

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF HORRY)
)
)
Flatiron Constructors, Inc.,)
)
Plaintiff,)
)
v.)
)
TranSystems Corporation,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C.A. NO. 2022-CP-26-06116

ORDER

RECEIVED

Feb 05 2024

SC Court of Appeals

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 Contracts¹ 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, SCRPC. 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 IP*”); *see also* Rule 56, SCRC. “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), SCRCF. 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), SCRPC.

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), SCRPC, 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), SCRPC. 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.

...

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, SCRPC.

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]



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