THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT IN TSC'S FAVOR WHERE TSC FAILED TO MEET ITS INITIAL BURDEN TO SHOW UNDER SOUTH CAROLINA LAW THE ABSENCE OF EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT CONCERNING A "SPECIAL RELATIONSHIP" BETWEEN TSC AND FCI?

II. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FAILING TO RECOGNIZE THAT, EVEN ASSUMING TSC MET ITS INITIAL BURDEN, FCI MET ITS BURDEN TO OVERCOME SUMMARY JUDGMENT BY PRESENTING EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER A SPECIAL RELATIONSHIP EXISTED BETWEEN TSC AND FCI CONSISTENT WITH SOUTH CAROLINA LAW?

III. DID THE TRIAL COURT ERR AS A MATTER OF LAW BY PREMATURELY DISMISSING CLAIMS ON SUMMARY JUDGMENT BEFORE DOCUMENT DISCOVERY WAS COMPLETE AND BEFORE ANY DEPOSITIONS HAD BEEN TAKEN?

IV. DID THE TRIAL COURT ERR BY MAKING FACTUAL FINDINGS OF AGENCY THAT WERE IMPROPER ON SUMMARY JUDGMENT, UNNECESSARY FOR THE TRIAL COURT'S RULING ON NEGLIGENCE, AND ARE UNFAIRLY PREJUDICIAL TO FCI'S REMAINING CLAIMS?

STATEMENT OF THE CASE

This is an appeal from the Trial Court's grant of summary judgment dismissing Flatiron Construction, Inc.'s ("Appellant" or "FCI") claim for professional negligence against TranSystems Corporation ("Respondent" or "TSC"). FCI initiated this claim against TSC on April 26, 2018, by filing a complaint in the Trial Court asserting, *inter alia*, a claim for damages incurred in connection with construction of the Carolina Bays Parkway in Horry County, South Carolina (the "Project"). (R. p. 71). FCI asserted that it incurred damages because TSC breached the standard of care applicable to its performance of construction, engineering, and inspection, services ("CEI Services") for the Project. Among other errors and omissions, FCI alleged that TSC negatively impacted FCI's performance of work by delaying submittal reviews, imposing unreasonable procedures, giving contradictory assessments from field inspectors, and wrongfully interpreting applicable specifications.

Following jointly requested stays to the litigation and the agreed-upon removal of the case from the active docket pursuant to Rule 40(j), FCI reinstated the litigation on September 27, 2022. (R. p. 12). On April 4, 2023, TSC filed a Motion for Summary Judgment seeking, *inter alia*, dismissal of FCI's professional negligence claim on the grounds that TSC's contract with the Project owner, Horry County, did not create a duty of care owed to FCI as the contractor. (R. 141); (R. p. 288). Similarly, TSC asserted that based upon the terms of its CEI contract with Horry County, no "special relationship" between TSC and FCI existed that would impose duties on TSC to FCI actionable in tort. *Id*., p. 1.

The Honorable Kristi F. Curtis heard oral argument on TSC's MSJ in a virtual proceeding on August 7, 2023 (R. p. 166). On November 22, 2023, the Trial Court entered a Form 4 Order granting TSC's MSJ in part and dismissing FCI's negligence claim. (R. p. 15). More specifically, the Trial Court's Form 4 Order stated, in part, "**I find TranSystems has established that it had no special relationship with Plaintiff [FCI] and owed no duty of care to Plaintiff . . . Defendant's attorney is to draft a proposed order consistent with its Memo in Support of Summary Judgment**…." *Id*. (emphasis added).

On December 1, 2023, FCI filed a Motion to Reconsider the Trial Court's Form 4 Order. (R. p. 153); (R. p. 1016). Thereafter, on December 7, 2023, TSC's counsel submitted to the Trial Court a 25-page proposed order that contained numerous factual and legal errors. (R. p. 17). FCI objected to these same errors in opposing TSC's MSJ. (R. p. 883 – 886). On December 27, 2023, the Trial Court issued an Order denying FCI's Motion to Reconsider. (R. p. 68). On the same day, the Trial Court adopted, verbatim, TSC's Proposed Order (including its errors and omissions), granting partial summary judgment and dismissing FCI's negligence claim. (R. p. 42).

FCI served its Notice of Appeal on counsel for TSC on January 26, 2023, and filed same with this Court on February 5, 2024. FCI appeals, *inter alia*, the Trial Court's ruling that TSC established – as a matter of law – that no "special relationship" existed between TSC and FCI for purposes of giving rise to an actionable duty. FCI further appeals the Trial Court's issuance of summary judgment on a factually driven issue prior to the commencement of deposition discovery and while document discovery is incomplete. The Trial Court's failure to apply South Carolina precedent, reliance upon inapposite case law from other jurisdictions, and hyperfocus – to the exclusion of all other evidence – upon the terms of Project contracts to determine the existence of a "special relationship" is erroneous as a matter of law and a violation of the standard on summary

judgment. Moreover, the Trial Court's summary disposition on an issue of fact prior to the completion of discovery that is likely to yield relevant evidence of a "special relationship" is an abuse of its discretion. Finally, the Trial Court's findings on agency are improper on summary judgment and prejudicial to the claims remaining before the Trial Court.

STATEMENT OF THE FACTS
-The Project-

This case involves a complex construction Project in Horry County, South Carolina. On November 7, 2013, the SCDOT, on behalf of Horry County, awarded the contract for construction of the Project to FCI in the amount of $97,868,087 (R. p. 511). The Project consisted of an extension to the Carolina Bays Parkway portion of South Carolina State Highway 31, including 7.45 miles of road, a main 3,633-ft bridge over the Intercoastal Waterway ("ICWW"), several minor bridges, and associated roadwork. (R. p. 314). The Project was governed by SCDOT's 2007 Standard Specifications for Highway Construction ("Standard Specifications"). (R. p. 292).

As part of an Intergovernmental Agreement ("IGA") among Horry County, the South Carolina Department of Transportation ("SCDOT"), and the South Carolina Transportation Infrastructure Bank, SCDOT provided Project oversight and administration services for the Project, but construction services had to "be obtained from third-party consultants or contractors by or on behalf of the County . . . ." (R. p. 781). On December 15, 2011, Horry County entered into a contract with TSC, under which TSC would provide CEI Services including, but not limited to, construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine FCI's compliance with the Construction Contract. (R. p. 807-832). TSC also "assume[d] full, complete and conclusive

liability for all discrepancies, errors or omissions found at any time in the plans or specifications." (R. p. 820).

The Construction Contract's substantial completion date was 1,220 calendar days (approximately three years and three months) from the Notice to Proceed ("NTP"). (R. p. 329). FCI began work on the Project in March 2014. (R. p. 81). FCI provided a realistic, achievable schedule for substantially completing the Project within the specified 1,220 calendar-day time period following the NTP. Despite FCI's efforts, the Project was significantly delayed, and substantial completion was not achieved until 2019, five years after the NTP. (R. p.146).

TSC was SCDOT's on-site representative for construction engineering and inspection services and, *inter alia,* managed communications between SCDOT and FCI. (R. p. 916-917). In addition, TSC provided contract administration, such as handling FCI's project submittals, Requests for Information ("RFIs"), schedule updates and change order requests. (R. p. 249). According to TSC, it performed construction administration and supervision, at least in part, as the Project's Resident Construction Engineer ("RCE") Representative. (R. p. 950).

-The Complaint-

On April 18, 2018, FCI filed a lawsuit against TSC due to its extensive maladministration and negligent supervision of the Project. FCI amended its complaint on May 10, 2018, which included four causes of action against TSC, namely, negligence (Count 1); breach of contract (Count 2); tortious interference (Count 3); and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") (Count 4). (R. p. 81-91). With regard to TSC's maladministration and negligence, by way of example, FCI alleged that "TranSystems delayed the review and approval of Flatiron submittals and added submittal review procedures not contemplated by the Specification[s], thereby causing delays to Flatiron's work and resulting in additional costs . . . ."

(R. p. 83-84). In addition, FCI alleged that TSC "substantially impeded Flatiron's progress of the Project by instituting unreasonable inspection protocols not contemplated by the Specification[s], directing changes to means and methods, and directing changes to plans and specifications." (R. p. 85-86).

Among other actions or failures to act, FCI asserts that TSC negatively impacted and/or impeded FCI's work by and through: (i) delaying submittal reviews; (ii) excessive submittal revision requests; (iii) differing opinions and arguments amongst TSC field inspectors; (iv) unorthodox and non-industry standard inspection procedures; (v) erroneously interpreting specifications that impacted FCI's means and methods; (vi) mandating unreasonable standards beyond industry standard, specified tolerances, and contract requirements; and (vii) imposing excessive timeframes for critical decision making. (R. p.847-854).

FCI supported its Amended Complaint with the Affidavit of Kenneth J. O'Connell, P.E. (R. p. 212-217). Mr. O'Connell is a Registered Professional Engineer with over thirty-five (35) years of experience, including "providing construction consulting, engineering and inspection services to public owners for the construction of bridge and roadway projects throughout the United States." (R. p. 212). Based upon Project documentation made available to him, Mr. O'Connell found, among other failures, that "[TSC] fell below the standard of care of a civil engineering firm in providing CEI Services and was negligent . . . in failing to review submittals in [a] timely manner so as not to impede the progress of the construction activities . . . [and] failing to follow the project specifications regarding Drill Shaft Foundation Plans." (R. p. 215).

-The Case is Stayed for Two Years While FCI's Claims Against the Owner are Resolved-

When FCI originally initiated litigation against TSC, the Project had not yet reached

substantial or final completion. In addition, pursuant to the terms of the Construction Contract and applicable specifications, FCI was obligated to pursue certain administrative remedies with regard to Project claims against SCDOT and/or Horry County, including a Dispute Resolution Board ("DRB") process. (R. p. 412). As such, and for a number of reasons, the Parties agreed to stay the litigation while the DRB process with Horry County and SCDOT proceeded.

The litigation between FCI and TSC was first stayed in response to a request from SCDOT that "both parties stay this litigation pending SCDOT's agency evaluation and review of claims asserted." (R. p. 92). On November 22, 2019, the Parties moved to extend the stay until September 30, 2020. (R. p. 95). The Trial Court granted the request on November 26, 2019. (R. p. 3).

The DRB processes on certain of FCI's Project claims were completed, and settlement agreements finalized between FCI and Horry County/SCDOT by September 22, 2020. (R. p. 844). FCI's remaining Project claims against Horry County/SCDOT proceeded to DRB thereafter, and a final settlement was not achieved until June, 2023. (R. p. 1033).

-The Stay is Lifted, and the Parties Begin Discovery-

The stay expired on September 30, 2020, and discovery commenced promptly thereafter. (R. p. 3). In that regard, on October 19, 2020, FCI issued its First Request for Production of Documents to TSC. (R. p. 124-131). On November 13, 2020, TSC answered the Amended Complaint. (R. p. 99-105). On November 19, 2020, TSC filed a Motion to Stay and a Motion for Protective Order seeking relief from responding to FCI's discovery requests. (R. p. 106-118); (R. p. 221); (R. p. 261). The Trial Court denied TSC's Motion to Stay on April 14, 2021. (R. p. 8).

As part of its efforts to progress discovery, on January 11, 2021, FCI moved to compel TSC to respond to discovery, including FCI's First Requests for Production of Documents that were propounded to TSC on October 19, 2020. (R. p. 119). The Trial Court granted FCI's Motion

to Compel on April 9, 2021. (R. p. 5). TSC began producing its documents on June 30, 2021. (R. p. 1117). Of course, the scale of document production on a 5-year, $100 million project is enormous, and the Parties have long agreed that discovery in this case "will involve discovery from multiple companies, various government agencies, and numerous experts." (R. p. 132). Further, the Parties agreed that depositions need to be taken of "over twenty (20)" witnesses. (R. p. 134-135). To date, document discovery has not yet concluded, and, as such, no depositions have been taken in this matter. (R. p. 887).

-The Parties Removed the Case from the Active Docket but Continued Discovery-

Due to the scale and complexity of the dispute, on October 4, 2021, FCI and TSC jointly moved for a complex case designation. (R. p. 132). The Trial Court denied the joint motion. (R. p. 10). As a result, the Parties promptly filed a consent order pursuant to Rule 40(j), removing the case from the docket. (R. p. 138). While the case was on the docket, the Parties diligently collected and produced relevant Project documents. Indeed, between the expiration of the stay on September 30, 2020, and the case's removal under SCRCP 40(j) on October 11, 2021, the Parties exchanged 452,317 documents totaling 1,618,310 pages.

Following the removal of the case from the docket, FCI and TSC continued to discuss the needed discovery and collectively exchanged an additional 78,336 documents totaling 363,769 pages. On February 17, 2022, TSC notified FCI that TSC had discovered a group of approximately 25,000 documents responsive to FCI's discovery requests that had not yet been produced. (R. p. 1043). At that time, TSC informed FCI that it was "reviewing this new group of documents and [would] supplement [its] responses accordingly, probably within the next month . . . ." *Id.* On September 22, 2022, FCI moved to restore the case to the active docket. (R. p. 140). The Trial Court ordered the case to be restored on September 27, 2022. (R. p. 12). Despite FCI's requests,

TSC had not yet produced the 25,000 documents referenced in its February 17, 2022, email by the time the case was reinstated on September 27, 2022.

-TSC's Motion for Summary Judgment and Additional Document Production-

On April 4, 2023, TSC filed its Motion for Summary Judgment. (R. p. 141). TSC, in relevant part, argued that TSC owed no duty of care to FCI because TSC's contract with Horry County created no such duty. (R. p. 295-304). In support of its MSJ, TSC provided a single affidavit from Peter Strub, a TSC Senior Vice President and Principal, stating that TSC never "prepared, signed, or sealed any design plans for the project." (R. p. 835). Mr. Strub also purported to explain TSC's contract with Horry County, noting that "[TSC's] work . . . was limited to Construction, Engineering, Inspection, and Testing services, which were subject to final review and approval by the Resident Construction Engineer." (R. p. 835).

On July 28, 2023, FCI filed its Opposition to TSC's MSJ. (R. p. 881-914). FCI argued, in relevant part, that TSC had a "special relationship" with FCI, creating an extra-contractual duty in tort not to negligently design or supervise the Project. *Id*. FCI's Opposition was supported by the affidavits of Louis Hutcherson and Linda Brumfield. (R. p. 915-925). Mr. Hutcherson served initially as an FCI Project Engineer and later as a Project Manager on the Project. (R. p. 916). Linda Brumfield was FCI's Vice President, Divisional Finance, and provided business records in support of FCI's Opposition to TSC's MSJ. (R. p. 923).

From his personal experience on the Project, Mr. Hutcherson testified that "Martin Long of TSC held himself out as [SCDOT's] Resident Construction Engineer ('RCE')," and that throughout the Project, TSC exercised considerable control over communications, oversight, and acceptance or rejection of FCI's work. (R. p. 916-918). Mr. Hutcherson also recounted that TSC "wielded substantial influence and power over FCI and impacted the progression and completion

of FCI's work on the Project" (R. p. 918). Further, Mr. Hutcherson testified that during his time on the Project, TSC had the "right to reject or stop FCI's work," which "TSC repeatedly exercised . . . ." (R. p. 918-919). Mr. Hutcherson also testified that TSC oversaw FCI's construction activities (R. p. 917), coordinated and processed pay applications (R. p. 917), inspected and rejected FCI's work (R. p. 918), and stopped FCI's work (R. p. 918-919).

Mr. Hutcherson possessed first-hand knowledge of myriad issues that arose from TSC's negligent performance of its contract administration and supervision responsibilities. For example, Mr. Hutcherson testified that TSC: rejected compliant work, which led to Project delays; delayed the review of critical submittals, preventing the commencement of FCI's drilled shaft activities; refused to inspect rebar or point out supposed construction errors, thereby preventing FCI from proceeding with work; and rejected work based upon erroneous interpretations of Project specifications. (R. p. 918-921). Mr. Hutcherson recalled that TSC often made poor decisions in the field that negatively impacted FCI's progress, unilaterally, and without any prior consultation with SCDOT. (R. p. 918).

The documents exhibited to the Brumfield Affidavit corroborate the Hutcherson Affidavit and provide further examples of TSC's control over FCI's performance and negligent supervision of the Project. For example, Exhibit 1 to the Brumfield Affidavit provides evidence that Mr. Long controlled communications between FCI and SCDOT and held up processing a critical submittal for 44 days because he failed to properly manage his own email account. (R. p. 926); (R. p. 919-920). Exhibit 3 to the Brumfield Affidavit includes an FCI Notice of Potential Claim from October 18, 2016, outlining "enhanced specifications, inspection and testing requirements . . . materially different than that specified in the Contract Documents," and several "disruptions, delays and increased costs [sic] delays" attributable to TSC's negligent work on the Project. (R. p. 934).

Moreover, the Brumfield Affidavit presented evidence showing that TSC's Mr. Long held himself out as the RCE for the Project, including, for example, minutes of meetings between SCDOT, Horry County, TSC, FCI and other parties signed by Mr. Long as the "Resident Construction Engineer." (R. p. 927, 936-941). In addition, Exhibit 6 to the Brumfield affidavit is an organizational chart produced by TSC titled the "SCDOT/TRANSYSTEMS ORGANIZATIONAL CHART" in which TSC's Mr. Long is given the title "RCE" with no SCDOT employee retaining that title. (R. p. 942). Significantly, pursuant to the Specifications, the RCE possessed extensive rights to exercise control over the Project, namely the right to: "decide all questions that may arise regarding the quality and acceptability of materials furnished, the work performed, the rate of progress of the work, etc. (R. p. 973); "suspend the work . . . for failure to carry out orders of the RCE" (R. p. 973); determine construction requirements (R. p. 973); direct FCI to perform certain work (§ 105.7); cause work to be corrected "upon failure to comply immediately with any order of the RCE" (§ 105.11); and accept or reject Work (§ 105.15.1). These rights are amended and expanded upon in the Construction Contract to include the right to: receive certain documentation from FCI, including for RCE approval (R. pp. 324-325, 331, 338, 346, 356, 360, 384, 440, 444); suspend work (R. p. 328); determine the date of substantial completion (R. p. 328); charge FCI for liquidated damages (R. p. 328); conduct testing and sampling for approval or rejection (R. p. 334, 352, 384, 442); determine the necessity of certain work (R. pp. 353, 360, 432, 434); approve written claims to initiate the claims procedure (R. p. 412); negotiate punch list timelines with FCI (R. p. 420); and direct FCI to perform certain Work (R. p. 441).

TSC filed its Reply on August 2, 2023. (R. p. 950). The Trial Court held a hearing on TSC's MSJ (the "SJ Hearing") on August 7, 2023. (R. p. 166-211). At the SJ Hearing, FCI

highlighted, among other issues warranting dismissal of TSC's MSJ, the fact that discovery was far from complete and specifically pointed to TSC's February 17, 2022, email acknowledging that it still had not produced approximately 25,000 documents responsive to FCI's First Request for Production of Documents. (R. p. 188).

On August 31, 2023, FCI served its Second Request for Production of Documents and its First Set of Interrogatories on TSC. (R. p. 1019). On October 4, 2023, TSC moved for an extension of time to respond to FCI's August 31, 2023 discovery requests. (R. p. 144). Subsequently, on October 6, 2023 (approximately two months *after* the MSJ Hearing), TSC produced 12,953 documents consisting of an additional 61,964 pages to FCI, and responded to FCI's First Set of Interrogatories. (R. p. 1053-1073). The following day, FCI produced an additional 48,683 documents consisting of the SCDOT project file that FCI obtained by way of FOIA requests to SCDOT.

On October 18, 2023, two months after the MSJ Hearing, the Parties filed a Joint Motion for Complex Case Designation (the "Joint Motion") stating that "[d]espite the extensive files already produced in this matter, more document production remains to be performed." (R. p. 147). The Parties agreed that "[t]he scale of this production is commensurate with the complexity of this dispute" involving "scores of construction events on a complex public infrastructure project performed over the course of at least five years." *Id*. Further, the Joint Motion points out that "[b]oth 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.)" (R. p. 148).

On November 22, 2023, the Trial Court issued a Form 4 Order granting in part and denying in part TSC's MSJ. (R. p. 14-16). The Trial Court found in relevant part that "TranSystems has established it had no special relationship with Plaintiff and owed no duty of care to plaintiff." *Id*. The Trial Court instructed TSC to draft an order consistent with its MSJ. *See id.*

On December 1, 2023, FCI filed a Motion to Reconsider the Trial Court's Form 4 Order. (R. p. 153). FCI argued it had met its burden to overcome summary judgment and that summary judgment was premature at this stage. *See id*. FCI also provided several documents relevant to the issue of the scope of TSC's construction supervisory authority during the Project that were discovered through post-SJ Hearing document production and review. *See id*. These documents included: correspondence from TSC's Martin Long to FCI, in which he wrote "on behalf of Horry County and SCDOT" and signed the email as "RCE" (R. p. 1090); Concrete Sample Identification Cards repeatedly identifying Mr. Long as "SCDOT RCE," (R. p. 1093); an email from Mr. Long to SCDOT in which Mr. Long identifies himself as RCE (R. p. 1097); and an email from Mr. Long to the United States Coast Guard, stating "**Hello, My name is Martin Long and I am the RCE for the SCDOT over the Carolina Bays Parkway project**" (R. p. 1099) (emphasis added).

On December 7, 2023, TSC moved to strike FCI's Motion to Reconsider as premature. (R. p. 155-159). On December 12, 2023, FCI filed its Opposition to TSC's Motion to Strike. (R. p. 1103).

On December 7, 2023, TSC also filed a 25-page Proposed Order. (R. p. 17-41). On December 27, 2023, the Trial Court adopted, as its own, TSC's Proposed Order verbatim in its entirety. (R. p. 42-67). The same day, the Trial Court issued an order denying FCI's Motion to Reconsider on the grounds that "the Trial Court [was] unable to discover any material fact or

principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered." (R. p. 68).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to SCRCP Rule 56. *See Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). The moving party on summary judgment bears an initial burden of demonstrating the absence of a genuine issue of material fact. *See Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). To overcome summary judgment, the non-moving party must create a reasonable inference that there exists a genuine issue of material fact. *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). A trial court's grant of summary judgment is reviewed de novo. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *See Grimsley v. S.C. L. Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015); *see also True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) ("In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.").

Summary judgment, as a "drastic remedy . . . 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543 (citation omitted). As such, "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id*. A trial court may properly grant a motion for summary judgment when "the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP Rule 56(c); *see also Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001). Summary judgment is not appropriate, however, when further inquiry into the facts of the case is desirable to clarify the application of the law. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) (citing *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). Summary judgment "should not be granted even when there is no dispute as to evidentiary facts if there is a dispute as to the conclusion to be drawn from those facts. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant." *Tupper*, 326 S.C. at 325, 487 S.E.2d at 191 (citations omitted). Appellate courts apply an abuse of discretion standard when reviewing whether a trial court's grant of summary judgment was premature. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 319, 548 S.E.2d 854, 855 (2001) (holding that the trial court abused its discretion by granting summary judgment before depositions had been taken).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT IN TSC'S FAVOR WHERE TSC FAILED TO MEET ITS INITIAL BURDEN TO SHOW UNDER SOUTH CAROLINA LAW THE ABSENCE OF EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT CONCERNING A "SPECIAL RELATIONSHIP" BETWEEN TSC AND FCI.

Almost three decades ago, the South Carolina Supreme Court recognized that, in South Carolina, a contractor – such as FCI – can sue an engineer – such as TSC – for purely economic loss arising from professional negligence. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (hereinafter, "*Tommy L.*

Griffin I"). In *Tommy L. Griffin I*, a construction contractor who performed work for the County of Charleston brought a tort action against the engineer who supervised the project negligently because the engineer "closed the job for nearly a month due to false allegations of OSHA violation, made demands of [the contractor] that were not in the contract" . . . [and] erroneously interpreted the contract . . . ." *Id*. at 51-52, 463 S.E.2d at 86-87. Like TSC, the engineer in *Tommy L. Griffin I* had the "right, among other rights, to inspect the construction and to halt construction." *Id*. Based on its control over the construction project, the South Carolina Supreme Court in *Tommy L. Griffin I* held that the engineer "owed a duty to the contractor not to negligently design **or** negligently supervise the project." *Id*. (emphasis added). The Supreme Court's ruling was disjunctive. Thus, under South Carolina law, an engineer who has inspection rights and can halt construction has a duty to the contractor not to negligently supervise the work.

A. The Trial Court erred by failing to apply South Carolina precedent in favor of foreign law inapposite to the "special relationship" standard established in *Tommy L. Griffin I*.

The South Carolina Supreme Court has made plain that, in South Carolina, an engineer who has construction supervisory responsibilities, such as the power to inspect work and halt construction progress, has a special relationship with the contractor, giving rise to an extra-contractual duty on the engineer's part not to negligently supervise the work. *See Tommy L. Griffin I*, 320 S.C. at 55-56, 463 S.E.2d at 89. South Carolina law, therefore, is clear regarding the facts and circumstances that give rise to an engineer's duty to a contractor with which it has no contractual privity. Indeed, South Carolina courts have had no issue following *Tommy L. Griffin I*. *See Cullum Mech. Constr. Co. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2021). The Trial Court should have done likewise.

In *Cullum Mechanical*, a subcontractor sued, *inter alia*, the architect on a project involving construction of certain floors of a medical center. *Id*. at 429, 544 S.E.2d at 840. The architect's responsibilities under its contract with the owner included certain authority and control over how payments were made to the general contractor and subcontractors, like Cullum, including the power to withhold payment certification to the general contractor if it failed to acquire a payment bond. *Id*. at 426, 429, 544 S.E.2d at 840. The general contractor failed to acquire a payment bond, but the architect did not recommend termination. *Id*. at 432, 544 S.E.2d at 841. Cullum informed the architect that it and other subcontractors had not been paid or were paid untimely and inquired about the payment bond, which the general contractor had not obtained in violation of its contract with the owner. *Id*. The Court of Appeals rejected Cullum's claim against the architect in part because "the [a]rchitect in this case did not have specific contractual authority to halt construction." *Cullum Mech. Const., Inc. v. S.C. Baptist Hosp*., 336 S.C. 423, 432, 520 S.E.2d 809, 814 (Ct. App. 1999), *rev'd*, 344 S.C. 426, 544 S.E.2d 838 (2001). Recognizing the "special relationship" standard set out in *Tommy L. Griffin I*, the South Carolina Supreme Court reversed the Court of Appeals' decision, finding that the architect's construction responsibilities *may* have given rise to a duty to subcontractors and that "**further inquiry into the facts of the case [was] desirable to clarify the application of the law**." *Id*. at 432-33, 520 S.E.2d at 841-42 (emphasis added).

The Trial Court should have ruled consistent with *Tommy L. Griffin I* and *Cullum Mechanical* and rejected TSC's MSJ. Nevertheless, instead of following binding South Carolina Supreme Court precedent, the Trial Court erroneously implemented standards from Idaho, Vermont, and Maryland that are not in concert with existing South Carolina precedent. (R. p. 55-58; 61-62).

It is axiomatic that a court must apply binding precedent. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) ("Of course, the decisions of the Supreme Court bind this Court as precedents.") (citing S.C. Const. art. V, § 9)). Courts may only consider foreign law if there is no applicable South Carolina law and the foreign law is persuasive authority. For example, in *Ellis v. Oliver*, the Court of Appeals was "faced with an issue of first impression in South Carolina" relating to whether a set-off right under a particular statute arose as a matter of law or upon motion of a party entitled to the set-off. 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999). Only after determining that "there is no South Carolina case directly on point" did the Court of Appeals look to other jurisdictions "to determine if the issue has been decided and if the decision is persuasive authority." *Id*. at 111, 515 S.E.2d at 271 (citing *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995) ("There are no opinions by this Court addressing the precise issue raised in this lawsuit. Nevertheless, there is persuasive authority from the state of Maine, which has a constitutional provision very similar . . . .")). These circumstances do not exist here. In the instant matter, *Tommy L. Griffin I* is directly on point. The Trial Court was not faced with an issue of first impression. *Tommy L. Griffin I* "negates any need to examine other jurisdictions' treatment of this issue." *Nash v. Tindall Corp.*, 375 S.C. 36, 41, 650 S.E.2d 81, 83 (Ct. App. 2007). Thus, the Trial Court erred as a matter of law by failing to apply *Tommy L. Griffin I* and by basing its decision, even in part, on foreign law.

Even if we were to imagine that the *Tommy L. Griffin I* case does not exist, the foreign decisions in the SJ Order are not *persuasive authority*, as demonstrated in *Nash v. Tindall*. *See id*. In *Nash v. Tindall*, the issue before the Court of Appeals was whether a statute of repose was substantive or procedural. *Id*. at 41, 650 S.E.2d at 83. The plaintiff in *Nash* cited foreign cases that did not address the precise issue before the court. *Id*. Specifically, the *Nash* plaintiff pointed to an

Alabama case that addressed an out-of-state statute's effect on procedural or substantive rights and a Connecticut case examining the underlying right to determine whether the statute of repose is substantive or procedural. *Id*. As such, the South Carolina Court of Appeals found that "[t]he Alabama and Connecticut case law advanced by Plaintiffs are interesting but do not constitute persuasive precedent for this court." *Id*. Only those foreign cases that address circumstances actually before the court are persuasive authority. *See*, *e.g.*, *Silva v. Silva*, 333 S.C. 387, 509 S.E.2d 483 (Ct. App. 1998) (finding persuasive a Georgia decision that "addressed a situation similar, if not identical, to the present case.").

Here, for example, the SJ Order states baldly, without legal citation, that the "Vermont standard is also applicable in South Carolina." (R. p. 61). However, the "Vermont standard" examined the existence of a duty between entirely different kinds of parties – a construction contractor and a condominium association that later took over the condominium after construction. (R. p. 57) (citing *Long Trail House Condo Ass'n v. Engelberth Constr., Inc.*, 192 Vt. 322, 59 A.3d 752 (2012)). The parties in *Long Trail* are certainly not similarly situated to a supervising engineer and a contractor like TSC and FCI.[1] Therefore, the "Vermont standard" is, at most, interesting, but does not constitute persuasive or useful precedent. Consequently, the foreign authority on which the Trial Court was simply not relevant. It should not have been referenced in this matter

[1] The Trial Court's reliance on a decision of the Idaho Supreme Court is similarly unpersuasive. (R. p. 56) (citing *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005) (*abrogation recognized by BrunoBuilt, Inc. v. Briggs Eng'g, Inc.*, 525 P.3d 1122, 1128-29, n. 5 (Idaho 2023)). In *Blahd*, the court evaluated the relationship between a soils engineer hired by a developer and a homeowner who later purchased the affected property. *Id*. These parties are not similarly situated to a supervising engineer and a contractor like TSC and FCI. The Trial Court erred in its reliance upon unpersuasive Idaho law.

and it certainly cannot be relied upon when South Carolina's own precedent, set forth in *Tommy L. Griffin I*, is directly on point.

Moreover, the foreign cases relied on in the SJ Order are not persuasive because they directly contradict South Carolina Supreme Court law. *See State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019) ("we may not apply [foreign cases] in such a manner that we overrule Supreme Court precedent.") (citing S.C. Const. art. V, § 9).[2] For example, the SJ Order cites *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 155 A.3d 445 (Md. 2017), which expressly rejected the *Tommy L. Griffin I* test. The Maryland Court of Appeals determined, *on behalf of Maryland courts*, that "we find persuasive the logic of states barring negligence claims for purely economic damages against design professionals in complex construction projects." *Id*. 451 Md. at 625, 155 A.3d at 459. *Balfour Beatty* does nothing more than reflect *Maryland law*. It directly contradicts settled South Carolina law and, thus, is not instructive here. *Cf. Tommy L. Griffin I*, 320 S.C. at 55, 463 S.E.2d at 89 ("we see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties .

[2] The Trial Court's reliance on *Blahd*, is also improper because Idaho law is in conflict with South Carolina law and is therefore not persuasive. In *Blahd*, the Idaho Supreme Court found that "there are only two situations in which the Court has found the special relationship exception applies." *Blahd*, 141 Idaho at 301, 108 P.3d at 1001. These are (1) where a "professional or quasi-professional performs personal services," and (2) "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." *Id*. This is directly in conflict with South Carolina law, which has already found a "special relationship" between a supervising engineer and a contractor based on the engineer's design and supervisory roles on a construction project. *See Tommy L. Griffin I*. 320 S.C. at 56, 463 S.E.2d at 89. The Trial Court erred in its reliance upon law that directly conflicts with South Carolina Supreme Court precedent.

. . ."); *see also State v. Counts*, 413 S.C. 153, 171, 776 S.E.2d 59, 69 (2015) ("we are not persuaded by the decisions of other states . . . as we specifically rejected this requirement in another context.").

Further evidencing the Trial Court's errors here, the Vermont Supreme Court in *Long Trail House* (a case cited in the SJ Order) followed the practice of rejecting contradictory foreign law when it articulated the so-called "Vermont standard." *See Long Trail House*, 192 Vt. at 337, 406 A.3d at 762 (citing *Beachwalk Villas Condo. Ass'n, Inc. v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991)). In *Beachwalk*, the South Carolina Supreme Court recognized that "architects may be held liable to homebuyers for negligence . . . ." 305 S.C. at 147, 406 S.E.2d at 374. The Vermont Supreme Court expressly refused to apply *Beachwalk*, stating that "we are equally unpersuaded by [*Beachwalk*] . . . [because] this case is inconsistent with our case law . . . ." *Id*., fn. 1. The Vermont Supreme Court rejected South Carolina law concerning liability of design professionals in negligence as contradictory to its own and, thus, unpersuasive. The Trial Court should have acted in kind and found Vermont law unpersuasive in this matter.

The Trial Court's elevation of foreign law over South Carolina precedent directly on point, i.e., *Tommy L. Griffin I*, is a plain error of law.

B. TSC failed to establish an absence of evidence or undisputed conclusive evidence negating FCI's negligence claim.

On summary judgment, where the non-moving party bears the burden of proof, the moving party bears an initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. This can be discharged by showing there is an absence of evidence to establish the nonmoving party's case or that the undisputed evidence conclusively negates the nonmoving party's case. *Id*. *See also Tommy L. Griffin Plumbing &*

Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 470, 570 S.E.2d 197, 202 (Ct. App. 2002) ("*Tommy L. Griffin II*"). Here, TSC must carry the initial burden to show an absence of evidence or undisputed conclusive evidence negating FCI's claim. *Id*.

The Trial Court erred by adopting TSC's assertion that the Trial Court's analysis with regard to the existence of a special relationship is limited to the Project Contracts. In an effort to dismiss the compelling and substantial testimony presented by FCI, the SJ Order drafted by TSC proclaims, "there is no need for further inquiry into facts or circumstances because the unambiguous conditions are set forth in the plain, unambiguous Project Contract." (R. p. 55-56). In addition, the SJ Order states incorrectly that "[h]ere, the relationship between TSC and Plaintiff is defined entirely and limited by the Project Contracts." (R. p. 62). *Tommy L. Griffin I* neither states nor implies that the Project Contracts are the sole source of duty arising from an engineer to a contractor. Indeed, the South Carolina Supreme Court recognized an extra-contractual duty owed by an engineer to a contractor in *Tommy L. Griffin I*. The Trial Court's adoption of TSC's misstatement of the law that the court need not apply the analysis in *Tommy L. Griffin I* and *Cullum Mechanical* was in error.

Further, the Trial Court erred in adopting TSC's comparative analysis of the contract language in *Tommy L. Griffin I* and this case. The South Carolina Supreme Court decision did not quote, summarize, or describe the language of any contract provisions sufficient to perform a comparative analysis, and TSC did not make available to the Trial Court any contract language from *Tommy L. Griffin I*. In short, the Supreme Court made clear that its analysis of the "special relationship" was not confined to the contract.

Yet, the SJ Order states that the engineer in *Tommy L. Griffin I* had certain design and supervision duties that were "expressly assumed . . . in its contract for engineering services." (R.

p. 61). It also claims that the engineer in *Tommy L. Griffin I* "had extremely broad duties set forth in the engineer's contract." *Id*. The SJ Order continues, "[i]n 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." *Id*., p. 21. The Trial Court cannot conduct any comparative analysis of the contracts in this dispute versus the contracts in *Tommy L. Griffin I* because no such contract language has been made available to the Trial Court. Further, FCI cannot rebut any conclusions drawn from this analysis because no contract language has been presented. Any reliance on such contractual analysis is clearly in error and misunderstands the basis of the *Tommy Griffin* cases.

Consistent with *Tommy L. Griffin I* and *Cullum Mechanical*, the Trial Court was obligated to consider not only the Project Contracts but all facts and circumstances. Had the Trial Court done so, it would have determined that TSC's exclusive – but selective – focus on the contract language was insufficient to justify summary judgment. As addressed in detail below, TSC did not meet its initial burden because: (1) SCDOT's "final decision-making authority" is not dispositive of whether a "special relationship" between TSC and FCI existed; (2) TSC's claim that it did not perform design duties is not undisputed and is otherwise insufficient to negate the existence of the special relationship; and (3) there is no conflict of interest precluding a finding of a "special relationship" between TSC and FCI as evidenced by the very existence of the South Carolina Supreme Court's decision in *Tommy L. Griffin I*.

1. SCDOT's "final decision making authority" does not conclusively negate FCI's claims.

The Trial Court erroneously adopted TSC's assertion that SCDOT's final decision-making authority over certain aspects of the Project neutralized any duty TSC had to avoid negligently

supervising the Project. (R. p. 61). TSC, however, offered no legal citation for this novel proposition. Moreover, this proposition conflicts with the terms of TSC's CEI Contract. In that regard, the CEI Contract's Scope of Services states unequivocally that TSC "will be responsible for the day-to-day operation and administration of the project." (R. p. 247). The provision requires that TSC report to SCDOT, but it says nothing about when and under what circumstances such reporting will occur. Nor does the Scope of Services give SCDOT final authority over every inspection and contract administration issue, only that SCDOT "will make final decisions when necessary." *Id*.

Further, TSC asserted that it was the RCE Representative. (R. p. 957) ("it is clear that [Martin] Long was a Representative of RCE"). As reflected in the documents attached to FCI's Brumfield Affidavit, there is a genuine dispute regarding the existence, scope, and nature of TSC's RCE or RCE-related authority. Those documents show Mr. Long repeatedly identified in official documents as the "RCE" and not the "RCE Representative," there is a genuine dispute regarding the existence, scope, and nature of TSC's RCE or RCE-related authority. (R. p. 928-934; 936-942) Whether TSC's Martin Long was or served as the RCE, with the expanded rights and control attendant to that title,[3] is a hotly contested issue. Nevertheless, even if TSC's assertion that it was

[3] Pursuant to the Specifications, the RCE possessed extensive rights to exercise control over the Project, namely the right to: "decide all questions that may arise" regarding Project Contract requirements. (R. p. 973); "suspend the work" (R. p. 973); determine construction requirements (R. p. 973); cause work to be corrected "upon failure to comply immediately with any order of the RCE" (R. p. 974); and accept or reject Work (R. p. 973). These rights are amended and expanded upon in the Construction Contract to include the right to: receive certain documentation from FCI, including for RCE approval (R. p. 346, 356, 360, 384,440,444); determine the date of substantial completion (R. p. 328); charge FCI for liquidated damages (R. p. 328); determine the necessity of certain work (R. p. 353, 360,432 ,434); and direct FCI to perform certain Work (R. p. 441, 447).

merely the RCE Representative is true, that does not conclusively negate FCI's claim. Indeed, it might support it.

In that regard, the Construction Contract makes clear that the "RCE 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." (R. p. 974) (emphasis added). These were determinative facts in *Tommy L. Griffin I*. To suggest that TSC had an obligation to conduct inspections, provide day-to-day administration of the Project, and had the right to reject defective material and suspend work as set out in its CEI Contract, but had no duty to exercise those rights in a non-negligent manner simply because SCDOT had final authority to accept or reject work, begs credulity and runs afoul of South Carolina Supreme Court precedent. To accept TSC's argument – as the Trial Court has – would establish that in South Carolina, an engineer such as TSC could, for instance, negligently reject work that actually complied with the project specifications but then evade responsibility for such improper actions by asserting that the project owner had final authority on whether to accept the work. Such a rule would be particularly detrimental in this case because, under the Project Contracts, TSC controlled the flow of information and communication between FCI, SCDOT, and the project owner Horry County. (R. p. 917). This is not the law in South Carolina. Since TSC's argument does not rely upon undisputed evidence that conclusively negates FCI's case, summary judgment was improper.

2. TSC's claim that it did not perform design duties is not undisputed evidence conclusively negating FCI's claim.

The SJ Order states that:

> In *Tommy L. Griffin I* (and in similar cases)[4], a contractor relied on design plans presented by the engineer, and it also relied on findings by the engineer regarding

[4] The SJ Order cites to no other cases to support this proposition.

> construction . . . TSC prepared no plans, and Plaintiff had no right to rely on TSC's observations and reporting . . . Accordingly, there is no special relationship between Plaintiff and TSC . . . ."

(R. p. 61). This statement is erroneous.

First, *Tommy L. Griffin I* does not stand for the proposition that an engineer *must* design the project to create a special relationship. The contractor in *Tommy L. Griffin I* sued the engineer for failures in contract administration, including "closing the job . . . due to false allegations," making "demands of [the contractor] which were not in the contract," and "erroneously interpret[ing] the contract." *Tommy L. Griffin I*, 320 S.C. at 51-52, 463 S.E.2d at 86-87. FCI lodges some of the very same allegations against TSC in this case. Based on those facts, South Carolina's Supreme Court ruled that the engineer owed a duty to the contractor not to ***either*** negligently design ***or*** negligently supervise the work. The South Carolina Supreme Court in *Tommy L. Griffin I* makes no mention of any design issues in its opinion. *Id*. In short, South Carolina Supreme Court precedent establishes that an engineer who has construction supervisory authority, including the right to inspect the work and halt construction, has a duty to the contractor not to negligently supervise the project. This duty exists irrespective of whether the engineer also designed the Project. Therefore, TSC's non-performance of design does not conclusively negate FCI's claim.

Second, although TSC argued that it did not perform any design services, the Strub Affidavit does not negate TSC's contractual requirements for design services. FCI showed that TSC's CEI Contract and Engineer Certification assigned to TSC "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." *See* Engineer Certification. In the Engineer Certification, TSC certifies not only that it will produce plans and specifications, but that it will check the plans and specifications "in

their entirety for completeness, correctness, accuracy and consistency" and thoroughly review them to ensure that they will comply with the applicable requirements. *Id*. TSC presented no evidence that the Engineer Certification was withdrawn or that the CEI Contract was amended to delete its design services on the Project. TSC's only evidence regarding its design responsibilities on the Project is an affidavit claiming that a portion of the CEI contract was not actually performed. (R. p. 835). A single paragraph from an affidavit submitted by the moving party is certainly not dispositive of whether a special relationship existed. The competing summary judgment evidence demonstrates that, to the extent material, the scope of TSC's design role on the Project is genuinely in dispute, rendering summary disposition improper. Moreover, the admitted failure to comply with TSC's contractual obligations, at least, warrants more discovery.

Finally, the Trial Court's SJ Order improperly placed the burden on FCI to "introduce any evidence . . . as to whether [sic] demonstrating that TSC provided any design services." (R. p. 48). This misplaced burden is an error of law. It is well settled that TSC must meet its *initial* burden to show an absence of evidence or undisputed evidence conclusively negating FCI's case. *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545. TSC failed to do so, and thus, the Trial Court erred as a matter of law in granting summary judgment in TSC's favor.

3. An alleged conflict of interest does not warrant summary judgment.

The Trial Court's SJ Order, drafted by TSC, contains a lengthy and legally erroneous analysis of TSC's professional responsibilities, culminating in the Trial Court's refusal to uphold South Carolina law set forth in *Tommy L. Griffin I,* because to do so "would create an improper and impermissible conflict of interest." (R. p. 58). There is neither binding nor persuasive legal authority to support this conclusion.

The Trial Court is correct that all engineers practicing in South Carolina are bound by the Rule of Professional Conduct for Engineers. (R. p. 58) (citing S.C. Code of Regs. § 49-300). This, of course, includes the engineer in *Tommy L. Griffin I*. Yet, the Supreme Court in *Tommy L. Griffin I* held that the engineer owed the contractor a duty not to negligently supervise the project. 320 S.C. at 55-57, 463 S.E.2d at 89. The SJ Order made no effort to explain this disparity between its own conclusory remarks about a conflict of interest and South Carolina's Supreme Court ruling in *Tommy L. Griffin I*.

Further, the SJ Order declares, without support, that "[u]nder 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 . . . 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." (R. p. 60). The Trial Court adopted TSC's straw man argument, which does not reflect the duty at issue here or in *Tommy L. Griffin I*. Stated simply, the duty at issue is not to negligently design or negligently supervise the Project. *See Tommy L. Griffin I,* 320 S.C. at 56, 463 S.E.2d at 89. TSC did not identify and, thus, the SJ Order fails to cite any binding South Carolina law that would preclude the enforcement of a duty consistent with *Tommy L. Griffin I* due to some unproven conflict of interest. There is no conflict of interest requiring summary judgment, and the Trial Court's order should be reversed.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE THAT, EVEN ASSUMING TSC MET ITS INITIAL BURDEN, FCI PRESENTED EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER A SPECIAL RELATIONSHIP EXISTED BETWEEN TSC AND FCI CONSISTENT WITH SOUTH CAROLINA LAW.

Even if TSC met its initial burden, which it did not, summary judgment was improper because FCI met its burden to overcome summary judgment. To survive summary judgment, FCI

need not affirmatively establish a "special relationship." FCI needs only to "create a reasonable inference that there exists a genuine issue of material fact." *Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301. FCI presented substantial evidence concerning whether there was a "special relationship" between TSC and FCI under South Carolina law. Accordingly, the Trial Court erred in dismissing FCI's negligence claim and finding that no special relationship existed as a matter of law.

A. FCI met its burden by presenting sufficient evidence that TSC possessed and exercised extensive supervisory authority over FCI's work, including the right, among other rights, to inspect and halt construction, consistent with the existence of a "special relationship."

FCI's summary judgment evidence demonstrates, at a minimum, that there is a genuine issue of material fact concerning the existence of a special relationship between TSC and FCI on the Project. FCI's affidavits testify to the extensive day-to-day authority that TSC wielded over FCI on the Project and are consistent with TSC's rights and obligations under the Project Contracts. TSC's attempt to discredit the affidavits is inappropriate at the summary judgment stage, and the Trial Court erred in adopting TSC's analysis as its own.

1. FCI's affidavits and other documentary evidence demonstrate TSC's extensive supervisory control and authority over FCI on the Project.

In opposition to the MSJ, FCI presented to the Trial Court affidavits from Louis Hutcherson and Linda Brumfield. (R. p. 916-925). Mr. Hutcherson started as an FCI Project Engineer and later became a Project Manager on the Project. (R. p. 916). Linda Brumfield was FCI's Vice President, Divisional Finance, and provided business records in support of FCI's Opposition to TSC's MSJ. (R. p. 923).

The Hutcherson Affidavit stated that throughout the Project, TSC exercised considerable control over communications, oversight, and acceptance or rejection of FCI's work. (R. p. 917-

918). TSC "wielded substantial influence and power over FCI and impacted the progression and completion of FCI's work on the Project." *Id*. at ¶ 8. Further, TSC had the "right to reject or stop FCI's work," which "TSC repeatedly exercised . . . ." *Id.* at ¶¶ 8 & 11. Mr. Hutcherson testified that TSC oversaw FCI's construction activities (¶ 6), coordinated and processed pay applications (¶ 7), inspected and rejected FCI's work (¶ 10), and stopped FCI's work on occasion (¶ 11).

Mr. Hutcherson outlined the numerous issues that arose from TSC's negligent performance of its contract administration and supervision responsibilities. For example, TSC rejected compliant work, which led to Project delays. *Id*. at ¶ 17. TSC also delayed the review of critical submittals, preventing the commencement of FCI's drilled shaft activities. *Id*. at ¶ 15. Similarly, TSC refused to inspect rebar or point out supposed construction errors, thereby preventing FCI from proceeding with work. *Id*. at ¶ 16. TSC also rejected work based upon erroneous interpretations of Project specifications. *Id.* at ¶ 9-12. These decisions were often made by TSC unilaterally, in the field, and without any prior consultation with SCDOT. *Id*. at ¶ 10. This evidence is more than sufficient to meet FCI's burden to establish that there is a genuine issue of material fact for trial concerning the "special relationship" between TSC and FCI.

Mr. Hutcherson also stated that "TSC held itself out as having authority" consistent with the RCE on the project, including the "authority to decide, among other things, questions concerning the quality and acceptability of materials furnished or work performed by FCI and/or its subcontractors, the rate of progress of the work, and the interpretation of the Plans and Specifications." *Id.* at ¶ 9.

TSC's supervisory authority was also recognized by SCDOT. On at least one occasion, SCDOT even admonished TSC's Mr. Long for, at times, failing to exercise the powers of the RCE. In a December 1, 2015, email, Mr. Long notified FCI that "The SCDOT has instructed

TranSystems to have Flatiron stop all work . . . ." (R. p. 943). Yet, when Mr. Long sent a copy of his email to SCDOT's District Bridge Engineer, SCDOT responded that "the stop work call **should have been made by the RCE. This type of scenario is what TranSystems has been hired for** . . . project inspection and management." *Id*. (emphasis added). This exchange demonstrates not just that SCDOT considered TSC to be the RCE, but that TSC was expected to exercise its authority ***to stop FCI's work*** as part of its inspection and management responsibilities. This same authority was held by the engineer in *Tommy L. Griffin I*, and the Trial Court erred in finding no special relationship given the facts presented by FCI.

2. The affidavits are consistent with TSC's rights and obligations under its CEI Contract.

Unlike the Affidavit presented by TSC, the substantial affidavit and documentary evidence presented by FCI on the existence of a special relationship between the parties is consistent with TSC's rights and obligations under its CEI Contract. More specifically, the CEI Contract expressly granted TSC the right to control and impact the construction, including, among others, the right to inspect and halt construction on the Project.

First, the Specifications provide TSC with the authority to inspect construction and halt FCI's work. In that regard, TSC concedes that, at a minimum, it was the Representative of the RCE. (R. p. 957). Under § 105.9 of the Specifications, the "RCE 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." (R. p. 974). This alone should provide sufficient evidence to overcome summary judgment as it reflects, at a minimum, a genuine issue material to TSC's construction supervisory authority, similar to the engineer in *Tommy L. Griffin I*.

Further, TSC's CEI Contract required TSC to provide engineering, inspections, and other contract administration and supervision services related to the construction of the Project. (R. p. 825). The CEI Contract Scope of Services describes TSC's services to include: "construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verification to determine compliance with the contract requirements." (R. p. 248). Pursuant to TSC's "Project Management" responsibilities listed in the Scope of Services, TSC was obligated to provide a "Project Engineer" to be "responsible for the day-to-day operation and administration of the project." *Id*. TSC was also obligated to "ensure that quality materials are being incorporated into the project, ensure that quality workmanship is utilized on the project, ensure that the contractor is progressing in accordance with the proposed schedule, and ensure compliance with applicable state laws regarding environmental issues." *Id*.

Finally, the Engineer Certification incorporated into the CEI Contract required, among other things, that TSC perform its work "in accordance with the special provisions and specifications." (R. p. 279). TSC also certified that its work would "meet or exceed the reasonable standard of care of the engineering profession." *Id.*

The contract documents support FCI's summary judgment evidence that TSC's vast supervisory authority over FCI's work on the Project created a "special relationship" between TSC and FCI or, at the very least, presented sufficient evidence to demonstrate a genuine issue of material fact regarding the existence of a "special relationship." Summary judgment on this issue was improper.

3. The Trial Court's Order improperly disregards as meritless the affidavit evidence introduced by FCI.

On summary judgment, courts "must view the evidence and all inferences which can reasonably be drawn from that evidence in the light most favorable to the nonmoving party." (R. p. 43) (citing *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2020)). In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Weston v. Kim's Dollar Store*, 399 S.C. 303, 308, 731 S.E.2d 864, 866 (2012). Further, courts must not make factual determinations or consider the merits of competing testimony. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

Contrary to this well-settled summary judgment law, the Trial Court improperly disregarded FCI's Affidavit of Louis Hutcherson – the only affiant with relevant first-hand knowledge of the Project – and weighed inferences *against non-movant* FCI, instead of against movant TSC. The Trial Court erred as a matter of law.

The Trial Court's SJ Order, drafted by TSC, states that "the Affidavit of Louis Hutcherson . . . does not expressly or implicitly state that he believed Long was the SCDOT RCE or that Long had the authority of the SCDOT RCE . . . ." (R. p. 49). It further provides that "[i]f Hutcherson believed Long was RCE for SCDOT, he could and should have expressly said so in his affidavit." (R. p. 50). This analysis is inconsequential substantively, inappropriate procedurally, and the Trial Court erred in adopting it.

In that regard, the Trial Court's analysis disregarded the relevant testimony in Mr. Hutcherson's affidavit and failed to follow well-established summary judgment law requiring the court to draw reasonable inferences in FCI's favor as the nonmovant and against TSC as the

movant. *See Grimsley*, 415 S.C. at 40, 780 S.E.2d at 900; *see also True v. Monteith*, 327 S.C. at 119, 489 S.E.2d at 616. For example, the Trial Court failed to recognize that Mr. Hutcherson specifically identifies TSC as the RCE. (R. p. 918) ("As RCE, TSC held itself out as having authority . . . ."). Further, the Trial Court completely ignores FCI's substantial evidence showing that TSC, SCDOT, and Mr. Long himself, held Mr. Long out as the SCDOT RCE. (R. p. 928-932; 938-942).[5]

Moreover, Mr. Hutcherson's testimony was specific and directly relevant to the Trial Court's determination on the existence of a "special relationship" under South Carolina law. This testimony, however, is conspicuously absent from the Trial Court's SJ Order that TSC drafted. For example, Mr. Hutcherson testified to, *inter alia*, TSC's role in funneling communications between FCI and SCDOT (R. p. 917), TSC's field oversight of FCI's work (R. p. 917), TSC's administrative control over the Project (R. p. 917), TSC's right to interpret the Specifications in the field (R. p. 918), and TSC's exercise of its right to reject or stop work (R. p. 918). These facts and circumstances are particularly relevant to the "special relationship" determination under *Tommy L. Griffin I*. Mr. Hutcherson's subjective beliefs are not. The Trial Court erred in disregarding FCI's summary judgment evidence without cause and in violation of established summary judgment law. The Trial Court also erred by viewing perceived ambiguities in the evidence against FCI, the non-movant. Accordingly, the SJ Order should be reversed.

[5] *See* (R. p. 1067-1068) ("Marty Long used the title Resident Construction Engineer . . . ."); (R. p. 1088-1102) ("Hello, My name is Martin Long and I am the RCE for the SCDOT over the Carolina Bays Parkway project."); (R. p. 1135-1139; 1174-1178; 1181).

B. The facts and circumstances presented by FCI squarely align with the facts and circumstances in *Tommy L. Griffin I*, in which the Supreme Court found there existed a "special relationship" between the contractor and engineer.

The South Carolina Supreme Court in *Tommy L. Griffin I* considered the facts and circumstances in the dispute before it and concluded:

> Engineer designed the project specifically for the County of Charleston. Engineer supervised the construction. Engineer had the right, among other rights, to inspect the construction and to halt construction. Under these facts, Engineer owed a duty to the contractor not to negligently design or negligently supervise the project.

Tommy L. Griffin I, 320 S.C. at 56, 463 S.E.2d at 89. The facts and circumstances in this case are nearly identical to those in *Tommy L. Griffin I*.

The chart below indicates key similarities (bolded for ease of review) between *Tommy L. Griffin I* and this case:

Tommy L. Griffin I	**FCI v. TSC**
Engineer **contracted** to be the **design engineer** and **supervised the project** for the County of Charleston. 320 S.C. at 51, 463 S.E.2d at 86.	TSC was contractually responsible for "**all project plan and specification reviews**. . . involved in the production of the project plans and specifications." (R. p. 279). TSC was "**responsible for the day-to-day operation and administration of the project**." (R. p. 248).
"Engineer wrongfully **closed the job** for nearly a month . . .." 320 S.C. at 51, 463 S.E.2d at 86.	TSC had "the authority to **reject defective material** and to **suspend any work** that is being improperly performed . . .." (R. p. 974). TSC also "**repeatedly exercised its right to reject or stop FCI's work**." (R. p. 918).
"Engineer **made demands of [Contractor]** which were not in the contract." 320 S.C. at 51, 463 S.E.2d at 86-87.	"**TSC demanded** significant additional information exceeding . . . requirements. . . . Due to the **control TSC possessed on the Project**, FCI was forced to give time and effort even to clearly meritless **demands made by TSC**." (R. p. 919). "TSC **rejected FCI's work** based upon **erroneous interpretation of the Project specifications** – which occurred on multiple occassions . . . ." (R. p. 918).

	"**TSC often made unilateral decisions in the field** . . . **that delayed, hindered or otherwise negatively impacted FCI's work**." (R. p. 918).
"Engineer **supervised the construction**." 320 S.C. at 56, 463 S.E.2d at 89.	"**TSC oversaw all aspects of FCI's performance of [Work].**" (R. p. 917). "**TSC's field oversight of FCI's work** . . . included, without limitation . . . **providing direction** as to whether FCI . . . could proceed with the work, **must stand down, and/or perform rework**." (R. p. 917) TSC was "**responsible for the day-to-day operation and administration of the project**." (R. p. 248) "**TSC wielded substantial influence and power over FCI** and impacted the progression and completion of FCI's work on the Project." (R. p. 918).
"Engineer had the right, among other rights, to **inspect the construction** and to **halt construction**." 320 S.C. at 56, 463 S.E.2d at 89.	TSC had the right to "**inspect all work done and all materials furnished** . . . [and] the authority to **reject defective material** and to **suspend any work** that is being improperly performed . . . ." (R. p. 974). TSC "on multiple occasions . . . **rejected FCI's work** . . . ." (R. p. 918). TSC also "**repeatedly exercised its right to reject or stop FCI's work**." (R. p. 918).

FCI's summary judgment evidence makes apparent the plain factual similarities between the instant case and *Tommy L. Griffin I*. The Trial Court erred by failing to follow South Carolina Supreme Court precedent and failing to recognize that FCI met its burden to overcome summary judgment by presenting substantially similar facts and circumstances as deemed dispositive of an existing duty in *Tommy L. Griffin I*.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY PREMATURELY DISMISSING CLAIMS ON SUMMARY JUDGMENT BEFORE DOCUMENT DISCOVERY WAS COMPLETE AND BEFORE ANY DEPOSITIONS HAD BEEN TAKEN.

Summary judgment is premature because FCI has not had a full and fair opportunity to complete discovery. As noted by the South Carolina Supreme Court, summary judgment "is based on depositions, interrogatories, affidavits and other evidentiary material provided by the parties." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). Summary judgment is a "drastic remedy and should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman*, 306 S.C. at 113, 410 S.E.2d at 543 (citations omitted). Therefore, summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id*, 306 S.C. at 114-15, 410 S.E.2d at 543. In *Baughman*, despite three years of discovery, the South Carolina Supreme Court reversed the entry of partial summary judgment to afford the plaintiff in that case "an adequate opportunity to complete discovery." *Id*. Likewise, the Trial Court's SJ Order in this matter should be reversed to afford FCI an opportunity to complete document production, conduct relevant depositions, and develop expert opinions based on the adduced facts.

The Trial Court erred by adopting TSC's reliance upon caselaw that is irrelevant, inapplicable, or otherwise not binding on the court to claim that summary judgment is "ripe" at this stage. (R. p. 52-53). The Trial Court relied entirely on cases in which discovery deadlines had been set and had expired. *See id*. (*citing Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 67 S.E.2d 32 (Ct. App. 2009) ("discovery deadlines had expired and Guinan was afforded a full and fair" opportunity to conduct discovery."); *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (the motion for summary judgment was filed one month

after the discovery deadline and another month passed before appellant moved to extend time for discovery)). That is not the case here. In this case, no discovery cut-off has been set, and therefore, the discovery period has not expired. FCI does not seek to expand discovery beyond the time allowed. It seeks only to be permitted a full and fair opportunity to conduct discovery to which it is entitled – discovery that will undoubtedly glean evidence pertinent to whether a special relationship existed between TSC and FCI on the Project.

The Parties' dispute concerning the scope of TSC's authority and differing interpretation of documentary evidence produced to date demonstrates the need for continued discovery, including depositions. The Trial Court erred in granting summary judgment and cutting the discovery process short. For example, FCI's summary judgment evidence, including Post Hearing Production evidence, included multiple emails in which Martin Long and SCDOT hold Mr. Long out as the RCE, including an email from Mr. Long to the United States Coast Guard in which he states: "**Hello, My name is Martin Long and I am the RCE for the SCDOT over the Carolina Bays Parkway project**." (R. p. 1099). Travis Patrick of SCDOT, whom TSC claims is the RCE, was copied on this email. *Id*. This directly contradicts TSC's claim that it is "implausible and incredible" to claim that "Martin Long of TSC held himself out as [SCDOT's] Resident Construction Engineer." (R. p. 955). It is anticipated that deposition testimony will support FCI's position and further evidence the true nature and extent of TSC's control and authority over FCI's construction activities and progress.

TSC's Motion to Strike further demonstrates the need for appropriate time to complete discovery and conduct depositions. TSC relied upon an incomplete portion of an email chain to claim that Mr. Hutcherson knew Mr. Long was not the RCE. (R. p. 157). TSC's analysis was improper as it did not place the email in full context. The email exchange relied upon by TSC

begins with an email from Lisa Nix, an FCI Cost Engineer, to Mr. Long requesting approval of materials relying upon "the note on SCDOT drawing 702-305-00," which states that "the RCE is to approve the material for the completion date stamp in the barrier of the bridges." (R. p. 1167-1173). FCI made this approval request approximately two years into the Project.

Mr. Long responded to the approval request, stating:

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

(R. p. 1169). Ms. Nix responded to Mr. Long's email, stating simply, "I did not know that. But will now know for in the future." *Id*. Mr. Hutcherson forwarded Mr. Long's email to Mr. Ted Kirk, FCI VP, stating:

> Please see Marty's e-mail below to Lisa this morning validating and confirming my Recovery Plan Issue Item 21.B . . . 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.

(R. p. 1167). TSC claims that this email from Mr. Hutcherson confirms that he knew that Mr. Long was not the RCE, and suggests that Mr. Hutcherson's affidavit was made in bad faith. (R. p. 157). The email cited by TSC arises from FCI's understanding that certain submittals needed to be sent to Mr. Long because more than two years into construction, FCI understood Mr. Long to be the RCE. (R. p. 1167). Mr. Hutcherson is not stating that he *knew* Mr. Long did not have RCE authority, but rather that Mr. Long was abdicating his RCE responsibility by needlessly creating extra steps. Mr. Kirk affirms Mr. Hutcherson's frustration in his response email, in which he stated

that "the process has been broken since the beginning delaying the work." (R. p. 1171). Depositions will illuminate the meaning intended by the email authors.

Further, the record has many instances in which Mr. Long is identified as the RCE. (R. p. 928-932; 938-942; 1067-1068); ("Marty Long used the title Resident Construction Engineer . . . ."); (R. p. 1088-1102); (R. p. 1135-1139; 1174-1178). Therefore, if Mr. Long's instruction that "anywhere it says RCE you can replace it with the word District" were followed, anytime Mr. Long identified himself as RCE would indicate that he was identifying himself as the District, supporting FCI's position that Mr. Long assumed certain authority of the RCE. (R. p. 1134).

There is also a dispute as to TSC's design responsibilities on the Project requiring further discovery and depositions. The CEI Contract contains express design obligations assigned to TSC. *See* Engineer Certification. TSC argued to the Trial Court that it "never prepared, signed, or sealed any design plans for the Project." (R. p. 835). This plainly is not in compliance with TSC's Engineer Certification responsibilities. FCI asked TSC, in a Request for Production ("RFP"), to provide "all correspondence to, from, or among, TranSystems, Horry County, and/or SCDOT that led to TranSystems' alleged release from its performance obligations under the [Engineer Certification]." (R. p. 1085). TSC responded by objecting to the phrasing of the request, stating that "Mr. Strub never testified that there was a release from obligations – he testified that [TSC] never prepared, signed or sealed any design plans for the Project." (R. p. 834-835).

What TSC actually did with regard to design is currently a mystery. The Engineer Certification lists a host of obligations. *See* Engineer Certification. TSC denies performing some of those responsibilities. (R. p. 835). FCI should be afforded an opportunity to explore the full extent of TSC's design-related activities. Further discovery on this point will likely reveal relevant

evidence of TSC's design responsibility, which will inform the existence of a special relationship under *Tommy L. Griffin I*.

FCI has not been dilatory in seeking discovery on the issue of the "special relationship" giving rise to TSC's duty to FCI. As TSC and FCI agreed in their Joint Motion that was filed *after* the SJ Hearing, "the parties have diligently exchanged discovery over the life of this dispute . . . ." (R. p. 149-150). The Parties also agreed that "more document production remains to be performed." (R. p. 147). Further, while "[b]oth FCI and TSC will rely upon the testimony of an exceptionally large number of fact witnesses . . ." neither party has begun conducting depositions. (R. p. 148). FCI has diligently pursued discovery and should be provided an opportunity to complete that effort.

As set forth in the Parties' Joint Motion, "this dispute . . . 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)." (R. p. 146-148). The complex nature of the claims, as well as the dispute resolution mechanisms at play with regard to FCI's claims against Horry County, the Project owner, impacted the discovery in this case. (R. p. 1116-1118). Soon after filing this case, it was stayed for two years. (R. p. 1117). Document exchange began in waves starting in June 2021, after the stay was lifted, and continued after the case was subsequently removed from the docket under SCRCP 40(j) just four months later. (R. p. 1117). In the interests of economy and to narrow issues, the Parties focused attention on FCI's contractual disputes with Horry County and SCDOT from late 2022 into the Spring of 2023. Mr. Long's status as RCE was not challenged until TSC's MSJ on April 4, 2023. (R. p. 1118). This gave FCI only three months to review documents relevant to that inquiry, which included hundreds of thousands of documents totaling over one million pages. *See id*. Even with sophisticated discovery review software, three

months was insufficient to properly uncover all evidence relevant to defend against TSC's MSJ. (R. p. 1120). Further, FCI was still receiving substantive document productions as of October 6, 2023, and was still evaluating the substantial number of documents previously produced by TSC and SCDOT, as well as those retrieved from its own files as of the SJ Hearing date. (R. p. 1120).

Finally, the SJ Order relies on *Savannah Bank, N.A. v. Stalliard*, *supra*, to support dismissal on the basis the party requesting additional time for discovery after the discovery deadline passed never submitted a Rule 56 affidavit supporting its request.[6] First, FCI is *not* requesting additional time for discovery, only that it be afforded a full and fair opportunity to complete discovery. Second, FCI did file an SCRCP 56(f) affidavit. (R. p. 1116 – 1124). Further, even if FCI had not filed an SCRCP 56(f) affidavit, "courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the Trial Court." *Baughman*, 306 S.C. at 112 n. 4, 410 S.E.2d at 544 n. 4. On multiple occasions, FCI informed the Trial Court of the need for additional discovery. (R. p. 188-189); (R. p.1017-1020; 1026-1035); (R. p. 1107-1108; 1112-1113; 1116-1124). No matter whether FCI filed a SCRCP 56(f) affidavit (which it did), the Trial Court's denial of FCI's full and fair opportunity to complete discovery and failure to consider the Reid 56(f) Affidavit on that basis constitutes an abuse of discretion. *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003) ("the judge was mandatorily required to at least evaluate and consider the affidavit.").

[6] The SJ Order drafted by TSC also cites *Matter of Estate of Smith*, 419 S.C. 111, 796 S.E.2d 158 (Ct. App. 2016) (Few, A.J., concurring). The Trial Court's adoption of TSC's analysis of *Estate of Smith* was in error as the language relied upon was entirely *dicta*. First, the opinion is only a concurrence and the majority ruled entirely on other grounds. Moreover, the concurring opinion is unpersuasive because it was directly contradicted by a dissenting opinion of equal weight. Reliance on what was "recommended" in a concurring opinion that is merely disputed non-precedential *dicta* is improper. (R. p. 53).

IV. THE TRIAL COURT ERRED BY MAKING FACTUAL FINDINGS OF AGENCY THAT WERE IMPROPER ON SUMMARY JUDGMENT, UNNECESSARY FOR THE TRIAL COURT'S RULING ON NEGLIGENCE, AND ARE UNFAIRLY PREJUDICIAL TO FCI'S REMAINING CLAIMS.

A court considering summary judgment "neither makes factual determinations nor considers the merits of competing testimony . . . ." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Nevertheless, the SJ Order repeatedly found that TSC is the agent of Horry County. (R. p. 51) ("it is also clear that **TSC is an agent of Horry County**"), (R. p. 59) ("Horry County and SCDOT merely required **TSC . . . as agent for Horry County**"), & (R. p. 65) ("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**.") (emphasis added).

A finding on agency is a question of fact and, therefore, premature on summary judgment. *Froneberger v. Smith*, 406 S.C. 37, 49–50, 748 S.E.2d 625, 631 (Ct. App. 2013) ("[a]gency is a question of fact."). While FCI disputes TSC's allegation that it acted as the agent of SCDOT, if there are "any facts giving rise to an inference of an agency relationship," the question of "agency ordinarily should not be resolved by summary judgment." *Fernander v. Thigpen,* 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (internal quotation marks omitted); *see also Gathers v. Harris Teeter Supermarket, Inc.,* 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984) ("If there are any facts tending to prove the relationship of agency, it then becomes a question for the jury."). Thus, the SJ Order's factual findings regarding agency are legally untenable on summary judgment.

The Trial Court's erroneous findings regarding agency are unrelated to FCI's negligence claim, the dismissal of which is at issue in this Appeal. The alleged agency relationship between

TSC and Horry County is a disputed fact and is, however, relevant to TSC's defense to FCI's tortious interference claim remaining before the Trial Court. TSC's MSJ asserts immunity from tortious interference liability on the basis that it is the agent of both Horry County and SCDOT. (R. p. 306-307) (citing *Dutch Fork Dev. Grp. II, LLC v. SEL Props. LLC*, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012)); (R. p. 909-910); (R. p. 965-966). The Trial Court dismissed TSC's MSJ with regard to FCI's tortious interference claim. (R. p. 15-16; 42-67). TSC should not be granted erroneous factual findings on summary judgment that may prejudice FCI's claims remaining before the Trial Court simply because TSC drafted the SJ Order. The Trial Court erred by making these erroneous and unsupported factual findings on agency. The SJ Order, including the erroneous factual findings, should be reversed.

CONCLUSION

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

Respectfully submitted,

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