities
    c. Hazardous material handling activities
14. Utility coordination
    a. Utility company facilitation
    b. Specification conformance reviews
15. Project Closeout
    a. Final Inspection
    b. Completion of Punchlist
    c. Materials Certification preparation and submittal
    d. DBE Compliance Review
    e. Final Quantities and Estimate

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f. Review Contractor As-built plans

Inspection and Testing Services

Consultant shall provide a sufficient number of Project Inspectors to perform the majority of the on-site inspection and testing duties in accordance with the project Quality Control/Quality Assurance (QC/QA) program. Consultant shall be responsible for verifying and documenting that the quantities of testing (QC and QA) are being met and maintain master project QC and QA records. The Consultant shall review the Contractor's Quality Control (QC) Plan and recommend for approval in accordance with contract documents. Consultant shall interface and coordinate with the Contractor's QC personnel on a daily basis. The Project Inspectors shall report directly to the Project Engineer who shall direct the daily work of the inspectors. These inspectors will be responsible for highly technical and specialized inspection and testing procedures for roadway and bridge construction in the areas of concrete, foundations, soils and earthwork, asphalt roadway, erosion control, traffic control, and others. These positions will be expected to be SCDOT certified in the areas mentioned, or possess the ability to become certified through the SCDOT certification program. The following tasks have been developed to address the aforementioned goals and objectives.

1. Perform Inspection and Quality Acceptance Testing for all Concrete Structures

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of concrete structures on the Project. This task includes performing necessary air and slump tests, inspecting the construction of the formwork, placement and tying of reinforcing steel, checking grades as set by the contractor, making and storing concrete cylinders, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Concrete Inspection.

2. Perform Inspection and Quality Acceptance Testing for all Structural Foundations

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of structural foundations on the Project. This may include driven pile foundations, spread footing foundations, and drilled shaft foundations. This task includes performing necessary inspection of the driven piles, including gathering all necessary information for the completion of the pile recap sheet and spot checks of pile alignment and cut off grades. This task also includes the necessary inspection of drilled shafts, including inspection of the excavated shaft, tying and placement of the rebar cage, sampling and inspection of the slurry, on-site testing and sampling of the concrete, completion of all forms associated with drilled shafts, including the concrete curves, etc., facilitating the CSL testing,

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logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Foundations. Additionally, it is desired that inspectors assigned to this task possess at least 10 years of progressively responsible inspection experience on project(s) similar to the aforementioned.

3. Perform Inspection and Quality Acceptance/Assurance Testing for all Earthwork and Base Activities

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of earthwork and base construction on the Project. This includes, but is not limited to embankment construction, excavations, mucking, borrow excavation, installation of geosynthetics and geogrids, cement and/or lime stabilization, ground modifications, graded aggregate base course construction, placement of drainage systems, and any other related activities. This task includes performing necessary inspection and sampling of borrow excavation and subgrade at frequencies established in the specifications, monitoring, inspection, and testing of all compaction activities on the project, establishing limits of mucking or undercutting, inspection and sampling of geosynthetic material placement, and completion of all forms associated with earthwork and base construction, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall monitor Contractor's compliance with the Contractor's approved QC plan for earthwork and shall provide sufficient staff to monitor all these activities independently and conduct Quality Acceptance sampling and testing of materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Earthwork, or have a temporary waiver in place prior to start of work.

4. Perform Inspection and Quality Assurance/Quality Acceptance Testing of all Hot Mix Asphalt Activities

The Consultant shall provide all necessary personnel and equipment to perform all necessary QA inspection, sampling, and on-site testing of Hot Mix Asphalt construction on the Project. This may include placing Asphalt Base, Binder, Surface, and Friction Courses, and any other related activities. This task includes performing necessary QA inspection, testing, and sampling of Hot Mix Asphalt delivered to and placed on the Project. This includes performing rate calculations, checking mix and mat temperatures, monitoring the workmanship of the paving crew, directing any corrective action deemed

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necessary, taking roadway samples when needed, monitoring the compaction activities of the contractor, monitoring and performing compaction tests of asphalt, reviewing the traffic control operations associated with this activity, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall monitor Contractor's compliance with the Contractor's approved QC plan for asphalt and shall provide sufficient staff to monitor all these activities independently and conduct QA sampling and testing of materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification as HMA Roadway Technician, or have a temporary waiver in place prior to start of work.

5. Perform Quality Acceptance Inspection and Testing for all other construction activities associated with the Project and not specifically mentioned above.

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of incidental construction activities and items including, but not limited to installation of structural steel or pre-stressed girders, traffic signal installation, pavement markings, guardrail installation, seeding and erosion control measures, traffic control items, Mechanically Stabilized Earth Retaining Wall systems, welds, and clearing and grubbing. This also includes logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual.

6. Maintain field notes and compile Site Manager Daily Work Reports (DWR)

The Consultant shall maintain sufficient field notes and generate daily work reports within SiteManager for all activities assigned to the Consultant on a daily basis. These DWRs and field notes should be of sufficient detail to provide SCDOT the ability to reconstruct any or all activities of the project at a future date, if desired. Field notes should be prepared in conformance with the current editions of the SCDOT Construction Manual, Standard Drawings, and specifications.

7. Perform other associated duties typically assigned to Project Inspectors

The Consultant shall provide sufficient staff and equipment to complete general project duties not described elsewhere. These tasks may include delivering samples to the Office of Materials and Research, delivering or picking up revised plan sheets, project documents etc, from SCDOT HQ or District Office, performing routine but limited QA verification surveying, establish construction limits, proposed grades, etc. for property owners, utilities, etc., and compilation of data and records necessary to produce final

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plans, satisfy the SCDOT Business Plan, facilitate requests from outside parties, or to support decisions made in the field. The Consultant may be asked to meet with contractor's representatives, SCDOT personnel, local interested parties, etc. to provide information or assistance.

8. Furnish all necessary equipment to facilitate Tasks 1-7

The Consultant shall furnish all necessary equipment, including cell phones, laptop computers, vehicles, and specialized testing equipment to fulfill their testing, sampling, and inspection responsibilities. This equipment will include, but not limited to, nuclear density gauge and related supplies (proctor mold, moisture tester, etc.), concrete air meter(s), slump cones, infrared thermometer, paint thickness gauge, surveying equipment, and any other testing and sampling equipment as required by SCDOT.

Verification Survey

The Consultant shall provide survey crews and survey equipment to independently confirm layouts and geometry at key locations throughout the project construction. The survey crew will initially ensure that the project control points are correct and will monitor all primary control points periodically throughout the project duration to verify that they have not been disturbed. Verification surveys should be performed at the minimum frequency as listed in the 2004 SCDOT Construction Manual.

Substructure elements to be checked shall include but are not limited to:

1. Drilled shaft plan locations and cut off elevations.
2. Pile group layout benchmarks.
3. Footing plan locations and elevations.
4. Pier plan locations, elevations, and verticality.
5. Pile cap/Pier cap elevations.
6. Bearing seat elevations.
7. Embedded items.

Superstructure elements to be checked shall include but are not limited to:

1. Girder placement plan and elevation
2. Deck elevations and profiles
3. Approach slab plan and elevation
4. Parapet wall plan and elevation

Furnish a Project Office for SCDOT and Consultant

As part of this project, SCDOT will require the Consultant to furnish a fully functional office for use by SCDOT and Consultant. The location of the project office shall be approved by the SCDOT. All installation fees and monthly bills shall be the responsibility of the Consultant. The Consultant and SCDOT shall agree upon minimum dimensions of the project office prior to signing rental agreement. At a minimum, the project office shall have one ½ bath, one private office for Project Engineer, private office for SCDOT Resident Engineer, and workspace for support staff, including a plan table. The project office shall be furnished to support the daily functions of the field staff

as well as maintain and store all documentation related to the project including but not limited to desks, chairs, file cabinets, computers, fax machine, copier, printers, digital and video cameras, etc. The project office shall be equipped with high-speed internet (T1, cable or DSL) service and phone service The Consultant is responsible for cancellation of the rental agreement upon completion of the Project.

Public Relations and Informational Meetings

The Consultant shall assist SCDOT in any project public relations and informational meetings. The tasks may include:

1. SCDOT Leadership Updates
    a. Executive briefing packets.
    b. Provide monthly one-page updates to local elected officials as well as State legislators, SCDOT leadership, the Governor's office, and bridge mailing list.
    c. Monthly update presentations to SCDOT Leadership.
    d. Host necessary site visits for leadership and elected officials.
2. Community Meetings
    a. General public
    b. Local Businesses

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ATTACHMENT "B"

SERVICES OF THE COUNTY

The County agrees to provide to the CONSULTANT, and at no cost to the CONSULTANT, the following upon request:

1. Access to and use of all reports, data and information in possession of the County which may prove pertinent to the work set forth herein.
2. Existing Policies and Procedures of the County and Department with reference to geometrics, standards, specifications and methods pertaining to all phases of the CONSULTANT's work.

EXHIBIT B

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July 1, 2017

CLAIMS PROCEDURE

1. Scope of Procedure

The following claims procedure covers all claims for additional time or compensation arising under this contract. The claims procedure is non-binding and is a condition precedent to litigation or any other form of dispute resolution. All communications testimony and all documents prepared for this procedure by either party from the time of filing the CERTIFICATE OF CLAIM, per section 105.16.8 of the 2007 Standard of Specifications for Highway Construction, to the conclusion of the procedure shall be deemed to be settlement negotiations and not admissible in litigation or any other dispute resolution procedure. If at the conclusion of this procedure the claim has not been resolved, litigation may be pursued through the South Carolina Circuit Court. Contractor waives all rights to a jury trial and agrees that all litigation matters shall be heard non-jury and venue for any action shall be in South Carolina Circuit Court.

2. Continuation of Work

At all times during the pendency of a claim under this procedure, the contractor shall continue work pursuant to the contract and as directed by the engineer as provided by the contract. If the contractor fails to continue work, it may be declared delinquent in its work as provided by §108.08 of the South Carolina Standard Specifications for Highway Construction ("Standard Specifications").

3. Submission of Claim

The notice of claim and claim shall be submitted in accordance with §105.16.7 of the Standard Specifications. The notice of claim does not trigger this claims procedure. The claims procedure is initiated when the contractor submits a written fully detailed CERTIFICATE OF CLAIM to the resident construction engineer ("RCE"). The claim shall contain, at a minimum, the information required by §105.16.7 of the Standard Specifications. The RCE shall immediately forward a copy of the claim to the District Engineering Administrator ("DEA") for resolution. If the DEA is unable to resolve the claim within thirty (30) days of receipt, the DEA shall forward it immediately to the Director of Construction ("DOC"), together with documents supporting the Department's position. The DEA shall also submit the supporting documents to the contractor at this time. The DOC shall investigate the claim and attempt to resolve it by mutual agreement with the contractor. If it cannot be resolved, then the DOC shall make a decision and forward the decision to the contractor, no later than thirty (30) days after receipt by the DOC. The contractor shall notify the DOC within five (5) days of receipt of the DOC's decision whether the contractor accepts or rejects the decision.

For all claims under Fifty Thousand Dollars ($50,000.00) the DOC's decision shall be final and shall conclude the claims procedure. For the purpose of determining if a time only claim may be submitted to the Board, the value of a time only claim shall be deemed to be the number of days requested multiplied by the contract daily rate for liquidated damages. The contractor does not have a right to submit claims under $50,000.00 to the Dispute Review Board. If the contractor does not accept the DOC's decision on its claim of less than $50,000.00, then its remedy is litigation in the South Carolina Circuit Court for Richland County as set forth in Paragraph 1 of this Claims Procedure or other mutually agreeable dispute resolution procedures.

For all claims in excess of $50,000.00, if the contractor rejects the DOC's decision or fails to respond to the decision, the DOC shall forward the claim to the Dispute Review Board.

4. Dispute Review Board

A Standing Dispute Review Board has been established and shall be maintained. The Standing Dispute Review Board shall consist of one member selected by the Department, one member selected by the Director of Heavy and Highway Division of the Associated General Contractors (Carolina's Branch), and a third member selected by the first two members. The third member shall be the chairperson of the Standing Dispute Review Board. The selection of qualified Standing Dispute Review Board members

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shall be made in accordance with the Dispute Review Board rules and procedures. (See Section 6) Each member shall serve a three (3) year term and the terms shall be staggered. Each member is limited to two (2) terms. All board members shall be neutral and unbiased. No party shall have any *ex parte* communication with any Board Member.

5. Hearing Procedure

When the DOC forwards the claim to the Dispute Review Board, the DOC shall provide three (3) copies of the claim and three (3) copies of all documents submitted by the contractor and the DEA. The DOC shall notify both parties that the claim has been submitted to the Board.

Within fifteen (15) days of notice of submission of the claim to the Board, the contractor may submit to the DOC five (5) copies of any additional documentation supporting its claim. The DOC shall immediately forward three (3) copies to the Board, one (1) copy to the DEA, and the DOC will keep one (1) copy.

Within fifteen (15) days of receipt of the contractor's supplemental documentation, the DEA may submit to the DOC five (5) copies of its additional documentation. The DOC shall immediately submit three (3) copies to the Dispute Review Board, one (1) copy to the contractor, and the DOC will keep one (1) copy. Upon submission of supplemental documentation, the party shall notify the Board whether it requests a hearing.

The Dispute Review Board shall review all documents and notify the parties of what additional documents, if any, it requires. The Dispute Review Board shall schedule a hearing at either party's request or may schedule a hearing at its own discretion. However, if a hearing is requested, it must be held no later than sixty (60) days after the DOC submits the claim to the Dispute Review Board. The location of the hearings shall be determined by the Board. While extensions of these deadlines are discouraged, the Dispute Review Board shall have authority to extend any of the above deadlines for just cause.

The Dispute Review Board shall have full authority to establish guidelines and procedures for the investigation of a claim. The entire process is intended to be flexible and the Board is encouraged to adapt the process to individual circumstances presented by particular disputes.

In the interest of timely resolution of all claims, the Board shall conduct all hearings and issue its final decision within ninety (90) days of receipt of the claim.

The Dispute Review Board Chairperson shall direct all meetings and hearings. Presentation of evidence shall be in accordance with the Dispute Review Board's rules and shall not be bound by judicial rules of evidence. Documents and testimony shall be presented in the order, manner and degree of detail that the Dispute Review Board deems most efficient and probative. Each party shall be allowed to make a brief initial presentation and to rebut any factual assertion by another party; however, the Dispute Review Board shall determine when enough evidence has been presented and it may limit the presentation of any documentation or testimony that it deems not relevant or redundant. At the Board's option, testimony may be required to be given under oath and the oath shall be administered by the Chairperson.

Legal counsel for either party may be present at meetings or hearings as observers only. If a party intends to have its counsel present at a hearing, it must provide at least ten (10) days notice prior to the meeting or hearing. Legal counsel may not speak on behalf of a party, unless requested by the Board. Counsel may not examine or cross-examine witnesses, object to questions or statements during meetings or make legal motions or arguments during meetings or hearings. The Board, by majority vote, may suspend legal counsel's privilege to attend meetings or hearings.

The Dispute Review Board shall issue to the contractor and the Deputy Secretary for Engineering a written recommendation with an explanation of the results as soon as reasonably possible following the

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conclusion of the hearing. However, in no event shall the Board take more than ninety (90) days from receipt of claim to conduct hearings and issue a recommendation. The Board is encouraged to reach a unanimous decision; however, it may provide a majority recommendation. The minority Board Member may provide a written explanation of his position. The Board shall provide further explanation of its decision if requested by either party within ten (10) days of the receipt of the decision. Issuance of the Board's recommendation concludes the claims procedure.

The parties may settle at any time during the procedure. If the dispute is resolved prior to issuance of a recommendation, the DOC shall immediately notify the Board.

Within sixty (60) calendar days of issuance of the Board's recommendation, both parties shall submit written acknowledgement to the Deputy Secretary for Engineering, whether they accept the Board's decision. Failure to submit such written acknowledgement within the sixty (60) day time frame shall be considered an acceptance of the Board's recommendation.

If at the conclusion of this procedure the claim has not been resolved, litigation may be pursued in South Carolina Circuit Court for Richland County as set forth in Paragraph 1 of this Claims Procedure.

The Board members shall not be compelled to testify, give any type of statements, nor produce any documents or evidence submitted at the DRB hearing in any subsequent proceedings or litigation.

6. Dispute Review Board Rules and Procedures

a. Qualifications of Dispute Review Board Members

(1) All Dispute Review Board Members shall have substantial experience in highway or bridge design and construction. This experience may be technical, administrative or legal. The goal is to have a Board with the technical and administrative skills and experience that will promote confidence in its decisions.

(2) No Dispute Review Board Member shall be employed currently or within the last three (3) years with the Department, any contractor (currently or in the past pre-qualified with the Department), or any design consultant that has worked for the Department within the last three (3) years.

(3) No Dispute Review Board Member shall have any financial or ownership interest in any party to the contract nor any design consultant or major subcontractor.

b. Selection of Dispute Review Board Members

The selection process for Dispute Review Board Members shall begin at the appropriate time in order to allow completion of the Member selection by beginning of the term. The selection process shall be as provided in Section 4.

c. Replacement of Board Members

Each party may elect to replace its Board Member at any time with a showing of reasonable justification. The Chairperson of the Board may be replaced at any time with the consent of both parties. If any Board Member is replaced, the new member shall be selected in the same manner in which the original appointment had been made.

If disputes are pending at the end of a member's term, the existing Board shall complete its hearing on the disputes and issue a decision.

d. Costs

Board Members shall be paid a reasonable hourly rate or salary for their services. Each party shall negotiate the fee arrangements with the Member it selects, however, the other party must agree on the rate. Both parties shall agree on the fee arrangement for the Chairperson.

EXHIBIT B

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Board Members shall be reimbursed for out-of-pocket expenses including, but not limited to, travel, copying, telephone, clerical services, and mailings. The Board Members shall be allowed reimbursement of actual expenses for meals up to the daily maximums set forth in the Department's Regulations for Reimbursement of Travel and Subsistence Expenses and actual lodging costs provided they stay in hotels approved by the Department and they obtain a government rate. Board Members must provide documentation for all expenses.

The parties shall share all Board Members' fees and expenses equally. The total fees and expenses to hear each claim shall not exceed the following maximum amounts unless otherwise agreed to by both parties in writing (one claim shall constitute all issues submitted to the Dispute Review Board at one (1) time):

Claim Amount	Cumulative Total
$ 50,000 - $499,999.99	$15,000.00
$500,000.00 - $999,999.99	$25,000.00
$1 million - $4,999,999.99	$40,000.00
over $5 million	$75,000.00

The Department shall pay the Board Members and deduct the Contractor's share from monies owed to the contractor. If monies owed are not sufficient, the Contractor shall pay the Department directly for its share of the fees and expenses.

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	**C.A. NO. 2018-CP-26-02633**
Flatiron Constructors, Inc.,	)	
	)	**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY AND MOTION FOR PROTECTIVE ORDER**
Plaintiff,	)	
	)	
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

Plaintiff, Flatiron Constructors, Inc. ("Flatiron"), by and through the undersigned counsel, respectfully submits this Opposition to Defendant TranSystems Corporation's ("TranSystems") Motion to Stay Proceedings Pending Final Determination of Construction Contract Obligations and Protective Order ("TranSystems' Motion"). As set forth herein, TranSystems' Motion fails to satisfy the fundamental requirements for staying Flatiron's legitimate action against the Defendant for, inter alia, professional negligence. Hence, imposition of another stay in this long-delayed action would unnecessarily prejudice Flatiron's interest in the expedient resolution of its claim. Similarly, no bases exist for precluding Flatiron's discovery requests which must be answered regardless of the outcome of any claims that Flatiron may have against Horry County, South Carolina ("Horry County") and/or SCDOT.

A. TranSystems Owed Flatiron an Independent Duty

Absent from TranSystems' Motion is any reference to the Engineer's duties and responsibilities on the instant Project. Yet, these duties included, without limitation, construction management, construction engineering, acceptance inspections, and construction survey verifications to determine compliance with the Contract requirements. See, Agreement and Contract Between Horry County and TranSystems Corporation ("TranSystems Agreement"),

Attachment A – "Scope of Services", attached hereto as **Exhibit 1**. TranSystems also certified that it is a South Carolina registered engineering firm and that it would perform all of its Project duties "so as to meet or exceed [the] reasonable standard of care of the profession." See, Engineer Certification for Project Plans and Specifications attached hereto as **Exhibit 2**. Pursuant to this Certification, TranSystems "assume[d] full, complete and conclusive liability for all discrepancies, errors or omissions found at any time in the plans or specifications."

TranSystems' status as a professional engineering firm, coupled with its Project duties affecting Flatiron's ability to perform the construction work, give rise to a special relationship between the parties. Tommy L. Griffin Plumbing & Heating Co., v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88-89 (S.C. 1995). This special relationship casts upon TranSystems a duty of care separate and distinct from any contractual obligations that Horry County may have to Flatiron. Id. As with the engineering firm in Griffin, TranSystems owed a duty to Flatiron not to negligently manage, engineer, or inspect Flatiron's work. TranSystems' breach of that duty forms the bases of the instant action which is wholly independent of Flatiron's contract claims and entitlements against Horry County and/or SCDOT.

B. Applicable Law Precludes Another Stay of Flatiron's Action

In light of TranSystems' independent duty to Flatiron, insufficient bases exist under South Carolina law to justify staying Flatiron's lawsuit against TranSystems. As set forth in Connecticut National Bank v. Wilson, 326 S.E.2d 657, 658 (S.C. 1985) (citing McConnell v. Williams, 252 S.C. 573, 167 S.E.2d 492 (1969)):

> [I]n order that one of two pending actions may be urged in abatement of the other, the actions must be identical or substantially so, that is, they must be between the same parties…based on the same cause of action, involve the same issues…and be capable of authorizing the same relief.

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More recent, trial court decisions have specifically applied this standard to deny a motion to stay. Thus, the court in Crawford v. Medical University of South Carolina, No. 2013-CP-40-02877, 2014 WL 12515760, at *2 (S.C. Com.Pl. Mar. 31, 2014) refused to grant the defendants' motion to stay noting that different parties were involved in the two actions and that distinct claims were being asserted in each. As with the matters in the Conn. Nat'l Bank and Crawford decisions, the instant action and Flatiron's claims under the contract Between Horry County and Flatiron ("Construction Contract") involve different parties and distinct causes of action. Furthermore, the claims against Horry County and/or SCDOT are not capable of yielding the full relief sought in the instant case. TranSystems' Motion, therefore, cannot meet the well-established standard for staying an action under South Carolina law.

1. No Competing Action Exists

Unlike in the reported decisions granting motions to stay, TranSystems, as the moving party, can identify no other pending legal action that would justify a stay of the instant lawsuit. Rather, the Defendant simply points to prior Dispute Review Board ("DRB") decisions and Flatiron's claim submitted to SCDOT. See TranSystems' Motion, Para. 3-5. Of course, TranSystems was not a party before the DRB, nor was it the recipient of any of Flatiron's contract claims to SCDOT. Moreover, pursuant to Flatiron's Construction Contract referenced in Para. 1. of TranSystems' Motion, all communications, testimony and documents prepared through the conclusion of the contract claims procedure are "deemed settlement negotiations and not admissible in litigation or any other dispute resolution procedure." Supplemental Specification "Claim Procedure", Art. 1, attached hereto as **Exhibit 3**. No justification exists for staying the instant lawsuit in this court of record until "settlement negotiations" with another party are concluded. Notably, TranSystems offers no explanation for how these negotiations between

Flatiron and Horry County and/or SCDOT will benefit or streamline the instant case. For example, TranSystems does not concede that it is in any way bound by the DRB decisions.

To the extent that TranSystems seeks to stay the action in this court based upon the possibility of some later action that Flatiron may file against Horry County and/or SCDOT, the Defendant presents no legal authority justifying such a stay. Indeed, TranSystems can point to no rule, statute, or precedent that dictates that Flatiron's current action must be sidelined based upon the possibility of future action against Horry County and/or SCDOT. It certainly cannot present legal authority for the proposition that Flatiron's case against TranSystems must be abated over Flatiron's objection pending "settlement negotiations" between Flatiron and a separate party.

2. The Matters Involve Different Parties and Different Claims

Contrary to the precedent established by the South Carolina Supreme Court in Conn. Nat'l., the instant action and Flatiron's claims under its Construction Contract with Horry County involve different parties and are based upon different causes of action. Most obvious is the fact that the instant action does not include Horry County or SCDOT, and the claims under the Construction Contract are not brought against TranSystems who is not a party to that contract. Hence, TranSystems fails an initial test of the validity of its Motion.

Similarly, Flatiron's cause of action against TranSystems for professional negligence in this case is undeniably distinct from any claim or request for equitable adjustment brought under the Construction Contract's Claim Procedures. The former cause of action sounds in tort and involves expert testimony regarding TranSystems' violation of the applicable standard of care among other common law proof requirements. The latter claims against Horry County and/or SCDOT, in contrast, are creatures of contract based upon an interpretation of the parties' intentions and facts demonstrating entitlement under specific contract provisions.

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3. The Matters Involve Different Types of Relief

TranSystems' Motion fails to mention that certain damages recoverable in the instant action may not be recoverable through Flatiron's claims under the Construction Contract. For example, as set forth in Flatiron's Amended Complaint, TranSystems significantly delayed and complicated Flatiron's construction performance causing it to incur delay damages, additional construction costs, and even liquidated damages. See, e.g., Amended Complaint Para. 24. Even if Flatiron were able to recover for TranSystems' delays from Horry County and/or SCDOT, Flatiron's ability to claim the full extent of these damages from SCDOT may be limited under the Construction Contract's "Non-Recoverable Damages" provision and other restrictive Contract clauses.

Construction Contract, Specification 105.16.6 provides that SCDOT has no liability for certain damages such as labor inefficiencies, interest, and prejudgment interest. See Selected Spec. Sections attached hereto as **Exhibit 4**. The provision further limits recovery of profit, home office overhead and other damages. Similarly, Specification 105.16.3 asserts that SCDOT has no liability for construction acceleration or the costs incurred in an effort to overcome delays to the construction. To the extent these clauses are enforceable, they may preclude Flatiron from being made whole for delays caused by others.

No such limitations exist on Flatiron's right to recover its full panoply of damages caused by TranSystems' negligence. Such tort damages are limited only by Flatiron's ability to prove its entitlement and the amount of resulting loss. No arbitrary or bargained-for restrictions on such damages apply. In sum, Flatiron's claims under the Construction Contract and the instant lawsuit against TranSystems are not "capable of authorizing the same relief." Conn. Nat'l, 326 S.E. 2d 657,658. Consequently, TranSystems' Motion is unsustainable.

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C. The Instant Action is Ripe

In Paragraph 8 of its Motion, TranSystems mistakenly argues that "Until Flatiron has obtained a final determination of [its claims against Horry County and/or SCDOT], Flatiron has suffered no damages, and its claims against TranSystems are not ripe…" Yet, TranSystems offers no explanation for this proclamation and provides no law to support it. Contrary to such assertions, Flatiron's claims against TranSystems are neither contingent, hypothetical, nor abstract. See, Sunset Cay LLC v. City of Folly Beach, 593 S.E. 2d 462, 466 (S.C. 2004). Rather, as set forth in its Amended Complaint, due to TranSystems' negligence, the Project already has been delayed, and Flatiron already has suffered damages. Moreover, as set forth above, Construction Contract provisions exist aimed at preventing Flatiron from fully recovering delay-related damages from SCDOT. These are real, incurred costs resulting from TranSystems' committed negligence. There is nothing contingent, hypothetical, or abstract about them. The instant matter is ripe and ready for prosecution.

D. The Previous Stays are Irrelevant

In Paragraph 7 of its Motion, TranSystems asserts that "In their November 22, 2019, Joint Motion for Extension of Stay, the parties stated that 'SCDOT must complete that agency evaluation, and then there is a review and appeal process available. The completion of that process will define, and perhaps limit, issues to be decided in this civil action.'" TranSystems then argues that "this statement is still accurate." Yet, the facts set forth elsewhere in the Motion belie TranSystems' argument.

For example, in Paragraph 3 of its Motion, TranSystems accurately points out that on September 3, 2020, the SCDOT DRB rendered a decision that Flatiron did not accept. At that point, the agency evaluation, review, and appeal process was completed. Hence, any further action

on that particular claim must be brought against Horry County and/or SCDOT in the S.C. Court of Common Pleas. In short, events have occurred since November 22, 2019, that have changed the landscape and clarified that the instant lawsuit should move forward. TranSystems offers no substantive argument supporting the proposition that Flatiron should be forced to litigate against Horry County and/or SCDOT on contract claims before proceeding with the instant action based on professional negligence. The previous stay expired without objection and Flatiron should not be required to wait any longer to seek redress from TranSystems.

E. TranSystems Should Not be Allowed to Avoid Discovery

TranSystems also seeks a Protective Order in an effort to avoid producing basic, relevant project records in the instant action. Again, the previous stay has expired and no protective order has been issued, yet TranSystems persists in withholding documents vital to advancing Flatiron's case. No legitimate grounds exist for the Defendant's failure to produce the requested documents. Rather, TranSystems simply seeks to delay and/or to avoid producing information that is expected to reveal its violations of the applicable standard of care.

First, the outcome of any litigation against Horry County and/or SCDOT will not obviate the need for discovery from TranSystems. As set forth herein, even if Flatiron can recover from Horry County and/or SCDOT for TranSystems' negligence, contractual damages limitations provisions may prevent a full recovery. As a result, Flatiron will still need to proceed against TranSystems in the instant action in order to be made whole. In sum, "The discovery from which [TranSystems] seeks to be shielded will need to occur regardless of the outcome of the [claims against Horry County and/or SCDOT]." See Crawford v. Med. Univ. of S.C., 2014 WL 12515760, at *3. Issuance of a protective order, therefore, would be improper.

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Second, should Flatiron be forced to pursue litigation against Horry County and/or SCDOT as TranSystems suggests in Paragraph 3 of its Motion, some level of basic project document discovery, through subpoena or otherwise, will need to be propounded upon TranSystems, the engineer charged with construction administration, engineering, and inspections. Hence, TranSystems' requested Protective Order amounts to a delay tactic as opposed to a legitimate entreaty for protection from discovery. Of course, to the extent that TranSystems complies with Flatiron's discovery requests in this action, Flatiron will entertain an appropriate limitation of any subpoena to TranSystems should an action be launched against Horry County and/or SCDOT.

Third, as presented in Section C. above, Flatiron has already incurred damages resulting from TranSystems' negligence. This matter is not contingent, hypothetical, or abstract. The case is ripe and, after two years under an agreed stay, the litigation should proceed. Under the circumstances, TranSystems faces no undue burden or expense in responding to Flatiron's legitimate discovery. Hence, Flatiron was forced to file a motion to compel production of the needed documents.

F. Conclusion

TranSystems presents no viable bases for imposing yet another stay upon the instant case. Similarly, no grounds exist for issuance of a Protective Order to shield TranSystems from needed discovery. Flatiron, therefore, respectfully requests that TranSystems' Motion be denied in all respects.

SIGNATURE PAGE FOLLOWS

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Respectfully submitted this 5th day of March, 2021.

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Exhibit 1

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ATTACHMENT "A"

SCOPE OF SERVICES

AND SCHEDULE

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SCOPE OF SERVICES

Consultant Engineering and Inspection Services

Carolina Bays Extension

Description

The **Carolina Bays Extension** project will be on new location from SC-544 to SC-707 in Horry County. The project includes nearly 5.0 miles of roadway with approximately 3 miles being PCC pavement, a 3,633 foot bridge over the Intracoastal Waterway, a 225 foot bridge over Enterprise Road, and a 148 foot bridge over SC-707.

Scope of Services

The SCDOT and Horry County desire to hire a Consultant to perform Construction Engineering and Inspection (CEI) Services for the above described project to include, but not limited to, construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the contract requirements. The Consultant will provide services that conform to current state policy and practice of construction engineering including certification of personnel. For the Project, the performance of the services will: ensure that quality materials are being incorporated into the project, ensure that quality workmanship is utilized on the project, ensure that the work of the contractor is progressing in accordance with the proposed schedule, and ensure compliance with applicable state laws regarding environmental issues. Other tasks may be added as deemed necessary by the SCDOT or Horry County.

Project Management

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. This 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. The Project Engineer will be responsible for ensuring an appropriate level of inspection for all phases and aspects of the project. The Project Engineer will direct a staff of Project Inspectors that will carry out the majority of the inspection, sampling, and testing responsibilities on the project. All references to the Project Engineer, staff of inspectors, or to any individual inspector in the scope of services section shall be as Consultant.

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Contract Management & Administration

The Consultant shall provide office engineering, scheduling and administration staff to adequately manage the project to include, but not limited to the tasks as listed below.

1. Document management
    a. Software
    b. Personnel
    c. Interface with Design-Build contractor as necessary
    d. Hard copies and electronic data
    e. Construction submittals & tracking
2. EEO compliance
3. DBE plan and program monitoring
4. Training program
5. Safety program
6. Contractor pay requests and estimate generation
    a. Verification and approvals
7. Partnering and disputes management
8. Construction contract change order generation
9. Project documentation
    a. SiteManager DWR
    b. Photo and video gallery
10. Project schedule
    a. CPM analysis
    b. Schedule approval recommendation
    c. Progress Reports
    d. Updates
11. Contractor submittals
    a. Submittal review Coordination and Tracking
    b. Claims review
    c. Certification of Contractor's inspection personnel
    d. As-Built Plans
12. Resource agency coordination
    a. Environmental mitigation/permit monitoring
    b. Water quality monitoring
    c. Permit requirement tracking
    d. Permit modification tracking
13. Right-of-way coordination
    a. Acquisition schedule/Special provision adherence
    b. Relocation, demolition and clearing activities
    c. Hazardous material handling activities
14. Utility coordination
    a. Utility company facilitation
    b. Specification conformance reviews
15. Project Closeout
    a. Final Inspection
    b. Completion of Punchlist
    c. Materials Certification preparation and submittal
    d. DBE Compliance Review
    e. Final Quantities and Estimate

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f. Review Contractor As-built plans

Inspection and Testing Services

Consultant shall provide a sufficient number of Project Inspectors to perform the majority of the on-site inspection and testing duties in accordance with the project Quality Control/Quality Assurance (QC/QA) program. Consultant shall be responsible for verifying and documenting that the quantities of testing (QC and QA) are being met and maintain master project QC and QA records. The Consultant shall review the Contractor's Quality Control (QC) Plan and recommend for approval in accordance with contract documents. Consultant shall interface and coordinate with the Contractor's QC personnel on a daily basis. The Project Inspectors shall report directly to the Project Engineer who shall direct the daily work of the inspectors. These inspectors will be responsible for highly technical and specialized inspection and testing procedures for roadway and bridge construction in the areas of concrete, foundations, soils and earthwork, asphalt roadway, erosion control, traffic control, and others. These positions will be expected to be SCDOT certified in the areas mentioned, or possess the ability to become certified through the SCDOT certification program. The following tasks have been developed to address the aforementioned goals and objectives.

1. Perform Inspection and Quality Acceptance Testing for all Concrete Structures

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of concrete structures on the Project. This task includes performing necessary air and slump tests, inspecting the construction of the formwork, placement and tying of reinforcing steel, checking grades as set by the contractor, making and storing concrete cylinders, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Concrete Inspection.

2. Perform Inspection and Quality Acceptance Testing for all Structural Foundations

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of structural foundations on the Project. This may include driven pile foundations, spread footing foundations, and drilled shaft foundations. This task includes performing necessary inspection of the driven piles, including gathering all necessary information for the completion of the pile recap sheet and spot checks of pile alignment and cut off grades. This task also includes the necessary inspection of drilled shafts, including inspection of the excavated shaft, tying and placement of the rebar cage, sampling and inspection of the slurry, on-site testing and sampling of the concrete, completion of all forms associated with drilled shafts, including the concrete curves, etc., facilitating the CSL testing,

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logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Foundations. Additionally, it is desired that inspectors assigned to this task possess at least 10 years of progressively responsible inspection experience on project(s) similar to the aforementioned.

3. Perform Inspection and Quality Acceptance/Assurance Testing for all Earthwork and Base Activities

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of earthwork and base construction on the Project. This includes, but is not limited to embankment construction, excavations, mucking, borrow excavation, installation of geosynthetics and geogrids, cement and/or lime stabilization, ground modifications, graded aggregate base course construction, placement of drainage systems, and any other related activities. This task includes performing necessary inspection and sampling of borrow excavation and subgrade at frequencies established in the specifications, monitoring, inspection, and testing of all compaction activities on the project, establishing limits of mucking or undercutting, inspection and sampling of geosynthetic material placement, and completion of all forms associated with earthwork and base construction, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall monitor Contractor's compliance with the Contractor's approved QC plan for earthwork and shall provide sufficient staff to monitor all these activities independently and conduct Quality Acceptance sampling and testing of materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification in Earthwork, or have a temporary waiver in place prior to start of work.

4. Perform Inspection and Quality Assurance/Quality Acceptance Testing of all Hot Mix Asphalt Activities

The Consultant shall provide all necessary personnel and equipment to perform all necessary QA inspection, sampling, and on-site testing of Hot Mix Asphalt construction on the Project. This may include placing Asphalt Base, Binder, Surface, and Friction Courses, and any other related activities. This task includes performing necessary QA inspection, testing, and sampling of Hot Mix Asphalt delivered to and placed on the Project. This includes performing rate calculations, checking mix and mat temperatures, monitoring the workmanship of the paving crew, directing any corrective action deemed

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necessary, taking roadway samples when needed, monitoring the compaction activities of the contractor, monitoring and performing compaction tests of asphalt, reviewing the traffic control operations associated with this activity, logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall monitor Contractor's compliance with the Contractor's approved QC plan for asphalt and shall provide sufficient staff to monitor all these activities independently and conduct QA sampling and testing of materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual. All Consultant staff assigned to this task must possess a current SCDOT certification as HMA Roadway Technician, or have a temporary waiver in place prior to start of work.

5. Perform Quality Acceptance Inspection and Testing for all other construction activities associated with the Project and not specifically mentioned above.

The Consultant shall provide all necessary personnel and equipment to perform all necessary Quality Acceptance inspection, sampling, and on-site testing of incidental construction activities and items including, but not limited to installation of structural steel or pre-stressed girders, traffic signal installation, pavement markings, guardrail installation, seeding and erosion control measures, traffic control items, Mechanically Stabilized Earth Retaining Wall systems, welds, and clearing and grubbing. This also includes logging all samples into the project sample log, tracking test results, taking check samples as needed, addressing failing samples by arranging and assisting in alternate testing of materials through the SCDOT Office of Materials and Research, and all other inspection duties as described in the SCDOT Construction Manual, 2004 edition, and the Standard Specifications, 2007 edition. The Consultant shall provide sufficient staff to monitor all these activities independently and to sample and test materials in accordance with the sampling frequencies established by the special provisions, specifications, supplemental specifications, and the SCDOT Construction Manual.

6. Maintain field notes and compile Site Manager Daily Work Reports (DWR)

The Consultant shall maintain sufficient field notes and generate daily work reports within SiteManager for all activities assigned to the Consultant on a daily basis. These DWRs and field notes should be of sufficient detail to provide SCDOT the ability to reconstruct any or all activities of the project at a future date, if desired. Field notes should be prepared in conformance with the current editions of the SCDOT Construction Manual, Standard Drawings, and specifications.

7. Perform other associated duties typically assigned to Project Inspectors

The Consultant shall provide sufficient staff and equipment to complete general project duties not described elsewhere. These tasks may include delivering samples to the Office of Materials and Research, delivering or picking up revised plan sheets, project documents etc, from SCDOT HQ or District Office, performing routine but limited QA verification surveying, establish construction limits, proposed grades, etc. for property owners, utilities, etc., and compilation of data and records necessary to produce final

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plans, satisfy the SCDOT Business Plan, facilitate requests from outside parties, or to support decisions made in the field. The Consultant may be asked to meet with contractor's representatives, SCDOT personnel, local interested parties, etc. to provide information or assistance.

8. Furnish all necessary equipment to facilitate Tasks 1-7

The Consultant shall furnish all necessary equipment, including cell phones, laptop computers, vehicles, and specialized testing equipment to fulfill their testing, sampling, and inspection responsibilities. This equipment will include, but not limited to, nuclear density gauge and related supplies (proctor mold, moisture tester, etc.), concrete air meter(s), slump cones, infrared thermometer, paint thickness gauge, surveying equipment, and any other testing and sampling equipment as required by SCDOT.

Verification Survey

The Consultant shall provide survey crews and survey equipment to independently confirm layouts and geometry at key locations throughout the project construction. The survey crew will initially ensure that the project control points are correct and will monitor all primary control points periodically throughout the project duration to verify that they have not been disturbed. Verification surveys should be performed at the minimum frequency as listed in the 2004 SCDOT Construction Manual.

Substructure elements to be checked shall include but are not limited to:

1. Drilled shaft plan locations and cut off elevations.
2. Pile group layout benchmarks.
3. Footing plan locations and elevations.
4. Pier plan locations, elevations, and verticality.
5. Pile cap/Pier cap elevations.
6. Bearing seat elevations.
7. Embedded items.

Superstructure elements to be checked shall include but are not limited to:

1. Girder placement plan and elevation
2. Deck elevations and profiles
3. Approach slab plan and elevation
4. Parapet wall plan and elevation

Furnish a Project Office for SCDOT and Consultant

As part of this project, SCDOT will require the Consultant to furnish a fully functional office for use by SCDOT and Consultant. The location of the project office shall be approved by the SCDOT. All installation fees and monthly bills shall be the responsibility of the Consultant. The Consultant and SCDOT shall agree upon minimum dimensions of the project office prior to signing rental agreement. At a minimum, the project office shall have one ½ bath, one private office for Project Engineer, private office for SCDOT Resident Engineer, and workspace for support staff, including a plan table. The project office shall be furnished to support the daily functions of the field staff

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as well as maintain and store all documentation related to the project including but not limited to desks, chairs, file cabinets, computers, fax machine, copier, printers, digital and video cameras, etc. The project office shall be equipped with high-speed internet (T1, cable or DSL) service and phone service The Consultant is responsible for cancellation of the rental agreement upon completion of the Project.

Public Relations and Informational Meetings

The Consultant shall assist SCDOT in any project public relations and informational meetings. The tasks may include:

1. SCDOT Leadership Updates
    a. Executive briefing packets.
    b. Provide monthly one-page updates to local elected officials as well as State legislators, SCDOT leadership, the Governor's office, and bridge mailing list.
    c. Monthly update presentations to SCDOT Leadership.
    d. Host necessary site visits for leadership and elected officials.
2. Community Meetings
    a. General public
    b. Local Businesses

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Exhibit 2

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ENGINEER CERTIFICATION FOR
PROJECT PLANS AND SPECIFICATIONS

Consultant's Name: TranSystems

Route Number: SC 31

File Number: 26.036775A; A.1 thru A.5

Project Number: N/A

Project Description: Extension of SC 31 from SC 544 to SC 707

In order to advance projects in an expeditious and efficient manner, County hereby assigns to the above-named consulting firm, hereinafter referred to as the Undersigned, and the Undersigned accepts full responsibility for all project plan and specification reviews including the approval of all information, dimensions, quantities, details and designs involved in the preparation and production of the project plans and specifications for the above-named project. In accepting this responsibility, the undersigned makes the following certification:

THE UNDERSIGNED CERTIFIES to be a South Carolina registered engineering firm with absolute authority to accept the responsibility for the project plans and specification involved in the project; and,

THE UNDERSIGNED CERTIFIES to produce project plans and specifications that will conform with all guidelines and requirements stated in this agreement unless a specific deviation has been requested in writing and approved by the County and DEPARTMENT, and, if applicable, the Federal Highway Administration (FHWA); and,

THE UNDERSIGNED CERTIFIES that all project plans and specifications will be checked in their entirely for completeness, correctness, accuracy and consistency with other details in all respects, and will be thoroughly reviewed by the undersigned consulting firm to be in compliance with the requirements in effect at the time of submission to the County; and,

THE UNDERSIGNED CERTIFIES that each project plan sheet submitted on this project will be signed and sealed by a South Carolina Registered Engineer; and,

THE UNDERSIGNED CERTIFIES that all of the work performed under this Contract will be performed in accordance with the special provisions and specifications, and will be performed so as to meet or exceed reasonable standard of care of the profession; and

THE UNDERSIGNED CERTIFIES that by signing and sealing the plans, the undersigned assumes full, complete and conclusive liability for all discrepancies, errors or omissions found at any time in the plans or specifications. Further, that all corrections to the plans or specifications will be made at the consultant's expense and the consultant will not include the cost of corrections of faulty or deficient work on its invoice to the County, and

THE UNDERSIGNED FURTHER CERTIFIES that it agrees that failure to meet any of the above requirements may be deemed just cause, at the discretion of the County, for withholding payment on the Contract and/or termination of the Contract, without damages due to the Undersigned by County.

This Engineering Certification for Project Plans and Specification is attached to and becomes part of the agreement and project, with all terms and conditions of the agreement and project applicable hereto.

Seal

Date

Firm: TRANSYSTEMS

By: [signature]

Title: SR. VICE PRESIDENT

Template Revised 6/23/2011

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Exhibit 3

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CLAIMS PROCEDURE

1. Scope of Procedure

The following claims procedure covers all claims for additional time or compensation arising under this contract. The claims procedure is non-binding and is a condition precedent to litigation or any other form of dispute resolution. All communications testimony and all documents prepared for this procedure by either party from the time of filing the claims request to the conclusion of the procedure shall be deemed to be settlement negotiations and not admissible in litigation or any other dispute resolution procedure. The parties shall execute a written agreement to this effect prior to the submission of testimony or other evidence before the Dispute Review Board.

2. Continuation of Work

At all times during the pendency of a claim under this procedure, the contractor shall continue work pursuant to the contract and as directed by the engineer as provided by the contract. If the contractor fails to continue work, it may be declared delinquent in its work as provided by §108.08 of the South Carolina Standard Specifications for Highway Construction ("Standard Specifications").

3. Submission of Claim

The notice of claim and claim shall be submitted in accordance with §105.16 of the Standard Specifications. The notice of claim does not trigger this claims procedure. The claims procedure is initiated when the contractor submits a written fully detailed claim to the resident construction engineer ("RCE"). The claim shall contain, at a minimum, the information required by §105.16F of the Standard Specifications. The RCE shall immediately forward a copy of the claim to the District Engineering Administrator ("DEA") for resolution. If the DEA is unable to resolve the claim within thirty (30) days of receipt, the DEA shall forward it immediately to the Director of Construction ("DC"), together with documents supporting the Department's position. The DEA shall also submit the supporting documents to the contractor at this time. The DC shall investigate the claim and attempt to resolve it by mutual agreement with the contractor. If it cannot be resolved, then the DC shall make a decision and forward it to the contractor, no later than thirty (30) days after receipt by the DC. The contractor shall notify the DC within five (5) days of receipt of the DC's decision whether the contractor accepts or rejects the decision.

For all claims under Fifty Thousand Dollars ($50,000.00) the DC's decision shall be final and shall conclude the claims procedure. For the purpose of determining if a time only claim may be submitted to the Board, the value of a time only claim shall be deemed to be the number of days requested multiplied by the contract daily rate for liquidated damages. The contractor does not have a right to submit claims under $50,000.00 to the Dispute Review Board. If the contractor does not accept the DC's decision on its claim of less than $50,000.00, then its remedy is litigation or other mutually agreeable dispute resolution procedures.

For all claims in excess of $50,000.00, if the contractor rejects the DC's decision or fails to respond to the decision, the DC shall forward the claim to the Dispute Review Board.

4. Dispute Review Board

On designated contracts an *Ad Hoc* Dispute Review Board will be established to hear claims on that contract. On other contracts, claims will be heard by a Standing Dispute Review Board. All Board Members shall be neutral and unbiased. No party shall have any *ex parte* communication with any Board Member.

a. *Ad Hoc* Dispute Review Board

On designated contracts a Dispute Review Board shall be established within sixty (60) days after the Preconstruction Conference. The *Ad Hoc* Dispute Review board shall consist of one member selected by the Department, one member selected by the contractor, and a third member selected by the first two members. The third member shall be the chairperson of the *Ad Hoc* Dispute Review Board. The selection of qualified *Ad Hoc* Dispute Review Board members shall be made in accordance with the Dispute Review Board rules and procedures. (See Section 6).

b. Standing Dispute Review Board

A Standing Dispute Review Board shall be established upon implementation of this claims procedure. The Standing Dispute Review Board shall consist of one member selected by the Department, one member selected by the Director of Heavy and Highway Division of the Associated General Contractors (Carolina's Branch), and a third member selected by the first two members. The third member shall be the chairperson of the Standing Dispute Review Board. The selection of qualified Standing Dispute Review Board members shall be made in accordance with the Dispute Review Board rules and procedures. (See Section 6). Each member shall serve a three (3) year term and the terms shall be staggered. The terms for the initial Board members shall be as follows:

Department Member - 1 year
AGC member - 2 years
Third member - (Chairperson) 3 years

The term for the initial members begins January 1997. Each member is limited to two (2) terms. The initial abbreviated terms of the Department and AGC members do not count as a term.

5. Hearing Procedure

When the DC forwards the claim to the Dispute Review Board, the DC shall provide three (3) copies of the claim and three (3) copies of all documents submitted by the contractor and the DEA. The DC shall notify both parties that the claim has been submitted to the Board.

Within fifteen (15) days of notice of submission of the claim to the Board, the contractor may submit to the DC four (4) copies of any additional documentation supporting its claim. The DC shall immediately forward three (3) copies to the Board and one (1) copy to the DEA.

Within fifteen (15) days of receipt of the contractor's supplemental documentation, the DEA may submit to the DC four (4) copies of its additional documentation. The DC shall immediately submit three (3) copies to the Dispute Review Board and one (1) copy to the contractor. Upon submission of supplemental documentation, the party shall notify the Board whether it requests a hearing.

The Dispute Review Board shall review all documents and notify the parties of what additional documents, if any, it requires. The Dispute Review Board shall schedule a hearing at either party's request or may schedule a hearing at its own discretion. However, if a hearing is requested, it must be held no later than sixty (60) days after the DC submits the claim to the Dispute Review Board. The location of the hearings shall be determined by the Board. While extensions of these deadlines are discouraged, the Dispute Review Board shall have authority to extend any of the above deadlines for just cause.

The Dispute Review Board shall have full authority to establish guidelines and procedures for the investigation of a claim. The entire process is intended to be flexible and the Board is encouraged to adapt the process to individual circumstances presented by particular disputes.

In the interest of timely resolution of all claims, the Board shall conduct all hearings and issue its final decision within ninety (90) days of receipt of the claim.

The Dispute Review Board Chairperson shall direct all meetings and hearings. Presentation of evidence shall be in accordance with the Dispute Review Board's rules and shall not be bound by judicial rules of evidence. Documents and testimony shall be presented in the order, manner and degree of detail that the Dispute Review Board deems most efficient and probative. Each party shall be allowed to make a brief initial presentation and to rebut any factual assertion by another party; however, the Dispute Review Board shall determine when enough evidence has been presented and it may limit the presentation of any documentation or testimony that it deems not relevant or redundant. At the Board's option, testimony may be required to be given under oath and the oath shall be administered by the Chairperson.

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Legal counsel for either party may be present at meetings or hearings as observers only. If a party intends to have its counsel present at a hearing, it must provide at least ten (10) days notice prior to the meeting or hearing. Legal counsel may not speak on behalf of a party, unless requested by the Board. Counsel may not examine or cross-examine witnesses, object to questions or statements during meetings or make legal motions or arguments during meetings or hearings. The Board, by majority vote, may suspend legal counsel's privilege to attend meetings or hearings.

The Dispute Review Board shall issue to the contractor and the State Highway Engineer a written recommendation with an explanation of the results as soon as reasonably possible following the conclusion of the hearing. However, in no event shall the Board take more than ninety (90) days from receipt of claim to conduct hearings and issue a recommendation. The Board is encouraged to reach a unanimous decision; however, it may provide a majority recommendation. The minority Board Member may provide a written explanation of his position. The Board shall provide further explanation of its decision if requested by either party within ten (10) days of the receipt of the decision. Issuance of the Board's recommendation concludes the claims procedure.

The parties may settle at any time during the procedure. If the dispute is resolved prior to issuance of a recommendation, the DC shall immediately notify the Board.

6. Dispute Review Board Rules and Procedures

a. Qualifications of Dispute Review Board Members

(1) All Dispute Review Board Members shall have substantial experience in highway or bridge design and construction. This experience may be technical, administrative or legal. The goal is to have a Board with the technical and administrative skills and experience that will promote confidence in its decisions.

(2) No Dispute Review Board Member shall be employed currently or within the last three (3) years with the Department, any contractor (currently or in the past pre-qualified with the Department), or any design consultant that has worked for the Department within the last three (3) years.

(3) No Dispute Review Board Member shall have any financial or ownership interest in any party to the contract nor any design consultant or major subcontractor.

b. Selection of Dispute Review Board Members

(1) *Ad Hoc* Dispute Review Board

Within twenty (20) days after the Preconstruction Conference, the contractor and Department shall each submit a list of three (3) proposed Dispute Review Board Members to each other.

The contractor shall send its list to the DC. The Department shall send its list to the contractor's designated representative. Within ten (10) days after receipt of the list, the contractor shall select one member from the Department's list and the Department shall select one member from the contractor's list and notify the other party of their selection. The DC shall notify the two selected members that they must select a third member within twenty (20) days. The DC shall also provide a copy of the claims procedure to the two (2) selected members. Within twenty (20) days of the selection of the first two members, the first two members shall select the third member and the third member shall be the chairperson of the Dispute Review Board. The third member does not have to come from the lists provided by the parties.

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Exhibit 4

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South Carolina Department of Transportation

2007

STANDARD

SPECIFICATIONS

FOR

HIGHWAY

CONSTRUCTION

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105.16.3 Claims for Acceleration

1 The Department has no liability for construction acceleration. If the Department gives express written direction to the Contractor to accelerate its effort, then both parties execute a Change Order as defined in **Subsection 101.3.10**.

105.16.4 Other Claims

1 If the Contractor believes that it is entitled to additional compensation for reasons other than delay or acceleration, notify the RCE in writing of its intent to claim such additional compensation before beginning or proceeding further with the work, out of which such claim arises. Submit notification to the Department on SCDOT Form No. 100.04, Contractor Notice of Claim. If such notification is not given, the Contractor waives its right to any additional compensation.

2 The liability of the Department for such claims is limited to those items of damages that are specifically identified as payable in connection with delay claims as set forth in **Subsection 105.16.5**. For such claims, the Department has no liability for those items of damages identified as not payable in connection with Delay Claims as set forth in **Subsection 105.16.6**.

105.16.5 Recoverable Damages

1 Only the following items may be recovered by the Contractor with respect to Delay Claims or other claims. The Department has no liability for damages beyond the following items:

A. Additional job site labor expenses.

B. Documented additional costs for materials.

C. Equipment costs, as determined in accordance with this subsection.

D. Documented costs of extended job site overhead.

E. An additional 10% of the total of items A, B, C, and D above, for home office overhead and profit; however, this amount will not exceed the anticipated margin for home office overhead and profit provided for in the Contractor's original bid. Additionally, home office overhead margins paid to the Contractor included in Change Orders are considered as partial or final compensation for these costs.

F. Bond costs.

G. Subcontractor costs determined by and limited to those items identified as payable under items A, B, C, D, E, and F above.

2 For purposes of computing extra equipment costs, rates used are based on the Contractor's actual costs for each piece of equipment. These rates must be supported by equipment cost records furnished by the Contractor. Equipment rates will not be allowed in excess of those in the *Rental Rate Blue Book* with the appropriate adjustments noted in **Subsection 109.5**. The stand-by rate is 50% of the operating rate.

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105.16.6 Non-Recoverable Damages

1 The parties agree that, in any claim for damages, the Department has no liability for the following items of damages or expense:

A. Profit in excess of that provided in item E of **Subsection 105.16.5**.

B. Loss of profit.

C. Labor inefficiencies.

D. Home office overhead in excess of that provided in item E of **Subsection 105.16.5**.

E. Consequential damages including, but not limited to, loss of bonding capacity, loss of bidding opportunities, and insolvency.

F. Interest and any other indirect costs or expenses of any nature other than those allowable under item D of **Subsection 105.16.5**.

G. Attorneys' fees, claims preparation expenses, or costs of litigation.

H. Prejudgment interest on any amounts the Contractor may be found to be entitled for any claim.

105.16.7 Required Contents of Claims

1 Submit all claims in writing and in sufficient detail to enable the RCE to ascertain the basis and the amount of each claim. All information submitted to the Department under this subsection is used solely for analyzing and resolving the claim. At a minimum, provide the information opposite a checkmark (✓) in the following table.

Documentation Required with Claims		
For Delay Claims	**For Other Claims**	**Required Documentation**
✓		A. A description of the operations that were delayed, the reasons for the delay, how they were delayed, including the report of all scheduling experts or other consultants, if any.
✓		B. An As-Built chart, CPM schedule or other diagram depicting in graphic form how the operations were adversely affected, and may be required to submit a full electronic version of the CPM.
	✓	C. A detailed factual statement of the claim providing all necessary dates, locations and items of work affected by the claim.
✓	✓	D. The date on which actions resulting in the claim occurred or conditions resulting in the claim became evident.

(table continued on the next page)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C.A. NO. 2022-CP-26-06116
Flatiron Constructors, Inc., Plaintiff, v. TranSystems Corporation, Defendant.	)	**BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant TranSystems Corporation (hereafter "TSC") submits the following Brief in Support of TSC's Motion for Summary Judgment on each cause of action alleged by Plaintiff Flatiron Constructors, Inc. ("Plaintiff").

SUMMARY OF ARGUMENT

Because this claim involves purely economic losses, the scope of any duties owed by TSC must be determined entirely from the three contracts setting forth obligations among Horry County, Plaintiff, TSC and SCDOT. Because the language of each of those contracts is clear and unambiguous, a summary judgment ruling is proper at this stage. Plaintiff's First Cause of Action, alleging Negligence, against TSC fails as a matter of law, because TSC owes no duty of care to Plaintiff. TSC contracted with Horry County to provide certain construction, engineering, inspection and testing services ("CEIT" services), but TSC had no contract with Plaintiff. TSC's contract with Horry County does not and may not create a "special relationship" between TSC and Plaintiff which would impose duties on TSC to Plaintiff in tort. Plaintiff's Second Cause of Action, alleging Breach of Contract as a purported third-party beneficiary, fails as a matter of law, because the plain, unambiguous language of the various Highway Project Contracts demonstrate that

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neither Horry County nor TSC intended for Plaintiff to be a third party beneficiary of the TSC Contract. Plaintiff's Third Cause of Action, alleging Tortious Interference with Contract, fails, because TSC's actions were legally justified and in fact, required, because TSC acted under its contract obligations to Horry County in performing CEIT services.[1] Finally, Plaintiff's Fourth Cause of Action for Violation of the S.C. Unfair Trade Practices Act fails, because all of Plaintiff's claims are premised upon a breach of TSC's obligations under the TSC Contract, identified and described *infra*, and breach of contract does not constitute a violation of the Unfair Trade Practices Act.

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides that the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56, SCRCP. In determining whether a triable issue of fact exists, the court must view the evidence and all inferences which can reasonably be drawn from that evidence in the light most favorable to the nonmoving party. *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 234, 692 S.E.2d 499. 505 (2020). The party moving for summary judgment may discharge its initial burden by showing that: (1) there is an absence of evidence to establish the nonmoving party's case; or (2) the undisputed evidence conclusively negates the nonmoving party's case. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (S.C. Ct. App. 2002). Then, the nonmoving party must set forth specific evidence showing that there is a genuine issue for trial. *Id*. But, the nonmoving party

[1] Additionally, the cause of action is not ripe, because there has been no determination that Horry County breached its contract with Plaintiff, and there is currently a suit pending on that issue.

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may not carry that burden by creating an unreasonable inference or an issue of fact that is not genuine. *Kagan v. Simchon*, 429 S.C. 516, 523, 839 S.E.2d 106, 109 (S.C. Ct. App. 2020).

"In construing a contract [or contracts], the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). "The parties' intention must, in the first instance, be derived from the language of the contract [or contracts]." *Id.* (internal citations omitted). "To discover the intention of [contracts], the court must first look to [their] language – if the language is perfectly plain and capable of legal construction, [the contracts' language] alone determines the [documents'] force and effect. Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* at 498, 649 S.E.2d at 501 (internal citations omitted). "If [contracts'] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [the contracts'] language determines the [instruments'] force and effect. *Id.* at 499, 649 S.E.2d at 502. "Where [agreements are] clear and capable on legal interpretation, the courts['] only function is to interpret [their] lawful meaning, discovery the intention[s] of the parties as found within the [agreements], and give effect to [them]. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). "The interpretation of unambiguous contract is a question of law." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "Inasmuch as the construction of the subject contract [or contracts] can be determined by consideration of the plain and unambiguous language of the contract [or contracts], it becomes a question of law to be resolved by the court and is thus no bar to the grant of summary judgment." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 474, 570 S.E.2d 197, 205 (Ct. App. 2002) ("*Tommy L. Griffin II*"); *see also* Rule 56, SCRCP.

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"Similarly, whether a contract is ambiguous is a question of law." *Miles*, 393 S.C. at 117, 711 S.E.2d at 883.

RELEVANT PROCEDURAL HISTORY

Plaintiff filed its initial Complaint on April 26, 2018; however, it nearly immediately moved with TSC to stay the case, to allow Plaintiff to pursue a claim against SCDOT and/or Horry County, via the claim procedure set forth in the Specifications. Pursuant to joint motions, the Court entered a December 4, 2018, Order staying this case for one year, and then entered a November 26, 2019, Order extending the stay until September 30, 2020. The stay expired on September 30, 2020; so TranSystems then filed its Answer to Flatiron's Amended Complaint. The parties engaged in limited written discovery, including an exchange of Interrogatories and Requests for Production, and a production of files. On October 11, 2021, the Court struck the case from the active docket, pursuant to Rule 40(j), SCRCP. It was restored to the active docket on September 27, 2022.

On November 1, 2022, Plaintiff filed C.A. No. 2022-CP-26-06970, entitled *Flatiron Constructors, Inc., Plaintiff v. Horry County, a political subdivision of the State of South Carolina, and South Carolina Department of Transportation, an agency of the State of South Carolina, Defendants*, in the Court of Common Pleas for Horry County, alleging damages relating to the same project (the "HC/SCDOT Action"). SCDOT accepted service of that Summons and Complaint on February 21, 2023, and Horry County was served with that Summons and Complaint on February 24, 2023, according to an affidavit of service filed with the Clerk of Court for Horry County. On March 24, 2023, Horry County answered and counterclaimed for liquidated damages for delay caused by Plaintiff's breach of its contract with Horry County.

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RELEVANT FACTUAL BACKGROUND

This case arises out of the construction of the Carolina Bays Parkway in Horry County, South Carolina (the "Project"). The Court should take judicial notice that the Project, as a highway in a highly-traveled area, was required to be safe for public use and to perform without failure. Horry County contracted with Plaintiff to serve as General Contractor for the Project (the "Construction Contract").[2] Plaintiff performed its services pursuant to the Construction Contract, which stated that the Project was governed by SCDOT's 2007 Standard Specifications for Highway Construction (the "Standard Specifications").[3] The Construction Contract provides a specified claims procedure, whereby Plaintiff could pursue compensation for changed contractual requirements, weather-related delays, or other increased costs which were not the fault of Plaintiff.[4] (Exhibit A, p. FIC000013908.)

Horry County contracted with the S.C. Department of Transportation ("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").[5] 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

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[2] A copy of Flatiron's Proposal, Contract and Bond is attached hereto as Exhibit A, and it is incorporated herein by reference.

[3] The Standard Specifications are voluminous; therefore, TSC provides only those portions of the Standard Specifications which are relevant to this Motion as Exhibit B, which is incorporated herein by reference.

[4] A copy of the Claims Procedure is filed herewith as Exhibit C, and it is incorporated herein by reference.

[5] A copy of the IGA is filed herewith as Exhibit D, and it is incorporated herein by reference.

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payment of contracts, construction for the Project and each Component Project, and any related or necessary activities or functions of the Project." (IGA, p. 10, § 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." (IGA, p. 14, § 5.7.)

Horry County contracted TranSystems Corporation ("TSC") (in the "TSC Contract") to provide Construction, Engineering and Inspection Services ("CEIT Services") for the Project.[6] However, TSC was not the engineer of record, and TSC's CEIT Services were supervised by the Resident Construction Engineer ("RCE") provided by SCDOT.[7] SCDOT's RCE had final decision-making authority over TSC's CEIT Services. (Standard Specifications, § 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." (Standard Specifications, § 105.3(1).) Final review and approval of conformity of Plaintiff's Project construction work was performed by the RCE, and the RCE made the final determination as to whether SCDOT would accept any non-conforming construction. (Standard Specifications, §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.

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[6] A copy of the TSC Contract is filed herewith as Exhibit E, and it is incorporated herein by reference.

[7] Although the TSC Contract references design services, TSC never provided any design services for the Project. *See* Affidavit of Peter Strub, P.E., filed herewith as Exhibit F.

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The Construction Contract required Plaintiff to "[g]ive the work the constant attention necessary to facilitate the progress thereof, and cooperate with the RCE, the RCE's authorized representatives and inspectors [to include firm providing CEIT Services], and other Contractors in every way possible." (Standard Specifications, § 105.5(2).)

Based on Plaintiff's Complaint, Plaintiff contends that it suffered damage, in part, because TSC imposed too strict a standard of review for repair procedures and installation by Plaintiff, and because TSC allegedly took too much time in review of some submittals. Both the TSC Contract and the Project's Specifications make it clear that SCDOT's *RCE* had the final decision-making authority for all installation and repair procedures and for approval of submittals. The Specifications also provide a designated claims procedure by which Plaintiff can claim compensation for delays or scope changes attributable to the Owner, Horry County. (Amended Complaint, ¶¶ 23, 30.) In its Answers to TSC's Interrogatories, Plaintiff identified multiple areas where it contends that TSC engaged in "overzealous," "unreasonable," or too-rigorous inspections of Plaintiff's work. (See Plaintiff's Answers to TSC's Interrogatory 9, 10, 11.)[8] It is also clear that TSC is an agent of Horry County; therefore, Horry County would face contractual exposure for contract changes caused by TSC. If Plaintiff is entitled to any relief based on these allegations, it may seek this relief under Plaintiff's Construction Contract with Horry County; and Plaintiff, in fact, is seeking this relief in the HC/SCDOT Action.

The three contracts at issue – the Construction Contract, the IGA, and the TSC Contract – contain no ambiguity or any evidence that any of the contracted parties thereto intended for Plaintiff to be a third-party beneficiary of the TSC Contract or of the IGA. These agreements

[8] A copy of Plaintiff's Answers to TSC's Interrogatories is filed herewith as Exhibit G, and it is incorporated herein by reference.

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clearly defined the roles of Plaintiff, Horry County, SCDOT, and TSC, and the agreements explicitly described the rights and obligations of each.

In the HC/SCDOT Action, Plaintiff pleads causes of action against Horry County and SCDOT for breach of the Construction Contract and for breaches of implied warranties associated with the plans and specifications provided to Plaintiff as part of the Construction Contract. Plaintiff also asserts two causes of action solely against SCDOT: (1) alleged tortious interference with the Construction Contract (which SCDOT was empowered to administer); and (2) professional negligence in performance of engineering duties and project administration. Finally, Plaintiff seeks equitable relief solely against Horry County for unjust enrichment. As noted above, Horry County has counterclaimed for liquidated damages for delay caused by Plaintiff's breach of the Construction Contract. Plaintiff's claims in the HC/SCDOT Action are predicated on its Certified Claims under the Construction Contract, which are based on alleged delicts of both SCDOT and TSC like those Plaintiff has alleged in this civil action against TSC.

LEGAL ARGUMENT

This case is ripe for summary judgment, because the unambiguous contracts and undisputed circumstances demonstrate that TSC owed Plaintiff no duties in tort or contract; therefore, Plaintiff has no legal basis for its claims.

1. Plaintiff's First Cause of Action, Alleging Negligence, Fails Because TSC Owed No Duty of Care to Plaintiff.

Plaintiff's claims are solely economic losses; therefore, this Court must evaluate the potential application of the economic loss rule to limit Plaintiff's claims based on theories of negligence. As Judge Clifton Newman recognized in the *McCarthy* case, 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,

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2013 WL 9921457 at *3 (S.C. Ct. Common Pleas, 2013), filed herewith as Exhibit H, (citing *McCullough v. Goodrich & Pennington Mort. Fund. Inc.*, 373 S.C. 43, 47-8, 644 S.E.2d 43, 46 (2007) and *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003)). Plaintiff has not and cannot identify any statute, contract, status, or property interest which creates a tort duty owed by TSC to Plaintiff; so the remaining question is whether there is a special circumstance or relationship which creates such a tort duty. There is none.

In South Carolina, courts evaluate tort claims under the economic loss rule by evaluating "whether or not the alleged tortfeasor acted in a way that violated a legal duty aside from his [potential] contractual duties." *Colleton Prep. Acad., Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 189, 666 S.E.2d 247, 251 (2008). "Tort law . . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). Our Supreme Court has noted that South Carolina's courts "are cautious in permitting negligence actions where there is neither personal injury nor property damage." *Id.* at 149, 687 S.E.2d at 50.

"Whether a defendant owes a plaintiff a duty of care is a matter of law for [a court] to determine." *McCarthy, supra*, at *3 (citing *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011)). First, as is clear from review of the plain language of the three contracts at issue – the IGA, the TSC Contract, and the Construction Contract (collectively the "Project Contracts") – TSC assumed no duties to Plaintiff under any contract or by any property status. The remaining question is whether there is any special relationship between TSC and Plaintiff giving rise to any TSC tort duty to Plaintiff.

a. There Is No Special Relationship Giving Rise to Any Tort Duty.

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South Carolina's courts have not explicitly stated a test to evaluate whether there is a special relationship sufficient to create a tort duty in these circumstances, but other states' courts have. In assessing when to recognize tort duties for purely economic losses, Idaho's Supreme Court has held that "[u]nless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 p.3D 996, 1000 (Idaho 2005), *abrogated on other grounds by BrunoBuilt, Inc. v. Briggs Eng'g, Inc.*, 2023 WL 2375766 (Idaho 2023). Like South Carolina does, Idaho recognizes an exception to this rule where a "special relationship" exists between the parties. *Id.* at 301, 108 P.3d at 1001; *see, e.g.*, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 89 (1995) ("*Tommy L. Griffin I*") (recognizing special relationship exception to economic loss rule). South Carolina's courts have recognized that "whether such a [special-relationship-based] duty exists will depend on the facts and circumstances of each case." *Id.* In this case, there is no need for further inquiry into facts or circumstances, because the unambiguous conditions are set forth in the plain, unambiguous Project Contracts.

Idaho's Supreme Court provides this guidance:

> There are only two situations in which this Court has found the special relationship exception applies. One situation is where a professional or quasi-professional performs personal services. *McAlvain v. General Ins. Co.*, 97 Idaho 777, 780. 554 P.2d 955, 958 (1976). In *McAlvain*, an insured expressly requested his insurance agent provide complete insurance coverage on the insured's business inventory. The insurance agent knew or should have known the amount of insurance that was needed to completely cover the value of the inventory. A fire destroyed the inventory and the insurance coverage was insufficient to cover the loss.
>
> . . .

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> The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function. *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995) (wherein group was the only entity in Idaho authorized to certify seed potatoes and was held liable for erroneous certification).

Blahd, 141 Idaho at 301-2, 108 P.3d at 1001-02. Although Idaho's courts have recognized that there may be unique circumstances which require a different allocation of risk, Idaho has never applied this exception in any circumstance. *Id.* at 302, 108 P.3d at 1002. The Idaho court specifically noted that it refused to apply the unique circumstance exception to residential construction, because it was an everyday occurrence. *Id.* For the same reason, highway construction, which is a routine, and hopefully soon even-more-routine, occurrence in South Carolina, does not provide a basis for a special relationship exception.

Under the Idaho standard, there is no basis for tort liability for TSC to Flatiron for economic losses. TSC provided no personal services to Plaintiff, as clearly demonstrated by the Project Contracts; rather, TSC provided services to only *Horry County* and under SCDOT's ultimate supervision. Additionally, TSC made no representations of having unique qualifications such that it made representations to the public at large, and there is no evidence that TSC engaged in any unique work. The Project Contracts clearly give all decision-making authority to SCDOT, and the Project Contracts demonstrate that SCDOT and TSC actions were to protect the interests of Horry County and its citizens.

Like Idaho's courts, Vermont's courts have considered what facts can create a special relationship sufficient to justify an exception to the economic loss rule. As do South Carolina courts, Vermont's courts hold that "[t]he economic loss rule 'prohibits recovery in tort for purely economic losses.' " *Long Trail House Condo. Ass'n v. Engelberth Const., Inc.*, 192 Vt. 322, 327,

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59 A.3d 752, 755 (2012). Vermont's Supreme Court noted that privity is not required for application of the economic loss rule, and that special relationship claims require "a special relationship, which creates a duty of care independent of contract obligations. The key is not whether one is licensed in a particular field; rather, the determining factor is the type of relationship created between the parties." *Id.* at 328-9, 59 A.3d at 756-7. In evaluating whether there is a special relationship based on professional status, the question becomes whether the defendant offered a specialized professional service and whether the plaintiff relied on (or reasonably could rely on) the defendant to provide it with a professional service. *EBWS, LLC v. Britly Corp.*, 181 Vt. 513, 525, 928 A.2d 497, 508 (2007).

Under the Vermont standard, Plaintiff could not rely on TSC to provide professional services to it, or for its benefit, because TSC was ethically prohibited from providing services to Plaintiff. Horry County hired TSC as a third-party CEIT services provider; so its exact duties were to provide critical, *independent* review for TSC's client, Horry County, of the work performed by Plaintiff under the Construction Contract.

b. Recognition of a Tort Duty Would Create an Impermissible Conflict of Interest.

South Carolina law requires this Court refuse to recognize any duty tort owed by TSC to Plaintiff, because doing so would create an improper and impermissible conflict of interest in TSC's provision of CEIT Services for the Project. While professional engineers can have certain types of duties imposed on them under law, those duties are and must be limited to ones that comply with the Rules of Professional Conduct for Engineers. S.C. Code Ann. Regs. § 49-300.

Under South Carolina law, other than as required to protect public health and safety, a professional engineer may limit the scope of his responsibility by contract. *C.f. Tommy L. Griffin II*, 351 S.C. at 474, 570 S.E.2d 197, 204-5 (finding that unambiguous contract determined JJG's

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scope of duty regarding water line testing requirements). The General Assembly has authorized the S.C. Board of Engineers and Land Surveyors (the "Board") to promulgate regulations defining licensure requirements for engineers. S.C. Code Ann. § 40-22-60. The Board adopted the Rules of Professional Conduct for Engineers, "[i]n order to safeguard the life, health, property and welfare of the public and to establish a high standard of integrity, skills, and practice in the profession of engineering . . . ," which are "binding upon every person holding a certificate of registration as a Professional Engineer." S.C. Code of Regs. § 49-300. "The Rules of Professional Conduct delineate specific obligations engineers . . . must meet," and engineers are "deemed to be familiar with [the Rules'] several provisions and to understand them." S.C. Code of Regs § 49-300(D). S.C. Code Ann. Regs. § 49-301(A) provides that the primary obligation of engineer is to "protect the safety, health, property and welfare of the public" and that engineers "shall conduct their practice to fulfill this obligation."

The Board has clearly stated that "[t]he Engineer shall avoid conflicts of interest;" however, the duty Plaintiff seeks to impose on TSC creates a conflict of interest. S.C. Code of Regs § 49-304. Conflicts of interest are not a situation where engineers must make a close ethical call, and this Court must refuse to recognize a duty that would impose a conflict of legal interests for engineers, by pitting engineers' duties to clients and the public against purported implied duties to non-clients whose work the engineers review on behalf of clients. The Project Contracts make it clear that TSC's role is to inspect the work of Plaintiff; therefore, they are not in aligned interest – TSC's role is to test and evaluate Plaintiff's work to ensure it meets *Horry County's* construction requirements. To recognize duties owed by TSC to Plaintiff in this circumstance would create an impermissible conflict of interest in TSC's competing duties to Horry County, its client, and Plaintiff.

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In this case, Plaintiff has recourse, through the Construction Contract and Standard Specifications, for alleged unfair interpretation or overzealous enforcement of its obligations under the Construction Contract, and for any other claims Plaintiff has related to work performed by TSC in its CEIT services; but that recourse is against Horry County. To allow recourse against TSC would create an impermissible conflict of interest in TSC's duties. Accordingly, this Court must find that TSC had no duty to Plaintiff related to TSC's provision of CEIT Services for Horry County and its citizens.

Under South Carolina law, this Court also must refuse to recognize a duty of an engineer to avoid doing "too good" of a job for its client, Horry County, and the public, because such a requirement would clearly conflict with all engineers' duties to avoid a conflict of interest and to safeguard the public. Specifically, by the Rules of Professional Conduct for their profession, engineers are barred from accepting compensation, financial or otherwise, from more than one party for services for the same project, or for services pertaining to the same project, unless fully disclosed to all parties. S.C. Code of Regs. § 49-304(B). The logic for this rule is clear – an engineer, much like a lawyer, cannot be beholden to two principals. For the same reason, an engineer cannot simultaneously owe a duty to a client of utmost good faith and diligence in performing inspections, while simultaneously owing some duty imposed by law to not be "too diligent" or "too zealous" in performing inspections.

As noted in *Tommy L. Griffin I*, this Vermont standard is also applicable in South Carolina. In *Tommy L. Griffin I* (and in similar cases), a contractor relied on design plans presented by the engineer, and it also relied on findings by the engineer regarding construction. Such circumstances do not exist in this case – TSC prepared no plans, and Plaintiff had no right to rely on any determinations of TSC, because TSC had no final decision-making authority. Plaintiff could rely

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only on the decisions of the *SCDOT* Resident Construction Engineer. Accordingly, there is no special relationship between Plaintiff and TSC sufficient to give rise to any duty owed by TSC to Plaintiff related to its CEIT services.

Although Plaintiff contends that *Tommy L. Griffin I* holds that an engineer owes duties to contractors outside of privity to not negligently perform inspections, that is not the duty Plaintiff seeks to impose on TSC. The claims in *Tommy L. Griffin I* were for *errors* in design and supervision of the Project, which were duties expressly assumed by Jordan, Jones & Goulding, Inc., in its contract for engineering services.[9] In that case, the Supreme Court recognized that "[w]hether a … [tort] duty exists will depend on the facts and circumstances of each case." *Id.* at 55-56. There, the engineer had extremely broad duties set forth in the engineer's contract, but, here, TSC had narrow contractual duties and no final decision-making authority. In *Tommy L. Griffin I*, the defendant engineer under its contract for services had the right to halt construction and the duty to approve pay applications submitted by the contractor, neither of which TSC had vis-à-vis this Project. In fact, the duties recognized by the Supreme Court in *Tommy L. Griffin I* arose from the contract for services of the engineer in that case, but here the TSC Contract does not have similar provisions. Accordingly, JJG's tort duty was defined in its contract while no such terms exist in the TSC Contract in this case.

"Duty [of care] is 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445, 451 (Md. 2017) (quoting W. Page Keeton, *et al.*,

[9] The closest analog to JJG's role in *Tommy L. Griffin I* is the role played by SCDOT, not TSC. SCDOT, not TSC, was authorized 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." (IGA, p. 10, § 5.1.)

Prosser and Keeton on the Law of Torts § 53, at 358 (5th ed. 1984)). "To determine whether a tort duty exists in a particular context, [a court must] examine: (1) the nature of the harm likely to result from a failure to exercise due care, and (2) the relationship that exists between the parties." *Id.* (internal quotations omitted). Here, the relationship between TSC and Plaintiff is defined entirely and limited by the Project Contracts. None of the Project Contracts impose any duty on TSC vis-à-vis Plaintiff. Duties run from Horry County to Plaintiff and potentially from SCDOT to Plaintiff, but not from TSC to Plaintiff. TSC acted as Horry County's consultant to SCDOT, which had final decision-making authority. Had Plaintiff wished to impose some tort duty on TSC, it could have attempted to negotiate contract terms with Horry County that did so, or it could have refused to enter any contract which did not impose duties on TSC; however, Plaintiff did neither. In the *Balfour Beatty* case, *supra*, the Maryland Court of Appeals determined that "the complex web of contracts that typically undergirds a public construction project should govern [the determination of duty for negligence liability] because parties have a sufficient opportunity to protect themselves (and anticipate their liability) in negotiating these contracts." *Balfour Beatty*, 155 A.3d at 460.

Indiana's courts have similarly relied on construction project contracts to evaluate the parties' respective duties, stating "the roles of the participants in a major construction project vary with the type of construction project, and the particular contract chosen will determine the role the design professional will play and the risks and liabilities to be assumed." *Indianapolis-Marion Cty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 737 (Ind. 2010). The Indiana Supreme Court further noted:

> Perhaps more than any other industry, the construction industry is vitally enmeshed in our economy and dependent on settled expectations. The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required – owner, architect, engineer, general contractor, subcontractors,

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> materials supplier – and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects. Imposition of tort duties that cut across those contractual lines disrupts and frustrates the parties' contractual allocation of risk and permits the circumvention of a carefully negotiated contractual balance among owner, builder, and design professional. Indeed the right of the parties to make their own bargain as to economic risk is impaired.

Id. (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 941 (1989)). The Indiana Supreme Court appropriately determined that "whether an . . . engineer owes any duty to the employees [or] independent contractors on a construction site . . . is to be determined from the various contracts governing them and from the actual conduct of . . . the engineer." *Id.* at 738. In this case, if and to the extent that Horry County or SCDOT utilized TSC in some manner as to cause damage to Plaintiff, Plaintiff may make such claims under the Construction Contract, as Plaintiff has done in its suit against Horry County. Regardless, this Court must refuse to modify the well-bargained relationships created under the Construction Contract, the TSC Contract, and the IGA by imposing or creating unanticipated and unprecedented duties owed by TSC to Plaintiff.

For this reason, Plaintiff's cause of action for negligence fails as a matter of law, and TSC is entitled to summary judgment on Plaintiff's negligence claim.

2. Plaintiff's Second Cause of Action for Breach of a Contract for a Third-Party Beneficiary Fails, Because There is No Evidence that Plaintiff Was an Intended Third-Party Beneficiary of 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*

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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 TSC intended for Plaintiff to be a direct beneficiary of the TSC Contract, and TSC has produced affirmative evidence that Plaintiff was not and is not a third-party beneficiary of the TSC Contract. (*See* Strub Affidavit.) "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).

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As a matter of law, this is an appropriate matter for redress through a Motion for Summary Judgment. *See* Rule 56, SCRCP.

The TSC Contract sets forth TSC's duties thereunder – to evaluate and test Plaintiff's work and Plaintiff's compliance with the plans, specifications, Project schedule, and terms of the Construction Contract. TSC's work was solely for Horry County's benefit. Every TSC criticism of Plaintiff's work is potentially to Plaintiff's *detriment*, because Plaintiff may incur costs or delay in re-performing work. Accordingly, Plaintiff was not and never could be a third-party beneficiary of TSC's obligations under the TSC Contract. The Project's timeline also proves that Plaintiff was not a third-party beneficiary of the TSC Contract, because TSC executed the TSC Contract nearly two years before Plaintiff was even identified as the Contractor. (Construction Contract, p. 1.) Accordingly, Plaintiff's claim for breach of contract by a third-party beneficiary fails as a matter of law. TSC's Motion for Summary Judgment as to Plaintiff's Second Cause of Action should therefore be granted.

3. Plaintiff's Third Cause of Action for Tortious Interference with Contract Fails as a Matter of Law Because Plaintiff Cannot Establish the Elements of Intentional Procurement of a Breach, the Existence of a Breach, or Absence of Justification.

"To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Eldeco, Inc. v. Charleston Co. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 480 (2007).[10] Further, "the

[10] The claims presented in this cause of action by Plaintiff are, at the very least, premature. Without a final determination of rights and liabilities under the Construction Contract, there can be no finding of a breach of that contract. "In the absence of a breach of contract, [Plaintiff] cannot prove the required elements of its cause of action for tortious interference with contractual relations." Id. at 482, 642 S.E.2d 726, 732. If the Court does not grant TSC the relief it seeks, the claim for tortious interference must be stayed until there is resolution of whether Horry County breached the Construction Contract.

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actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract." *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012). "The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract." *Id.* (quoting *CGB Occupational Therapy, Inc. v. RHA Health Servcs. Inc.*, 357 F.3d 375, 385 (3d Cir. 2004)). The only limit to this privilege is if the agent is acting outside the scope of its authority. The TSC Contract and the SCDOT Standard Specifications make it clear that TSC was acting within the scope of its CEIT Services in reviewing Plaintiff's work; therefore, the privilege applies.

Review of the TSC Contract and the Standard Specifications demonstrates that Horry County delegated all decision-making authority to SCDOT's Resident Construction Engineer. (Standard Specifications, §105.3(2-3); *see also* TSC Contract, Scope of Services, pp. 21 - 27.) All actions complained of occurred due to TSC's performance within the scope of TSC's services, which means it was action within TSC's agency authority. Accordingly, TSC's actions were privileged, and no cause of action for tortious interference with contractual relations will lie.

For the reasons set forth above, TSC's Motion for Summary Judgment as to Plaintiff's claim for tortious interference with contractual relations should be granted.

4. Plaintiff's Fourth Cause of Action Asserting UTPA Violations by TSC Fails As a Matter of Law, Because the Claims Are Based on Alleged Breaches of Contract, Which Are Not Actionable under the UTPA.

All of Plaintiff's claims against TSC are premised upon TSC's alleged breach of duties related to its CEIT Services under the TSC Contract. At worst, TSC's actions constitute a breach of TSC's duties to Horry County under the TSC Contract, which breach TSC expressly denies. "A mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done so intentionally. Otherwise, every intentional breach of a contract within a

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commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012), *vacated in part as to other causes of action, but affirmed as to this holding by* 410 S.C. 319 (2014). In that case, the Court of Appeals found that claims of unjustified delays with improper justification did not create sufficient evidence to defeat a motion for summary judgment as to UTPA claims. *Id.*

Additionally, the express language of the Unfair Trade Practices Act states that the UTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law." S.C. Code Ann. § 39-5-40(a). The practice of engineering and the provision of CEIT Services is permitted both by the S.C. Engineering Act and by the Standard Specifications for Highway Construction, promulgated by the S.C. Department of Transportation. As a matter of law, therefore, these acts cannot constitute unfair trade practices. Accordingly, TSC's Motion for Summary Judgment as to Plaintiff's claims under the S.C. Unfair Trade Practices Act should be granted.

CONCLUSION

South Carolina's State and local governments spend hundreds of millions of dollars each year creating and improving our highway system for the benefit and safety of our citizens and the State's visitors. Plaintiff is bound by its Construction Contract with Horry County and must be limited to the relief available thereunder, which it seeks in the HC/SCDOT Action. Horry County has a duty to its citizens to construct highways safely and economically in conjunction with the SCDOT, and this is accomplished by defining the complex roles of all parties by law and contract, including without limitation project plans and specifications. Horry County retained TSC to

perform CEIT services in conjunction with SCDOT's services and SCDOT's responsibility to require Plaintiff to fully, properly, and timely perform its Construction Contract duties for the benefit of Horry County and its citizens. While this can be described as cooperative effort of all Project parties, TSC was contractually and ethically obligated to Horry County to evaluate elements of Plaintiff's work and report to SCDOT, including criticisms of Plaintiff's work. TSC did not design the Project, approve pay applications or have any other final decision-making authority. In its limited CEIT role, TSC provided information to Horry County and SCDOT so they could decide whether Horry County would accept and pay for Plaintiff's work under the Construction Contract. TSC was prohibited from serving two principals on this Project, which could influence the performance of its duties to Horry County and endanger the public.

In these circumstances, TSC cannot have a "special relationship" with and for the benefit of Plaintiff; TSC was not and could not have been limited in its duty to Horry County to critique Plaintiff's performance of its duties under Construction Contract. Accordingly, TSC has no duty to Plaintiff in tort; so the Court must grant TSC summary judgment on Plaintiff's negligence cause of action.

For the same reasons, and because the plain, unambiguous language of the Project Contracts shows no intention of either TSC or Horry County to make Plaintiff a third-party beneficiary of the TSC Contract, Plaintiff's third-party beneficiary claim fails as a matter of law. Plaintiff's tortious interference with contractual relations claim fails because TSC was acting pursuant to its legal obligations in providing CEIT services to Horry County under the TSC Contract and its actions are privileged. Finally, Plaintiff's S.C. Unfair Trade Practices Act claim fails for two reasons: (1) Plaintiff alleges TSC breached its duties in contract, but a breach of contract is not actionable under the UTPA; and (2) TSC performed professional engineering

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services under laws administered by the S.C. Board of Registration for Professional Engineers and Surveyors, and the UTPA expressly provides that it does not apply to claims based on such services.

Accordingly, TSC is entitled to summary judgment on all of Plaintiff's causes of action.

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April 4, 2023

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