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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry County
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2026-000386

Flatiron Constructors, Inc.,

Respondent,

v.

TranSystems Corporation,

Petitioner.

APPENDIX (Volume III of III)

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

Defendant TranSystems Corporation (hereafter “TSC”) submits this Reply Brief in Support of TSC’s Motion for Summary Judgment on each cause of action alleged by Plaintiff Flatiron Constructors, Inc. (“Plaintiff”).

SUMMARY OF REPLY

In its Brief in Opposition, Plaintiff undertakes great effort to attempt to create an issue of fact, but it ultimately fails. TSC is entitled to summary judgment for a simple reason – the plain language of the contracts at issue (including the documents incorporated therein) demonstrate that TSC never owed any tort duty to Plaintiff, and Plaintiff has failed to identify any duty owed by TSC to Plaintiff, or the breach of any duty. Plaintiff has had four months since the filing of TSC’s Motion to identify specific duties or cases supporting its position, and it has failed to do so.

The saying has become a Southern aphorism because it is true -- a hit dog will holler. While Plaintiff objects to citations being argumentative or unclear in TSC’s Brief, Plaintiff’s Opposition Brief is clearly incorrect in two extremely important respects: (1) Plaintiff vastly overstates the breadth of our Supreme Court’s holding in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) (“*Tommy L. Griffin I*”), incorrectly contending that the case creates some sort of blanket tort duty owed by engineers to

parties outside privity, whereas the case actually directly states that, in analyzing professional liability claims “[w]hether such a duty [in tort] exists will depend on the facts and circumstances of each case,” *Id.* at 55-6, 463 S.E.2d 85, 89; and (2) Plaintiff misstates the burden of proof for this Motion, by citing a case evaluating a summary judgment granted to a party that bore the burden of proof on the matter for which it sought summary judgment. *C.f. Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020) (holding that defendant seeking summary judgment on its counterclaim bore burden of proof for on its counterclaim). This distinction is clear, because the case quoted by the *Beneficial* court says, in a block quotation used in *Beneficial*:

A party seeking summary judgment has the burden of clearly establishing by the record properly before the [c]ourt the absence of a triable issue of fact. All inferences from facts in the record must be viewed in the light most favorable to the party opposing the motion for summary judgment. A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment *even though his adversary does not come forward with opposing materials.*

Id. at 267, 847 S.E.2d 799, quoting *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (emphasis in *Beneficial* citation). There is a huge difference between a burden of proof, and the burden to establish the absence of an issue of fact; and Plaintiff improperly conflates the two. Our Rules of Civil Procedure and related cases state how a moving party can meet its initial responsibility to show the absence of an issue of fact. “Under Rule 56(c)[, SCRC], the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing – that is, pointing out to the trial court – that there is an absence of evidence supporting the nonmoving party’s case. The moving party need not support its motion with affidavits or other

similar materials **negating** the opponent’s claim.” *Id.*, citing and quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (internal citations and quotations omitted) (emphasis in original). TSC has met that burden by pointing out the absence of evidence that TSC had final decision-making authority as to the Construction Contract, because that authority expressly lay with the RCE for SCDOT. Because TSC has met its initial burden of pointing out the absence of an issue of fact, Plaintiff must, “under Rule 56(e), [SCRCP,] ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a **genuine issue for trial**.’” *Id.*, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (emphasis in original).

As Plaintiff greatly overstates the holding of *Tommy L. Griffin I*, it apparently completely ignores the existence of *Tommy L. Griffin II*, which held that the engineer, “as the moving party [in the motion for summary judgment], who in the posture of this case does not have the burden of proof, was not required to present affidavits to negate [the plaintiff’s] claims.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 471, 570 S.E.2d 197, 203 (Ct. App. 2002) (“*Tommy L. Griffin II*”). As stated in *Tommy L. Griffin II*, “a plaintiff in a professional malpractice action is required to introduce expert testimony to establish the defendant’s standard of care.” *Id.* at 472, 570 S.E.2d at 203. Five years into this case, the sole expert testimony Plaintiff has offered in this case is an affidavit from Kenneth O’Connell from 2018, which does not allege that TSC performed any design services, and which includes opinions related only to review of Drilled Foundation Installation Plans.¹ This is significant, because

¹ Tellingly, in his affidavit, which is in the record in this case, O’Connell implicitly acknowledges that neither TSC nor Martin Long were the RCE, because he states that TSC should have submitted plans to SCDOT’s BDGE, BCE, and RCE, rather than making comments. (O’Connell Affidavit, filed August 16, 2018, and in the record, ¶ 12.)

without expert testimony to identify an error in plans and specifications, Plaintiff's desperate allegations that TSC was the design engineer still do not create any issue of fact as to TSC's liability. Plaintiff cannot dispute the fact that TSC is not the engineer of record which sealed the Project plans.

Plaintiff asserts highly implausible and unreasonable inferences to attempt to create an issue of fact – namely alleging that Marty Long of TSC somehow acted as the RCE for SCDOT, even though the Standard Specifications incorporated into Plaintiff's Construction Contract identify the RCE as a SCDOT official, and when there are numerous documents within Plaintiff's document production which identify the RCE as Travis Patrick, an employee of SCDOT. To defeat a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

Further, Rule 56(e), SCRCPP, makes it clear that "when a motion for summary judgment is made and supported as provided as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." To-date, other than the one O'Connell affidavit, Plaintiff has offered no admissible testimony identifying any specific admissible contentions regarding breach of professional duty by TSC. Accordingly, that affidavit is the only evidence the Court can consider of alleged breaches of duty in opposition to TSC's Motion.

RESPONSE TO ERRONEOUS FACTUAL CONTENTIONS OF PLAINTIFF

Plaintiff incorrectly argues that the analysis of potential duties owed by TSC to Plaintiff begins and ends with the interaction of TSC and Plaintiff. Plaintiff's contract with Horry County

for construction of the Carolina Bays Parkway (the “Construction Contract”) actually and clearly defines the relationship; so, in an effort to defeat TSC’s Motion, Plaintiff contends that the Court should ignore that document. The Construction Contract expressly incorporates by reference the Standard Specifications for Highway Construction, 2007 Edition, issued by the South Carolina Department of Transportation (the “2007 Standard Specs”), meaning that Plaintiff accepted these 2007 Standard Specs as governing its work. Based on the affidavits filed by Plaintiff’s managerial employees, it appears clear that Plaintiff did not analyze or understand its obligations under the 2007 Standard Specs, and that such lack of prudent analysis likely resulted in problems with construction.

1. There Is No Genuine Issue of Material Fact as to Whether Martin Long of TSC Served as RCE for SCDOT—He Did Not.

Although Plaintiff argued in sworn statements issued by two managerial employees that it was unclear as to whether Marty Long of TSC was acting as RCE as defined by Section 105.1 of the 2007 Standard Specs, the 2007 Standard Specs themselves clearly state that the RCE is an “SCDOT Official.” (2007 Standard Specification, Section 101.2).² The Role of the RCE of SCDOT is explicit in the 2007 Standard Specs:

Unless otherwise specified elsewhere in these specifications, the RCE will decide all questions that may arise regarding the quality and acceptability of materials furnished, the work performed, the rate of progress on the work; the interpretation of the Plans and Specifications; acceptable fulfilment of the Contract by the Contractor; disputes and mutual rights between Contractors; and compensation for the work. The RCE will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract.

² Relevant portions of the 2007 Standard Specifications are provided as Exhibit 1, hereto.

The RCE has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor for failure to correct unsafe conditions for its workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders of the RCE; for periods as the RCE deems necessary due to unsuitable weather; for conditions considered unsuitable for prosecution of the work; or for any other conditions or reason that the RCE deems to be in the public interest. No additional compensation is paid to the Contractor because of such suspensions of work.

The RCE is not authorized to increase the obligation of the Department [of Transportation] under the Contract except as provided herein.

(2007 Standard Specifications, Section 105.1.) Plaintiff argues that TSC could not identify the RCE for SCDOT, which is untrue. TSC did not identify the RCE by name, because it was not relevant to the Motion. What is true is that there is no genuine issue of fact as to who acted as RCE for SCDOT – Travis M. Patrick, P.E., served as RCE for SCDOT for the Project. To be generous, the sworn testimony of Lou Hutcherson in his Affidavit attached as Exhibit A to Plaintiff's Brief is implausible and incredible, stating that "Martin Long of TSC held himself out as [SCDOT's] Resident Construction Engineer." (Ex. A to Pl's Brief in Opp., ¶ 4.) During the period which Hutcherson testified he was "Project Engineer" for Plaintiff, as demonstrated by Flatiron's own document production,³ Hutcherson wrote an email to Long to state that Flatiron

³ If Plaintiff argues that the documents offered from Plaintiff's own production somehow are not sufficiently authenticated, TSC makes reference to Exhibit A to Plaintiff's Brief in Opposition to TSC's Motion for Summary Judgment, wherein Linda Brumfield offers sworn testimony that "[i]t is the regular course and business of FCI for an employee or representative of FCI with knowledge of an act, event or condition to create or input such information and documents into the electronically maintained business records of FCI at or reasonably soon after the event occurs, and it is the ordinary and regular practice for FCI to maintain such records." (Ex A to Pl's Brief in Opp, ¶ 3.) Further, the emails drafted by Hutcherson are admissible as the prior statement of a witness, under Rule 801(d)(1), SCRE, and as the admission of a party opponent under Rule 801(d)(2), SCRE. Patrick's emails and correspondence are public records, admissible under Rule 803(8), SCRE. Finally, the documents prove notice to Hutcherson and Flatiron and are admissible because they do not fit the definition of hearsay.

ceased all SC-707 Bent 1 concrete removal. Hutcherson copied Patrick on the email, and he received a response stating:

Lou,

We know the vertical steel in the existing foundation has been damaged, and we have concerns that the use of the trackhoe mounted hoe-ram may have damaged the concrete in the existing foundation. Since the foundation is a continue piece, prior to proceeding with any further work, we need to have an evaluation performed on the condition of the foundation. To properly evaluate it, the rest of the concrete must be removed. You need to resubmit your proposed removal procedure for review showing how you will remove the rest of the concrete without causing further damage to the underlying foundation.

Travis M. Patrick, P.E.
Resident Construction Engineer
District 5 Special Projects
South Carolina Department of Transportation

(FIC000170769, attached hereto as Exhibit 2.) (Emphasis added.) It seems implausible that Hutcherson would not remember who SCDOT's RCE was, after that person ordered him to remove all concrete from Bent 1. Similarly, as demonstrated by Plaintiff's own document production, in November 2015, which appears to be incomplete, includes emails and letters between Patrick and Hutcherson, with Long copied, wherein Patrick identifies himself as RCE, and Hutcherson agrees to have certain work approved by the RCE. Hutcherson never asks for the identity of the RCE, because it is clear he knows who serves as RCE.⁴ (FIC000170384-5; FIC00002499-500, attached hereto as Exhibit 3.) In the flowchart, identified as Exhibit 6 to the Hutcherson Affidavit, Patrick

⁴ Further undermining Hutcherson's vague assertions, Travis Patrick was selected as 2016 Resident Construction Engineer of the Year, based on his work in Horry County, during the period that Hutcherson was working on the project at issue. (See SCDOT's "The Connector," a self-authenticating periodical under Rule 902(6), SCRE, which also serves as a public record of a state agency under Rule 803(8), SCRE, Spring, 2016, p. 17, attached hereto as Exhibit 4.)

is identified on the line above Martin Long, consistent with the 2007 Standard Specifications, which state, in outlining “Authority and Duties of the RCE’s Representatives:

Authorized representatives of the RCE may inspect all work done and all materials furnished. Such inspection may extend to all or part of the work and to the preparation, fabrication, or manufacture of the material to be used. However, such inspection does not relieve the Contractor of any responsibility or obligation to perform the work strictly in accordance with the requirements of the Contract. **The RCE’s representative has the authority to reject defective material and to suspend any work that is being improperly performed subject to the final decision of the RCE.** The RCE’s representative is not authorized to alter or waive the provisions of the Contract, to approve or accept any portion of the work, or to issue instructions contrary to the Plans and Specifications. In no case will the RCE’s representative act as superintendent or perform other duties for the Contractor or interfere with the management of the work by the Contractor’s superintendent. **Do not construe advice given by the RCE’s representative as in any way binding on the RCE or the Department or as releasing the Contractor from the fulfillment of the terms of the Contract.**

(2007 Standard Specs, Section 105.9.) (Emphasis added.) Even from the documents and testimony offered by Plaintiff in a feeble attempt to create an issue of fact as to who held the position of SCDOT’s RCE, it is clear that Long was a Representative of RCE, whose initial decisions and inspections are subject to the final decision of the RCE. Hutcherson’s affidavit describes tasks consistent with “Representatives of the RCE,” not the RCE. In Paragraph 15 of his Affidavit, Hutcherson acknowledges that Long was to review Plaintiff’s submissions and “pass it along for **final approval by the owner and/or SCDOT.**” (Ex B to Pl’s Brief in Opp., ¶ 15.) This is consistent with the definition of Representative of the RCE, which Representative carries no ultimate authority.

2. Plaintiff Has Offered No Evidence to Demonstrate that TSC Designed Any Portion of the Project at Issue, Nor Has It Offered Any Evidence of Alleged Negligent Design by TSC, Causing Damage to Plaintiff.

Plaintiff argues, without evidence, that TSC designed plans and specifications, based on language in a contract to which Plaintiff was not a party. TSC provided sworn testimony that it did not sign or seal any plans, and Plaintiff has failed to identify any such plans or to identify any witness to provide any admissible testimony to show TSC ever did so. Plaintiff must identify admissible evidence creating an issue of fact, and, because it asserts claims for professional negligence, it must also identify expert testimony identifying a breach of duty in design, if design occurred, which caused damage to Plaintiff. Plaintiff is in possession of all design drawings as the Project Contractor, and it has failed to produce any drawings which are signed, sealed or prepared by TSC, even though it has an obligation to provide evidence to contradict TSC's identification of a lack of a genuine issue of material fact.

3. Plaintiff Disingenuously Implies There is an Issue of Fact as to SCDOT's Sole Authority to Reject Work.

As noted in TSC's summary of reply, Plaintiff has misstated the burden of proof for this Motion. At page 12 of Plaintiff's Brief in Opposition, Plaintiff accuses TSC of making a conclusory statement, unsupported by affidavits, even though *Tommy L. Griffin II* says, in analyzing burdens of proof under Rule 56, SCRCP: "the moving party [in a motion for summary judgment], who in the posture of this case does not have the burden of proof, [is] not required to present affidavits to negate [the plaintiff's] claims." *Tommy L. Griffin II*, 351 S.C. at 471, 570 S.E.2d at 203. Even if TSC were required to present evidence to support the statement, which it is not, Sections 105.1 and 105.9 of the 2007 Standard Specs make it clear that the RCE for SCDOT

has authority to make final decisions, while representatives of the RCE only have power to act, “subject to the final decision of the RCE.” 2007 Standard Specs, Section 105.9.

LEGAL REPLY ARGUMENT

1. Plaintiff Has Vastly Overstated the Holding of *Tommy L. Griffin I*.

First, it remains undisputed that Plaintiff presents no claims in this case other than ones for purely economic losses; so, this Court must evaluate the source of the duty Plaintiff claims TSC owed to determine whether the economic loss rule bars recovery. In *Tommy L. Griffin I*, South Carolina’s Supreme Court states that “the question of whether [a] plaintiff may maintain an action in tort for purely economic loss turns on the determination of the duty [that] plaintiff claims the defendant owed.” *Tommy L. Griffin I*, 320 S.C. 49, 54, 463 S.E.2d 85, 88 (1995). The Court noted that “a growing number of states have refused to apply the ‘economic loss’ rule to actions against design professionals where there is a ‘special relationship’ between the design professional and the contractor.” *Id.* at 53, 463 S.E.2d at 87. The Court then compared the law of design professionals to that affecting professional liability for lawyers and accountants, noting that “[those groups of] professionals, however, owe a duty to the client and **sometimes to third parties** which arises separate and distinct from the contract for services.” *Id.* at 55, 463 S.E.2d at 89 *citing* *Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 636 N.E.2d 503 (Ill. 1994).⁵ Lawyers, for example, owe duties to only a limited number of groups of non-clients, but it is not a blanket duty to all non-clients.

It is no small irony that, after leading its Brief in Opposition with priggish arguments regarding the clarity and accuracy of TSC’s citations of law, Plaintiff fails to report one of the

⁵ Although Plaintiff argues that this Court should disregard opinions for other states, the Supreme Court of South Carolina used an Illinois Supreme Court opinion to support its finding that professionals (accountants in that case) sometimes owe duties to non-client third parties.

central holdings of the case on which it principally relies. In *Tommy L. Griffin I*, the Court notes that lawyers and accountants have long been held liable to clients for malpractice, and that they sometimes owe duties to clients and third parties which arise separately and distinctly from contracts for services. Drawing an analogy to that circumstance, the Court notes “we see no 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 **separate and distinct from any contractual duties between the parties or with third parties.**” *Id.* (emphasis added). Our Supreme Court then states, and Plaintiff conveniently excludes from its Brief, “[w]hether such a duty exists will depend on the facts and circumstances of each case.” *Id.* (emphasis added).

Whether there is a duty of care is a matter of law, not a factual determination. “The court must determine, as a matter of law, whether the law recognizes a particular duty.” *Steinke v. S.C. Dep’t of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999).

Based on the express holding of *Tommy L. Griffin I*, the determination of duty owed by that engineer to a non-client contractor in that case is limited to the facts of that case. There is no South Carolina case analyzing tort duties owed by an engineer providing CEIT services as one of the RCE’s Representatives.⁶ For this reason, TSC provided examples of analyses of other states. That said, it is clear that TSC’s relationship with Plaintiff is very different than the relationship of engineer and contractor in *Tommy L. Griffin*. In that case, the engineer “was the design engineer and supervised the project for the County.” *Tommy L. Griffin I*, 320 S.C. 49, 51, 463 S.E.2d 85, 86 (1995). In the present case, TSC acted as a Representative of the RCE, with no final decision-

⁶ As noted on p. 1 of TSC’s Brief in Support, CEIT services is construction, engineering, inspection and testing services.

making authority, and Plaintiff was expressly told in writing: “Do not construe advice given by the RCE’s representative as in any way binding on the RCE or the Department or as releasing the Contractor from fulfillment of the terms of the Contract.” 2007 Standard Specs, Section 105.9. Plaintiff has offered no evidence from any person stating that Plaintiff was ever told or that Plaintiff even ever thought that Marty Long was “RCE for SCDOT” as defined by Sections 101.2 and 105.1 of the Standard Specs; so, Plaintiff has not created any **genuine** issue of material fact. In this case, TSC’s role was to provide “Construction Engineering and Inspection Services,” which is a fundamentally different factual situation that held by the engineer in *Tommy L. Griffin*. In *Tommy L. Griffin*, the Engineer served as Project Engineer, with final authority for decisions on safety and operations. In the present case, any decisions made by TSC were preliminary, subject to final review, approval or rejection of SCDOT through the RCE. The RCE’s role, for purposes of project supervision, was very similar to that of the engineer in *Tommy L. Griffin*. Plaintiff has identified no cases in South Carolina where an engineer providing Construction Engineering and Inspection services for an owner was deemed to owe a duty of care to a general contractor outside privity, and this Court must determine as a matter of law whether such a duty exists.

This is where South Carolina law becomes critical to the analysis. As noted in TSC’s Brief in Support, S.C. Code Ann. Regs. §49-300(B) states that “[t]he Rules of Professional Conduct [for Engineers and Land Surveyors] delineate specific obligations engineers and surveyors **must meet**.” *Id.* (Emphasis added.) The Engineer “shall hold paramount the safety, health, and welfare of the public in the performance of their professional duties.” S.C. Code Ann. Regs. §49-301. Further, “[t]he Engineer ... **shall avoid conflicts of interest**.” S.C. Code Ann. Regs. § 49-304 (emphasis added). Plaintiff argues for the Court to recognize a duty that these regulations appear

to deem improper, whereby an engineer would owe a duty to a non-client not to do too thorough a job evaluating construction for the benefit of the engineer's client and the general public.

As noted above, “[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.” *Simmons v. Tuomey Reg. Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). “The determination of the existence of a duty is solely the responsibility of the court.” *Miller v. City of Camden*, 329 S.C. 310, 320, 494 S.E.2d 813, 818 (1997). Further, our Supreme Court has held:

Whether the law regarding a particular duty is an issue of law to be decided by the Court. An affirmative legal duty exists only if created by statute, contract, relationship, status, or some other special circumstance.

Hendricks v. Clemson University, 353 S.C. 449, 456, 578 S.E.2d 711 (2003). Plaintiff has identified no statute, contract, relationship, status or special circumstance creating a duty. It argues that the status of TSC creates a duty, but that argument is directly contradicted by the 2007 Standard Specs, which are incorporated into the Construction Contract, as well as the TSC Contract, which creates no duty owed by TSC to Plaintiff. Finally, South Carolina regulations in the Rules of Professional Conduct for Engineers, which were adopted pursuant to statutory authority, demonstrate that this Court should not find a duty to exist which would create an impermissible conflict of interest for TSC. Accordingly, the Court should find no duty owed by TSC to Plaintiff. Specifically, there is no evidence that TSC had final supervisory authority over Plaintiff, and the 2007 Standard Specs actually prove that it did not. In *Tommy L. Griffin I*, the Engineer assumed certain duties, including that of project design, whereby, under South Carolina law it assumed duties to the public regarding safety and to the contractor regarding constructability of the plans and specifications. Further, that Engineer had final decision-making authority over

the General Contractor, agreed to by its client, Charleston County, in the form of a contract. In this case, TSC did not.

2. Plaintiff Has Failed to Identify Any Evidence Indicating Either Party to the TSC Contract Intended Plaintiff to Be a Third-Party Beneficiary of the TSC Contract.

Once again, Plaintiff's arguments against summary judgment on its third-party beneficiary claims are built upon a fundamental misunderstanding of South Carolina law. Plaintiff brought the claim, and Plaintiff bears the burden of proof. To satisfy Rule 56, SCRCP, TSC has stated, in the affidavit of Peter Strub, who was the person who signed the TSC Contract for TSC, that TSC never considered or intended Plaintiff to be a third-party beneficiary of the TSC Contract. Although TSC did not have a burden to provide evidence, it did so with Strub's affidavit. Plaintiff has failed to offer any evidence of intent of either Horry County or TSC to confer third-party beneficiary status on Plaintiff. The case has been pending for 5 years, and there is no reasonable argument that Plaintiff needs further discovery on the issue. Rule 56(e) requires Plaintiff to provide evidence of intent as to third-party beneficiary status to defeat TSC's Motion, and Plaintiff has failed to do so.

Plaintiff's legal arguments on this issue are not credible. Plaintiff argues that, because the TSC Contract does not expressly say "Plaintiff is not a third-party beneficiary," there must be an issue of fact. By law, the TSC Contract must be read as a whole, and Plaintiff has identified no provision of the TSC Contract which it contends confers a third-party benefit on Plaintiff. Accordingly, Plaintiff has failed to provide evidence to defeat TSC's motion. The cases that Plaintiff attempts to argue as refuting TSC's position actually bolster it. Evidence of intent is only necessary in an ambiguous contract, and Plaintiff has identified no ambiguity as to intent regarding third-party beneficiaries. "A third-party beneficiary is a party that **the contracting parties intend to directly benefit.**" *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485,

488 (2005). The purpose of the TSC Contract was to benefit Horry County and its citizens, not Flatiron. Plaintiff has provided no evidence at all that either Horry County or TSC intended the TSC Contract to directly benefit Plaintiff; therefore, TSC is entitled to summary judgment on Plaintiff's cause of action for breach of contract by third-party beneficiary.

4. The TSC Contract Demonstrates TSC's Agency Status with Horry County, as Well As SCDOT, for the Project at Issue.

TSC's Scope of Services, which is Attachment A to the TSC Contract, demonstrates that TSC acted as an agent for both Horry County and SCDOT in providing Construction Engineering and Inspection Services, stating:

The SCDOT and Horry County desire to hire a ConsultantPI to perform Construction Engineering and Inspection (CEI) Services for the above-described project to include but not be limited to, construction management, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the contract requirements.

(TSC Contract, filed as Exhibit E to TSC's Brief in Support, p. 21/28.) Interestingly, this document also differentiates between TSC and SCDOT's Resident Engineer because it states:

As part of the project, SCDOT will require the Consultant to furnish a fully functional office for use by SCDOT and Consultant. The location of the project office shall be approved by SCDOT. All installation fees and monthly bill shall be the responsibility of the Consultant. The Consultant and SCDOT shall agree upon minimum dimensions of the project office prior to signing rental agreements. At a minimum, the project office shall have one ½ bath, one Private Office for the Project Engineer, **private office for SCDOT Resident Engineer**, and workspace for support staff, including a plan table...

(TSC Contract, p. 26/28 (emphasis added)).⁷

⁷ Marty Long filled the role of Project Engineer, as defined in the TSC Contract, and Travis Patrick, as noted above, was Resident Engineer for SCDOT.

Review of the TSC Contract and the Standard Specifications demonstrates that Horry County delegated all decision-making authority to SCDOT's Resident Construction Engineer, and that TSC acted as a representative of the RCE. (2007 Standard Specs, §105.3(2-3), 105.9; *see also* TSC Contract, Scope of Services, pp. 21 - 27.) Plaintiff erroneously argues: (1) that there is no evidence of the Principal's manifestation of any agency, when it is clear from the TSC Contract and the 2007 Standard Specs (as well as the emails that Plaintiff placed in the record); and (2) that because agency is normally an issue of fact, summary judgment is inappropriate. Summary judgment is appropriate, because Plaintiff has failed to meet its burden to oppose the Motion under Rule 56(e) – it has offered no evidence showing a lack of agency relationship. The TSC Contract gave TSC authority to inspect Plaintiff's work, and the 2007 Standard Specs gave Plaintiff notice of that authority. This provides the immunity which defeats the claim for tortious interference.

4. Even in the Brief in Opposition, Plaintiff Premises Claims Against TSC on Breach of the TSC Contract. This Is Fatal to Plaintiff's UTPA Claim.

All of Plaintiff's claims against TSC are premised upon TSC's alleged breach of duties related to its CEIT Services under the TSC Contract. "A mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done so intentionally. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012), *vacated in part as to other causes of action, but affirmed as to this holding* by 410 S.C. 319 (2014). In that case, the Court of Appeals found that claims of unjustified delays with improper justification did not create sufficient evidence to defeat a motion for summary judgment as to UTPA claims. *Id.* In its Brief in Opposition, Plaintiff argues that the alleged unfair trade practices of TSC were breaches of the professional standard of care. This is not unfair or misleading activity; it is a claim

for professional negligence. Plaintiff has offered no legal support for the proposition that S.C. law allows it to recover treble damages and attorneys' fees for a negligence claim, and allegations of negligence are insufficient to allow for recovery for UTPA violations. Again, Plaintiff appears not to understand its obligation at this point in the proceedings to produce admissible evidence of unfair or misleading actions in the conduct of business.

Plaintiff incorrectly argues that there is no specific regulatory measure authorizing the activities performed by TSC. S.C. Code Ann. §40-22-20(25) defines the "practice of engineering" to include "the review of construction for the purpose of monitoring compliance with drawings and specifications." S.C. Code Ann. § 40-22-2 states that "[i]n order to safeguard life, health, and property and to promote the public welfare, the practice of engineering ... in this State is subject to regulation." S.C. Code Ann. Regs §49-301(A) requires that an "Engineer shall at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public and shall conduct their practice to fulfill this obligation." Again, Plaintiff alleged that TSC's provision of CEI Services was excessive, but engineering regulations issued by statutory authority authorize and require TSC to conduct its practice in recognition that TSC's primary obligation is to protect safety, health, property and welfare of the public." TSC applied its professional judgment in fulfillment of this obligation. This is authorized and required by state regulatory authority; therefore, TSC is immune from UTPA liability.

CONCLUSION

Plaintiff's Brief in Opposition fails to create any genuine issue of material fact, but it does use innuendo and implication in an effort to confuse the Court. The facts are clear – there is no privity between TSC and Plaintiff, and there is no special relationship giving rise to tort duties. Plaintiff has identified no contract or statute which creates duties, and this Court should, as a matter

of law, find that no duties exist. Plaintiff has had 5 years to create issues of fact, and TSC has incurred hundreds of thousands of dollars in expenses in defense of a claim that has once been placed on a trial roster. There is no reasonable argument that the motion is premature, and it is clear that Plaintiff has failed to identify evidence to refute TSC's assertion of the absence of an issue of material fact. TSC is entitled to judgment as a matter of law.

As to Plaintiff's objections to citations, the undersigned addresses the arguments, which he deems meritless, in Exhibit 5, filed herewith.

WILKES ATKINSON & JOYNER, LLC

August 2, 2023

s/ C. Daniel Atkinson
 Michael B.T. Wilkes, Esq. (S.C. Bar 6107)
mwilkes@wajlawfirm.com
 320 Broad St., Suite 220
 Charleston, SC 29401
 843.737.6229

- And -

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

*Attorneys for Defendant
 TranSystems Corporation*

EXHIBIT 1

**Reply Brief in Support
Of Defendant's
Motion for Summary Judgment**

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

101.1

101.2

DIVISION 100
GENERAL PROVISIONS
SECTION 101

DEFINITIONS AND TERMS

101.1 General

- 1 The titles or headings of the sections and subsections of these Standard Specifications are in bold type and are intended for convenience of reference and do not have any bearing on the interpretation. The number to the left of each paragraph is also for convenience of reference and does not have any bearing on the interpretation.
- 2 Cited publications, including the Office of Materials and Research (OMR) Standard Method of Tests, SCDOT Supplemental Specifications, SCDOT Supplemental Technical Specifications, and specification from other organizations or associations refer to the most recent issue or edition of the publication accepted or adopted by the Department, including interim publications, in effect at the time of advertisement of the proposal unless otherwise specified.
- 3 Action required of the Bidder or Contractor in these specifications is written as a command in the active voice, imperative mood to communicate the Bidder's or Contractor's responsibilities in a direct manner. The subject "the Bidder" or "the Contractor" is understood. Omission of words or phrases such as "the Contractor shall," "unless otherwise specified," or "unless otherwise directed" is intentional. Interpret the specifications as if they were included.
- 4 Sentences that define the Department's responsibility are written in the indicative mood, in either active or passive voice.

101.2 Abbreviations and Acronyms

- 1 Wherever the abbreviations and acronyms in the following tables are used in these specifications, the Supplemental Specifications, the Supplemental Technical Specification, the Special Provisions, or on the Plans, take them to represent the respective expressions in the following tables.

ORGANIZATIONS or PUBLICATIONS	
AASHTO	American Association of State Highway and Transportation Officials
ACI	American Concrete Institute
ADA	Americans with Disabilities Act
AED	Associated Equipment Distributors
AGC	Associated General Contractors of America

(table continued on the next page)

101.2

101.2

(table continued from the previous page)

ORGANIZATIONS or PUBLICATIONS	
AISC	American Institute of Steel Construction
AMRL	AASHTO Materials Reference Laboratory
ANLA	American Nursery & Landscape Association
ANSI	American National Standards Institute
API	American Petroleum Institute
ASME	American Society of Mechanical Engineers
ASNS	<i>American Standard for Nursery Stock</i>
ASNT	American Society for Nondestructive Testing
ASTM	American Society for Testing and Materials
AWPA	American Wood Preserver Association
AWS	American Welding Society
CFR	<i>Code of Federal Regulations</i>
CRSI	Concrete Reinforcing Steel Institute
DBE	Disadvantaged Business Enterprise
ECTC	Erosion Control Technology Council
EPA	(U.S.) Environmental Protection Agency
FHWA	Federal Highway Administration
GSI	Geosynthetic Institute
ISEA	International Safety Equipment Association
ISO	International Organization for Standardization
MUTCD	<i>Manual of Uniform Traffic Control Devices</i>
NCHRP	National Cooperative Highway Research Program
NCMA	National Concrete Masonry Association
NEC	<i>National Electrical Code</i>
NESC	<i>National Electrical Safety Code</i>
NIST	National Institute of Standards and Technology

(table continued on the next page)

101.2

101.2

(table continued from the previous page)

ORGANIZATIONS or PUBLICATIONS	
NPDES	National Pollutant Discharge Elimination System(General Permit)
NRMCA	National Ready Mixed Concrete Association
NTPEP	National Transportation Product Evaluation Program
OSHA	Occupational Safety and Health Administration
PCI	Prestressed Concrete Institute
PUPS	Palmetto Utility Protection Service
SAE	Society of Automotive Engineers
SCDA	South Carolina Department of Agriculture
SCDHEC	South Carolina Department of Health and Environmental Control
SCDNR	South Carolina Department of Natural Resources
SCDOI	South Carolina Department of Insurance
SCDOT	South Carolina Department of Transportation
SPIB	Southern Pine Inspection Bureau
SSPC	Steel Structures Painting Council
UL	Underwriters Laboratories
USACE	United States Army Corps of Engineers
USCG	United States Coast Guard
USDA	United States Department of Agriculture
USDOT	United State Department of Transportation

SCDOT OFFICIALS and OFFICES	
AME	Asphalt Materials Engineer
BCE	Bridge Construction Engineer
BDE	Bridge Design Engineer
BDGE	Bridge Design Geotechnical Engineer
DCE	District Construction Engineer
DEA	District Engineering Administrator

(table continued on the next page)

101.2

101.3.1

(table continued from the previous page)

SCDOT OFFICIALS and OFFICES	
DOC	Director of Construction
GME	Geotechnical Materials Engineer
MRE	Materials and Research Engineer
OMR	Office of Materials and Research
RCE	Resident Construction Engineer
RME	Resident Maintenance Engineer
SHE	State Highway Engineer
SME	Structural Materials Engineer

PAY UNITS	
ACRE	Acre
BALE	Bale
CF	Cubic Foot
CY	Cubic Yard
CYHM	Cubic Yard Half-Mile
EA	Each
LB	Pound
LF	Linear Foot
LS	Lump Sum
MI	Mile
MSY	One-Thousand Square Yards
SF	Square Foot
STA	Station (100 feet)
SY	Square Yard
TON	Ton (2000 pounds avoirdupois)

101.3 Terms and Definitions**101.3.1 General**

- ¹ Wherever in these specifications or in other contract documents the following terms and definitions are used, interpret the intent and meaning as set

105.1

105.2

SECTION 105

CONTROL OF WORK

105.1 Authority of the RCE

- 1 Unless otherwise specified elsewhere in these specifications, the RCE will decide all questions that may arise regarding the quality and acceptability of materials furnished, the work performed, the rate of progress of the work; the interpretation of the Plans and Specifications; acceptable fulfillment of the Contract by the Contractor; disputes and mutual rights between Contractors; and compensation for the work. The RCE will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract.
- 2 The RCE has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor for failure to correct unsafe conditions for its workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders of the RCE; for periods as the RCE deems necessary due to unsuitable weather; for conditions considered unsuitable for the prosecution of the work; or for any other conditions or reason the RCE deems to be in the public interest. No additional compensation is paid to the Contractor because of such suspensions of work.
- 3 The RCE is not authorized to increase the obligation of the Department under the Contract except as herein provided.

105.2 The Design Plans, Shop Plans, and Working Drawings

- 1 The Design Plans (the Plans) are furnished by the Department and consist of drawings that show details necessary to provide a comprehensive idea of the construction work contemplated. Road Plans will normally show the roadway alignment, profile, grades, and typical cross-sections. In general, Structure Plans will show the general details and dimensions of the structure work contemplated. In cases where dimensions are not shown, the Structure Plans show general features and details necessary to provide a comprehensive idea of the structure. The drawings for bridges will show sufficient information to enable the Contractor to determine the work contemplated, but the RCE reserves the right to have the Plans supplemented with Construction Plans, Erection Plans, or Working Drawings by the Contractor.
- 2 The information contained upon the Plans regarding the results obtained from test piles or borings is a record of the conditions revealed by fieldwork and shows conditions that were encountered at the place where the test piles were driven or the borings made, as nearly as those conditions could be interpreted by the inspector observing the operations. The Contractor is not bound to accept or rely on this data. Interpret them in the light of experience, and make such additional borings and investigations, including test piles, as desired in order to determine or obtain satisfaction concerning the conditions affecting lengths of piles or entering into the construction of foundations.

105.8.3**105.10**

equipment, tools, supplies, and incidental work, including computations, necessary to satisfactorily complete the work.

- 10 The payment includes all direct and indirect costs and expenses required to complete the work.

- 11 Pay items under this subsection include the following:

Item No.	Pay Item	Unit
105081X	Construction Stakes, Lines, And Grades (For Bridge Only)	EA

105.9 Authority and Duties of the RCE's Representatives

- 1 Authorized representatives of the RCE may inspect all work done and all materials furnished. Such inspection may extend to all or part of the work and to the preparation, fabrication, or manufacture of the material to be used. However, such inspection does not relieve the Contractor of any responsibility or obligation to perform the work strictly in accordance with the requirements of the Contract. The RCE's representative has the authority to reject defective material and to suspend any work that is being improperly performed subject to the final decision of the RCE. The RCE's representative is not authorized to alter or waive the provisions of the Contract, to approve or accept any portion of the work, or to issue instructions contrary to the Plans and the Specifications. In no case will the RCE's representative act as superintendent or perform other duties for the Contractor or interfere with the management of the work by the Contractor's superintendent. Do not construe advice given by the RCE's representative as in any way binding on the RCE or the Department or as releasing the Contractor from the fulfillment of the terms of the Contract.

105.10 Inspection of the Work

- 1 Furnish the RCE with every reasonable facility for ascertaining whether or not the work as performed and materials used are in accordance with the requirements and intent of the Contract. At any time before final acceptance of the work, remove or uncover such portions of the finished work as directed by the RCE. After examination by the RCE, restore said portions of the work to the standard required by the Specifications. Should the work thus exposed and examined prove acceptable, the uncovering or removing and the replacing of the covering or making good of the parts removed will be paid for as Extra Work; but should the work so exposed and examined prove unacceptable, the uncovering or removing and replacing of the covering or making good the parts removed will be at the Contractor's expense. Any work done or materials used without the knowledge or inspection by the RCE or the RCE's representative may be ordered removed and replaced at the Contractor's expense. Failure to reject any defective work or material does not in any way prevent later rejection when such defect is discovered, nor does it obligate the Department to final acceptance.

EXHIBIT 2

**Reply Brief in Support
Of Defendant's
Motion for Summary Judgment**

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

Date: Tue, 1 Dec 2015 9:32:00 PM (UTC)
Sent: Tue, 1 Dec 2015 9:32:26 PM (UTC)
Subject: RE: 26.036775A CBP - RE: 707 Abutment 1 Wall Pour 1 Form Blowout
From: Patrick, Travis M
To: 'Hutcherson, Lou' <LHutcherso@flatironcorp.com>; Long, Martin L - TranSystems <MLLong@transystems.com>;
 djkenedy@transystems.com; dlpieronek@transystems.com; Thompson, Jason D <ThompsonJD@scdot.org>; Sanborn, Todd <tsanborn@flatironcorp.com>; Mattison, Bill R <MattisonBR@scdot.org>;
CC:
Attachments: IMG_0136.jpg

Lou,

We know the vertical steel in the existing foundation has been damaged, and we have concerns that the use of the trackhoe mounted hoe-ram may have damaged the concrete in the existing foundation. Since the foundation is a continuous piece, prior to proceeding with any further work, we need to have an evaluation performed of the condition of the foundation. To properly evaluate it, the rest of the concrete must be removed. You need to submit your proposed removal procedure for review showing how you will remove the rest of the concrete without causing further damage to the underlying foundation.

Travis M. Patrick, PE

Resident Construction Engineer
 District 5 Special Projects
 South Carolina Department of Transportation
 3829 Business Street
 Myrtle Beach, SC 29579
 Office: 843-236-9658

From: Hutcherson, Lou [mailto:LHutcherso@flatironcorp.com]
Sent: Tuesday, December 01, 2015 3:58 PM
To: Long, Martin L - TranSystems
Cc: djkenedy@transystems.com; dlpieronek@transystems.com; Patrick, Travis M; Thompson, Jason D; Sanborn, Todd
Subject: RE: 26.036775A CBP - RE: 707 Abutment 1 Wall Pour 1 Form Blowout

Mr. Long –

Pursuant to direction in the e-mail below, Flatiron has ceased all SC-707 Bent 1 concrete removal. To clarify and confirm, Flatiron will continue SC-707 Bent 1 abutment construction of and on non-impacted areas and elements.

Should you have any questions, or if I can possibly be any assistance, please contact me at your convenience.

Best Regards,

Lou Hutcherson

Project Manager
 Carolina Bays Parkway (SC 31)

FLATIRON

7449 Butler Rd.
 Myrtle Beach, SC 29588
 732.754.3358 **CELL**
 LHutcherso@flatironcorp.com
 www.flatironcorp.com

Build the Best. Be the Best

EXHIBIT 3

**Reply Brief in Support
Of Defendant's
Motion for Summary Judgment**

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

Date: Mon, 2 Nov 2015 9:55:43 PM (UTC)
Subject: File # 26.036775A - SC-31 - ICWW Foundations
From: Patrick, Travis M <PatrickTM@scdot.org>
To: Lou Hutcherson (LHutcherso@flatironcorp.com) <LHutcherso@flatironcorp.com>;
CC: CR-Marty Long <mllong@transystems.com>; Craig Rivers (craig.rivers@meadhunt.com) <craig.rivers@meadhunt.com>; Thompson, Jason D <ThompsonJD@scdot.org>; Mattison, Bill R <MattisonBR@scdot.org>;
Attachments: 26.036775A - ICWW Foundation Letter.pdf

Lou,

Please see the attached letter regarding the foundations in the ICWW and respond as soon as possible. If you have any questions, please contact me on my cell at 843-340-4623.

Travis M. Patrick, PE

Resident Construction Engineer

District 5 Special Projects

South Carolina Department of Transportation

3829 Business Street

Myrtle Beach, SC 29579

Office: 843-236-9658

November 2, 2015

Lou Hutcherson
Project Manager
Flatiron Constructors, Inc.
7449 Butler Road
Myrtle Beach, SC 29588

RE: SC File No. 26.036775A – Carolina Bays Parkway – Phase III – SC-31 –
ICWW Bridge Foundations and In-Water Work Restrictions

Mr. Hutcherson:

As you are aware, the contract for this project has a restriction on in-water work from January 1 through April 30 of each year during the spawning season for Atlantic Sturgeon. This restricts any work from taking place below the water's surface.

We are two months away from the beginning of this season, and one of the items on your critical path that must be completed are the foundations for Bents 14, 15, 16, and 17 that tie the six drilled shafts together into one pier. Two of these bents, 15 and 16, are out in the water of the ICWW. These foundations are also mass concrete pours that require special insulation and monitoring requirements.

The project plans have a pay item for a Cofferdam Type 4 (30,001-40,000 CF) for each of these two bents to allow you to dry out the foundation location and form and pour the foundation concrete without exposure to the brackish tidal water of the ICWW. To date, we have not received any working drawings for review for a cofferdam, and have been told by your staff that you do not intend to use a cofferdam. If use of a cofferdam is intended, there is very little time left to get the working drawings submitted and approved and install the cofferdams before the In-Water Work Restriction begins.

Because of the current water levels of the ICWW, and the potential for high water levels in the future, we do not understand how you intend to construct Bents 15 and 16. You must comply with both the In-Water Work Restriction and ensure that tidal water does not come into contact with the fresh concrete per section 702.4.2.7 of the 2007 Standard Specifications. You must also comply with all of the mass concrete requirements from section 702.4.2.5 of the 2007 Standard Specifications and your approved mass concrete plan. We also must be able to inspect the work both during the forming stage and after the forms have been removed from the completed foundation.



Date: Thu, 17 Dec 2015 3:43:27 PM (UTC)
Sent: Thu, 17 Dec 2015 3:41:46 PM (UTC)
Subject: FW: File # 26.036775A - SC-31 - ICWW Foundations
From: LHutcherso@flatironcorp.com
To: PatrickTM@scdot.org;
CC: mllong@transystems.com; ThompsonJD@scdot.org; MattisonBR@scdot.org; craig.rivers@meadhunt.com; Jeff.Burkett@meadhunt.com; Michael.Cook@meadhunt.com;

Travis –

To clarify and confirm a few ambiguous items in my previous response to you:

1. Per predicted tide charts, the top elevation of the mats placed on the steel falsework for ICWW Bents 15 and 16 Foundations should be above top of water at all times and all subsequent work should be above the water's surface. NOTE: Post 1,000 year rain event ICWW water levels have finally receded to near normal levels – there has been a significant and noticeable difference just this week.
2. Flatiron will only plan, schedule, and perform ICWW Bents 15 & 16 Foundations work when there is no water level conflict occurring, scheduled to occur, or predicted to occur.
3. Flatiron will only plan, schedule, and perform ICWW Bents 15 & 16 Foundations work when there is no water level conflict occurring, scheduled to occur, or predicted to occur that will prevent or limit proper and satisfactory inspection of all construction Foundation phases, activities, and elements.
4. All planned, scheduled, and performed ICWW Bents 15 and 16 Foundations work will be coordinated with and approved by the RCE.
5. Secondary containment for all ICWW Bents 15 and 16 concrete placements will be resolved and subsequently approved by the RCE prior to any placements.

And, as you are aware, any and all in-place Bents 15 and 16 Foundations falsework and soffit forms will remain in place until the no in-water work moratorium expires April 30, 2016. In a follow-up correspondence, based on the documented satisfactory and successful ICWW Bent 14 Foundation construction, upon completion of the ICWW Bents 15 and 16 foundations, Flatiron will respectfully requests to proceed with respective columns and caps construction.

Should you have any questions, or if I can possibly be additional assistance, please contact me at your convenience.

Kind Regards,

Lou Hutcherson

Project Manager
 Carolina Bays Parkway (SC 31)

FLATIRON

7449 Butler Rd.
 Myrtle Beach, SC 29588
 732.754.3358 **CELL**
 LHutcherso@flatironcorp.com
 www.flatironcorp.com

Build the Best. Be the Best

From: Hutcherson, Lou
Sent: Monday, December 14, 2015 1:32 PM
To: 'Patrick, Travis M'

Cc: Long, Martin L - TranSystems; Craig Rivers (craig.rivers@meadhunt.com); Thompson, Jason D; Mattison, Bill R
Subject: RE: File # 26.036775A - SC-31 - ICWW Foundations

Travis –

Please see attached Flatiron's response to the issues and concerns expressed in your letter dated November 2, 2015.

Should you have any questions, please contact me at your convenience.

Best Regards

Lou Hutcherson

Project Manager
 Carolina Bays Parkway (SC 31)

FLATIRON

7449 Butler Rd.
 Myrtle Beach, SC 29588
 732.754.3358 **CELL**
 LHutcherso@flatironcorp.com
 www.flatironcorp.com
Build the Best. Be the Best

From: Patrick, Travis M [mailto:PatrickTM@scdot.org]

Sent: Monday, November 02, 2015 4:56 PM

To: Hutcherson, Lou

Cc: Long, Martin L - TranSystems; Craig Rivers (craig.rivers@meadhunt.com); Thompson, Jason D; Mattison, Bill R

Subject: File # 26.036775A - SC-31 - ICWW Foundations

Lou,

Please see the attached letter regarding the foundations in the ICWW and respond as soon as possible. If you have any questions, please contact me on my cell at 843-340-4623.

Travis M. Patrick, PE

Resident Construction Engineer
District 5 Special Projects
South Carolina Department of Transportation
 3829 Business Street
 Myrtle Beach, SC 29579
 Office: 843-236-9658

EXHIBIT 4

**Reply Brief in Support
Of Defendant's
Motion for Summary Judgment**

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

THE CONNECTOR

VOLUME XXVI NO. 1

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

SPRING 2016

Christy Hall confirmed as Secretary of Transportation

By Pete Poore

By a vote of 37-0 on Jan. 18, 2016, the South Carolina Senate gave final approval to Governor Nikki Haley's appointment of SCDOT veteran **Christy Hall** as Secretary of Transportation. The Governor appointed Hall to the job on Oct. 21, 2015. The approval meant that no longer did the Secretary have the words "Acting" or "Interim" at the front of her title as she did on three occasions.

Officially, the title was new, but Hall was not new to the job. Governor Haley called upon her in January 2014 to serve as "Acting Secretary" and again in June 2015. Both appointments were the result of resignations by previous secretaries.

The Abbeville native relied on her experience as a Deputy Secretary in two different Divisions, as a DEA in District 2 and other management and front line positions both at HQ and in the field earned during her 20+ year career at SCDOT.

When Acting Secretary Hall stepped up in 2014, she took the reins just in time for two winter storms that slammed into the state in February. The second storm was so devastating it brought down thousands of trees that not only blocked roads, but brought down power lines all across the state. The Federal Emergency Management Agency (FEMA) came to South Carolina to assist SCDOT and other agencies. Little did anyone know at that time that FEMA would come back to South Carolina in

the fall of 2015 on a much larger scale.

That's when the historic rain-fall deluged South Carolina on the first weekend in October of 2015. Three months of rain fell in just three days. The result was an unprecedented 1,000 year flood that took lives, destroyed property, wiped out 541 roads and bridges, while leaving many more temporarily closed until the floodwaters receded.

Then-Acting Secretary Hall led the SCDOT team before, during and after the flood in preparing and putting a strategy in place to deal with a calamity that had never been seen before.

The strategy put together by Hall and her senior staff paid off. South Carolina was braced for road and bridge damage expected to add up in the billion dollar range. The SCDOT team pulled together as one unit and held the cost down to \$137 million. The majority of the 541 roads and bridges were expected to be closed well into 2016. But within 60 days, just over 90% of those devastated facilities were back in service once more.

Shortly after Secretary Hall was named to the job, she devised a list of four management initiatives, all aimed at making SCDOT a more stable, open and accountable agency and to improve delivery of projects. In short, Hall wants the agency to get better at doing what it promised, and completing projects when it promised to do so.

Hall's initiatives are living, breathing efforts that can be monitored. This link to the



ROB THOMPSON/THE CONNECTOR

South Carolina Secretary of Transportation Christy Hall

SCDOT web site: <http://www.scdot.org/inside/mmDashboard.aspx> provides an introduction to a "Monthly Management

Dashboard" for a short summary of agency accomplishments and specific measurements for the four initiatives:

See HALL page 10

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ELECTRONICALLY FILED - 2025 JAN 02 12:28 PM HOBBS COUNTY CLERK'S OFFICE

PLEAS - CASE#2022CP2606148

Branham, Robbins join Commission

Two new members have joined the Transportation Commission replacing Commissioners whose terms have expired.

David Eugene "Gene" Branham now represents the 5th Congressional District.

Branham, of Kershaw County, was sworn in on March 10 to replace Commissioner W. B. Cook.

Branham has been employed with Lynches River Electric Coop for 44 years. He served 20 years on the Kershaw County Transportation Committee. Branham has been a citizen of Kershaw County for more than 43 years.

Branham and his wife, Gail H. Branham, have three adult children, David, Patricia and Adam.



Branham



Robbins

The new SCDOT Commissioner from the 1st Congressional District is **Robert D. Robbins**. He replaces Jim Rozier whose term expired.

Robbins is an attorney from Summerville and is a past chair and member of

both the Tri-County Regional Chamber of Commerce and the Greater Sumerville/Dorchester County Chamber Board of Directors.

Robbins and his wife, Mary Bryce Robbins, have a son, Bryce, and daughter, Lena.

Wooten elected Commission Chairman; Hardee, Vice Chairman

By Bob Kudelka

The SCDOT Commission on Thursday, Jan. 21, 2016, unanimously elected Mike Wooten of the 7th Congressional District as the new Chairman of the SCDOT Commission.

The Commission also unanimously elected John N. Hardee of the 2nd Congressional District as the new Vice Chairman of the SCDOT Commission.

Wooten, of Murrells Inlet, is the Founding Partner and the Principal Engineer of DDC Engineers, Inc., a Myrtle Beach based consulting engineering firm specializing in land planning, landscape architecture, environmental planning, land surveying and civil engineering.

Prior to founding DDC Engineers, Inc., in 1986, Wooten was employed by Santee Cooper where he was responsible for the upkeep of 42 miles of dams. He also served as the liaison with the U.S. Army Corps of Engineers and South Carolina Congress-

sional Delegation for the state owned utility. He has a Bachelor of Science in Civil Engineering from The Citadel in 1977.

Hardee, representing the 2nd Congressional District, is Director of Public Affairs for Lamar Outdoor Advertising. Hardee previously served a term as SCDOT Commission Vice Chairman from 2002 to 2004.

Over a six-year period, Hardee helped secure \$1.2 million in funding for enhancements in the Loris community. A portion of U.S. 701 is named in his honor. Hardee has been a member of the Board of Directors of the Central Midlands Council of Governments since 2004. He is chairman of the Midlands Authority for Conventions, Sports & Tourism and was a member of the Richland County Transportation Committee prior to becoming an SCDOT Commissioner again. For his efforts in securing funding for the Airport Connector, the road was named in his honor, the "John N. Hardee Expressway."

South Carolina Department of Transportation Commission



Robert D. Robbins

1st Congressional District



John N. Hardee

2nd Congressional District



Ben H. Davis Jr.

3rd Congressional District



Woodrow W. Willard

4th Congressional District



Gene Branham

5th Congressional District



Samuel B. Glover

6th Congressional District



Mike Wooten

7th Congressional District



Clifton Parker

Commissioner At-Large

THE CONNECTOR

Winner of awards from S.C. Division, Public Relations Society of America; Carolinas Association of Business Communicators; S.C. Press Association and AASHTO.

Editor: Stan Shealy

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Christy Hall is the South Carolina Secretary of Transportation.



South Carolina Press Association Associate Member

SCDOT is #1 in asphalt reclamation in U.S., Canada



PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

LEFT: Christy Hall accepts an award from the Asphalt Recycling and Reclaiming Association (ARRA) on April 21, 2016, during the April SCDOT Commission meeting. Shown from left: SCDOT Director of Maintenance Jim Fedra, S.C. Secretary of Transportation Christy Hall, Miller Group General Manager Kimbel Stokes, ARRA President Ryan Essex, SCDOT Acting Deputy Secretary for Engineering Leland Colvin, and Stan Bland of the Portland Cement Association.

ABOVE: ARRA President Ryan Essex makes comments before presenting the award. Essex said that SCDOT does more asphalt reclamation than any other state or province in the United States or Canada.



Engineering publication names Hall a top 25 newsmaker of 2015



By Pete Poore

Christy A. Hall has been named by "Engineering News-Record" (ENR) as one of the publication's Top 25 Newsmakers of 2015. Secretary Hall is credited with leading the massive effort in South

Carolina to restore the state's highways and bridges following the historic 1,000-year October flood.

ENR announced its annual list of Top 25 Newsmakers in January 2016. Upon learning of the honor, Hall said, "I'd like to thank ENR for recognizing the hard work and

dedications of the SCDOT Team in managing an unprecedented natural disaster in our state."

Secretary Hall was invited to attend ENR's recognition ceremonies in New York in early April. She was honored along with the other members of the Top 25 list.

I-85/I-385 Gateway groundbreaking ceremony

By Bob Kudelka

SCDOT's largest project since the Arthur Ravenel Jr. Bridge ceremoniously began on a chilly morning in February with a groundbreaking led by state and local leaders.

The I-85/I-385 Gateway Project in Greenville was described as both a watershed moment for the region and an impact project for the state.

"It's an absolutely phenomenal day here in Greenville," said Secretary of Transportation **Christy A. Hall**. "The Governor and members of the General Assembly are very supportive of this project."

The I-85/I-385 Gateway is designed to improve safety and increase traffic capacity for an estimated 200,000 vehicles that use this interchange each day. By 2035, that number is estimated to rise to 350,000 vehicles per day.

Hall knows the region well, having spent 10 years there earlier in her career, including doing design and construction work on past I-385 improvements.

"So I know what the traffic is like up here; in the morning rush hour, evening rush hour, Friday after lunch on Woodruff Road, holidays... This project is absolutely intended to correct all those issues we deal with day to day in this particular region of this state," Hall said.

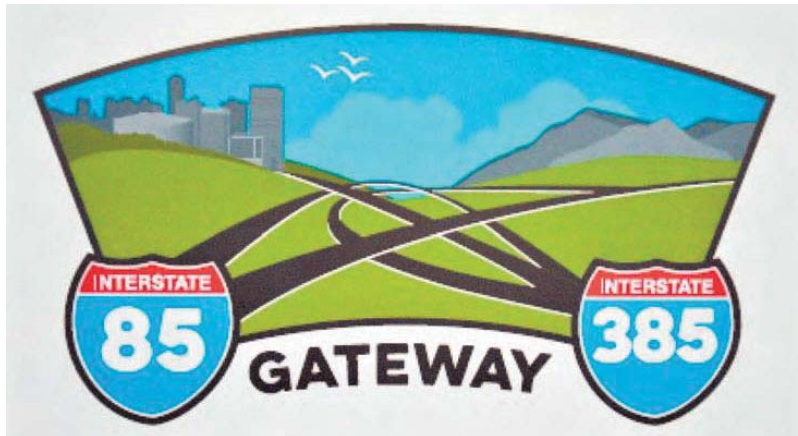
State Representative Wendy K. Nanney, of House District 22, said there was a lot of excitement for the project and advised the public to visit www.85385gateway.com for more details.

"It's going to be fantastic," said Nanney, who is also Chairman of the Greenville County Legislative Delegation. "We thank the DOT for their hard work and the effort and energy that's already been put into this project."

GPATS Chairman Butch Kirven said, "A project of this magnitude...no matter how you look at it, it takes teamwork, old-fashioned communications, hard work and understanding among all the partners."

SCDOT partners on the project include: the Federal Highway Administration (FHWA); the contractor, Flatiron-Zachry Joint Venture; Civil Engineers Consulting Services as the Lead Engineer for Contractor; HDR/ICA, (the Design Review Consultant); and Infrastructure Consulting and Engineering, (the Construction Engineering and Inspection Consultant).

"FHWA is very fortunate to have such a good relationship with SCDOT, which benefits the Federal Highway Administration, SCDOT, other partners, stakeholders and, ultimately, the traveling public," said Emily Lawton, FHWA South Carolina Division Administrator.



SCDOT's team is led by District 3 Engineer Administrator **Stephanie Jackson-Amell**; District Construction Engineer **David Hebert** and Resident Construction Engineer **Jack Valetti**.

Also speaking at the event was Max Metcalf, former vice chairman of the S.C. Transportation Infrastructure Bank Board (SCTIB). Rev. T.E. Simmons of Reedy Fork Baptist Church delivered the invocation and benediction.

- The construction of 11 new bridges, including two flyovers that will replace the existing tight loop ramps that tie I-85 from and to I-385.

- Reconstructing and enhancing the traffic signal system on the Woodruff Road Corridor.

- Constructing additional turn lanes at the Woodruff Road intersections with Market Point Drive and Garlington Road.

The project's scope includes creating a

By The Numbers

The I-85/I-385 Gateway Project

- 4.7 miles of interstate rehabilitation
- 7.2 miles of widening for northbound and southbound lanes
- 350,000 square feet of new bridges
- 260,000 square feet of MSE walls (Mechanically Stabilized Earth)
- 95,000 cubic yards of concrete
- 9.5 million pounds of structural steel
- 5.7 million pounds of rebar
- 50,000 linear feet of drainage pipe

Cost

\$231 Million

new interchange within the general footprint of the current interchange, staging construction of the new lanes, ramps, and bridges; and by widening I-385 through the project limits.

The completion of the project is estimated for summer 2019.



Commission Vice Chairman John N. Hardee led the pledge of allegiance. Director of Communications **Pete Poore** was emcee.

Funding sources for this project include Act 98, signed into law by Governor Haley in 2013 after passage by the Legislature; FHWA; the SCTIB; and GPATS.

Highlights of the Gateway project also include:

- The extension of the 4th auxiliary lane on I-85 Northbound & Southbound between I-385 and Pelham Road.

- The widening of I-385 to six lanes from Butler Road to Roper Mountain Road.



SCDOT flooding story goes international

By Bob Kudelka

Finland and South Carolina each have a population of about 5 million, but it's hard to find other similarities between the country and state that are 4,683 miles apart.

That doesn't mean the Finnish people aren't interested in the Palmetto State, however.

In February, a correspondent from the Finnish Broadcasting Company, Yle, visited Headquarters in Columbia for a story on SCDOT's response to the 1,000-year flood in October 2015.

Pirkko Pontinen, who is from Helsinki but works out of Washington, D.C., and cameraman Bryan Rager had been in town covering the Republican Primary. They decided to stay an extra day to visit SCDOT and then stop by Bluff Road for footage of one of the remaining recovery projects.

"We always tell about the disasters, and when it's over we never mention what happens afterward," Pontinen said. "This is a good chance to cover South Carolina and what it is doing."

Pontinen interviewed Chief Engineer for Operations **Andy Leaphart** about SCDOT's response to the flood and its impact financially.

"As a small country, we are about the size of South Carolina so people like to know about the culture and understand what a huge country the United States is," Pontinen said.

Finland, who shares a 1,300-kilometer border with Russia, has constant budget battles concerning its own roads and bridges, Pontinen said.

"We have a heavy winter... so roads and bridges don't really compare well with South Carolina," she said. "The whole structure has to be different. Here you don't have the ice cold one meter down. So when the



ABOVE: Bryan Rager, videographer, and reporter Pirkko Pontinen were in town to cover the Republican Primary, but stopped by SCDOT to ask about the disastrous flooding in October.

spring and summer comes you see what has happened during the winter."

Pontinen said her broadcasting company is funded through its government, with each family paying a yearly tax based on their income. She said like the BBC, the news company is not censored by its government.

Yle has four television channels, six radio channels, and over 20 regional radio stations and regional news from eight districts. Its mission is to "support democracy and everyone's opportunity to participate by providing a wide variety of information, opinions and debates as well as opportunities to interact."



PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

The crew interviews Chief Engineer for Operations Andy Leaphart on Feb. 2, about SCDOT's response to the flood and its financial impact on South Carolina.

2016 State of SCDOT

By Pete Poore

Secretary of Transportation **Christy A. Hall** presented the "State of SCDOT" report for 2016 to the Senate Transportation Committee on Feb. 3, 2016.

The annual review provided the current status of South Carolina's transportation network. Secretary Hall's overall assessment was summed up in these four points:

- Most South Carolinians are riding on poor pavement.
- Most bridges are in good condition, but high-risk areas exist that need to be addressed.
- Day-to-day maintenance is graded a "D."
- Congestion is increasing and will impact S.C.'s economic competitiveness.

Secretary Hall also presented her vision of the agency in an effort to make SCDOT more effective as well as initiatives to improve the agency's transparency and accountability.

The entire presentation of the 2016 State of SCDOT can be found on the SCDOT web site or at the link shown at right:

<http://www.scdot.org/inside/pdfs/StateofSCDOT2016.pdf>



David Bland
IT Services



John Boylston
Preconstruction



Thomas Dorn
District 2



Sarah Gaffney
District 6



Rickette Gennie
FHWA



Claude Ipock
Construction

Leadership Education and Development

New SCDOT program to find, train LEADers

By Pete Poore

Secretary of Transportation **Christy Hall** places great value on recruiting, training and retaining SCDOT employees. The goal is for SCDOT to provide career opportunities, not just jobs.

However, the agency had not had a leadership program for a number of years. In 2015, the Human Resources Office was directed to develop a program that would groom future leaders and would get underway in 2016.

The newly launched Leadership Education and Development (LEAD) SCDOT program has been designed to provide leadership training to employees who wish to compete for senior positions as they become vacant in the future.

LEAD SCDOT is a year-long program. Sessions are scheduled two days per month. The core of the program is a series of presentations by senior managers who discuss the structure and mission of the office or division each one represents, and how these offices or divisions play a role in the overall mission of SCDOT.

Additional sessions are conducted on leadership, hands-on activities with maintenance crews and bridge inspections teams. Class members also team up to work on a class project that addresses an issue that impacts SCDOT as a whole.

The first class members were nominated, screened and selected in 2015. LEAD SCDOT's first class got underway in January 2016.

Members in the first class are: **David Bland** of IT Services, **John Boylston** of Preconstruction, **Thomas Dorn** of District 2, **Sarah Gaffney** of District 6, **Rickette Gennie** of FHWA, **Claude Ipock** of Director of Construction Office, **Jim Johannemann** of Director of Maintenance Office, **Cedric Keitt** of Rights of Way, **James Mattox** of Preconstruction, **William McGoldrick** of Environmental, **Keith Melvin** of Director of Maintenance Office, **Chad Rawls** of Planning, **Cathy Rice** of LPA, **Jeff Terry** of District 7, **J. Allen Thompson** of District 1, **Tony Thompson** of District 3, **Mark Westbury** of Rights of Way and **Jacqueline Williams** of Finance and Administration.



Jim Johannemann
Maintenance



Cedric Keitt
Rights of Way



James Mattox
Preconstruction



William McGoldrick
Environmental



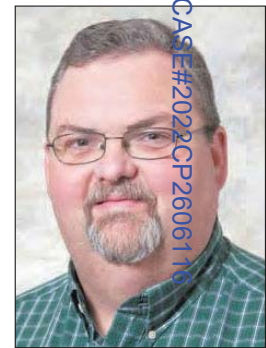
Keith Melvin
Maintenance



Chad Rawls
Planning



Cathy Rice
Local Program Administration



Jeff Terry
District 7



J. Allen Thompson
District 1



Tony Thompson
District 3



Mark Westbury
Rights of Way



Jacqueline Williams
Finance and Administration

2016 Maintenance Conference: *Engineers share information to increase productivity*



Marlboro Resident Maintenance Engineer Robby Bean explains the salt brine production process and showcases different setups maintenance forces across the state use in their own production of salt brine.

By Bob Kudelka

The 2016 Maintenance Conference drew more than 700 employees who attended one of three days of training March 8-10 in Columbia.

Attendees heard from SCDOT

leadership and learned the latest about a variety of subjects including how to make homemade salt brine, brush and limb management and chainsaw safety.

"This conference provides training that is beneficial to our maintenance personnel," said As-



PHOTOGRAPHS BY CODY CROUCH/THE CONNECTOR

SCDOT Maintenance foremen from across the state spend a day asking questions and gathering information on maintenance-related topics during the 2016 SCDOT Maintenance Conference at The Zone in Williams-Brice Stadium on March 8-10. Topics covered include salt brine production, job site hazards and staying safe, casting and installation of bridge deck panels, brush and limb management and chainsaw safety.

sistant State Maintenance Engineer **Walter Reed**, who oversaw the conference on behalf of the

Office of Maintenance. "They see processes and activities they may have not thought of. It also gives them a chance to network with other foremen and other employees in the state and see how other counties and districts are doing things."

Plus, Reed said, "This is a good way to show them we appreciate them and provide training at the same time."

Speakers at the conference included Secretary of Transportation **Christy Hall**, Acting Secretary for Engineering **Leland Colvin**, Chief Engineer for Operations **Andy Leaphart** and Director of Maintenance **Jim Fedra**.

Employees who led training sessions included Marlboro RME **Robby Bean** on Salt Brine Production, Kershaw Maintenance Foremen **Dewey Bass** and **Chris Team** on Casting and Installation of Bridge Deck Panels, Aiken RME **Joe Winfield** and Bamberg

RME **Bobby Crider** on Brush and Limb Management – Contract and In-House.

District 3 ADME **Brandon Wilson** and Spartanburg ADME **Jamie Gambrell** on Equipment Operator Training, District 4 Vegetation Manager **Ken Caldwell** on Chainsaw Safety, District 5 ADME **Lorena Pate** and District 6 ADME **Keith Richards** on Training for Hazard Assessment Forms, Dorchester ARME **Steve Michalski** and Charleston ARME **Joel Smith** on Maintenance and ITMS.

Chris McCurry of the Director of Maintenance Office on DOM – HMMS Updates and Issues and **Charlie Brown** of Human Resources on Headroom and Hiring.

Reed would like to thank the following for helping make the 2016 Maintenance Conference a success: **Michelle Walker**, **Tina Kennedy**, **Meagan Hare**, **Phyllis Hughes** and **Lawton Player**.



SHEP

State Highway
Emergency Program

*Incident responders
get hands-on training*

By Rob Thompson

SCDOT incident responders with the state's SHEP program got hands-on experience during special trainings across the state. The training was given to teach them how to clear vehicles quickly and safely from the roadway after they have been in an accident. The training was done by Danny Thompson and John Weaver from Parsons Corporation. SHEP responders in Columbia met on March 10. Greenville received training on Feb. 17, and SHEP responders in Charleston received training on March 8. There was an extra make-up session in Greenville on April 20.



PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

SCDOT Incident Responders in Columbia examine a vehicle before they use a chain and their truck to flip the vehicle back on its wheels during the March 10 training session in Columbia.



John Weaver of Parsons Corporation shows SCDOT Incident Responders the best place to attach a chain to turn over a flipped vehicle.



Once the chain is attached properly to the flipped vehicle and the SCDOT SHEP truck, responders slowly flip the vehicle back onto its wheels.



ABOVE and RIGHT: Danny Thompson of Parsons Corporation gives SCDOT Incident Responders instructions on how to push a disabled vehicle out of the roadway depending on the steering capabilities and other conditions after a vehicle is damaged in a crash.



SHEP, Brian O’Cain celebrate 20 years of helping SC motorists



PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

SHEP Incident Responder Brian O’Cain has been with the highway assistance program since its inception in 1996. O’Cain says helping people is his favorite part of the job.

By Kim Corley

This year, the State Highway Emergency Program (SHEP) celebrates its 20th anniversary. Since 1996, SHEP has served thousands of motorists across the state. Those iconic blue trucks are one of the most visible programs administered by SCDOT.

Brian O’Cain has been with the SHEP program since the beginning. His first job with SCDOT was as a summer intern with the Richland Construction Office. For the past seventeen years, he has been a SHEP supervisor.

Being a SHEP responder seemed to be a natural fit. His father was a mechanic and he says that’s something that’s really helped him over the years.

A typical day begins bright and early for O’Cain and his crew. He arrives early to check out the trucks and meet with responders before heading out to cover the morning rush hour traffic.

Technology is one of the biggest changes for the SHEP program throughout the years. The introduction of the 511 Program and traffic cameras has dramatically decreased response time for responders. O’Cain added that SCDOT camera services often report disabled vehicles to responders.

During a ride along, O’Cain spots a vehicle on the side of I-20. A couple and their dog are stuck with a flat tire. Kelly McDonalds and her husband were on their way to Fort Bragg all the way from San Diego, Ca.

She was surprised South Carolina offered the SHEP Program. “This is great. We didn’t expect this at all,” she said. O’Cain makes quick work of putting on the spare and directed them to the closest tire shop.

He says that helping people and interacting with the public is his favorite part of being a responder. He’s glad to see how SHEP’s reputation has grown. “As the program has grown over the years, more local people are aware,” he said. People often tell him they are “Glad to see their tax money at work,” he added.

As one can imagine, O’Cain has seen a lot in the last two decades. For the most part, he sees flat tires and minor collisions. An afternoon in July 2006 made a lasting impression when a Columbia pilot turned a stretch of I-26 near Chapin into a runway. A mechanical problem with the single engine plane forced the pilot to make an emergency landing. Along with other emergency responders, O’Cain helped control slowed traffic until the plane was cleared to take off.

In his spare time, O’Cain enjoys a very unique hobby. “I’ve been a beekeeper for about four years,” he said. O’Cain describes himself as an avid outdoorsman who enjoys hunting and fishing. He began researching and reading about bees, then joined the South Carolina Mid-State Beekeepers Association. He gives the honey he harvests to family and friends.

O’Cain is a Columbia native where he lives with his wife, two dogs, three chickens and a few thousand bees in Rosewood.



SHEP 20th Anniversary

On Monday, April 25, the SHEP 20th anniversary news conference was held at the Traffic Management Center (TMC) on Shop Road. Speakers included Secretary Christy A. Hall, DPS Director Leroy Smith and Highway Patrol Colonel Michael Oliver. Above, Hall, SHEP operators and some Traffic Engineering personnel pose by a SHEP truck after the news conference.

The table below shows the number of motorists/incidents SCDOT SHEP Program has assisted in the past four fiscal years.

AREAS	FY 2012	FY2013	FY2014	FY2015
Columbia	7,584	7,847	8,350	8,408
Upstate (G’Ville/Spart.)	5,295	5,105	5,397	5,909
Rock Hill	2422	1,699	1,529	2,069
Charleston	10,115	9,745	9,059	8,101
Myrtle Beach	2869	3,132	4,952	5,209
Florence	3326	3,238	3,182	2,602
Cherokee	973	757	968	993
TOTAL RESPONSES	33,687	31,524	33,427	33,521

Coincidence?

When the SHEP program first started, the logo included a photo of a German Shepherd. On March 1, the couple O’Cain helped had a German Shepherd named Mac.





O’Cain changes a tire for a couple from California on March 1. Incident responders help keep disabled vehicles from causing traffic congestion along urban interstates in South Carolina.



ROB THOMPSON/THE CONNECTOR

Secretary of Transportation Christy Hall thanks the members of the South Carolina Senate upon her confirmation.

HALL
from page 1

http://www.scdot.org/inside/pdfs/Secretaries_Monthly_Management_Report.pdf
Secretary Hall's "Dashboard" is updated each month at the SCDOT Commission meetings.

After a whirlwind 10 months as SCDOT's leader, Secretary Hall had this to say upon her confirmation. "I am honored to serve the Great State of South Carolina and I greatly appreciate Governor Haley providing me this opportunity to lead the dedicated men and women of the S.C. Department of Transportation."

Severe February weather keeps SCDOT crews busy

Winter weather did not cause as much damage as it could have on two occasions in the state during the month of February. However, Maintenance crews were heavily involved during the week leading up to Feb. 12-14 in preparing for a mix of snow and ice that had been forecast for South Carolina. Crews prepared equipment and supplies and pretreated the interstates, anticipating winter storm conditions. However, the center of the front went further north causing only minimal accumulations on the state's roads. Later in the month on Feb.

24 and 25, a storm front that spawned tornados and caused significant damage and loss of life came from the Midwest to the East coast. Once again, our state was spared the brunt of the storm. But Maintenance crews around the state were called out to respond. More than 650 reports of fallen trees and tree limbs were made beginning on the afternoon of Wednesday, Feb. 24. Crews worked through the night and into Thursday, Feb. 25, clearing roads and repairing some traffic signals that were damaged or destroyed.

COMMISSION HONORS EMPLOYEES KILLED ON THE JOB



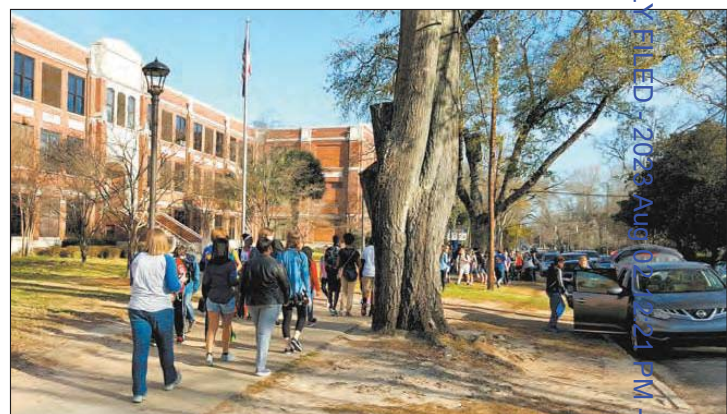
PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

The SCDOT Commission presented a resolution in memory of SCDOT employee Timothy Gibson who died in October while working during the flood. The resolution was presented to coworkers on Feb. 18, during the SCDOT Commission Meeting. From left, Commission Chairman Mike Wooten, Richland Maintenance Engineer Tony Magwood, Assistant Richland Maintenance Engineer Sandra Riley, District 1 Engineering Administrator Bryan Jones and South Carolina Secretary of Transportation Christy Hall.

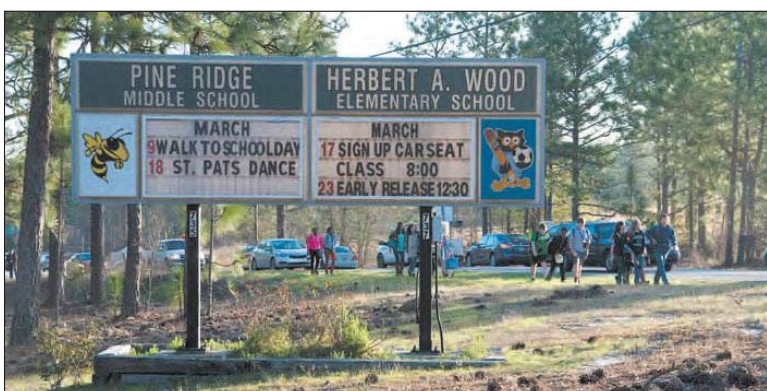


The SCDOT Commission read a resolution in honor of Henry Clay "Ray" Norris Jr. on March 24. Norris, a trades specialist III at Darlington Maintenance, died on the job on Oct. 20, 2015. From left, Roy Parnell and Treasure Scarborough accepted the framed resolutions which include a state flag from the South Carolina Statehouse from S.C. Secretary of Transportation Christy Hall and SCDOT Commission Chairman Mike Wooten.

Safe Routes to School promotes annual Walk to School Day



LEFT and ABOVE: Teachers and students from Hand Middle School students walk and bike from Sims Park to their school on March 9 as part of the annual 'Walk to School Day.'



PHOTOGRAPHS BY CODY CROUCH/THE CONNECTOR

ABOVE and RIGHT: Students at Pine Ridge Middle School participate in 'Walk to School Day' on March 9.



SCDOT Safe Routes to School honored as 'outstanding program'

The Southeast Chapter of the Association for Commuter Transportation (SEACT) recognized the South Carolina Safe Routes to School (SRTS) program as the Outstanding Transportation Demand Management Program for 2015. The award was presented at the Feb. 18 SCDOT Commission meeting.

The SCDOT SRTS program was selected from nominated projects and programs in eight states including South Carolina, North Carolina, Georgia, Tennessee, Florida, Alabama, Mississippi, Kentucky, and also Puerto Rico, beating out traditional commuter programs and projects.



SCDOT's program was nominated by the engineering firm AECOM, a SEACT organization member. From left are: Doris Ford of AECOM, S.C. Secretary of Transportation Christy Hall, Patti Sistrunk of AECOM, S.C. Safe Routes to School Coordinator Rodney Oldham, Emily Swearingen of AECOM, Jennifer Senn of AECOM and Tony Chapman of AECOM.



PHOTOGRAPHS BY ROB THOMPSON/THE CONNECTOR

Jerry Gosnell's second chance

Liver transplant an ordeal, but gives recipient inspiration to help others

By Kim Corley

Jerry Gosnell is the Resident Maintenance Foreman for the Hampton County Maintenance Office in District 7. He has been with SCDOT for 22 1/2 years. He is a native of Hampton County where he lives with his wife, Karen. His daughter, Kayla, is a senior at Clemson University studying accounting. She plans to pursue her master's degree after graduation.

Two years ago, a life-threatening illness tested the limits of his body and spirit.

On July 23, 2015, Jerry Gosnell finally got the call he and his family had been anxiously awaiting for 15 months. He was finally to receive a new liver.

The previous summer, Gosnell went to the ER for pain in his side. A CT scan of his abdomen revealed devastating news. He was diagnosed with gallstones and cirrhosis. He and his wife knew immediately that he would need a liver transplant because 14 years earlier, Gosnell's mother also needed a new liver.

She was the first in the family to be diagnosed with a genetic disorder called Alpha 1 Antitrypsin Deficiency. It is an inherited condition that may cause lung and liver disease. Tragically, his mother died while on the waiting list. Gosnell and his daughter went through genetic testing after her diagnosis. Doctors told them they were both carriers, but not likely to develop the active disease.

After receiving the call, Gosnell and his family had just 4 hours to get to the Medical University of South Carolina (MUSC) in Charleston for the transplant operation. They waited 19 excruciating hours before he was taken into the pre-op area. "I told my wife and daughter I loved them and was wheeled into the OR. That is the last thing I did for 23 days," he said.

Doctor's initially estimated Gosnell would remain in the hospital a week after the surgery. Unfortunately, there were complications. The first transplant did not go as expected; the organ cracked as blood flow was restored. This occasionally happens but doctors thought it could still function properly. He was taken to the ICU to recover. Less than 12 hours later he was hemorrhaging profusely and going into hypovolemic shock. His kidneys shut down and he became septic.

After two weeks, a second liver became available in Myrtle Beach. Gosnell was at the top of the transplant list because of the severity of his condition.

"After seven surgeries, two livers, di-



ROB THOMPSON/THE CONNECTOR

Jerry Gosnell is living proof that your health, often taken for granted, is the most important thing you have. After his liver transplant he is using his second chance to help others and promote organ donations.

alysis and lots of time and energy from everyone...I am alive and I am so thankful," he said.

That was only the beginning of Gosnell's journey. He was in a medically induced coma and on a ventilator for 23 days. He spent approximately 27 days in ICU, during which he lost 85 pounds.

His devoted wife, Karen, never left his side.

He was then transferred to Vibra Hospital of Charleston where he received extensive physical, speech and occupational therapies. Overcoming the muscle atrophy was his next hurdle. This was a long, slow process. When he first woke up, he couldn't move at all. With the help of his therapist, Alyssa Hydar, he stayed positive and diligent. After only a month at Vibra Hospital, he was able to take five steps.

His last transfer was to Colleton Medical Center where he continued with his therapy. Doctors told him he would stay for at least six weeks. Gosnell took that as

a challenge. He told the therapist he would be discharged by Halloween. He was able to go home on Oct. 23, 2015, after only arriving three weeks prior.

That same day, he returned to MUSC for a follow-up appointment with his surgeon. He was thrilled when the surgeon cleared him to drive.

He continued to grow stronger after he got home. "I threw the walker in the trash," he said and laughed. Karen, who is also a registered nurse, helped him with his physical therapy at home. "She told me I was her worst patient," he joked.

Through a lot of hard work and determination, Gosnell returned to work full-time on Dec. 1, 2015.

Doctors are impressed with his progress. He will have to take immunosuppressant (anti-rejection) medications for the rest of his life. He also takes anti-viral and anti-fungal medications, both are common for transplant patients. The drugs make him sensitive to the sun, so he wears sun-

screen daily.

Gosnell is also pleased with his progress. "I didn't realize how bad I felt while I was sick," he said.

The support from friends, family and coworkers was overwhelming for Gosnell. The Hampton County Office took up a collection for him and sent it to his wife. Resident Maintenance Engineer **Jack Priester** and his wife, JoAnn, visited often and took Karen and Kayla to dinner to take their minds off things. SCDOT coworker **Julie Collins** also visited as often as she could.

MUSC gave Gosnell the opportunity to write letters to both donors' families. He hopes they will respond because he would like to know more about their loved one.

Gosnell is taking full advantage of his second chance. "I'm a miracle. God has plans for me," he said.

This experience inspired him to help others. Every Sunday, he spends time with a mentally challenged man in his community.

PROMOTIONS

Cameron Albert, promoted to program coordinator II in Call Center on Mar. 17.

Cesar Aldrete, promoted to trades specialist III at Aiken Maintenance on Mar. 17.

Aspen Alford, promoted to trades specialist III at District 5 Bridge Inspection on Feb. 2.

Danny Allison, promoted to trades specialist III at Spartanburg Maintenance on Feb. 2.

Lawrence Armstrong, promoted to trades specialist V at District 3 Maintenance Operations on Feb. 17.

Michael Bagley, promoted to engineer/associate engineer III at Lexington Maintenance on Feb. 17.

Randy Bailey, promoted to trades specialist III at Spartanburg Maintenance on Jan. 2.

Michael Barbee, promoted to Director of Rights of Way on Feb. 17.

Richard Barfield, promoted to trades specialist V at Greenwood Maintenance on Feb. 17.

Joseph Bennett, promoted to engineer/associate engineer II in RPG 4 – Upstate on Dec. 17.

Kenneth Bethea, promoted to chief geodetic technician at Dillon Construction on Feb. 17.

Dustin Bolding, promoted to trades specialist II at Oconee Maintenance on Jan. 2.

Quincy Brodus, promoted to trades specialist III at Bamberg Maintenance on Feb. 2.

Loretta Brown, promoted to right of way agent I at Rights of Way – Greenville on Dec. 17.

Michael Brunson, promoted to mechanic III at Lexington Maintenance on Dec. 2.

James Burns, promoted to engineer/associate engineer II at Oconee Maintenance on Feb. 17.

Nathaniel Burriss, promoted to trades specialist V at District 6 Traffic Signals on Dec. 2.

Kenneth Butler, promoted to IT consultant I in IT Services on Dec. 17.

Elliott Calder, promoted to associate geodetic technician at Horry Construction on Dec. 2.

Steven Canaday, promoted to chief geodetic technician at Berkeley Maintenance on Dec. 17.

Kenneth Carter, promoted to trades specialist III at Bamberg Maintenance on Dec. 2.

Trenten Chambers, promoted

to trades specialist III at Saluda Maintenance on Mar. 2.

Jason Chambers, promoted to trades specialist II at Oconee Maintenance on Jan. 2.

Raymond Cheek, promoted to chief geodetic technician at District 4 Office on Mar. 17.

James Christmas, promoted to mechanic III at Richland Maintenance on Mar. 2.

Kody Clack, promoted to trades specialist III at Chester Maintenance on Jan. 17.

Marcus Clore, promoted to engineer/associate engineer III at District 5 Office on Mar. 17.

Carroll Collins, promoted to engineer/associate engineer I at Greenville Maintenance on Dec. 2.

Robert Collins, promoted to trades specialist III at Aiken Maintenance on Mar. 2.

Vernell Cooper, promoted to administrative assistant at Fairfield Maintenance on Dec. 17.

Christopher Couch, promoted to chief geodetic technician at Greenville Construction on Dec. 17.

Robbie Craigo, promoted to trades specialist III at Greenville Maintenance on Feb. 17.

Steven Davis, promoted to trades specialist V at Oconee Maintenance on Mar. 2.

Micheal Dukes, promoted to trades specialist III at Williamsburg Maintenance on Feb. 2.

Rebecca Dunn, promoted to trades specialist IV at Kershaw Maintenance on Dec. 17.

Brandon Durham, promoted to trades specialist III at Greenville Maintenance on Mar. 2.

Joseph Dwinnell, promoted to trades specialist IV at Anderson Maintenance on Feb. 17.

Robert Galbreath, promoted to trades specialist III at Pickens Maintenance on Feb. 2.

Edward Gariboldi, promoted to trades specialist IV at District 3 Traffic Signals on Feb. 17.

Scott Gaston, promoted to mechanic III at Fairfield Maintenance on Dec. 17.

Timothy Gemensky, promoted to engineer/associate engineer IV in Traffic Engineering on Dec. 2.

Chantago Gilchrist, promoted to trades specialist III at Dillon Maintenance on Feb. 17.

Daniel Godwin, promoted to associate geodetic technician at

Horry Construction on Mar. 2.

Jeremy Goodwin, promoted to engineer/associate engineer I in RPG 3 – Midlands on Dec. 2.

Ana Gordon, promoted to engineer/associate engineer II in RPG 2 – Pee Dee on Feb. 17.

James Gosnell, promoted to trades specialist IV at Greenville Maintenance on Dec. 2.

Sonya Grant, promoted to trades specialist III at Colleton Maintenance on Mar. 17.

James Gray, promoted to trades specialist III at Edgefield Maintenance on Feb. 17.

Jesse Gregory, promoted to trades specialist IV at Union Maintenance on Jan. 17.

Jesse Hames, promoted to engineer/associate engineer II at District 4 Special Projects on Mar. 17.

Whitney Hayes, promoted to trades specialist II at Oconee Maintenance on Jan. 2.

Allen Heyward, promoted to trades specialist IV at Lexington Maintenance on Mar. 17.

Derrick Holmes, promoted to trades specialist III at District 6 Bridge Inspection on Feb. 2.

James Holtzclaw, promoted to engineer/associate engineer III in RPG 1 – Lowcountry on Jan. 17.

James Howington, promoted to trades specialist III at York Maintenance on Dec. 2.

Donald Hughes, promoted to incident responder II at SHEP – Upstate I-85 on Feb. 2.

Matthew Hunter, promoted to trades specialist III at Chester Maintenance on Jan. 17.

Jeremy Jackson, promoted to chief geodetic technician at Marion Construction on Mar. 2.

Roy Jeffcoat, promoted to IT services specialist III in IT Services on Feb. 17.

Kimberly Johnson, promoted to associate geodetic technician at Materials and Research on Jan. 17.

Cedric Keitt, promoted to engineer/associate engineer III in Rights of Way on Dec. 2.

James Kirkland, promoted to trades specialist III at Spartanburg Maintenance on Feb. 2.

Laura Kline, promoted to engineer/associate engineer III at Materials and Research on Dec. 17.

Jeremy Knight, promoted to engineer/associate engineer III at Newberry Maintenance on Jan. 17.

Justin Lance, promoted to

trades specialist III at Pickens Maintenance on Mar. 2.

Jimmy Leonard, promoted to trades specialist V at Horry 1 Maintenance on Feb. 17.

Jordan Lisenby, promoted to trades specialist III at Chesterfield Maintenance on Feb. 17.

Steven Littlejohn, promoted to FTS manager II in Traffic Engineering on Mar. 17.

AaronLooper, promoted to trades specialist III at Greenville Maintenance on Dec. 17.

James Lusk, promoted to engineer/associate engineer III in RPG 4 – Upstate on Dec. 2.

David Marlowe, promoted to trades specialist III at Horry 1 Maintenance on Dec. 2.

Laquantra Mayberry, promoted to engineer/associate engineer II at Spartanburg Maintenance on Feb. 17.

David McAlister, promoted to trades specialist IV at Greenville Maintenance on Feb. 2.

Ryan McAlister, promoted to trades specialist III at Greenville Maintenance on Dec. 2.

Joseph McCurry, promoted to senior geodetic technician at Abbeville Construction on Feb. 17.

Levi McLeod, promoted to engineer/associate engineer III in Preconstruction Support on Feb. 17.

Stanley Meece, promoted to trades specialist III at Pickens Maintenance on Dec. 2.

Brad Merritt, promoted to trades specialist IV at Anderson Maintenance on Feb. 17.

Kenneth Mills, promoted to trades specialist III at Edgefield Maintenance on Feb. 17.

Dallas Mullinax, promoted to trades specialist V at District 3 Maintenance Operations on Mar. 17.

Gregory Nedrow, promoted to trades specialist IV at Horry 1 Maintenance on Mar. 17.

Steven Nelsin, promoted to senior geodetic technician at Greenville Construction on Dec. 17.

Anthony Owen, promoted to trades specialist V at Greenville Maintenance on Dec. 17.

Eugene Parnell, promoted to engineer/associate engineer III at Dillon Construction on Feb. 2.

Neal Peeler, promoted to trades specialist III at Cherokee Maintenance on Feb. 2.

Terry Poole, promoted to

trades specialist III at Aiken Maintenance on Dec. 2.

Charles Potts, promoted to supply manager I at Supply Depot on Mar. 17.

Joseph Powell, promoted to associate geodetic technician at Spartanburg Maintenance on Dec. 17.

William Rabon, promoted to trades specialist IV at Horry 1 Maintenance on Dec. 2.

Jon Reese, promoted to IT consultant I in IT Services on Jan. 17.

Christopher Reynolds, promoted to trades specialist III at Berkeley Maintenance on Mar. 17.

Robert Richter, promoted to engineer/associate engineer II in RPG 4 – Upstate on Jan. 17.

Anna Riddle, promoted to administrative coordinator I in Capital Improvements on Jan. 17.

Sandra Riley, promoted to engineer/associate engineer III at Sumter Maintenance on Dec. 17.

Ronald Riley, promoted to trades specialist IV at Beaufort Maintenance on Feb. 17.

Leroy Rivers, promoted to trades specialist III at Berkeley Maintenance on Mar. 17.

Heather Robbins, promoted to Director of Environmental Services on Jan. 17.

Thomas Rochester, promoted to trades specialist III at Spartanburg Maintenance on Feb. 17.

David Rogers, promoted to engineer/associate engineer IV in Office of Director of Construction on Mar. 2.

Richard Roof, promoted to engineer/associate engineer II in RPG 2 – Pee Dee on Jan. 17.

Randall Russell, promoted to engineer/associate engineer III at Greenville Maintenance on Dec. 2.

Timothy Scott, promoted to supply specialist III in Equipment Service Depot on Jan. 17.

Jesse Sessions, promoted to trades specialist V at District 1 Traffic Signals on Jan. 2.

James Simpson, promoted to trades specialist III at Anderson Maintenance on Mar. 2.

Tracy Smith, promoted to trades specialist IV at Spartanburg Maintenance on Jan. 2.

**PROMOTIONS
continue on next page**

PROMOTIONS - continued

Kelly Stapleton, promoted to engineer/associate engineer III in RPG 4 – Upstate on Dec. 2.

Gary Thackston, promoted to associate geodetic technician at Greenville Construction on Mar. 2.

Chinmay Thakore, promoted to associate geodetic technician at Greenville Construction on Feb. 2.

Stephen Tosco, promoted to engineer/associate engineer II in RPG 3 – Midlands on Dec. 2.

Charles Turner, promoted to trades specialist III at Greenville Maintenance on Feb. 17.

Philip Unrue, promoted to associate geodetic technician at Abbeville Construction on Feb. 2.

Jack Valetti, promoted to engineer/associate engineer III at District 3 Office on Jan. 17.

Wilbert Walker, promoted to trades specialist III at Dorchester Maintenance on Dec. 17.

Allen Ward, promoted to engineer/associate engineer III at Materials and Research on Mar. 17.

Larry Whisenhunt, promoted to trades specialist III at Bamberg Maintenance on Feb. 2.

John Williams, promoted to trades specialist III at Bamberg Maintenance on Dec. 2.

Jimmy Williamson, promoted to trades specialist IV at Lexington Maintenance on Dec. 17.

Howard Williamson, pro-

moted to engineer/associate engineer II in RPG 2 – Pee Dee on Dec. 2.

Phillip Willingham, promoted to trades specialist II at District 2 Office on Dec. 17.

James Willson, promoted to engineer/associate engineer II at Sumter Construction on Feb. 2.

Sam Wilson, promoted to trades specialist IV at District 6 Bridge Inspection on Feb. 17.

Craig Winn, promoted to engineer/associate engineer III in RPG 1 – Lowcountry on Dec. 2.

Emily Woods, promoted to engineer/associate engineer III in Office of Director of Maintenance on Mar. 17.

RETIREMENTS

Barbara Anderson, retired from Spartanburg Maintenance on Dec. 31.

Lorraine Bouknight Gayton, retired from Lexington Maintenance on Jan. 1.

Jimmy Brock, retired from Union Maintenance on Mar. 1.

Herbert Brown, retired from Colleton Maintenance on Feb. 26.

William Brown, retired from Newberry Maintenance on Dec. 2.

John Caskey, retired from Horry 1 Maintenance on Jan. 29.

Christopher Copeland, retired from District 4 Special Projects on Jan. 1.

William Cross, retired from Darlington Maintenance on Dec. 31.

Neal Dunlap, retired from Greenville Surveys on Dec. 1.

Kelvin Edwards, retired from IT Services on Mar. 4.

Charles Elliott, retired from Anderson Maintenance on Dec. 31.

Lanny Ensley, retired from Greenville Maintenance on Dec. 31.

Terry Faulk, retired from Lexington Maintenance on Jan. 28.

Larry Flowers, retired from Williamsburg Maintenance on Feb. 1.

David Fulmer, retired from

RPG 3 – Midlands on Mar. 21.

Patricia Gaither, retired from Fairfield Maintenance on Jan. 3.

Johnny Garris, retired from Materials and Research on Feb. 15.

Irwin Gibbons, retired from Clarendon Maintenance on Mar. 31.

Tommie Gordon, retired from Spartanburg Construction on Feb. 11.

Christopher Green, retired from SHEP – Upstate I-85 on Mar. 1.

David Gunter, retired from Lexington Maintenance on Mar. 25.

Joe Hawkins, retired from Greenwood Maintenance on Feb. 29.

Clarence Hicklin, retired from Chester Maintenance on Dec. 31.

Judy Hite, retired from Rights of Way on Dec. 30.

Charles Jackson, retired from Dorchester Surveys on Mar. 1.

John Johnson, retired from Greenville Maintenance on Mar. 17.

Donna Keaton, retired from Anderson Maintenance on Mar. 1.

Jeffery Kelling, retired from Sumter Construction on Feb. 1.

Michael Koon, retired from Materials and Research on Mar.

31.

Darrell Lawter, retired from Union Maintenance on Dec. 18.

Donald McElveen, retired from Road Data Services on Mar. 30.

Larry Orr, retired from Hampton Maintenance on Mar. 31.

Willie Pontoon, retired from Lexington Maintenance on Jan. 1.

Nancy Redmond, retired from Human Resources on Jan. 1.

Joseph Reid, retired from Berkeley Maintenance on Jan. 6.

Frank Shealy, retired from Saluda Construction on Feb. 1.

William Skinner, retired from SHEP – Upstate I-85 on Jan. 23.

Michael Sprott, retired from Materials and Research on Feb. 29.

Lewis Sweat, retired from Supply Depot on Jan. 31.

Sammie Taylor, retired from Saluda Maintenance on Feb. 12.

Jake Taylor, retired from Alendale Maintenance on Feb. 26.

Leroy Thomas, retired from Calhoun Maintenance on Dec. 9.

Levon Washington, retired from Dillon Maintenance on Jan. 6.

Joel Watts, retired from Lexington Maintenance on Mar. 31.

Terry Youngblood, retired from Union Maintenance on Jan. 1.

DEATHS



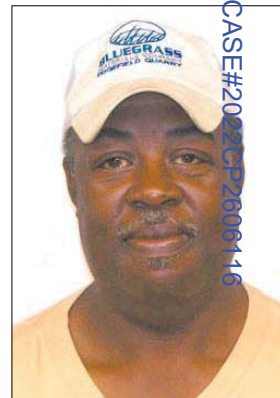
David Castro, a retiree from IT Services, died Jan. 24.



Gregory Todd Lyons, trades specialist III with Bamberg Maintenance, died March 27.



Ada Gardner, trades specialist III with Richland Maintenance, died Feb. 26.



William Niver, retired former Darlington Resident Construction Engineer, died March 19.

Jessie Weaver, trades specialist III with Edgefield Maintenance, died Feb. 17.

Do you have a good story for The Connector?

Let us know so we can share the information with our employees and interested citizens.

Email us at: PooreJP@scdot.org

2016 South Carolina Highway Engineers Conference: *Sharing what we learned from recent flooding*



David Beatty, Philip Bethea, John Boylston, Glen Bramlitt, Beacham Brooker, Joe Bruno, Chris Coleman, Leland Colvin, William Davis, Bradley Dows, Kenny Eargle, Kristofer Edelberg, Lee Floyd, Robbie Foxworth, Kevin Gantt, Sarah Gaffney, Ladd Gibson, Christy Hall, Brett Harrelson, Van Henson



Claude Ipock, Stephanie Ivey, J.P. Johns, Bryan Jones, David Kinard, Brian Klauk, Rocque Kneece, Emily Lawton, Andy Leaphart, Brad Lee, Tony Magwood, Jae Mattox

By Bob Kudelka

The 2016 South Carolina Highway Engineers Conference brought together SCDOT employees with partners in the private sector, local government and federal government.

So it seemed fitting that a theme of this year's conference was an event with those groups five months earlier under much different circumstances – responding to the historic, 1,000-year flood in October 2015.

"We wanted to spend time thanking people and telling our story," said conference chairman **Jamie Kendall**, SCDOT Preconstruction Support Engineer. "From there, that led to several other sessions."

Nearly 700 people, including 393 SCDOT employees, attended the March 22-23 conference at the Columbia Metropolitan Convention Center.

Topics included subjects on preconstruction, construction, environmental and maintenance. There were behind the scenes accounts of major projects such as Carolina Crossroads, the I-85/I-385 Gateway Project and "Paving the way for Volvo," which highlighted the Swedish car maker's eventual landing in the Lowcountry.

There were also sessions on employee safety and accident prevention, applying proven methods to reduce collisions; the I-26 median safety project; encroachment permitting process; an update on ACT 98; usage of cement treated materials; maintenance of outfall ditches; storm water management; geotechnical design alternatives on U.S. 17; avoiding rights of way delays; OSHA confined space regulations and contract procurement.

"We've gotten a lot of positive feedback," Kendall said after the conference ended. "There were a lot of different presenters from other DOTs, different state agencies, professors from the universities... We tried to get a wide variety of speakers so there was something for everyone."

Professional engineers gain continuing education credits through the training sessions, but more importantly they are afforded the opportunity to network with people from other areas, both inside and outside of DOT.

One mainstay of the annual conference has been an update from the Secretary of Transportation. This year, recently confirmed Secretary **Christy Hall** delivered wide ranging remarks on efforts to increase funding, the agency's mission and her goals.

Hall, who had spent part of the week providing information to Legislators concerning funding, said she is "ringing the alarm bell the loud-est" concerning the needs of the primary system. The primary system is a core network that connects communities and is where about half the traffic exists. However, 80 percent of the system is in a "state of disrepair."

"It's becoming our current generation of orphan roads," Hall said. "State funds tend to go toward neighborhood streets; federal funds toward the interstates."

The secondary system needs repair as well, and interstates should be "turning the curve" based on past funding decisions. Bridges also need to be addressed, with about 300 structurally deficient bridges on the interstate and primary systems, she said.

Hall also addressed the misperception that the agency spends too much on new roads. In fact, she said less than 1 percent of DOT's budget

goes toward new roads identified locally through COGs and MPOs.

A third of our monies go to widening projects, signal timing projects, intersection improvements and other capacity operation improvements.

More than half our dollars go to maintenance, Hall said.

"We're fixing it first," she said.

Hall said one of her goals is to increase stability to an agency that has had three Secretaries in the past three years. She has created a program to mold future leaders and improve continuity. She also aims to increase accountability and transparency, already reforming FOIA guidelines to improve access of information to the public.

In closing, Hall thanked the "DOT team" and all our partners for their work on recovering from the October floods.

"The results achieved were phenomenal," she said. "The results have been noticed by other states, other countries... We all worked together to achieve a goal."

Kendall, who as chairman was assisted by Letting Preparation Engineer **Mark Anthony**, said he wanted to thank "all the speakers and those who put together presentations to share their stories with us."

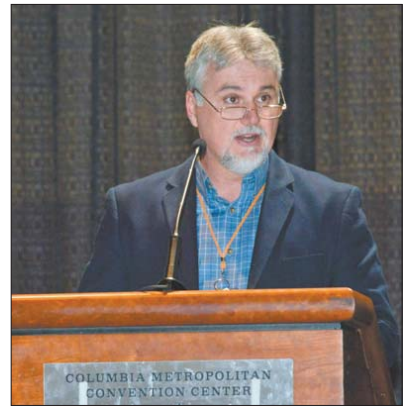
"I'm thankful that so many people turned out and enjoyed it," Kendall said.

Kendall also thanked Acting Deputy Secretary for Engineering **Leland Colvin**, Chief Engineer for Operations **Andy Leaphart**, Acting Chief Engineer for Project Delivery **Randall Young**, Agency Events Coordinator **Tina Kennedy**, as well as Shaun Gaines and the staff from Clemson University's Transportation Technology Transfer Service.

Speakers and presenters included:

Leland Colvin, **Christy Hall**, **Hope Mizzell** (SCDNR), **Andy Leaphart**, **Tony Magwood**, **Ladd Gibson**, **Todd Steagall**, **Stephanie Ivey** (University of Memphis), **Keith Honeycutt** (NC-DOT), **Mark Ward** (NC-DOT), **Jay Thompson**, **Heather Robbins**, **Greg Schuch** (HDR, Inc.), **Barrett Stone**, **(HDR, Inc.)**, **David Beatty** (HDR, Inc.), **Jennifer Ogle** (Clemson University), **Claude Ipock**, **Bryan Jones**, **Linda McDonald**, **Wayne Sarasua** (Clemson University), **Joe Bruno** (ESP), **Chris Coleman**, **Philip Bethea**, **Robbie Foxworth**, **Bill Roper** (Roper Laser Co.), **Sarah Gaffney**, **Brett Harrelson**, **Dipak Patel**, **Lee Floyd**, **Glen Bramlitt**, **Stephanie Jackson-Amell**, **Kevin McGlumphy** (Associated Asphalt Co.), **Ray Vaughan**, **J.P. Johns** (Woolpert, Inc.), **Emily Thomas** (SCDPS), **Gil Owens** (SCHP), **Mike Barbee**, **Joy Riley**, **Beacham Brooker**, **Jackie Williams**, **Jeremy Harmon**, **Bill Ventry** (VE Group), **John Ledbetter** (VE Group), **Hugh Haddock**, **Daryl Hardwick**, **Chris Johnston**, **Jim Feda**, **Van Henson** (SCLLR), **Kenny Eargle**, **Henry Cross**, **Brad Lee** (Trinity Industries, Inc.), **Jeff Smith** (Work Area Protection Corp.), **Brian Klauk**, **David Kinard** (HDR, Inc.), **Rocque Kneece** (CECS, Inc.), **Kristofer Edelberg** (Flatiron Construction), **Tina Kennedy**, **Randall Young**, **John Boylston**, **Jae Mattox**, **Daniel Young** (Department of Commerce), **Brian Keys**, **Emily Lawton** (FHWA), **Kevin Gantt**, **Ron Patton**, and SCDOT Commission Chairman **Mike Wooten**.

See **ENGINEERING AWARDS** on next page.



PHOTOGRAPHS BY ROB THOMPSON AND CODY CROUCH/THE CONNECTOR

SCDOT Preconstruction Support Engineer **Jamie Kendall**, above, served as this year's conference chairman. He was assisted by Letting Preparation Engineer **Mark Anthony**.



Linda McDonald, Kevin McGlumphy, Hope Mizzell, Jennifer Ogle, Dipak Patel, Joy Riley, Heather Robbins, Bill Roper, Wayne Sarasua, Greg Schuch, Jeff Smith, Todd Steagall, Barrett Stone, Emily Thomas, Jay Thompson, Mark Ward, Jackie Williams, Mike Wooten, Daniel Young, Randall Young

2016 Engineering Recognition Awards



2016 DISTRICT RESIDENT CONSTRUCTION ENGINEERS OF THE YEAR
DISTRICT WINNERS: Seated, from left: District 1- Paul Miller of Richland Construction A, District 2 - Matthew Shealy of Newberry Construction, District 3 - Kimberly Bishop of Greenville Construction B, District 4 - John Huskins of York Construction, District 5 - Travis Patrick of Horry Construction, District 6 - Behling Guess of Dorchester Construction and District 7 - Bobby Usry of Aiken Construction.



2016 RESIDENT CONSTRUCTION ENGINEER OF THE YEAR
 Travis Patrick
 Horry Construction



2016 DISTRICT RESIDENT MAINTENANCE ENGINEERS OF THE YEAR
DISTRICT WINNERS: Seated, from left: District 1- Tony Magwood of Richland Maintenance, District 2 - Fritz Wewers of Anderson Construction, District 3 - Steven Henderson of Pickens Maintenance, District 4 - Jamie Johnston of Fairfield Maintenance, District 5 - Robby Bean of Marlboro Maintenance, District 6 - Roger Bowers of Charleston Maintenance and District 7 - Lyle Davis of Calhoun Maintenance.



2016 RESIDENT MAINTENANCE ENGINEER OF THE YEAR
 Tony Magwood
 Richland Maintenance



2016 SAFETY UNITS OF THE YEAR
 Seated, from left: Small Unit of the Year - Bamberg Maintenance - RME Bobby Crider; Medium Unit of the Year - Newberry Maintenance - RME Jeremy Knight; and Large Unit of the Year - Orangeburg Maintenance - RME David Brandyburg.



2016 EXCELLENT CONSTRUCTION QMT INSPECTION
 Seated, from left: Abbeville Construction - RCE Adam Rich and Spartanburg Construction - RCE Patrick McKenzie.

EXHIBIT 5

**Reply Brief in Support
Of Defendant's
Motion for Summary Judgment**

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

EXHIBIT 5**RESPONSE AS TO CITATIONS**

The undersigned has undertaken the lawyer's oath, and has sworn to show respect for the Courts and judicial officers, and to show integrity and civility to opposing parties and counsel. Having practiced in this state under that oath for nearly two decades, the undersigned takes this obligation seriously, and strenuously objects to the implications in Plaintiff's Brief in Opposition. The undersigned expects all counsel in this case, including out of state counsel, to abide by these requirements. It is surprising that a party that misstated the burden of proof for this motion and that overstated the breadth of *Tommy L. Griffin I* would open its argument attacking the credibility of citations by TSC.

TSC's counsel addresses each reference in order:

1. Alleged Argumentative Language:**a. Role as RCE Authorized Representative**

The undersigned added "[to include firm providing CEIT services]" to a Specification stating that Plaintiff was required to "cooperate with the RCE, the RCE's authorized representatives and inspectors, and other Contractors in every way possible." 2007 Standard Specs, Section 105.5(2). This is not misleading, and it is clear, even from Plaintiff's arguments that TSC was an authorized representative and inspector. Plaintiff contends this reference is misleading, because it alleges that the citation suggests that TSC was separate from the RCE – as noted in the facts, and as Plaintiff has failed to contradict (and for which Plaintiff has offered arguments that are not credible and are easily disproven by Plaintiff's own files), TSC was separate from the RCE. Frankly, this argument is made in bad faith.

b. “[Potential]” Contract Duties

Again, Plaintiff goes to great length to identify bad faith when none exists. Plaintiff objects to an addition of “[potential]” to a citation to contract duties. The sole purpose of the addition of “potential” in this instance is that contract duties are created as mutual obligations, and a party does not have contract duties absent performance of all duties by a counterparty. Frankly, the presence or absence of the word bears no significance to the case or argument, as is clear from reading the sentence in context. TSC has not argued that “potential” contract duties reduce or affect the breadth of exceptions to the economic loss rule, and there is no reasonable reading of TSC’s Brief that would provide such an inference. Paraphrased, the sentence, as cited, with or without the parenthetical, reads that “courts evaluate whether the alleged tortfeasor acted in a way that violated a legal duty aside from those in contracts or alleged contracts.”

c. Indiana Case Citation

The undersigned’s modification was intended to address the difference between the *Indianapolis Public Library Case*, and the case which that court cited, *Walters v. Kellam and Foley*, 360 N.E.2d 199 (Ind. Ct. App., 2d Dist. 1977). The *Walters* case was a claim by an employee of an independent contractor, therefore the language was “employees of.” The *Public Library* case, which the undersigned cited, dealt with claims asserted by an entity, and not a person, hence the differentiation. There is no functional difference between duties owed to people outside of privity (employees of independent contractors) or entities outside of privity (independent contracts), and for this reason, the undersigned added the “or” within brackets to note the change. Further, the consideration of duty for tort is the same for employees or entities.

As to the Law Review citation, the undersigned notes that Plaintiff’s objection is not credible. First, the article cited, entitled “Recovery of Economic Loss in Tort For Construction

Projects: A Critical Analysis,” a copy of which is provided as Exhibit 5, is an approximately 88-page, national survey of the economic loss doctrine, not an article regarding South Carolina. In fact, the article contains approximately 10 sentences discussing *Carolina Winds*, none of which are cited in TSC’s Brief. It beggars belief that Plaintiff argues that TSC owed the Court a duty to disclose the overruling of a case which TSC has not cited in support of its arguments. The quoted paragraph contained no reference to South Carolina law, and the cases supporting Barrett’s argument were from Washington, Virginia, and Missouri. Plaintiff’s argument both mis-states the undersigned’s intention, which was to file a secondary source explaining why there should be limits on tort duty in South Carolina, and misrepresents that the citation in any way referenced South Carolina law. In a portion of its brief dedicated to leveling serious, but unsupported allegations against the undersigned, this contention is, at best, spurious, and, at worst, malicious. The undersigned has worked with the attorney filing Plaintiff’s brief on numerous cases, and sincerely believes him to be an honorable, competent attorney; however, the accusations made in the brief are serious and unsupported on review of the documents.

s/C. Daniel Atkinson
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	C.A. NO. 2022-CP-26-06116
	)	
Flatiron Constructors, Inc.,	)	
	)	NOTICE OF CHANGE IN LAW
Plaintiff,	)	FOR DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
v.	)	
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	

Defendant TranSystems Corporation (hereafter "TSC") submits this notice to the Court, regarding a recent change in applicable law governing TSC's Motion for Summary Judgment. At the hearing on Defendant's Motion for Summary Judgment, which occurred on August 7, 2023, counsel for Plaintiff argued that, under Rule 56, SCRPC, Plaintiff need produce only a "scintilla" of evidence to defeat TSC's Motion for Summary Judgment. Since that argument, the Supreme Court of South Carolina has clarified the evidentiary standard for a Motion for Summary Judgment. On August 23, 2023, the Supreme Court file an Order in *The Kitchen Planners, LLC v. Friedman*, Appellate Case No. 2020-001669, which is filed as Exhibit A hereto. In that case, the Supreme Court stated "the court of appeals incorrectly applied the wrong standard of decision for a motion for summary judgment when the motion is based on the insufficiency of evidence." *Id.* at 2. The Supreme Court further stated:

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* [*v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009),] is inconsistent with our decision today, *Hancock* is overruled.

Id. at 6 – 7.

Based on this new Supreme Court opinion in *The Kitchen Planners*, it is now clear that Plaintiff must produce sufficient evidence to create a “**genuine** issue of **material** fact” to defeat TSC’s Motion for Summary Judgment. *Id.* (emphasis added).

WILKES ATKINSON & JOYNER, LLC

August 30, 2023

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*Attorneys for Defendant
TranSystems Corporation*

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The Kitchen Planners, LLC, Petitioner,

v.

Samuel E. Friedman and Jane Breyer Friedman and
Branch Banking and Trust, Respondents.

Appellate Case No. 2020-001669

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 28173
Submitted April 17, 2023 – Filed August 23, 2023

AFFIRMED AS MODIFIED

Christopher P. Kenney, of Columbia, Petitioner.¹

Charles A. Krawczyk, of Finkel Law Firm LLC, of
Columbia for Respondents.

¹ Petitioner's brief was prepared and filed by the late Jean Perrin Derrick of Lexington prior to her unfortunate death in January, just as this Court was initially preparing to consider this case.

JUSTICE FEW: The Kitchen Planners, LLC, filed a petition for a writ of certiorari asking this Court to review the court of appeals' decision in *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020). In that decision, the court of appeals affirmed the circuit court's order granting summary judgment to the Friedmans and dissolving Kitchen Planners' mechanic's lien. We granted Kitchen Planners' petition in part and now affirm as modified. As we will explain, the court of appeals incorrectly applied the wrong standard of decision for a motion for summary judgment when the motion is based on insufficiency of the evidence. Reviewing the circuit court's order using the correct standard of decision, however, we nevertheless find the court of appeals reached the correct result in affirming the summary judgment.²

The court of appeals' opinion contains an exhaustive recitation of the facts. 432 S.C. at 271-74, 851 S.E.2d at 726-28. Of importance, the Friedmans contracted with Kitchen Planners to procure cabinets manufactured by Crystal Cabinets and install the cabinets in the Friedmans' home. When Kitchen Planners delivered the cabinets, the Friedmans refused to accept them and refused to pay the final one-third of the contract price. Kitchen Planners attempted to perfect its mechanic's lien³ by serving on the Friedmans "a statement of a just and true account of the amount due" as required by section 29-5-90 of the South Carolina Code (2007). Kitchen Planners then filed this action to enforce the lien.

The Friedmans filed a motion for summary judgment contending Kitchen Planners failed to perfect its lien because it did not serve the section 29-5-90 "statement"

² We find "oral argument would not aid the court in resolving the issues" before us and thus consider this case without oral argument pursuant to Rule 215, SCACR.

³ A mechanic's lien arises automatically from the performance of work or the provision of materials. See S.C. Code Ann. § 29-5-10(a) (2007) ("A person to whom a debt is due for labor performed or furnished or for materials furnished . . . in the erection, alteration, or repair of a building or structure upon real estate . . . shall have a lien upon the building or structure . . . to secure the payment of the debt due to him."); S.C. Code Ann. § 29-5-20(A) (2007) ("Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon . . . to the value of the labor or material so furnished . . .").

within ninety days as required by the section. *See id.* ("Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner . . . a statement of a just and true account of the amount due . . ."). The circuit court agreed and granted the motion for summary judgment.⁴

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment "if the [evidence before the court] show[s] 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." To survive the Friedmans' motion, Kitchen Planners was required by Rule 56(c) to present evidence that it perfected its lien by serving the section 29-5-90 statement on the Friedmans "within ninety days after [Kitchen Planners] cease[d] to labor on or furnish labor or materials for such building or structure." § 29-5-90. Sufficient evidence that Kitchen Planners timely served the statement would have established a "genuine issue [of] material fact" as to whether it perfected the lien. Whether Kitchen Planners presented sufficient evidence to create a genuine issue of material fact that it met the ninety-day deadline for serving the section 29-5-90 statement is the sole issue before the Court.

The following dates are important. The cabinets were delivered to the Friedmans' home on May 20, 2015. Kitchen Planners' sole member—Patricia Comose—accompanied an installer to the Friedmans' home on May 21 for the purpose of installing the cabinets. The cabinets were not installed. On June 18, a Crystal Cabinets representative informed Comose the Friedmans did not want Comose involved any further. According to Comose, "In mid-June 2015 I was taken off the job." On August 18, the Crystal Cabinets representative emailed Comose telling her Crystal Cabinets had also been removed from the job. "We've been fired," the email stated, "Everything is done." On September 29, Comose wrote a check for \$550.61 to pay for parts of the cabinets she ordered on an unknown previous date. Kitchen Planners served the section 29-5-90 statement on the Friedmans on November 17, 2015. Ninety days before November 17 is August 19.

⁴ The court of appeals addressed issues other than timeliness. However, none of those issues were necessary for the court of appeals to address to affirm the order granting summary judgment. In light of our holding the circuit court properly granted the Friedmans' motion for summary judgment on the ground Kitchen Planners did not serve the section 29-5-90 statement within ninety days, and thus did not perfect its lien, we also need not address any other issues.

In the section of its opinion entitled "Standard of Review," the court of appeals stated, "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 432 S.C. at 275, 851 S.E.2d at 729 (alteration in original) (quoting *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). As we explain below, Comose's statement she wrote a check on September 29 to pay for parts of the Friedmans' cabinets is a scintilla of evidence the November 17 service of the section 29-5-90 statement was "within ninety days after [Kitchen Planners] cease[d] to labor on or furnish labor or materials." Applying the so-called "mere scintilla" standard, therefore, the court of appeals should have reversed the order granting summary judgment. As we now clarify, however, the "mere scintilla" standard is not the correct standard for decision under Rule 56(c).

Rule 56(c) became effective in 1985. Rule 86(a), SCRCP.⁵ In most cases applying Rule 56(c), this Court and our court of appeals have applied the "genuine issue of material fact" standard set forth in the Rule, requiring the party opposing the motion show a "reasonable inference" to be drawn from the evidence, and we have rejected the "mere scintilla" standard. See, e.g., *Vaughan v. Town of Lyman*, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006) (reversing an award of summary judgment and stating "the evidence is susceptible to more than one reasonable inference, and therefore should be submitted to the jury"); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219 n.4, 578 S.E.2d 329, 334 n.4 (2003) ("The standard for summary judgment 'mirrors the standard for a directed verdict under Rule 50(a)' [SCRCP]."⁶ (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991))); *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (holding a party opposing summary judgment "must . . . 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89

⁵ See also Rule 44, *Rules of Practice for the Circuit Courts of South Carolina*, 1962 S.C. Code Ann., Vol. 15 (Supp. 1975) (adopted 1969; repealed 1985) (stating the "genuine issue [of] material fact" standard for summary judgment motions based on insufficiency of the evidence).

⁶ The standard for directed verdict under Rule 50(a) requires the evidence support a "reasonable inference" in favor of the non-moving party. *Mullinax v. J.M. Brown Amusement Co.*, 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998).

L. Ed. 2d 538, 552 (1986));⁷ *Shelton v. LS & K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007) ("The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." (citing *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994))); *Dickert v. Metro. Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1991), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993) (stating "the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment" (citing *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214)).⁸ *But see Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992) ("At the summary judgment stage of the proceeding, it was only necessary for the Defendant to submit a scintilla of evidence warranting a determination by the jury." (citing nothing)).

In 2009 in *Hancock*, however, this Court made the statement quoted by the court of appeals in this case, "that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." 381 S.C. at 330, 673 S.E.2d at 803. In other cases even after *Hancock*, we continued to impose the "genuine issue of material fact" and "reasonable inference" standard that appears inconsistent

⁷ The *Baughman* Court also cited *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986). 306 S.C. at 115, 410 S.E.2d at 545. In *Anderson* and *Matsushita*, the Supreme Court of the United States rejected the "mere scintilla" standard for Rule 56, Fed. R. Civ. P., *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, and held "the issue of fact must be 'genuine,'" meaning "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*,'" *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (quoting Rule 56, Fed. R. Civ. P.).

⁸ In *Dickert*, the court of appeals found "the circuit court correctly decided this issue" and "direct[ed] the circuit court's order to be printed, with minor deletions, as the opinion of this Court." 306 S.C. at 313, 411 S.E.2d at 673. We find it significant that the circuit judge whose order became the opinion of the court of appeals was retired Chief Justice C. Bruce Littlejohn, sitting by designation as a special circuit judge. Chief Justice Littlejohn served as Chief Justice of this Court in January 1985 when the Court submitted the new Rules of Civil Procedure—including Rule 56(c)—to the General Assembly. Bruce Littlejohn, *LITTLEJOHN'S HALF CENTURY AT THE BENCH AND BAR* (1936-1986) 168 (1987).

with the "mere scintilla" standard *Hancock* purported to set. See *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (stating as to the summary judgment standard "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine"); see also *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022) (stating as to a motion for summary judgment, "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." (quoting *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002))); *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (same); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (reciting the "mere scintilla" standard from *Hancock*, but stating, "Nevertheless, 'when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.'" (quoting *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997))).

We acknowledge there may be disagreement as to whether the "mere scintilla" standard is inconsistent with the Rule 56(c) "genuine issue [of] material fact" standard. See *Taylor v. Atl. Coast Line R. Co.*, 78 S.C. 552, 556, 59 S.E. 641, 643 (1907) ("A *scintilla* of evidence is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror."). The position that the two standards are the same would explain this Court's recitation of both at various times since 1985. In the minds of many, however, the standards are inconsistent. See *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214 (rejecting the mere scintilla standard for Rule 56, Fed. R. Civ. P., and stating, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff"); see also *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935) ("Saying that there 'may be a *scintilla* of evidence' to go to the jury . . . is certainly a very weak contention. 'Scintilla' means. . . 'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.'" (quoting 56 Corpus Juris 863-64 (1932))); *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 95, 588 S.E.2d 87, 92 (2003) (Burnett, J., dissenting) ("A scintilla is defined as 'a trace' of evidence." (quoting *Scintilla*, BLACK'S LAW DICTIONARY (7th ed. 1999))).

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.

Turning back to the evidence Kitchen Planners presented in this case, and analyzing that evidence using the proper standard for decision, we find Kitchen Planners failed to show the existence of a genuine issue of material fact. Kitchen Planners served the section 29-5-90 statement on November 17. The only event within ninety days before November 17 is the September 29 check Comose wrote to pay for cabinet parts she previously ordered. Ordering parts for the cabinets may very well qualify as "to labor on or furnish labor or materials for" under section 29-5-90, and if that event occurred within ninety days of serving the section 29-5-90 statement, the statement would have been timely and the lien perfected. Writing a check to pay for parts previously ordered, however, does not qualify as "to labor on or furnish labor or materials for." While the writing of the check on September 29 is some evidence—a scintilla—of when she ordered the parts, it does not provide a meaningful factual basis on which a factfinder could determine if the parts were ordered within or before the ninety-day time frame. Comose specifically testified she did not remember why she wrote the check on September 29, and she did not know the date the parts were ordered. The writing of the check on September 29 does not create a reasonable inference that she ordered the parts within ninety days of the service of the section 29-5-90 statement. Thus, the factfinder would be required to speculate to determine whether Kitchen Planners perfected its lien in a timely manner. Under this circumstance, Kitchen Planners failed to establish a genuine issue of material fact, and the Friedmans were entitled to summary judgment as a matter of law.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

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

Plaintiff Flatiron Constructors, Inc. ("FCI") hereby submits this response to Defendant TranSystems Corporation's ("TSC") "Notice of Change in Law for Defendant's Motion for Summary Judgment," regarding the South Carolina Supreme Court's recent decision in *The Kitchen Planners, LLC v. Friedman*, No, 2020-001669, 2023 WL 5420401 (S.C. Aug. 23, 2023).

The South Carolina Supreme Court's holding in *Kitchen Planners* only applies after TSC meets its initial burden as the moving party in this matter to demonstrate a lack of evidence for FCI's claims. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.V. 459, 471, 570 S.E.2d 197, 203 (Ct. App. 2002). FCI contends that TSC has not met its initial burden, but even if it has, the decision in *Kitchen Planners* should not alter the Court's determination that genuine issues of material fact exist sufficient to deny TSC's Motion for Summary Judgment ("TSC's Motion"). As set forth in the Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("FCI's Opposition"), FCI presents much more than a scintilla of evidence to overcome TSC's Motion.

Kitchen Planners stands for the proposition that to overcome summary judgment, the non-moving party must create a reasonable inference that there exists a genuine issue of material fact for trial. *Kitchen Planners*, 2023 WL 5420401, at *3. The Court in *Kitchen Planners* clarified that

a non-moving party must put forth more evidence than merely “‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle.’ [or] ‘the smallest trace.’” *Id.* (citations omitted). Based on the substantial evidence presented to the Court, FCI has met its burden by demonstrating that TSC wielded the power of economic life or death over FCI giving rise to a duty by TSC to act in accordance with the applicable standard of care.

Central to FCI’s professional negligence claim is TSC’s “special relationship” with FCI on the Project. As determined by the South Carolina Supreme Court, that special relationship gives rise to a duty on TSC’s part towards FCI. *Tommy L. Griffin*, 320 S.C. 49, 463 S.E.2d 85(1995). FCI’s Opposition presents hard, irrefutable evidence that TSC held itself out as, acted as, and had the powers of the Project’s Resident Construction Engineer (“RCE”). TSC concedes that the RCE wielded the types of powers over FCI that would give rise to a “special relationship,” but cries out that it is “implausible and incredible...that ‘Martin Long of TSC held himself out as [SCDOT’s] Resident Construction Engineer.’” TSC Reply Brief in Support of Defendant’s Motion for Summary Judgment (“TSC’s Reply”), p. 6. Yet, TSC presents no cogent explanation for the overwhelming evidence FCI presents that, as pertains to FCI, TSC acted as RCE. As set forth in its Opposition, FCI provided:

- minutes of Project Weekly Update Meetings upon which TSC’s Mr. Martin Long signed as the “Resident Construction Engineer,” (FCI Opp., Ex. B - Brumfield Affidavit, Ex. 2, 5);
- correspondence on SCDOT letterhead to FCI signed by Mr. Martin Long as “Resident Construction Engineer” (FCI Opp., Ex. B – Brumfield Affidavit, Ex. 4);
- an organizational chart issued by TSC to FCI identifying Mr. Martin Long as “RCE” (FCI Opp., Ex. B – Brumfield Affidavit, Ex. 6);
- an email from SCDOT to TSC referring to TSC as the “RCE” (FCI Opp., Ex. B – Brumfield Affidavit, Ex. 7);

- an email signed by Mr. Martin Long in which he identifies himself as the RCE (FCI Opposition, Ex. B – Brumfield Affidavit, Ex. 9);

- the Affidavit of Lou Hutcherson, an FCI Project Manager, that “Martin Long of TSC held himself out as South Carolina Department of Transportation’s ...Resident Construction Engineer (“RCE”) on the Project.” (FCI Opp., Ex. A, Para. 3).

In short, FCI has presented much more than a “glimmer” or the “least particle” of evidence that a special relationship existed between TSC and FCI sufficient to give rise to TSC’s duty. Rather, FCI has conclusively demonstrated that such a relationship existed. At the very least, FCI has demonstrated that a genuine issue of material fact exists regarding the relationship such that TSC’s Motion must be denied. The decision in *Kitchen Planners* does not change this inescapable conclusion.

Respectfully submitted,

s/Mason A. Goldsmith, Jr.

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Attorneys for Flatiron Constructors, Inc.

September 5, 2023
Greenville, South Carolina

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

Pursuant to SCRCP 59(e)¹, Plaintiff Flatiron Constructors, Inc. (“FCI”) respectfully submits this Memorandum in Support of its Motion for Reconsideration of the Court’s Order entered on November 22, 2023, granting TranSystems Corporation’s (“TSC”) Motion for Summary Judgment (“TSC’s MSJ”) on FCI’s causes of action for negligence and for breach of contract (“Form 4 Order”). As set forth herein and as presented at the hearing on August 7, 2023 (“Hearing”), substantial evidence exists of a “special relationship” between TSC and FCI such that TSC’s breach of its professional duties to FCI is actionable under South Carolina law. *Tommy L. Griffin Plg. & Htg. Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C.49, 463 S.E.2d 85 (1995) (finding that an engineer wielding the power to inspect work and halt construction progress owes a professional duty to the contractor performing the work). There is also ample evidence and logic to support the argument that FCI was an intended third-party beneficiary of the Engineering

¹ Rule 59(e) is an appropriate means of seeking reconsideration of presented issues and ensuring full consideration of those issues, or when an argument is raised but not ruled upon. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004). Moreover, “if a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. *Id.* at 25, 780. FCI also moves pursuant to Rule 60 on the basis that new evidence has emerged since the hearing on TSC’s MSJ.

Contract between TSC and SCDOT and therefore has standing to sue TSC for breach of contract. *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985) (explaining that contracts between two persons for the benefit of a third can be enforced by the third person even though she is not named therein).

Summary judgment on FCI's claims for negligence and breach of contract are premature in light of the early stages of discovery in this matter. In fact, documents produced and Interrogatory Responses provided by TSC months after the Hearing undermine TSC's arguments, which serve as the apparent basis for the Court's finding that "TranSystems had no special relationship with Plaintiff and owed no duty of care to Plaintiff." Ex. A - Form 4 Order. Based upon the existing record, the need for completion of discovery, and the likelihood that such discovery will uncover additional relevant evidence, FCI requests that the Court withdraw the Form 4 Order and suspend any ruling on summary judgment until discovery is completed.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case involves construction of the Carolina Bays Parkway in Horry County, South Carolina ("Project"). Horry County contracted with FCI to construct the Project. Horry County also contracted with TSC to provide engineering, inspections, and other contract administration and supervision services related to the construction. *See* TSC's MSJ, Ex. E ("Engineering Contract"). As part of an Intergovernmental Agreement among Horry County, South Carolina Department of Transportation ("SCDOT") and the South Carolina Transportation Infrastructure Bank, SCDOT provided Project oversight and administration services for the Project. *See* TSC's MSJ, Ex. D.

A. This is a Complex Dispute, and Despite Diligent Efforts, the Parties are in the Early Stages of Discovery

FCI initially filed this action against TSC on April 26, 2018, including counts for professional negligence, breach of contract, tortious interference with contract, and violation of South Carolina's Unfair Trade Practice Act ("SCUTPA"). The Parties then jointly moved to stay the action until September 30, 2020. Upon expiration of the stay, FCI moved to compel TSC to respond to discovery, including FCI's First Request for Production of Documents, which had been propounded to TSC on October 19, 2020. On April 9, 2021, the Court granted FCI's Motion to Compel TSC to produce requested documents. TSC then began, but did not complete, producing documents to FCI on June 30, 2021.

Due to the complexity of this action, FCI and TSC jointly moved for a complex case designation on October 4, 2021. When the court denied the joint motion, the Parties filed a consent order pursuant to Rule 40(j) removing the case from the docket. During the time that the case was removed from the docket, FCI and TSC continued to discuss needed discovery. On February 17, 2022, TSC notified FCI that TSC had discovered a group of approximately 25,000 documents that had not yet been produced to FCI. *See* Ex. B – Email, dated February 17, 2023. 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 27, 2022, FCI reinstated the instant case, and the Court assigned a new case number. As of the reinstatement, TSC had not yet produced the 25,000 documents referenced in its February 17, 2022, email.

B. TSC Produced Additional Documents After the Hearing

TSC's MSJ was filed on April 4, 2023. Briefing was not completed until August 2, 2023, when TSC filed its Reply to FCI's Opposition. The Court set the Hearing for August 7, 2023. As noted in FCI's Opposition and as argued by FCI at the Hearing, as of the Hearing date, "document

productions are incomplete, and no depositions have been taken by either side.” *See* Brief in Support of Defendant’s Motion for Summary Judgment (“FCI’s Opp.”), p. 7. Also, at the Hearing, FCI referenced TSC’s February 17, 2022, email acknowledging that TSC still had not produced approximately 25,000 documents responsive to FCI’s First Request for Production of Documents. Therefore, FCI asked the Court to refrain from ruling on TSC’s MSJ until FCI could complete needed discovery.

On August 31, 2023, following the Hearing, FCI served its Second Request for Production of Documents and its First Set of Interrogatories on TSC. As of that date, TSC still had not produced the additional documents referenced in its February 17, 2022, email to FCI. On October 4, 2023, TSC moved for an extension of time to respond to FCI’s August 31 discovery requests. Subsequently, FCI agreed with TSC to an extension until November 3, 2023. On October 6, 2023 (approximately two months after the Hearing), TSC produced 12,953 documents consisting of 61,964 pages to FCI.

C. TSC Acknowledged the Scale and Complexity of Ongoing Discovery in this Litigation, Including the Need for Extensive Depositions

On October 18, 2023, the Parties filed a Joint Motion to Establish Complex Case Designation and Time for Trial. *See* Ex. C (hereinafter “Joint Motion”). In the Joint Motion, the Parties informed the Court that “[a]lthough the parties have diligently exchanged discovery over the life of this dispute, there remain certain documents for both Plaintiff and Defendant to produce.” Ex. C, ¶ 3(g). As of October 18, 2023, the Parties had exchanged more than one million documents containing at least twice as many pages and large native files. Ex. C, ¶ 3(a). A significant number of additional documents were also received from SCDOT in July of 2023, following FCI’s settlement of Project disputes with SCDOT and Horry County. Ex. C, ¶ 3(a). The Parties notified the Court that, due to the five-year lifespan of the Project, they each anticipated

calling approximately a dozen witnesses and that “[t]he number of depositions to be taken will match or eclipse the estimated number of witnesses.” To date, no depositions have been taken, awaiting completion of the document productions. Thus, the Parties “[sought] a complex case designation to ensure adequate time to conduct discovery and depositions and to properly prepare for trial.” Ex. C, ¶ 3(i).

On November 3, 2023 (nearly three months after the Hearing), TSC provided Answers to FCI’s First Set of Interrogatories and Second Set of Requests for Production. *See* Ex. D – TranSystems’ Answers to Flatiron Constructors, Inc.’s First Set of Interrogatories (1-27) (hereinafter “Interrogatory Responses”); *see also* Ex. E – TranSystems’ Answers to Flatiron Constructors, Inc.’s Second Set of Requests for Production (21-47) (hereinafter “Discovery Responses”). In these responses, TSC references the early stages of discovery in this matter. *See, e.g.*, Ex. D, No. 1 (“TranSystems notes that this case is at an early stage of discovery...”). More importantly, the October 6, 2023, document production and TSC’s post-hearing discovery responses include relevant information concerning the nature of TSC’s relationship with FCI in the context of the South Carolina Supreme Court’s decision in *Tommy L. Griffin Plg & Htg Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E. 2d 85 (1995). This discovery also demonstrates the likelihood that further discovery will uncover additional evidence relevant to the issue of TSC’s special relationship with FCI. *See Baughman v. Am. Tel & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

II. ARGUMENT

A motion pursuant to SCRCP 59(e) is appropriate to seek the Court’s reconsideration of an order granting summary judgment and to help ensure that the Court has fully considered and ruled upon proffered arguments or issues. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); *see also Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E. 2d

56 (1999). Here, to the extent the Court's considerations are discernible from its Form 4 Order, FCI respectfully requests that the Court reconsider its ruling and withdraw its Order as premature pending completion of discovery. Once relevant discovery is completed, TSC certainly would be entitled to renew its Motion, and the Court could then consider the issues with the benefit of a complete record.

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). Here, FCI has not had a full and fair opportunity to complete discovery, present all relevant facts to the Court, and ensure a proper record on appeal.

FCI deferentially submits that it would be beneficial to the judicial process and in keeping with prevailing law to allow FCI to complete discovery, allow TSC to refile its MSJ thereafter, and then have the Court issue a ruling based upon a more robust record. Allowing FCI to complete discovery would, at least, provide any subsequent appellate court the opportunity to consider depositions, interrogatories, and a complete set of relevant documents.

A. The Existence of a Special Relationship is a Factual Determination Based Upon All the Facts and Circumstances

In granting TSC's MSJ, the Court found that "TranSystems has established it had no special relationship with Plaintiff and owed no duty of care to Plaintiff" Ex. A – Form 4 Order. If such a special relationship, in fact, exists, then TSC does have a duty of care to FCI. *Tommy L. Griffin*, 320 S.C. at 54-56; 463 S.E.2d at 88-89. Moreover, as both TSC and FCI have argued, "whether such a duty exists will depend on the facts and circumstances of each case." *Id.*; *see also*, TSC's MSJ, p. 10 ("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.'"). The

South Carolina Supreme Court has since confirmed that whether circumstances give rise to a special relationship spawning a duty of care “is a factual issue.” *Cullum Mech. Const., Inc. v. South Carolina Baptist Hosp.*, 344 S.C. 426, 544 S.E.2d 838 (2001). The Court in *Cullum Mechanical* further declared that, “[s]ummary judgment is not appropriate . . . when further inquiry into the facts of the case is desirable to clarify the application of the law.” *Id.* at 432, 544 S.E. at 841-42 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 383, 365 S.E.2d 24 (1988)).

B. The RCE has Significant Supervisory Power, Giving Rise to a Special Relationship

In *Tommy L. Griffin*, the court found that because the engineer exercised supervision over the project and “had the right, among other rights, to inspect the construction and to halt construction” there existed a special relationship giving rise to a professional duty. *Tommy L. Griffin*, 320 S.C. at 56, 463 S.E.2d at 89. The RCE role on construction projects in South Carolina is a top supervisory position over contractors, as the RCE has the power 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; the interpretation of the Plans and Specifications; acceptable fulfillment of the Contract by the Contractor; disputes and mutual rights between Contractors; and compensation for the work.” TSC’s MSJ, Ex. B - SCDOT’s 2007 Standard Specifications for Highway Construction (hereinafter “Standard Specifications”) § 105.1. In fact, the supervisory power of the RCE is so broad that the RCE has the authority to suspend the work of a contractor or withhold payment from the contractor if the contractor merely fails to carry out the orders of the RCE. *Id.* (stating that the RCE “has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor...for failure to carry out orders of the RCE.”). As such, entities with RCE authority have a “special relationship” with contractors giving rise to a professional duty. Indeed, TSC concedes that “[t]he RCE’s role, for the purposes of project

supervision, was very similar to that of the engineer in *Tommy L. Griffin*.” Reply Brief in Support of Defendant’s Motion for Summary Judgment (hereinafter “TSC Reply”), p. 12.

C. The Facts and Circumstances, Including Those Showing Mr. Long’s RCE Status, Must Be Viewed in FCI’s Favor

When considering the facts and circumstances surrounding TSC’s relationship with FCI and whether such circumstances give rise to a duty by TSC, the Court must view all such information and any related inferences in the light most favorable to FCI. *Cullum Mechanical*, 344 S.C. at 432, 544 S.E.2d at 841; *see also Baughman v. American Tel and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991); *Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (S.C. App. 2020). In its Opposition to TSC’s MSJ, FCI presented the Affidavit of Lou Hutcherson, FCI’s Project Manager. FCI Opp., Ex. A – Affidavit of Lou Hutcherson. Among other testimony, Mr. Hutcherson testified that “Martin Long of TSC held himself out as South Carolina Department of Transportation’s (“SCDOT”) Resident Construction Engineer (“RCE”).” FCI Opp. Ex. A, ¶ 3. Mr. Hutcherson also 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). Notably, TSC did not provide an affidavit from Mr. Long or anyone else from TSC refuting Mr. Hutcherson’s testimony.

FCI also presented multiple documents identifying TSC’s Mr. Martin Long as the Project RCE. See FCI Opp. Ex. B – Affidavit of Linda Brumfield (hereinafter “Brumfield Aff.”). These documents included, but were not limited to: Bi-weekly Meeting Minutes signed by Mr. Long as Resident Construction Engineer (Brumfield Aff., Ex. 2); a letter on SCDOT letterhead signed by Mr. Long as Resident Construction Engineer (Brumfield Aff., Ex. 4); a TSC organizational chart identifying Mr. Long as RCE (Brumfield Aff., Ex. 6); an SCDOT email identifying Mr. Long as the RCE (Brumfield Aff., Ex. 7); and an email from Mr. Long identifying himself as the RCE

(Brumfield Aff., Ex. 9). All of this evidence must be viewed in the light most favorable to FCI. *Id.* Moreover, the Court must deny TSC's MSJ if FCI is able to provide evidence creating a reasonable inference that a "special relationship" existed between TSC and FCI. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023).

D. RCE Status Establishes Special Relationship

Much of the briefing and argument surrounding TSC's MSJ related to whether TSC's Mr. Long assumed the position and/or exercised the powers of the Resident Construction Engineer or RCE on the Project. *See, e.g.*, FCI Opp. pp. 10-13, 15-17, 19-20; TSC Reply, pp. 4, 5-12. FCI presented testimony and documents demonstrating that Mr. Long held himself out as the RCE and assumed RCE powers sufficient to establish a special relationship giving rise to a duty per the ruling in *Tommy L. Griffin*. In sum, FCI contends that even if the RCE is normally an SCDOT employee or described as such in the Specifications, that was not the case on this Project. In practice and throughout the Project, TSC was allowed to assume and/or share the role of RCE for the purposes of supervising FCI's work and TSC held itself out as the RCE without protest from SCDOT. In short, "TSC *was* the RCE in relation to FCI." FCI Opp. p. 4 (emphasis in original).

In contrast, TSC asserted, among other arguments, that Mr. Long did not assume such duties or responsibilities and that only SCDOT acted as RCE. Again, TSC did not provide an affidavit from Mr. Long. FCI's Mr. Hutcherson testified to Mr. Long's RCE authority as discussed above. *See* § II.C. However, regarding Mr. Hutcherson's testimony, TSC argued that, "[t]o be generous, the sworn testimony of Lou Hutcherson in his Affidavit attached as Exhibit A to Plaintiff's Brief is implausible and incredible, stating that "Martin Long of TSC held himself out as [SCDOT's] Resident Construction Engineer." TSC Reply p. 6 (emphasis added). Again, TSC concedes that, "[t]he RCE's role, for the purposes of project supervision, was very similar to that of the engineer in *Tommy L. Griffin*." TSC Reply, p. 12. In other words, if the facts and

circumstances taken in the light most favorable to FCI create a reasonable inference that TSC acted as or shared the role of RCE, then a “special relationship” existed between TSC and FCI and the Court should not have granted TSC’s MSJ regarding FCI’s negligence claim. *Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301 (2023).

In *Tommy L. Griffin*, the Court looked at the facts concerning what the engineer in that case actually did on the job. 320 S.C. at 56, 463 S.E.2d at 89. Because the engineer “supervised construction” and could inspect and halt construction, the Court considered a “special relationship” with the contractor to exist. *Id.* TSC’s MSJ suggests that FCI’s Contract with Horry County indicating that the RCE is an SCDOT employee is a dispositive factor in determining the identity of the RCE and, thus, whether a special relationship existed between TSC and FCI. TSC Reply, pp. 5-8. However, the *Tommy L. Griffin* and *Cullum Mechanical* decisions urge the Court to consider **all** the facts and circumstances, not just contract language. Indeed, the court in *Cullum Mechanical* forbids summary judgment when further inquiry into the facts will help clarify the application of the law. *Cullum Mechanical*, 344 S.C. at 432, 544 S.E.2d at 841. Thus, the extent to which SCDOT allowed TSC’s Mr. Long to present himself as the RCE and to wield the power of the RCE is a relevant inquiry into whether TSC had a special relationship with FCI or, at least, shared SCDOT’s power over FCI.

E. TSC’s RCE Duties and Activities Conferred Upon FCI Third-Party Beneficiary Status

A plain reading of the Engineering Contract makes clear that TSC was obligated to inspect, monitor, respond to questions, and report on FCI’s construction activities. Surely each of these tasks was intended to enhance the quality of the work, to facilitate the progress of the job, and to minimize the risk of re-work, needless stoppages, and the like. The benefits that would flow to

FCI from TSC's proper performance under the Engineering Contract are apparent, and, at a minimum, material questions of fact exist as to FCI's third-party beneficiary status.

F. The Court has not been Presented with All Facts Relevant to the Motion for Summary Judgment, and FCI Should have an Opportunity to Complete Discovery Before the Court Summarily Dismisses these Counts

The South Carolina Supreme Court has held that 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. According to the Supreme Court, "this means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.* In *Baughman*, despite three years of discovery, the Court reversed entry of partial summary judgment to afford the plaintiff in that case "an adequate opportunity to complete discovery." *Id.* at 114, 410 S.E.2d at 543. Based upon the ruling in *Baughman*, FCI respectfully submits that the Court should reconsider its decision granting TSC's MSJ and should afford FCI an opportunity to complete document production, conduct relevant depositions, and augment expert opinions based upon the adduced facts.

As in the *Baughman* case: (1) it is likely that further discovery will uncover additional evidence relevant to the central issue, namely, TSC's special relationship with FCI; (2) FCI has not been dilatory in seeking discovery on this critical issue; and (3) any perceived delay in completing discovery is tempered by the complexity of this case. *Id.* at 112-13, 410 S.E.2d at 543. Thus, summary judgment in this matter was premature. *Id.*

1. Further Discovery is Likely to Uncover Additional Evidence Relevant to the Motion for Summary Judgment

During the Hearing, FCI made arguments and presented evidence supporting the proposition that TSC acted as or at least shared the duties and authority of the RCE on the Project.

See Section II. B. *supra*. FCI also specifically requested at the Hearing that the Court refrain from ruling on TSC's MSJ until FCI had an opportunity to complete discovery. Since the Hearing, TSC's discovery responses and document productions reveal that additional discovery (e.g., depositions) likely will reveal evidence supporting FCI's arguments that TSC's Mr. Long acted as the SCDOT's RCE and/or assumed other duties that establish a special relationship between TSC and FCI as defined in *Tommy L. Griffin*. This discovery further suggests that TSC likely had contractual obligations that it simply ignored.

a. TSC's Response to Interrogatory No. 18 Admits Mr. Long Held Himself Out as the RCE

In support of its MSJ, TSC completely discards Mr. Hutcherson's testimony that "**Martin Long of TSC held himself out as [SCDOT's] Resident Construction Engineer.**" TSC Reply p. 6 (emphasis added). Indeed, TSC dismisses Mr. Hutcherson's sworn statement entirely. *Id.* ("[t]o be generous, the sworn testimony of Lou Hutcherson...is implausible and incredible..."). (emphasis added). Yet, TSC admits in its recently provided November 3, 2023 Answers to FCI's First Set of Interrogatories that, "**Marty Long used the title Resident Construction Engineer...**"² Ex. D – Interrogatory Responses, No. 18. Thus, Mr. Hutcherson was correct. Mr. Long *did* hold himself out as the RCE on the Project. There was nothing "implausible" or "incredible" about Mr. Hutcherson's testimony. Mr. Hutcherson's other assertions are equally veracious. At the very least, FCI should be afforded the opportunity to depose Mr. Long and to plumb the true depths of his exercise of power and authority under "the title of Resident Construction Engineer." Such a deposition is very likely to uncover additional evidence relevant to the existence of a "special relationship" between TSC and FCI.

² TSC's Interrogatory Answer goes on to disclaim that although Mr. Long, in fact, held himself out as the RCE, "he never had authority as SCDOT's RCE."

b. TSC's October 6, 2023, Document Production Contains Several Documents Relevant to the "Special Relationship" Determination

As represented by the Parties in their recent Joint Motion, "to date, more than one million documents have been produced, containing at least twice as many pages and large native files." Ex. C, ¶ 3(a). Moreover, additional documents remain to be produced. *Id.*, ¶ 3(h). Reviewing and comprehending the relevance of all of these documents is a time-consuming and complex task. The document review and analysis is further complicated because the document productions have occurred in waves throughout this protracted litigation. Consequently, tracking precisely when particular documents were produced, what remains to be produced, identifying duplicates, and finding particular documents related to the five-year long Project is challenging. Furthermore, even locating the relevant documents in FCI's own files requires great effort and diligence. Nonetheless, FCI has established that several documents produced by TSC on October 6, 2023, after the Hearing on TSC's MSJ, are relevant to the central issue of TSC's RCE status and whether TSC and FCI had a "special relationship" as defined in *Tommy L. Griffin*.

(i) Marty Long's Pre-construction Email, dated January 08, 2013, Introducing Himself as RCE

Very early in the Project, before construction even began, Mr. Long sent an email "on behalf of Horry County and SCDOT" inviting FCI, SCDOT, and other entities to a partnering and pre-construction conference. Ex. F – Mr. Long Introduction Email, dated January 08, 2014. Multiple Horry County and SCDOT personnel were sent this email in which Mr. Long identified himself as "RCE." *Id.* Notably, he did not identify himself as the "RCE Representative," which TSC asserts was his actual role. TSC Reply, p. 8 ("...it is clear that Long was a Representative of RCE..."). Rather, in one of the very first communications on the Project, Mr. Long clearly identified himself as the RCE to FCI, SCDOT, and Horry County personnel and invited them to the initial, pre-construction partnering session. A deposition of Mr. Long exploring the basis for

his assumption of the title, the powers actually granted to him, and any limitations on that power would likely lead to additional, relevant evidence on this point.

(ii) Sample Identification Card Indicates Mr. Long is the SCDOT RCE

When testing concrete mix compliance at the Project, inspectors were required to complete a concrete “Sample Identification Card.” *See, e.g.*, Ex. G – Concrete Sample Identification Card (this exhibit is one of many examples in which Mr. Long was referred to as the SCDOT RCE on Sample Identification Cards). Among other information, these cards identify the date the sample was taken, who took the sample, and the characteristics of the concrete. The cards also identify Mr. Long as “SCDOT RCE.” Again, at the very least, FCI should be granted the opportunity to depose Mr. Long concerning his assumption of authority as SCDOT RCE. This inquiry is very likely to cast additional light on the nature of TSC’s and FCI’s relationship.

(iii) An SCDOT Memorandum, dated February 09, 2016, is Addressed to Mr. Long as the RCE

As set forth in the attached Ex. H – SCDOT Memo, dated February 09, 2016, on February 9, 2016, SCDOT District Construction Engineer, D. L. Johnson, wrote a memorandum concerning a material waiver on the Project. He addressed his memorandum to Mr. Long as “Resident Construction Engineer.” Ex. H. The memorandum also was addressed to Mr. Travis Patrick. Notably, despite TSC’s contention in support of its MSJ (*see, e.g.*, TSC Reply, p. 4), the memorandum identifies Mr. Patrick as the “District Five Special Projects Engineer,” not as the RCE. This repeated conflation of Mr. Long as RCE and Mr. Patrick allegedly as RCE is fertile ground for discerning the true nature of TSC’s authority and actions on the Project, which defines TSC’s relationship to FCI. Notably, the SCDOT itself refers to Mr. Long as the Resident Construction Engineer and does not refer to Mr. Long as the “Representative of RCE.”

- (iv) Marty Long Refers to Himself as RCE in an Email to SCDOT, dated July 18, 2016

On July 18, 2016, Mr. Long sent an email to the SCDOT concerning information on a Project Quarterly Report. Ex. I – Email, dated July 18, 2016. Of significance in this and many other similar instances, Mr. Long refers to himself as “RCE Carolina Bays.” *Id.* Even when addressing the SCDOT, he does not simply refer to himself as the RCE Representative or as TranSystems, etc. Rather, Mr. Long calls himself the RCE. This is more evidence that additional discovery regarding Mr. Long’s real role on the Project when dealing with SCDOT and FCI will likely be revealing concerning whether a special relationship existed in accordance with the decision in *Tommy L. Griffin*.

- (v) Marty Long States that he is the “RCE for the SCDOT” in an Email to the United States Coast Guard

As set forth in the attached Ex. J – Mr. Long email to the United States Coast Guard, on July 12, 2017, FCI sent an email to the U.S. Coast Guard notifying them of FCI’s intention to halt temporarily marine traffic for bridge construction. FCI cc’d Mr. Long on that email. *Id.* In the same email chain, Mr. Long then sent an email directly to the U.S. Coast Guard, introducing himself and inquiring about the impact of overhead work on marine traffic. *Id.* In introducing himself, Mr. Long wrote; **“Hello. My name is Martin Long and I am the RCE for the SCDOT over the Carolina Bays Parkway project.”** *Id.* (emphasis added). Notably, Mr. Travis Patrick of SCDOT was copied on the email. *Id.* Thus, the SCDOT knew and presumably approved of Mr. Long representing himself as RCE and acting as the RCE for the SCDOT. Additional discovery concerning this point will likely lead to even more relevant evidence.

c. Continued Discovery is Warranted to Investigate the Scope of TSC's Obligations Under its Contract with Horry County

As indicated in FCI's Opposition to TSC's MSJ, the Court in *Tommy L. Griffin* did not base its opinion on the engineer's design effort. FCI Opp. pp. 18-19; 320 S.C. 49, 463 S.E.2d 85. Rather, the Court established a disjunctive assessment. 320 S.C. at 56, 463 S.E.2d at 89. ("Under these facts, Engineer owed a duty to the contractor not to negligently design **or** negligently supervise the project.") (emphasis added). Thus, whether TSC had design responsibility on the Project is not crucial to determining whether it had a special relationship with FCI giving rise to a duty of care.

(i) TSC's Response to Request for Production No. 46 Suggests TSC Was Not Relieved of Any Design Obligations

Even if the Court determined that design responsibility was a requirement for establishing a special relationship, FCI should be afforded an opportunity to conduct additional discovery on this point. *Baughman*, 306 S.C. at 112-13, 306 S.C. at 533-34; *Cullum Mechanical*, 344 S.C. at 432, 544 S.E.2d at 841. TSC executed an "Engineer Certification for Project Plans and Specifications" ("Engineer Certification") that assigns 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." TSC's MSJ, Ex. E p. 16/28 (pdf. p. 533). TSC also certified 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 comply with applicable requirements." *Id.*

In the Affidavit of Mr. Peter Strub, TSC admitted that it "never prepared, signed, or sealed any design plans for the Project." TSC MSJ, Ex. F, ¶ 7. Clearly, TSC did not comply with the Engineer's Certification. In its Request for Production ("RFP") No. 46, FCI asked TSC 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’s Certification].” Ex. E, No. 46. On November 3, 2023, TSC responded to RFP No. 46 objecting to FCI’s phrasing and 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.” *Id.*

The Engineer’s Certification was incorporated into and formed a part of TSC’s Engineering Contract with Horry County. TSC MSJ, Ex. E p. 3/28, Section II. C. (“A ‘Certification Agreement’ is attached hereto and specifically made a part hereof.”). Based upon the current evidence before the Court, TSC executed the Engineer’s Certification certifying that it had “absolute authority to accept responsibility for the project plans and specifications involved in the project,” that it would “produce project plans and specifications,” and that it would check all plans and specifications for completeness, correctness, accuracy and consistency.” *Id.* Yet, TSC admittedly did not fully comply with the Engineer’s Certification. Moreover, in Response to RFP No. 46, TSC acknowledges that it has no written evidence of relief from its obligations under the Engineer’s Certification. *See* Ex. E, No. 46

(ii) Additional Discovery Likely will Lead to More Evidence Relevant to TSC’s Design Responsibilities and Its Relationship with FCI

At least two bases exist for continued discovery on this point. Both of them are likely to lead to relevant evidence concerning TSC’s design responsibilities and its relationship with FCI. First, if TSC had design-related responsibilities as indicated in the Engineer’s Certification, was not relieved of those responsibilities, yet did not fulfill them, then TSC’s apparent failure to fulfill its Contract is relevant to whether the Court should recognize a design-related obligation on TSC’s part. Second, what TSC actually did with regard to design is currently a mystery. The Engineer’s Certification lists a host of obligations. TSC only denies performing a portion of those obligations

(preparing, signing, and sealing any design plans). FCI should be afforded an opportunity to explore the full extent of TSC's design-related activities. For example, if TSC did not actually prepare the plans, but it certified the completeness, correctness, accuracy and consistency of the plans, then TSC was an integral part of the overall design effort. Moreover, as noted above, RCE's have power to decide "all questions that may arise regarding . . . the interpretation of the Plans and Specifications" TSC MSJ, Ex. B – Standard Specifications. Further discovery on this point is likely to reveal relevant evidence of TSC's design responsibility, which likely will inform the existence of a special relationship under *Tommy L. Griffin*.

2. FCI Was Not Dilatory in Seeking Discovery

As TSC and FCI agreed in their Joint Motion filed a little over one month ago, "the parties have diligently exchanged discovery over the life of this dispute" Ex. C, ¶ 3(g). The case was stayed for two years following the initial filing. Subsequently, the Parties joined to remove the case from the docket in 2021, and then the lawsuit was reinitiated on September 27, 2022. These actions were driven by the complexity of the case and FCI's contemporaneous contractual claims against Horry County and SCDOT. In the interests of economy and in an effort to narrow issues, the Parties focused attention on FCI's contractual disputes with Horry County and SCDOT for a period from late 2022 into the Spring of 2023. Those disputes were settled in June 2023, with SCDOT providing its Project file to FCI in July 2023. One of the effects of the foregoing history and the complexity of the case is that TSC started producing its documents to FCI on June 30, 2021, and was still producing documents on October 6, 2023, and most recently, on November 3, 2023.

Until document production is completed, neither Party can efficiently and effectively take necessary depositions in this matter. For example, as indicated in the discovery received to date, Mr. Long held himself out as RCE as early as the initial pre-construction partnering meeting in

January of 2014 (Section II. E. 1. b. i. *supra*) and was still referring to himself as the “RCE for the SCDOT” in July of 2017. To effectively depose Mr. Long, FCI needs to receive and review all of the documents reflecting his exercised authority and activities during this timeframe and on through to Project completion in 2019. Such a deposition could not reasonably be conducted at any point prior to the Hearing in August of 2023 or even prior to completion of TSC’s document production, which was ongoing as of this Fall and included significant productions after the Hearing.

Under the circumstances, FCI has not been dilatory in seeking discovery on the issue of TSC’s special relationship with FCI or the host of other relevant issues in this matter. 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 Hearing date. In accordance with the South Carolina Supreme Court precedent set forth in *Baughman*, the Court should reconsider its Form 4 Order and withdraw any ruling on TSC’s MSJ pending completion of discovery.

3. Any Delay in Discovery was not Caused by FCI but is Due to the Complexity of the Case

To the extent the Court feels that the Parties have in any way delayed discovery in this matter, that conclusion must be tempered by the complexity of this case. *Baughman* 306 S.C. at 113-14, 410 S.E.2d at 543-44. As determined by the South Carolina Supreme Court in *Tommy L. Griffin* and *Cullum Mechanical*, whether TSC had a special relationship with FCI giving rise to a duty of care must be discerned based upon the facts and circumstances. 320 S.C. at 55-56, 463 S.E. 2d at 89. This is a factual issue. *Cullum Mechanical*, 344 S.C. at 433, 544 S.E.2d at 842. 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).” Ex. C, ¶ 3(a). Consequently, a thorough consideration of the facts and circumstances potentially giving rise to a duty by TSC requires that FCI be afforded an adequate opportunity to complete discovery of such wide-ranging facts including, but not limited to, receipt of all relevant TSC documents and the deposition of Mr. Long who TSC now admits “used the title Resident Construction Engineer.” Ex. D – Interrogatory Responses, No. 18. As TSC argued in support of its MSJ, “[t]he RCE’s role, for purposes of project supervision, was very similar to that of the engineer in *Tommy L. Griffin*.” TSC Reply, p. 12. Hence, completion of document production and the deposition of Mr. Long are critical to a fully informed ruling on TSC’s MSJ, as documents produced by TSC after the hearing and admissions made by TSC after the hearing go directly to the issues being considered in TSC’s MSJ.

III. CONCLUSION

FCI respectfully requests that the Court reconsider its Form 4 Order granting TSC’s MSJ. The seminal issue turns on a complete understanding of the facts and circumstances defining the relationship between TSC and FCI and whether that relationship gives rise to a duty of care by TSC as defined by the South Carolina Supreme Court in *Tommy L. Griffin* and *Cullum Mechanical*. Similarly, such discovery is likely to reveal relevant evidence regarding FCI’s third-party beneficiary status to TSC’s Engineering Contract. The Parties agree that this is a complex case and that despite diligent efforts, the Parties are only in the early stages of discovery. Summary judgment should not be considered until FCI has a full and fair opportunity to complete needed discovery. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. Hence, FCI requests that the Court withdraw its Order and allow TSC to refile its MSJ following the completion of discovery in this matter.

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December 1, 2023
Greenville, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2606116

Flatiron Constructors Inc
PLAINTIFF(S)

TranSystems Corporation
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

Carter B Reid for Flatiron Constructors Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2022CP2606116

Type: Order/Electronic Form 4

So Ordered

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

Electronically signed on 2023-11-21 15:10:45 page 3 of 3

EXHIBIT B

127 Dunbar St. | Ste 200 | Spartanburg, SC 29306
 200 Meeting St. | Ste 205 | Charleston, SC 29401

mwilkes@wajlawfirm.com
www.wajlawfirm.com

From: Carter Reid <creid@watttieder.com>
Sent: Thursday, February 17, 2022 12:55 PM
To: Michael Wilkes <mwilkes@wilkeslaw.com>
Cc: Dan Atkinson <datkinson@wilkeslaw.com>; Alex Joyner <ajoyner@wilkeslaw.com>; Ellen Cheek <echeek@wilkeslaw.com>; Ashley Henderson <ahenderson@wilkeslaw.com>; Leslie Osman <losman@watttieder.com>; Dominick Weinkam <dweinkam@watttieder.com>; Hanna Blake <hblake@watttieder.com>
Subject: RE: Flatiron v. TranSystems: RPD Issues

Mike,

I am in mediation. I will need to look into the issues you have raised. I will call you early next week to discuss them. Please let me know your availability. Thanks.

Carter

Carter B. Reid | Senior Partner



1765 Greensboro Station Place, Suite 1000 | McLean, VA 22102
p: 703.749.1028 | **e:** creid@watttieder.com

From: Michael Wilkes <mwilkes@wilkeslaw.com>
Sent: Thursday, February 17, 2022 11:47 AM
To: Carter Reid <creid@watttieder.com>
Cc: Dan Atkinson <datkinson@wilkeslaw.com>; Alex Joyner <ajoyner@wilkeslaw.com>; Ellen Cheek <echeek@wilkeslaw.com>; Ashley Henderson <ahenderson@wilkeslaw.com>; Leslie Osman <losman@watttieder.com>; Dominick Weinkam <dweinkam@watttieder.com>
Subject: Flatiron v. TranSystems: RPD Issues

****CAUTION! EXTERNAL EMAIL; when opening attachments and links be extremely careful****

Carter,

I am writing regarding various RPD issues:

[1] **TCR Production:** We have just discovered that there exists another group of about 25,000 documents that CDS uploaded into Relativity from TSC but did not provide to us to review. This is a CDS error—long story of our digital times.... Of course, we are confirming we have “everything.” We are reviewing this new group of documents and will supplement our responses accordingly, probably within the next month [we are preparing for several trials during the next four months which have been delayed by Covid...].

[2] **FCI Production:** Attached are our 5.28.21 RPD to FCI, and FCI’s 8.16.21 Response. I understand that FCI has produced 1,098,992 pages of documents so far; however, FCI has not served supplemental written responses to TSC’s discovery requests. At some point, FCI’s should serve specific supplemental responses to each request, which we can discuss later as necessary. Note that we have served supplemental responses with TSC’s recent productions.

Today, my question is simple: Has FCI produced not only its documents, but any documents it received from SCDOT or any other source? Our RPD 6 requests: “All documents obtained by Flatiron via subpoena, FOIA request, or any other open source request related to the Project.” If FCI has produced documents responsive to RPD 6, please identify the bates range of the FCI documents and the bates range of documents responsive to RPD 6. If FCI has not produced any documents responsive to RPD 6, please advise why not.

Please call me in our Spartanburg office today or Charleston tomorrow, if you wish to discuss these issues.

Mike
2.17.22

Michael B.T. Wilkes

864.591.2355 Spartanburg
843.737.6229 Charleston
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Disclaimer:

The information contained in this communication from creid@watttieder.com is confidential and may be legally privileged. It is intended solely for use by mwilkes@wilkeslaw.com and others authorized to receive it. If you are not mwilkes@wilkeslaw.com you are hereby notified that any disclosure, copying, distribution or taking action in reliance of the contents of this information is strictly prohibited and may be unlawful. Please consider the environment before printing this email.

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Flatiron Constructors, Inc.,

Plaintiff,

v.

TranSystems Corporation,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2022-CP-26-06116

**JOINT MOTION TO ESTABLISH
COMPLEX CASE DESIGNATION AND
TIME FOR TRIAL**

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

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

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

(a) Nature of the case

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

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

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

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

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

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

(b) The number of witnesses for the plaintiff

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

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

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

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

(c) The number of witnesses for defendant

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

(d) Anticipated time needed to try the case

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

(e) Motions pending

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

(f) Additional motions anticipated before trial

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

(g) Discovery pending

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

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

(h) Additional discovery contemplated

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

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

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

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

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

Respectfully submitted this 18th day of October, 2023

s/Mason A. Goldsmith, Jr.

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Attorneys for Plaintiff Flatiron Constructors, Inc.

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

s/C. Daniel Atkinson

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Attorneys for Defendant TranSystems Corporation

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. No.: 2018-CP-26-02633
	)	
Flatiron Constructors, Inc.,	)	
	)	TRANSYSTEMS' ANSWERS TO FLATIRON
Plaintiff,	)	CONSTRUCTORS, INC.'S
	)	FIRST SET OF INTERROGATORIES
vs.	)	(1-27)
	)	
TranSystems Corporation,	)	
	)	
Defendant.	)	
_____	)	

TranSystems Corporation ("TSC") hereby responds to Flatiron Constructors, Inc.'s First Set of Interrogatories ("Flatiron's Interrogatories") as follows:

General Objections

1. The following answers are made subject to and without waiver of any objections to the admissibility of these answers or any part thereof at trial or otherwise.

2. TSC objects to Flatiron's Interrogatories to the extent they seek information protected by the attorney-client privilege or the work-product doctrine.

3. The following answers are based upon information presently available to TSC after good faith investigation and in light of the present state of discovery. Said answers are made without prejudice to TSC's right to rely upon subsequently discovered facts and documents. TSC reserves the right to supplement these answers upon its further investigation and acquisition of information or documents that it does not possess, recall or presently have in its possession.

ANSWERS TO INTERROGATORIES

1. Identify all persons having knowledge of the facts or circumstances of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements; and summarize the knowledge of each such person

and indicate whether a written or recorded statement has been taken from each person and, if so, indicate who has possession of the written or recorded statement.

ANSWER: TranSystems notes that this case is at an early stage of discovery; therefore, TranSystems expressly reserves the right to supplement this response as it obtains additional information. Given the nature and scope of this claim, TranSystems will likely be required to supplement its response hereto:

1.0 Plaintiff Flatiron Constructors, Inc.

TranSystems incorporates herein by reference all witnesses identified by Flatiron in Flatiron's Answers to TranSystems Interrogatories, as well as any witnesses identified in supplemental responses thereto.

2.0 Defendant TranSystems Corporation –witnesses associated with TranSystems can be contacted via TranSystems' undersigned counsel.

2.1 Martin Long, P.E.

Long served as Project Manager for TranSystems for the Carolina Bays project. He is expected to testify regarding his interactions with Flatiron and his work with the SCDOT and Horry County for the Carolina Bays Project.

Long has not given written or recorded statements.

2.2 Peter Strub, P.E.

Strub is an executive with TranSystems, who negotiated and executed the TranSystems contract. He is expected to testify regarding TranSystems' contract and procedures for the company.

Strub has given an affidavit in this case, which has been provided to Flatiron.

2.3 Doug Kennedy

Kennedy was a senior bridge inspector for TranSystems for the Carolina Bays Project. He is expected to testify regarding his inspections for the Carolina Bays Project as well as his interaction with Flatiron.

TranSystems is unaware of any written or recorded statements from Kennedy.

2.4 Regina Wells

Wells was office administrator for TranSystems for the Carolina Bays Project. She is expected to testify regarding her handling and logging of submittals for the Project, as well as her interaction with Flatiron.

Wells has not given any written or recorded statements.

2.5 Chance Cargile

Cargile was a bridge inspector for TranSystems during girder installation and deck pours. He is expected to testify regarding his inspections, as well as his interactions with Flatiron.

Cargile has not given any written or recorded statements.

2.6 Allen Freeland

Freeland was a Senior Inspector for TranSystems. He is expected to testify regarding his bridge inspections on behalf of TranSystems.

Freeland has not given any written or recorded statements.

2.7 Jim Blackmore

Blackmore was a Foundation Inspector who oversaw inspection of drill shafts. He is expected to testify regarding his inspections, as well as his interactions with Flatiron.

Blackmore has not given any written or recorded statements.

3.0 SCDOT

3.1 Travis Patrick, P.E.

Patrick served as Resident Construction Engineer for SCDOT. He is expected to testify regarding his role in the Project, and his supervision of TranSystems.

TranSystems is unaware of whether Patrick has given any written or recorded statements.

3.2 Steve Nanney, P.E.

Nanney was the Bridge Construction Engineer for SCDOT. He is expected to testify regarding his observations and findings in his professional role.

TranSystems is unaware of whether Nanney has given any written or recorded statements.

3.3 Bill Madison, P.E.

Madison was Bridge Construction Engineer for the first two years of the Project. He is expected to testify regarding his findings and observations.

TranSystems is unaware of whether Madison has given any written or recorded statements.

4.0 **Horry County**

4.1 Jason Thompson, P.E.

Thompson was originally a bridge engineer for SCDOT; however, he eventually transferred to employment with Horry County. He is expected to testify regarding his work on the Project, and his interaction with Flatiron and TranSystems.

TranSystems is unaware of whether Thompson has given any written or recorded statements.

5.0 **S&ME, Inc.**

Greg Canavan, P.E.

Canavan is a geotechnical engineer with S&ME, Inc. He is expected to testify regarding his evaluation of the Project, and his interaction with TranSystems and Flatiron.

TranSystems is unaware of whether Canavan has given any written or recorded statements.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of TranSystems that relate to Flatiron's claim or TranSystems' defense in the case.

ANSWER: In lieu of a list, TSC has produced copies of all items in its possession responsive to this Interrogatory, in response to Flatiron's previously-served Requests for Production of Documents. As noted in the responses, TSC has not produced items protected by the Attorney-Client Privilege, nor has it identified those items via privilege log.

3. Set forth the names and addresses of all insurance companies that have issued liability insurance, property insurance, professional liability insurance, and other insurance coverage relating to TranSystems' work on the Project and set forth the number or numbers of the policies involved and the amount or amounts of coverage provided in each policy.

ANSWER: TranSystems objects to this Interrogatory as beyond the scope of discovery allowed by Rule 26, SCRCF, because it seeks all insurance policies held by TranSystems. The Rules of Civil Procedure allow only for discovery of insurance agreements "under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Rule 26(b)(2), SCRCF. Flatiron's request seeks information of all insurance coverage, much of which, like Workers Compensation or automobile coverage, would never be required to satisfy any potential judgment in this case. Subject to and without waiving this Objection, TranSystems states that TranSystems has certain coverages under a professional liability policy issued by Continental Casualty Company, bearing Policy Number AEH591904307, with limits of liability stated therein. TranSystems is producing a copy of the Policy, bearing Bates labels CNA 1 - 60, with premium information redacted, in response to Plaintiff's Second Requests for Production. TranSystems also possesses certain additional professional liability coverages, and TranSystems will produce copies and supplemental information regarding those policies.

4. If TranSystems has made claims with an insurer regarding the Project or damage arising from or connected to the Project, for each claim, please: State when the claim was made; identify the insurer to which the claim was made; state where the damage occurred; describe the nature of the damage and the alleged cause of the damage and describe the status of the claim.

ANSWER: TranSystems objects to this Interrogatory as seeking information prepared in anticipation of litigation by TranSystems and its insurer, which is exempt from discovery pursuant to Rule 26(b)(3). Subject to this objection, and in compliance with Rule 26(b)(2), SCRCF, TranSystems states that it notified its professional liability carrier of this claim, and it has responded by offering defense to same.

5. List the names and addresses of expert witnesses whom TranSystems proposes to call as witnesses at the trial of the case, state the subject matter on which each expert is expected to testify, and state the facts and opinions to which each expert is expected to testify and a summary of the grounds of each opinion.

ANSWER: TranSystems has not identified specific experts to provide trial testimony; however, it will do so in accordance with any Scheduling Order entered in this case. Further, TranSystems expressly reserves the right to supplement this response in accordance with any Scheduling Order entered by the Court in this case.

6. For each person known to TranSystems or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Flatiron of the important facts known to or observed by such witness or provide a copy of written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory 1.

7. Identify your involvement in prior lawsuits relating to allegations of negligent inspection. For each lawsuit, provide the case name, court name, date the complaint was filed, nature of the allegations, and the outcome or current status of the lawsuit.

ANSWER: TranSystems objects to this Interrogatory as overly broad and vague, because "allegations of negligent inspection" is insufficiently defined. Additionally, TranSystems

objects to this Interrogatory, because it is not limited in time or scope. Subject to these objections and the general objections above, TranSystems states that TranSystems has not been involved in any litigation asserted by a third-party non-client, based upon its provision of Construction, Engineering, Inspection and Testing Services. TranSystems is a defendant in one other civil action in South Carolina, but it is not related to inspection or testing services.

8. Identify and describe TranSystems' method of processing submittals and maintaining records of submittals and requests for information (RFI's). Provide a description of the steps involved in processing submittals, documentation generated during the submittal review process, methods used to maintain records of submittals and requests for information, and individuals or parties responsible for overseeing the submittal process and maintaining records of the submittal process.

ANSWER: TranSystems objects to this Interrogatory to the extent it requests company-wide methods of processing submittals for all projects, as the procedure varies project-to-project. This request is overbroad, due to the number and types of different submittals, and the fact that different submittals were forwarded to different supervisors at SCDOT. Subject to this objection, TranSystems states that its method for processing submittals and maintaining records of RFIs for the Project at issue was:

- a. Marty Long would review a submittal to verify it was appropriate for his review. If it was not, he would notify Flatiron who was the appropriate recipient for the submittal.
- b. Upon receipt, Long would add the submittal status for the running agenda item list for submittals for each bi-weekly project progress meeting.

- c. Shortly after receipt, Long would make comments in response to the submittal, as needed, or he would forward the submittal to the next person in the review chain. He would note the change of status of this on the agenda for the upcoming bi-weekly meeting.
- d. If Long had comments that needed a response from Flatiron, he would not take further action, other than status review at progress meetings, until he received a response to the comments.
- e. After forwarding to SCDOT personnel, Long would again change the status on the agenda and await a response from the person from SCDOT with authority for a specific response.
- f. After SCDOT approval, Long would notify Flatiron and note the approval in the upcoming agenda. The submittal would then be removed from subsequent agendas.

Each submittal chain, and each agenda and meeting minutes prepared by Long was uploaded to ProjectWise, and was available for review by all interested parties.

9. Identify all inspectors employed by or affiliated with TranSystems who were involved in the Project, and for each inspector, provide the following information: Full name; employment status (employee, independent contractor, e.g.); dates of employment or affiliation; roles and responsibilities on the Project; and dates the inspector was assigned to the Project and when they were on the Project site.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome. Flatiron is already in possession of a list of the inspectors, as referenced in Exhibit II.16 to Flatiron's Global Claim to the DRB. TranSystems incorporates by reference that Exhibit

as identifying all inspectors. This information is also included SCDOT's FOIA response to Flatiron. TranSystems objects to the Request for employment status and dates, as irrelevant to the claims presented and unduly burdensome to TranSystems. The daily reports, contained within that document, state the dates that the inspectors were on the site and performing inspections.

10. Identify the methods used by TranSystems for assessing requests for inspections on the Project, including a description of the process for accepting, processing, and responding to such requests, a description of documentation generated as part of the request for inspection process, and the individuals responsible for creating or maintaining documentation involved in the request for inspection process so identified.

ANSWER: TranSystems objects to the Interrogatory, because it implies a universal procedure for a wide variety of different circumstances. Subject to this objection, TranSystems states the general procedure followed for inspections was that Flatiron would produce a three-week schedule for construction, with all parties understanding the construction schedule was tentative based on progress, weather and availability of materials. Based on the schedule, Flatiron would schedule production and delivery of concrete for pouring. TranSystems would perform running inspections as available, but final inspections would typically be performed immediately prior to pouring of concrete, within 24 hours of the scheduled concrete pour. Requestors from Flatiron would vary, based on the field engineer responsible for a particular structure. Documentation would include the three-week schedule produced by Flatiron, as well as weekly day-by-day schedules produced by Flatiron, which were updated daily based on progress. Documentation produced by TranSystems would include the pre-pour checklist, to be signed by the assigned inspector for TranSystems. If TranSystems noted deficiencies or issues in the schedules produced

by Flatiron, Marty Long would notify if there were issues of non-compliance, like missing certifications or material tests.

11. Identify any and all deficiencies, defects, errors, omissions, or other issues in Flatiron's work, workmanship, or construction activities on the Project, and for each instance, provide the following information: date when the deficiency, defect, error, omission, or other issue was identified; the name of the inspector who identified the deficiency, defect, error, omission, or other issue; a detailed description of the deficiency, defect, error, omission, or other issue; an explanation of the reason for the deficiency, defect, error, omission, or other issue; and identify the steps taken by TranSystems after the deficiency, defect, error, omission, or other issue was identified.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, particularly given that TranSystems has presented no claim against Flatiron in this case. All communications and inspections were documented in writing, and were provided to Flatiron contemporaneously. Additionally, TranSystems has produced its project file, which includes all reports of deficiencies. Deficiencies could range in scope from minor compliance or missing paperwork, to work that failed to meet certification requirements for safety. It is impossible for TranSystems to identify every deficiency in a list form; however, TranSystems' files, as well as the reports provided to SCDOT and maintained in SCDOT's computer database will contain every documented deficiency, as well as the steps taken to respond to same.

12. Identify the methods employed by TranSystems to give notice to Flatiron of deficiencies, defects, errors, omissions, or other issues identified during inspections of Flatiron's work on the Project. Include a description of how notice is given, in what timeframe, and the individuals responsible for providing said notice.

ANSWER: TranSystems objects to this Request as overly broad and unduly burdensome, because there were a wide range of responses, based on the nature and extent of deficiency discovered. Subject to this Objection, TranSystems states that the general procedure for responses to deficiencies was as follows:

After the discovery of any deficiency, pursuant to the terms of its contract for services with Horry County, TranSystems notified SCDOT, Horry County, and Flatiron of any inspections revealing problems or concerns, and it provided comments to Flatiron for potential correction. Flatiron had the option to make changes, or to follow the escalation procedure provided in its contract with Horry County for resolution of any disputes. As to minor deficiencies, TranSystems would not notify Horry County or SCDOT, unless or until Flatiron refused to make changes to resolve the minor deficiencies and the dispute became part of the escalation process.

13. Identify all instances in which TranSystems instructed Flatiron to stop work, modify its work, suspend performance, or re-sequence work in relation to the Project, and for each instance, provide: Date of the instruction; nature and purpose of the instruction; grounds or reasons for the instruction; names and titles of individuals involved in giving or receiving the instruction; and written or documented communication conveying the instruction.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, because it contains no limit in scope as to the request. As the request is drafted, a minor paperwork revision would require the same response as a stop work order. Subject to this objection, TranSystems states that, at SCDOT's direction, it communicated partial project stop work orders on limited occasions, which were documented at the following locations in production:

- A. FIC000584029 – FIC000584033, from November 2016, regarding concrete issues at Bent 15;
- B. FIC000082888 – FIC000082935, from October 2016, involving concrete pours;
- C. FIC000030270, involving a temporary suspension of work in July, 2016;
- D. FIC000031582 – FIC000031589, involving lifting of a temporary suspension of work in August 2016;
- E. FIC000152248, addressing a SCDOT stop work order in December, 2015;
- F. FIC000180746, addressing a stop work order for Drilled Shafts in July, 2014; and
- G. FIC000021679, relating to a hold on mass pours pending approval of a revised Mass Concrete Plan, in December 2014.

14. Identify all instances where TranSystems sought instruction, permission, or approval from SCDOT to approve Flatiron's work, declare the work deficient, stop work, suspend performance, re-sequence work, or affect the ongoing work on the Project, and for each instance, provide: Date the instruction, permission, or approval from SCDOT was sought; description of the work related to the requested instruction, permission, or approval; names and titles of individuals involved in giving or receiving instruction, permission, or approval; and written or documented communication conveying the instruction.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, because it requests TranSytems to essentially provide a description of the entirety of its work on the project in an Interrogatory Answer. TranSystems has produced its available Project File, and SCDOT has produced its file to Flatiron, which contains all information responsive to this Interrogatory. The burden on Flatiron is equal to that for TranSystems to search SCDOT's file for this information.

15. Identify the methods used by TranSystems for documenting inspections performed on the Project, including a description of the process of inspection, a description of documentation generated as part of the inspection process, and individuals responsible for creating or maintaining documentation involved in the inspection process so identified.

ANSWER: SCDOT provided a form to be completed for every inspection of concrete pours, and all inspection protocols are listed in the 2004 SCDOT Manual for Construction, which has been produced in this case. Individual inspectors would complete the form appropriate for each inspection, and the inspection forms were maintained by being uploaded into Site Manager, the SCDOT database, and ProjectWise, as appropriate.

16. Identify all meetings, discussions, conferences, or communications by TranSystems to provide updates on the Project, whether they occurred regularly (daily, weekly, monthly, e.g.) or otherwise.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, as it requires TranSystems to describe all work it did on this Project in an Interrogatory response. Subject to this objection, TranSystems states that it conducted bi-weekly project progress meetings, and daily meetings of Marty Long with Lou Hutcherson on every week day, to discuss project progress. TranSystems kept minutes of the bi-weekly meetings, which were uploaded to ProjectWise, and which were sent contemporaneously to Flatiron. Additionally, TranSystems would respond to email or other requests as needed. Those emails would have also been uploaded to ProjectWise.

17. Identify reports, summaries, logs, or other documents created to provide project updates.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome. Further, the Interrogatory does not specify the people or entities to be updated on project status. Subject to this Objection, TranSystems states generally that it created the following categories of reports:

1. Bi-weekly meeting minutes;
2. Certification logs, which lists certification of materials;
3. Material testing log;
4. Rain log, documenting weather;
5. Inspectors Daily Work Reports;
6. Drill Shaft Logs;
7. Concrete Pre-Pour Checklist;
8. Stored Material Payment Report;
9. Change Order Log; and
10. ICWW Concrete and Rebar Installation Log.

All of these categories of reports were uploaded to SCDOT ProjectWise or Site Manager, as appropriate. Upon information and belief, Flatiron has obtained all of these reports via a Freedom of Information Act request to SCDOT. Additionally, Flatiron had to sign many of these reports as they were completed during construction.

18. Identify all persons acting as the Resident Construction Engineer (“RCE”) on the Project.

ANSWER: TranSystems objects to this Interrogatory as vague and insufficiently defined. Subject to this Objection, TranSystems states the following:

Although Marty Long used the title Resident Construction Engineer in his capacity with TranSystems, he never had authority as SCDOT's RCE. That authority is vested solely in an employee of SCDOT, under Section 101.2 of the SCDOT Standard Specifications. Travis Patrick was the primary Resident Construction Engineer for SCDOT for the Project. In 2017, Katherine Scott obtained the SCDOT title of Resident Construction Engineer, when Patrick became District 5 Assistant Construction Engineer. AJ Bostic also had a title of Resident Construction Engineer. Derrick Tindall also became Resident Construction Engineer for District 5.

19. Identify all instances in which TranSystems' inspection was requested, but the inspection was denied, and for each instance, provide: Date the inspection was requested; nature and purpose of the requested inspection; grounds or reasons for denying the inspection; names and titles of individuals involved in giving or receiving the denial; and written or documented communication conveying the request and denial.

ANSWER: There are no known instances where TranSystems was requested to perform an inspection, and such request was denied. Alleging that an inspection was denied would allege that portions of the project were built without an inspection, which such allegation is not supported by the project records. It is possible that a requested inspection was delayed allowing TranSystems inspectors to complete initiated inspections at other areas or awaiting Flatiron's Field Engineer to complete his/her QC as outlined in the project records or perform other inspections requested at the same time. As soon as an inspector was available to perform an inspection, it would be performed.

20. State in detail all facts and identify all documents upon which you rely in support of your Second Defense that "Flatiron's alleged damages were caused by its own negligence" (See TranSystems' Answer to Amended Complaint, ¶ 51, dated November 13, 2020).

ANSWER: SCDOT asserted errors on the part of Flatiron on multiple occasions, and TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

21. State in detail all facts and identify all documents upon which you rely in support of your Third Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God” (*See* TranSystems’ Answer to Amended Complaint, ¶ 52, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

22. State in detail all facts and identify all documents upon which you rely in support of your Fifth Defense that “Flatiron’s claims may be barred by the equitable doctrines or waiver, estoppel, and/or laches . . . based on Flatiron’s claims under its Construction Contract with Horry County” (*See* TranSystems’ Answer to Amended Complaint, ¶ 54, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

23. State in detail all facts and identify all documents upon which you rely in support of your Sixth Defense that “TranSystems is entitled to a setoff for any compensation received by Flatiron for the damages alleged in its Amended Complaint.” (*See* TranSystems’ Answer to Amended Complaint, ¶ 55, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this request in full until it has reviewed all documents from SCDOT and Flatiron. TranSystems reserves the right to supplement this response.

24. State in detail all facts and identify all documents upon which you rely in support of your Seventh Defense that “Flatiron’s claims against TranSystems may be barred by the doctrine of accord and satisfaction and/or satisfaction and release” (*See* TranSystems’ Answer to Amended Complaint, ¶ 56, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this request in full until it has reviewed all documents from SCDOT and Flatiron. TranSystems reserves the right to supplement this response.

25. State in detail all facts and identify all documents upon which you rely in support of your Ninth Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God” (*See* TranSystems’ Answer to Amended Complaint, ¶ 58, dated November 13, 2020).

ANSWER: Discovery is in an early phase in this case, and TranSystems continues to evaluate evidence, as well as its potential affirmative defenses. Accordingly, TranSystems reserves the right to supplement this response. Subject to this reservation, TranSystems states that significant portions of the delay claimed by Flatiron was a product of weather, which was not within the control of TranSystems. Additionally, in various locations, Flatiron has claimed delays related to weather, which would constitute Acts of God. TranSystems will supplement this response.

26. State in detail all facts and identify all documents upon which Mr. Peter Strub relied upon to claim that “[n]either TranSystems Corporation nor I ever considered or intended Flatiron to be a third-party beneficiary of TranSystems’ contract with Horry County.” (*See* TSC MSJ, ¶ 9, Ex. F – Affidavit of Peter Strub, P.E.).

ANSWER: Peter Strub is the person who executed and negotiated TranSystems' contract with Horry County, and he based his sworn testimony on his own personal knowledge held at the time of the Contract's execution, as well as the terms negotiated thereunder. Further, at the time of the execution of the TranSystems Contract, Flatiron was not hired as General Contractor, making it impossible for Flatiron to be an intended third party beneficiary of a contract entered before it agreed to do work on the Carolina Bays project.

27. State in detail all facts and identify all documents upon which Mr. Peter Strub relied to claim that "[a]lthough the TranSystems Contract included a document entitled 'Engineer Certification for Project Plans and Specifications,' signed by [Mr. Peter Strub], TranSystems never prepared, signed, or sealed any design plans for the Project. Accordingly, the Engineering Certification for Plans and Specifications was never performed by TranSystems for the Carolina Bays Project." (See TSC MSJ, ¶ 7, Ex. F – Affidavit of Peter Strub, P.E.).

ANSWER: TranSystems objects to this Interrogatory as posed, because it requests for TranSystems to identify documents to prove that something did not happen, which is impossible. There is no document, because it did not happen.

November 3, 2023

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Attorneys for TranSystems Corporation

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

I hereby certify that I have this date, served a true and correct copy of *TranSystems Corporation's Answers to Flatiron Constructors, Inc.'s First Set of Interrogatories* via Email only to the following counsel of record:

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November 3, 2023


 Judy J. Saad, Paralegal

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C.A. No.: 2018-CP-26-02633
	)	
Flatiron Constructors, Inc.,	)	
	)	TRANSYSTEMS' ANSWERS TO FLATIRON
Plaintiff,	)	CONSTRUCTORS, INC.'S
	)	SECOND SET OF REQUESTS FOR
vs.	)	PRODUCTION
	)	(21-47)
TranSystems Corporation,	)	
	)	
Defendant.	)	
	)	

TranSystems Corporation ("TSC") hereby responds to Flatiron Constructors, Inc.'s Second Set of Requests For Production ("Flatiron's Requests For Production") as follows:

General Objections

1. The following responses are made subject to and without waiver of any objections to the admissibility of these responses or any part thereof at trial or otherwise.

2. TSC objects to Flatiron's Requests For Production to the extent they seek information protected by the attorney-client privilege or the work-product doctrine.

3. The following responses are based upon information presently available to TSC after good faith investigation and in light of the present state of discovery. Said responses are made without prejudice to TSC's right to rely upon subsequently discovered facts and documents. TSC reserves the right to supplement these answers upon its further investigation and acquisition of information or documents that it does not possess, recall or presently have in its possession.

4. TSC objects to Flatiron's Requests for Production as unduly burdensome, to the extent they request identification of specific documents relevant to discrete questions/requests/issues/contentions/disputes. The document productions in this case are extremely voluminous, and TSC cannot be reasonably expected to cull through same for each and

every document relevant to Flatirons' requests in this regard.

RESPONSES TO REQUESTS FOR PRODUCTION

21. In accordance with your prior representations, we request that you produce all documents you indicated would be produced in response to Flatiron Constructors, Inc.'s First Requests for Production to TranSystems Corporation, dated October 19, 2020.

RESPONSE: TranSystems produced all items requested herein on October 6, 2023.

22. All documents identified in your responses to Flatiron's First Set of Interrogatories served concurrently with this Request for Production (hereinafter, each numbered Interrogatory will be referred to individually).

RESPONSE: All documents referenced have either been produced by TranSystems, or were produced to TranSystems by Flatiron.

23. All photographs, plats, sketches, or other prepared documents in possession of TranSystems that relate to Flatiron's claim or TranSystems' defense in this case.

RESPONSE: TranSystems has produced all documents which are not privileged, which are responsive to this Request. Additionally, TranSystems has produced a privilege log. As previously stated, TranSystems states that communications directly with defense counsel are not required to be disclosed on a privilege log, because such disclosure itself would violate privilege.

24. Any and all insurance policies and related documentation concerning insurance coverage that you have obtained in relation to the Project, including, but not limited to, general liability insurance, property insurance, professional liability insurance, and any other form of insurance coverage.

RESPONSE: TranSystems objects to this Request, because it exceeds the scope of discovery of insurance information allowed under Rule 26(b)(2), SCRCP. Subject to this

Objection, TranSystems will produce insurance policies, with premium information redacted, regarding policies that may provide coverage for the claims presented in this case. TranSystems is providing herewith a copy of its professional liability policy, with premiums redacted, bearing Bates labels CNA 1 – 60, and it will provide its excess professional liability policy upon receipt of same, with premium information redacted.

25. All documents relating to claims made by you or on your behalf under any insurance policy identified in response to Interrogatory #3.

RESPONSE: TranSystems objects to production of any insurance claims information, because it is not relevant to the claims, because such information is outside the scope of discovery by Rule 26(b)(2), SCRCP, and because the information is not relevant to the claims presented, nor is it admissible, nor is it narrowly tailored to obtain relevant, admissible information. Additionally, the information sought is barred from discovery by Rule 26(b)(3), SCRCP.

26. All documents relied upon by expert witnesses identified in response to Interrogatory # 5.

RESPONSE: TranSystems will supplement this response when it identifies expert witnesses in accordance with any Scheduling Order issued in this case.

27. Written or recorded statements taken from each person known to TranSystems or counsel to be witnesses concerning the facts of the case as identified in response to Interrogatory #6.

RESPONSE: At present, the only statement in possession of TranSystems is the affidavit of Peter Strub, which has been filed with the Court and of which Plaintiff has copies.

28. All documentation or records relating to submittals and requests for information (RFI's).

RESPONSE: TranSystems objects to this Request because it seeks information available from other sources (i.e., SCDOT) which are more convenient, less burdensome, less expensive, and/or equally available to Flatiron. Any documents within TranSystems' possession have been produced. All responsive information to this Request was uploaded to Site Manager and ProjectWise, which is in possession of SCDOT. Upon information and belief, Flatiron is in possession of this information, as a result of a Freedom of Information Act Request to SCDOT. TranSystems does not have access to this information other than requesting it from SCDOT.

29. All documentation supporting an individual's identification as Resident Construction Engineer in response to Interrogatory # 18.

RESPONSE: TranSystems objects to this Request as unduly burdensome (see, i.e., TranSystem's General Objection #4). Email correspondence identifying Travis Patrick and various other SCDOT officials as RCE is included in TranSystems' production to-date, and Flatiron was copied on much of the correspondence. Such documents are also contained in Flatiron's production. TranSystems identified specific references to Travis Patrick's role in its Reply in Support of TranSystems' Motion for Summary Judgment.

30. All personnel files for Marty Long, Doug Kennedy, and all inspectors who were involved with the Project, to include, without limitation:

- a. Resumes;
- b. Records of training, certifications, licenses, and professional qualifications;
- c. Performance evaluations, reviews, and disciplinary records;
- d. Records of any promotions, demotions, transfers, or changes in job title; and
- e. Records of any complaints, grievances, or internal investigations related to the inspectors' performance or conduct.

RESPONSE: TranSystems objects to this Request as overly broad and unduly burdensome, and outside the scope of discovery allowed by Rule 26, SCRCP. A request for information on “all inspectors involved with the Project” is not intended to obtain relevant evidence, because Flatiron has not identified “every inspector involved with the Project” as having even allegedly committed errors and omissions in this suit. The Request is no way limited in terms of time or scope, and it exceeds the scope of discovery allowed by the S.C. Rules of Civil Procedure. Subject to this objection, TranSystems will produce copies of discoverable documents from Long’s and Kennedy’s file in a supplemental response, with sensitive, personal identifying information redacted.

31. All documentation or reports related to the assignment of inspectors to the Project, including, but not limited to, work schedules, task assignments, and any changes to schedules and assignments.

RESPONSE: TranSystems objects to this Request as overly broad and unduly burdensome. Subject to this objection, TranSystems states that inspection reports prepared by TranSystems would identify assignments and work performed by TranSystems inspectors. These reports were uploaded to SCDOT’s database and, upon information and belief, were provided to Flatiron through SCDOT’s response to Flatiron’s Freedom of Information Act request.

32. All documents relating to notices from TranSystems to Flatiron of deficiencies, defects, errors, omissions, or other issues identified during inspection of Flatiron’s work on the Project.

RESPONSE: TranSystems objects to this Request as overly broad and unduly burdensome, because it is in no way limited in time or scope. All inspection reports and email correspondence would include information sought, with inspection reports being in possession of

SCDOT through its ProjectWise database. In its Answer to Plaintiff's Interrogatory 13, TranSystems identified specific stop work orders during construction. Any remaining notices would be contained in TranSystems correspondence and inspection reports, which are in Flatiron's possession.

33. All documents related to meetings, discussions, conferences, or communications involving TranSystems inspectors' work on the Project, including, but not limited to:

- a. Meeting minutes, agendas, and any documents generated concerning meetings related to the Project;
- b. Reports, presentations, and materials presented or distributed during meetings; and
- c. Any other records relating to meetings such as decisions, action items, or other outcomes.

RESPONSE: TranSystems objects to this Request as overly broad and unduly burdensome. Subject to and without waiving these objections, TranSystems states that all documents responsive to this Request would have been uploaded to ProjectWise, SCDOT's database, and Flatiron can obtain them through Freedom of Information Act request.

34. Any policies, procedures, guidelines, manuals, handbooks, or similar documents that outline the standards, expectations, and requirements for inspectors employed by or affiliated with TranSystems. These documents should include, but are not limited to:

- a. Inspection protocols and methodologies;
- b. Quality control and assurance procedures;
- c. Documentation and reporting standards; and
- d. Regulatory compliance procedures.

RESPONSE: TranSystems objects to this Request as written; the use of the phrases "or similar documents," "affiliated with TranSystems," "and" "but are not limited to" are overly broad

and not limited in any way in time or scope, and thus not reasonably calculated to lead to the discovery of admissible information. The policies and guidelines for work were dictated by the SCDOT Standard Specifications and the 2004 Construction Manual of SCDOT, which are in Flatiron's possession.

35. All training materials, modules, presentations, or documents used for training inspectors employed by or affiliated with TranSystems. This includes materials related to:

- a. General construction knowledge and principles;
- b. Technical skills and competencies required for effective inspections;
- c. Regulatory compliance; and
- d. Continuing education or professional development programs.

RESPONSE: TranSystems objects to this Request as overly broad and unduly burdensome, because the Request is no way limited as to scope or time. This Request seeks information provided to people who never worked on the Project at issue; therefore, the Request exceeds the scope of discovery allowed by Rule 26, SCRCP. TranSystems operates in 50 states, with different standards applied to different agencies. For the Project at issue, TranSystems inspectors were expected to meet the certification requirements contained in the TranSystems Contract, and they were to verify compliance of construction with plans and specifications for the Carolina Bays Project, which were set forth in Flatiron's contract documents. Further requirements were set forth in the SCDOT Standard Specifications and the 2004 SCDOT Manual for Construction.

36. Any and all communications discussing the adequacy, effectiveness, or potential modifications to TranSystems' policies, procedures, and training materials related to its inspectors from 2011 to present.

RESPONSE: TranSystems objects to this Interrogatory as overly broad, unduly burdensome, and beyond the scope of discovery allowed by Rule 26, SCRCp. This Request is not reasonably calculated to obtain information that is discoverable under the South Carolina Rules of Civil Procedure, and, in fact, seeks information explicitly not admissible under Rule 407, SCRE. Subject to these objections, TranSystems states that its inspection policies and procedures for the Carolina Bays Project were maintained, developed and updated by SCDOT, not TranSystems; therefore, any discoverable information responsive to this Request is in the possession of SCDOT.

37. Documents supporting your Second Defense that “Flatiron’s alleged damages were caused by its own negligence . . .” (*See* TranSystems’ Answer to Amended Complaint, ¶ 51, dated November 13, 2020).

RESPONSE: Documentation of Flatiron’s failure to comply with SCDOT’s specifications is contained throughout Flatiron and SCDOT’s project file. TranSystems will supplement this response at the time it identifies expert witnesses.

38. Documents supporting your Third Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God . . .” (*See* TranSystems’ Answer to Amended Complaint, ¶ 52, dated November 13, 2020).

RESPONSE: Documents responsive to this Request are contained within the documents produced by Flatiron, TranSystems and SCDOT. TranSystems will supplement this response at the time it identifies expert witnesses.

39. Documents supporting your Fifth Defense that “Flatiron’s claims may be barred by the equitable doctrines or waiver, estoppel, and/or laches . . . based on Flatiron’s claims under its Construction Contract with Horry County . . .” (*See* TranSystems’ Answer to Amended Complaint, ¶ 54, dated November 13, 2020).

RESPONSE: Flatiron has made claims against SCDOT and Horry County, alleging entitlement to payment, as well as delicts by Horry County and/or SCDOT. TranSystems has not yet had an opportunity to review and analyze all documents from those claims; however, TranSystems is informed and believed that documents responsive to this are contained within documents to be produced by Flatiron and/or SCDOT. TranSystems will supplement this response after review of all relevant documents.

40. Documents supporting your Sixth Defense that “TranSystems is entitled to a setoff for any compensation received by Flatiron for the damages alleged in its Amended Complaint.” (See TranSystems’ Answer to Amended Complaint, ¶ 55, dated November 13, 2020).

RESPONSE: TranSystems objects to this Request as premature, because Flatiron has not provided all information regarding settlements with other entities, despite pending Interrogatories and Requests for Production regarding same. TranSystems cannot respond to this Request until Flatiron provides full responses to TranSystems. TranSystems will supplement this response following Flatiron’s full production.

41. Documents supporting your Seventh Defense that “Flatiron’s claims against TranSystems may be barred by the doctrine of accord and satisfaction and/or satisfaction and release” (See TranSystems’ Answer to Amended Complaint, ¶ 56, dated November 13, 2020).

RESPONSE: TranSystems objects to this Request as premature, because Flatiron has not provided all information regarding settlements with other entities, despite pending Interrogatories and Requests for Production regarding same. TranSystems cannot respond to this Request until Flatiron provides full responses to TranSystems. TranSystems will supplement this response following Flatiron’s full production.

42. Documents supporting your Ninth Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God” (*See* TranSystems’ Answer to Amended Complaint, ¶ 58, dated November 13, 2020).

RESPONSE: Flatiron has made claims against SCDOT and Horry County, alleging entitlement to payment, as well as delicts by Horry County and/or SCDOT. TranSystems has not yet had an opportunity to review and analyze all documents from those claims; however, TranSystems is informed and believed that documents responsive to this are contained within documents to be produced by Flatiron and/or SCDOT. TranSystems will supplement this response after review of all relevant documents.

43. Documents relied upon by Mr. Peter Strub to support the claim in his affidavit that “the Engineering Certification for Plans and Specifications was never performed by TranSystems for the Carolina Bays Project.” (*See* TSC MSJ, Ex. F – Affidavit of Peter Strub, P.E. ¶ 7).

RESPONSE: TranSystems objects to this Request, because it is based upon a logical fallacy. TranSystems would not generate documents to document an action that did not occur. Subject to this objection, TranSystems states that its project invoices and project file indicate that there are no engineering certifications for Plans and Specifications for TranSystems and that there are no plans prepared or sealed by employees of TranSystems.

44. All correspondence to, from, or among TranSystems, Horry County, South Carolina (“Horry County”), and/or SCDOT regarding the “Engineer Certification for Project Plans and Specifications,” signed by Mr. Peter Strub. (*See* TSC MSJ, Ex. F – Affidavit of Peter Strub, P.E. ¶ 7).

RESPONSE: TranSystems is not aware of any such correspondence, because TranSystems did no work relating to the Engineer Certification for Plans and Specifications.

45. All versions and revisions of the Engineer Certification for Project Plans and Specifications.

RESPONSE: Flatiron is not aware of any versions or revisions other than the version contained in the TranSystems contract.

46. 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 for Project Plans and Specifications." (See TSC MSJ, Ex. F – Affidavit of Peter Strub, P.E. ¶ 7).

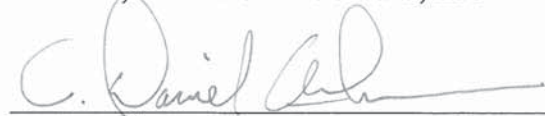
RESPONSE: TranSystems objects to this Request as phrased, because it is unreasonably argumentative and misstates Strub's affidavit testimony. Strub never testified that there was a release from obligations – he testified that TranSystems never prepared, signed or sealed any design plans for the Project. Despite Flatiron's actively misleading phrasing of the request, there can be no documents proving work was not done, because no documents were created.

47. Documents relied upon by Mr. Peter Strub to support the claim in his affidavit that "[n]either TranSystems Corporation nor I ever considered or intended Flatiron to be a third-party beneficiary of TranSystems' contract with Horry County." (See TSC MSJ, Ex. F – Affidavit of Peter Strub, P.E. ¶ 9).

RESPONSE: Strub relied on his own knowledge and involvement in the negotiation and execution of the TranSystems Contract in formulating his testimony; however, the TranSystems Contract itself demonstrates that it was executed two years prior to Flatiron's retention.

November 3, 2023

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Attorneys for TranSystems Corporation

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

I hereby certify that I have this date, served a true and correct copy of *TranSystems Corporation's Responses to Flatiron Constructors, Inc.'s Second Set of Requests for Production* via Email only to the following counsel of record:

Mason A. Goldsmith, Jr., Esq.
 Elmore Goldsmith Kelley & deHoll, P.A.
 P.O. Box 1887
 Greenville, SC 29602
agoldsmith@elmoregoldsmith.com

Carter B. Reid, Esq.
 Watt, Tieder, Hoffar & Fitzgerald, LLP
 1765 Greensboro Station Place, Suite 1000
 McLean, VA 22102
creid@watttieder.com

November 3, 2023

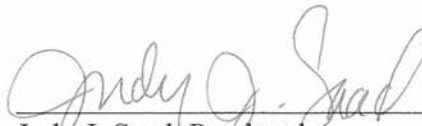

 Judy J. Saad, Paralegal

EXHIBIT F

From: GV-Marty Long </O=TRANSYSTEMS CORPORATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MLLONG>
To: Kim Partenheimer (partenheimer@pbworld.com)
Sent: 1/8/2014 8:27:13 PM
Subject: FW: Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).
Attachments: Carolina Bays Project Agenda.pdf; imaged21179.JPG; PRECON INVITE LIST.pdf

From: GV-Marty Long
Sent: Wednesday, January 08, 2014 3:24 PM
To: Andy Markunas (markunaa@horrycounty.org); Bert Parsons (albert.parsons@santeecooper.com); Bill Mattison (mattisonbr@scdot.org); Billy Ray Cox (billyray.cox@horryelectric.com); Brent Barker (brent.barker@htcinc.net); Brian Nickerson (nickersonbg@cecsinc.com); Christopher Stout (stoutcm@dhec.sc.gov); Craig Rivers (craig.rivers@meadhunt.com); David Gilreath (gilreath@horrycounty.org); GV-David Hoff; David Johnson (johnsondav@scdot.org); Dennis Townsend (townsenddl@scdot.org); CR-Doug Kennedy; Elizabeth Williams (elizabeth.g.williams@usace.army.mil); Evelyn Smart (evelyn.smart@uscg.mil); Frank Chapman (fhchapman@earthlink.net); Fred Crosby (crosbyf@horrycounty.org); Jason Poston (jposton@gswsa.com); Jason Thompson (thompsonjd@scdot.org); Jay Hawkins (hawkinswj@scdot.org); Jeff Burkett (jeff.burkett@meadhunt.com); CR-Jim Fisher; Johnson Dean (deanjb@scdot.org); Kelvin Waites (waitesk@horrycounty.org); Ken Beans (beansk@horrycounty.org); Kevin DuBose (dubosekw@scdot.org); Kim Partenheimer (partenheimer@pbworld.com); Kyle Berry (berrywk@scdot.org); Leah Quattlebaum (quattleblb@scdot.org); Lisa Bourcier (bourcierl@horrycounty.org); GV-Marty Long; Michael Cook (michael.cook@meanhunt.com); Mike Barbee (barbeemw@scdot.org); GV-Peter Strub; GV-Regena Wells; Robby McDonald (mcdonaldr@pbworld.com); Rocque Kneece (kneecerl@cecsinc.com); Ron Goodson (rgoodson@flatironcorp.com); Russ Touchberry (touchberrr@scdot.org); Sandra Rhodes (rhoess@horrycounty.org); Scott Rutherford (rutherfordds@horrycounty.org); Sonny Collins (ewcollins@schp.org); Steve Dimoro (sdimoro@flatironcorp.com); Steve Gosnell (gosnells@horrycounty.org); Ted Kirk (tkirk@flatironcorp.com); Todd Steagall (steagallrt@scdot.org); HU-Tom Mukai; Tom Warren (twarren@flatironcorp.com); Travis Hughes (travis.g.hughes@usace.army.mil); Travis Patrick (patricktm@scdot.org); Vance Langston (vance.langston@twcable.com); Will Fulton (fultonjw@scdot.org)
Cc: fchapman@RDA-usa.net
Subject: Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).

Ladies and Gentlemen

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

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

Date: January 24, 2014

Time: 9:00 AM

Facilitator: Frank Chapman with RDA

Precon: Martin Long with TranSystems

Location: Horry County Government & Justice Center

Multi-Purpose Room B (Second Floor)

1301 Second Avenue, Conway, SC

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

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

Thank you.

Martin Long

RCE

864.915.0741

Frank Chapman

Facilitator

803.261.2044

Martin L. Long

TranSystems
200 Prather Park Dr
Myrtle Beach, SC 29588
Main: 864-234-0866

Fax: 864-527-6873
Cell: 864-915-0741
www.transystems.com

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

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SAMPLE IDENTIFICATION CARD**CONCRETE**

SAMPLE ID: **526-14- 2475** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14
 PCN: 036775BR01 DATE TO LAB: 10/02/14
 SAMPLED BY: Galey, Brian (Tiny)
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)
☒ Job Control ☐ For Information Only (Choose One)

SAMPLE INFORMATION

MATERIAL: ConcCyl. 4000
 DESCRIPTION: Concrete Cylinder, Class 4000
 MANUFACTURER: S&W Ready Mix Concrete Co.
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526
 REPRESENTED QUANTITY: 9 OF 165 CY
 SAMPLED FROM: Truck Mixer
 JOB MIX NO.: 4000 DS
 BREAK SPECIMEN AT: 3 @ 28 days
 TO BE USED IN: Drilled Shaft with Wet & Dry
 Excavation - 102" Diameter
 OTHER INFORMATION: BENT 14-1 DS, SET-1

BRAND: ☐ Early Break
 Cement: Giant Type: two
 Fine Aggregate: American Coarse Aggregate: Vulcan
 Air Entraining: oz./bag Admixture: oz./100 lbs.
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.0 in.
 AIR: 0.0% WATER ADDED: 20 gal. IN 9 CY
 MIXED BY: Galey, Brian (Tiny) Temp: 84 °F
 Entered By: Widdifield, Ellen Date: 10/02/14
 S&ME Sample Results: _____
 Check Sample Results: _____ ID: _____

SAMPLE IDENTIFICATION CARD**CONCRETE**

SAMPLE ID: **526-14- 2476** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14
 PCN: 036775BR01 DATE TO LAB: 10/02/14
 SAMPLED BY: Galey, Brian (Tiny)
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)
☒ Job Control ☐ For Information Only (Choose One)

SAMPLE INFORMATION

MATERIAL: ConcCyl. 4000
 DESCRIPTION: Concrete Cylinder, Class 4000
 MANUFACTURER: S&W Ready Mix Concrete Co.
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526
 REPRESENTED QUANTITY: 63 OF 165 CY
 SAMPLED FROM: Truck Mixer
 JOB MIX NO.: 4000 DS
 BREAK SPECIMEN AT: 3 @ 28 days
 TO BE USED IN: Drilled Shaft with Wet & Dry
 Excavation - 102" Diameter
 OTHER INFORMATION: BENT 14-1 DS, SET-2

BRAND: ☐ Early Break
 Cement: Giant Type: two
 Fine Aggregate: American Coarse Aggregate: Vulcan
 Air Entraining: oz./bag Admixture: oz./100 lbs.
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.0 in.
 AIR: 0.0% WATER ADDED: 20 gal. IN 9 CY
 MIXED BY: Galey, Brian (Tiny) Temp: 86 °F
 Entered By: Widdifield, Ellen Date: 10/02/14
 S&ME Sample Results: _____
 Check Sample Results: _____ ID: _____

SAMPLE IDENTIFICATION CARD**CONCRETE**

SAMPLE ID: **526-14- 2477** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14
 PCN: 036775BR01 DATE TO LAB: 10/02/14
 SAMPLED BY: Galey, Brian (Tiny)
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)
☒ Job Control ☐ For Information Only (Choose One)

SAMPLE INFORMATION

MATERIAL: ConcCyl. 4000
 DESCRIPTION: Concrete Cylinder, Class 4000
 MANUFACTURER: S&W Ready Mix Concrete Co.
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526
 REPRESENTED QUANTITY: 135 OF 165 CY
 SAMPLED FROM: Truck Mixer
 JOB MIX NO.: 4000 DS
 BREAK SPECIMEN AT: 3 @ 28 days
 TO BE USED IN: Drilled Shaft with Wet & Dry
 Excavation - 102" Diameter
 OTHER INFORMATION: BENT 14-1 DS, SET-3

BRAND: ☐ Early Break
 Cement: Giant Type: two
 Fine Aggregate: American Coarse Aggregate: Vulcan
 Air Entraining: oz./bag Admixture: oz./100 lbs.
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.3 in.
 AIR: 0.0% WATER ADDED: 15 gal. IN 9 CY
 MIXED BY: Galey, Brian (Tiny) Temp: 82 °F
 Entered By: Widdifield, Ellen Date: 10/02/14
 S&ME Sample Results: _____
 Check Sample Results: _____ ID: _____

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MEMORANDUM

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

FROM: D. L. Johnson, District Construction Engineer



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

DATE: February 9, 2016

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

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

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

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

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

EXHIBIT I

From: CR-Marty Long </O=TRANSYSTEMS CORPORATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MLLONG>
To: campbelljp@scdot.org
Sent: 7/18/2016 3:45:19 PM
Subject: 26.036775A CBP - Question on Reporting
Attachments: imageeb84fa.PNG

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

Thanks for your help!!

Marty Long
RCE Carolina Bays
864.915.0741

Martin L. Long



Delivering the Transportation Experience for 50 Years

TranSystems
200 Prather Park Dr
Myrtle Beach, SC 29588

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

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E X H I B I T J

From: Heck, Justin LT <Justin.C.Heck@uscg.mil>
To: CR-Marty Long; Zercher, Jennifer N CIV; Lawrence, Eddie H CIV
CC: PatrickTM@scdot.org; CR-Doug Kennedy
Sent: 7/18/2017 8:59:08 PM
Subject: RE: 60 Day Notice for Work in AICWW (South Carolina)

Good Afternoon Mr. Long,

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

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

Regards,

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

-----Original Message-----

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

Mr. Heck

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

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

Thanks for your help and guidance.

Marty Long

RCE

864.915.0741

From: McGrath, Ken [mailto:KMcGrath@flatironcorp.com]
 Sent: Wednesday, July 12, 2017 1:44 PM
 To: Zercher, Jennifer N CIV <Jennifer.N.Zercher@uscg.mil>; Heck, Justin LT <Justin.C.Heck@uscg.mil>
 Cc: Lawrence, Eddie H CIV <Eddie.H.Lawrence@uscg.mil>; Fischer, Forrest <ffischer@flatironcorp.com>; MacFawn, Ian <IMacFawn@flatironcorp.com>; Beiter, Jeremiah <JBeiter@flatironcorp.com>; St. Martin, Jessica <jstmartin@flatironcorp.com>; Martel, Ryan <RMartel@flatironcorp.com>; CR-Marty Long <mllong@transystems.com>
 Subject: RE: 60 Day Notice for Work in AICWW (South Carolina)

Mr. Heck,

Attached is our notice to place our barge and tugboat and temporarily block marine traffic to set steel girders for the new AICWW bridge. Schedules times are not set yet but between the dates listed we will be performing the work and will keep you up to date as the work draws closer to actual blockage times needed.

Thanks,

Ken McGrath

Project Engineer
 Flatiron Construction Corp.

860 Aviation Parkway, Suite 100

Morrisville, NC 27560

803 517 5256 CELL

kmcgrath@flatironcorp.com <mailto:kmcgrath@flatironcorp.com>

[www.flatironcorp.com <https://urldefense.proofpoint.com/v2/url?u=http-3A__www.flatironcorp.com_&d=DwMGaQ&c=0NKfg44GVknAU-XkWXjNzQ&r=K7nPVFDaWfoogoF_bZN9BWLGCvU5hC_XB_8FxEOjvX0&m=8kyZZbFh-LoXMTA32vMEXSx0WEZd_by-P7_T5bM93Xs&s=HHK6jilucts7O7JvY6KvwXDtS39hZTFvAbvr0pFduWc&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.flatironcorp.com_&d=DwMGaQ&c=0NKfg44GVknAU-XkWXjNzQ&r=K7nPVFDaWfoogoF_bZN9BWLGCvU5hC_XB_8FxEOjvX0&m=8kyZZbFh-LoXMTA32vMEXSx0WEZd_by-P7_T5bM93Xs&s=HHK6jilucts7O7JvY6KvwXDtS39hZTFvAbvr0pFduWc&e=>)

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Build the Best. Be the Best

From: Zercher, Jennifer N CIV [mailto:Jennifer.N.Zercher@uscg.mil]
 Sent: Wednesday, July 12, 2017 10:28 AM
 To: McGrath, Ken <KMcGrath@flatironcorp.com>
 Cc: Lawrence, Eddie H CIV <Eddie.H.Lawrence@uscg.mil>; Heck, Justin LT <Justin.C.Heck@uscg.mil>
 Subject: FW: 60 Day Notice for Work in AICWW (South Carolina)

Good morning Mr. McGrath,

Please fill out the attached Pre-Construction checklist for the project below. LT Justin Heck from Sector Charleston Waterways Division

will be your point of contact for waterways restrictions/closures.

LT Justin Heck
USCG Sector Charleston (Waterways)
(843) 740-3184
Justin.c.heck@uscg.mil

Once we receive the updated information, we will update the Local Notice to Mariners with changes that LT Heck approves.

If you have any questions, please give me or Mr. Eddie Lawrence, (305) 415-6946, a call.

R,
Jennifer Zercher
Bridge Management Specialist
U.S. Coast Guard District 7 Bridge Branch
909 SE 1st Ave Ste 432
Miami FL 33131-3050
PH: 305.415.6740

-----Original Message-----

From: McGrath, Ken [<mailto:KMcGrath@flatironcorp.com>]
Sent: Wednesday, July 12, 2017 9:16 AM
To: Dragon, Barry CIV
Cc: Fischer, Forrest; MacFawn, Ian; Beiter, Jeremiah; St. Martin, Jessica; Martel, Ryan
Subject: [Non-DoD Source] 60 Day Notice for Work in AICWW (South Carolina)

Mr. Dragon,

I am writing to give the USCG the required the 60 day required notice of construction activities that require restriction, either total or partial, to be placed upon navigational interests, commercial or recreational marine traffic in the American Intercostal Waterway (AICWW) in Socastee, SC. This will require partial and full closure of the waterway for the placement of steel girders across the AICWW for the Carolina Bays Parkway construction project for the South Carolina Department of Transportation (SCDOT). The duration of the work period to erect the steel girders over the AICWW will be approximately 12 weeks.

If you have any questions feel free to call me at my cell phone number below.

Thanks,

Ken McGrath

Project Engineer
Flatiron Construction Corp.

860 Aviation Parkway, Suite 100

Morrisville, NC 27560

803 517 5256 CELL

kmcgrath@flatironcorp.com

www.flatironcorp.com <https://urldefense.proofpoint.com/v2/url?u=http-3A__www.flatironcorp.com&d=DwMGaQ&c=0NKfg44GVknAU-XkWXjNxQ&r=K7nPVFDaWfoogoF_bZN9BWLGCvU5hC_XB_8FxEOjvX0&m=8kvZZbFh-LoXMTA32vMEXSx0WEZd_by-P7_T5bM93Xs&s=HGIHBOrcGrXrofD_3Jio6QzsqwYsP0jvSgFkJfjNkY&e=>>
<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.flatironcorp.com_&d=DwMFaQ&c=0NKfg44GVknAU-XkWXjNxQ&r=vxefCZz-bKVK1IE1nUpJTgRNRn1jWq-cxN6WmnrNpLY&m=HJ5MC4ZeIPZiM4woa2YN9GQD2q7E7Wo8Fn-8teiIMxQ&s=JchsMjIqxlq7BPBB5m_5Oe0Zi0lp6cZu4xSYmV-78mY&e=>>

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~~~ FLATIRON CONFIDENTIALITY STATEMENT ~~~ The information in this email is confidential and may be legally privileged. It is intended solely for the addressee. Access to this email by anyone else is unauthorized. If you receive this email in error, please reply to notify me immediately. Thank you.

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

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### **OPPOSITION TO MOTION TO STRIKE**

Plaintiff, Flatiron Constructors, Inc. ("FCI"), by and through counsel, respectfully submits its Opposition to Defendant TranSystems Corporation's ("TSC") Motion to Strike ("Motion to Strike") FCI's Motion to Reconsider filed on December 1, 2023 ("Dec. 1 Motion"). FCI filed its Dec. 1 Motion in response to the Court's November 22, 2023 Form 4 Order. As set forth in Attorney Mason ("Andy") Goldsmith's December 7, 2023 email to Judge Curtiss's chambers, FCI filed the Dec. 1 Motion out of an abundance of caution in light of the ten-day filing deadline set forth in SCRCP Rule 59(e). Under the circumstances, the filing was appropriate and necessary to avoid any further complications in this already procedurally complex matter.

TSC's Motion to Strike also raises arguments in direct response to the substance of FCI's Dec. 1 Motion, which present the Court with an incomplete record of the facts and unfairly maligns affiants supporting FCI's Opposition to TSC's Motion for Summary Judgment and the Dec. 1 Motion. These misdirected TSC arguments only confirm that genuine issues of material fact exist which should be submitted to the jury. In addition, TSC misapprehends the law regarding the bases for SCRCP Rule 59(e) and Rule 60 motions. As a result, the Court should deny TSC's Motion to Strike and should consider FCI's Dec. 1 Motion as part of the record along with any

subsequent Motion for Reconsideration that FCI will file should the Court issue a more formal, final Order granting, in part, TSC's Motion for Summary Judgment.

**I. THE DEC. 1 MOTION WAS PROCEDURALLY APPROPRIATE**

On November 22, 2023, the Court issued a Form 4 Order granting in part and denying in part, TSC's Motion for Summary Judgment. The Form 4 Order states that "This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp...." Adjacent to the phrase "IT IS ORDERED AND ADJUDGED," the Court checked "Statement of Judgment by the Court." It did not check the box indicating "(formal order to follow)." Contrary to TSC's contention, the Form 4 Order does not expressly state that "the Court will enter a formal order following the Form 4." Mot. to Strike, p. 1. Rather, the Form 4 Order merely states that TSC is to draft a proposed order and e-file it "for [the court's] review."

Under the circumstances, FCI was reasonable to submit the Dec. 1 Motion within ten days of the Form 4 Order. FCI simply could not risk that Rule 59(e)'s ten-day filing requirement would toll until the Court issued a more formal order. First, the Court is under no obligation to issue a detailed Order. SCRCP 52(a) ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."). Second, the Form 4 Order may imply that a formal order will issue, but it does not definitively assert that fact. Finally, the Form 4 Order places no time constraints on TSC's submittal of a proposed order or the Court's issuance of a final order. TSC did not e-file its Proposed Order until December 7, 2023, fifteen days after the Form 4 Order. In the interim, FCI was left to guess whether the Form 4 Order would be considered "written notice of the entry of the order" for the purposes of Rule 59(e)'s ten-day filing requirement for motions to reconsider.

TSC cites no authority requiring that FCI's Dec. 1 Motion be stricken from the procedural record in this matter. Instead, it launches substantive defenses aimed at FCI's Dec. 1 Motion. For example, on page 2, TSC argues that FCI cannot raise issues that it "could have raised prior to judgment but did not." TSC then presents an email that was not included in its Motion for Summary Judgment. It misconstrues that email to attack FCI's Mr. Lou Hutcherson and Ms. Linda Brumfield, both affiants supporting FCI's Opposition to Summary Judgment. Similarly, TSC cites a concurrence by then-Judge Few to argue that this Court should not reconsider its ruling on summary judgment due to incomplete discovery because FCI had not previously filed a Rule 56(f) affidavit. Mot. to Strike, p. 4.

None of TSC's substantive arguments are valid. Moreover, their assertions do not support a motion to strike. On the contrary, TSC's arguments confirm that genuine issues of material fact exist and that the Court should withdraw its Form 4 Order and reconsider it upon completion of needed discovery in this matter. In the interim, FCI's Dec. 1 Motion and the substantive issues in TSC's Motion to Strike and this Opposition should remain part of the procedural record for reconsideration and any subsequent appeal.

## **II. FCI DOES NOT RAISE NEW ISSUES**

On page 2 of its Motion to Strike, TSC argues that FCI's Dec. 1 Motion is improper because FCI references emails contained in its own files that were not specifically included in FCI's Opposition to TSC's Motion for Summary Judgment. TSC cites *Anderson Memorial Hospital, Inv. v. Hagen*, 313 S.C. 497, 499, 443 S.E.2d 399, 400 (Ct. App. 1994) for the proposition that, "a party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." This argument, however, is misleading in light of the state of discovery and the complexities of this case.



In *Anderson Memorial Hospital*, the plaintiff brought an action based solely on the doctrine of necessities. *Id.* at 498, S.E.2d at 400. After losing on this legal theory, the plaintiff filed a motion for reconsideration raising, for the first time, the existence of a contract and asserting a breach of contract cause of action. *Id.* The court determined that the breach of contract cause of action, a new “issue,” could have been raised before but was not. Thus, the court determined that the new argument could not be asserted for the first time in a motion for reconsideration. *Id.*

Here, FCI has not raised a new issue in its Dec. 1 Motion. Rather, FCI seeks reconsideration of the Court’s Form 4 Order based upon the same issues raised in its Opposition to TSC’s Motion for Summary Judgment, namely: the existence of a special relationship between TSC and FCI, third-party beneficiary status, and the need for further discovery. FCI admittedly identifies additional, relevant documents supporting its arguments on these issues, but these documents were not reasonably available prior to the August 7, 2023 hearing on TSC’s Motion for Summary Judgment (“Hearing”). Similarly, these documents demonstrate that additional discovery in this matter is necessary.

As FCI argued in its Opposition to Summary Judgment and in the Dec. 1 Motion, at the time of the Hearing, TSC still withheld approximately 25,000 documents and refused to admit that TSC’s Mr. Long held himself out as RCE on the Project. The truth is that as of the Hearing, document production, review, organization and evaluation was on-going such that not all relevant documents were available for presentation to the Court. Moreover, as of the Hearing, TSC was attacking as “implausible” and “incredible,” Mr. Hutcherson’s testimony that “Martin Long of TSC held himself out as [SCDOT’s] Resident Construction Engineer.” TSC Reply, p. 6. Yet, months after the Hearing, TSC produced over 13,000 additional documents and admitted that

“Marty Long used the title Resident Construction Engineer...” *See* Dec. 1 Mot., p. 12 and Ex. D attached thereto. TSC avoids any discussion of these facts in its Motion to Strike.

### **III. THE DOCUMENTS WERE NOT REASONABLY AVAILABLE**

The fact that some of the documents referenced in the Dec. 1 Motion appear in FCI’s productions is irrelevant. Furthermore, TSC’s suggestion that this fact proves the documents were available for inclusion in FCI’s Opposition to Summary Judgment is misleading. As TSC repeatedly has acknowledged, this is a complex case involving millions of documents spanning a five-year-long, public construction project including multiple parties. The Parties’ October 18, 2023, Joint Motion to Establish Complex Case Designation and Time for Trial (“Joint Motion”) confirms that two months after the Hearing, the Parties still had relevant document productions and depositions to complete and that a scheduling order was needed to complete discovery. *See* Dec. 1 Mot., Ex. C. Furthermore, TSC’s Amended Motion for Extension to Respond to FCI’s Interrogatories filed on October 4, 2023, notes that, well after the Hearing, good cause exists for additional time to conduct discovery because the large volume of documents requires “considerable time and effort” to evaluate.

As noted in FCI’s Dec. 1 Motion at p. 13, “tracking precisely when particular documents were produced, what remains to be produced, identifying duplicates, and finding particular documents related to the five-year long Project is challenging.” Since the Hearing, FCI has determined through computer-assisted searches that, from the documents produced thus far, at least, 12,738 documents exist relevant to Mr. Long’s assumption of authority as RCE at the Project. *See* Ex. A, Affidavit of Carter Reid (hereinafter “Reid Aff.”), ¶ 28. FCI could not reasonably have been expected to find, analyze and present all of these documents prior to the hearing. As set forth herein, even the new document identified in TSC’s Motion to Strike is incomplete and taken out

of context. Presumably, this is due to the numerous, multi-tiered document productions and not due to an effort to conceal the complete email exchange<sup>1</sup>. Under the circumstances, FCI respectfully submits that the Court should be focused on the content and relevance of all these documents, not the timing of presentation. Under the circumstances, consideration of these documents is well within the Court's discretion on a motion to reconsider, especially where, as here, the documents reveal the likelihood that additional discovery will yield relevant facts. *See Reid Aff., Ex. A, ¶¶ 30-38.*

#### **IV. MR. HUTCHERSON'S BELIEF REGARDING TSC'S MR. LONG AS RCE**

In an unwarranted effort to besmirch Mr. Hutcherson's credibility, TSC's Motion to Strike misapprehends his Affidavit included in FCI's Opposition to Summary Judgment (*see Opp. to SJ, Ex. A* (hereinafter "Hutcherson Aff.")). Mot. To Strike, pp. 2-3. In support of this attack, TSC presents the Court with an incomplete email exchange, which TSC incorrectly assumes to be in conflict with Mr. Hutcherson's Affidavit. This inaccurate, disjointed presentation only highlights the existence of genuine issues of material fact for the jury and the need for further discovery to fully develop these facts.

##### **A. Mr. Hutcherson Identifies Mr. Long as the RCE**

In its Motion to Strike at p. 2, TSC states, "as noted repeatedly in TSC's submissions, Hutcherson does not testify that he believed that TSC's Marty Long was SCDOT's RCE...." As an initial matter, whether Mr. Hutcherson believed that Marty Long was the RCE is not dispositive

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<sup>1</sup> In footnote 3 to its Motion to Strike, TSC suggests that Mr. Hutcherson and Ms. Brunfield offered affidavits in "bad faith or solely for the purposes of delay." As explained herein, TSC neither fully cites Mr. Hutcherson's Affidavit nor fully presents the email exchange it claims undermines that Affidavit. FCI chooses not to cavalierly accuse TSC of bad faith. Rather, this oversight on TSC's part is likely due to the difficulty in locating and coordinating all of the electronic information produced in this action.

of whether a “special relationship” exists between TSC and FCI giving rise to a duty owed to FCI. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995). Rather, the existence of a special relationship turns on the authority assumed by the engineer and the control the engineer has over the contractor. *Id.* Mr. Hutcherson certainly testified that TSC and Mr. Long wielded such authority and control. For example, Mr. Hutcherson testified that Mr. Long inspected FCI’s work (Hutcherson Aff., ¶6(ii)), rejected FCI’s work (Hutcherson Aff., ¶6 (iii), ¶10), interpreted the contract requirements (Hutcherson Aff., ¶6(iii)), and exercised authority and control over every aspect of FCI’s performance on the Project (Hutcherson Aff., ¶20).

Mr. Hutcherson also testified that he, in fact, thought that Mr. Long was the RCE. TSC’s contentions otherwise reveal a shallow reading of Mr. Hutcherson’s Affidavit. For example, in Paragraph 9, Mr. Hutcherson states, “**As RCE, TSC** held itself out as having authority...” (emphasis added). Similarly, in Paragraph 10, Mr. Hutcherson states that TSC was allowed to exercise the rights that TSC claims only reside in the RCE (“TSC possessed the right and/or was permitted to oversee, inspect and reject FCI’s work on the Project.”). Furthermore, TSC “made unilateral decisions in the field (without first consulting the owner or SCDOT)....” In addition, when disputes arose in the field, Mr. Hutcherson testified that “FCI was forced to negotiate with **TSC’s Mr. Long, the RCE.**” Hutcherson Aff. ¶17 (emphasis added). Finally, in Paragraph 19, Mr. Hutcherson testifies that “**as RCE, TSC** regularly influenced the owner’s/SCDOT’s view of issues....” (emphasis added). In the only affidavit presented to the Court on the issue, Mr. Hutcherson clearly testified that Mr. Long was the RCE, held himself out as such, and exercised all of the powers of the RCE to control FCI’s performance.



B. Mr. Hutcherson's Affidavit is Not Inconsistent with TSC's New Email

In its quest to discredit Mr. Hutcherson, TSC presents an incomplete, fractured portion of an email exchange on February 25, 2016. Mot. to Strike, Ex.2. Notably, TSC failed to include this email in its Motion for Summary Judgment or Reply. Its inclusion now further emphasizes the difficult, time-consuming navigation of the millions of documents produced in this matter.

Notably, the February 25, 2016 email is dated nearly three years into the Project after FCI had already suffered significant difficulties and delays at the hands of TSC. Two and half years earlier, on October 29, 2013, Mr. Long contacted FCI at the beginning of the Project and introduced himself as RCE. Ex. B – Email, dated October 29, 2013, p. 2 (Bates Stamped TSC00395298). FCI's Mr. Paul Rudloff memorialized that conversation in an email, saying “Martin, thanks for calling and introducing yourself as the Resident Engineer for our Carolina Bays III project....” *Id.* Thus, from the inception of the Project, Mr. Long identified himself as and acted as the RCE. Indeed, a few months later, in February of 2014, SCDOT gave Mr. Long “contract authority” on the Project. Ex. C – Email, dated February 03, 2014, p. 1 (Bates Stamped FIC000148797) (“Marty, once Brian got your RCE access set up, I went in and gave you and Tom contract authority....”). In short, Mr. Long told FCI he was the RCE, acted like the RCE, and was given authority over the contract like the RCE.

Missing portions of the February 25, 2016, email exchange reveal that as of that date, FCI understood that Mr. Long was the RCE with authority to make decisions on the Project. TSC's Ex. 2 email chain starts at 10:30 a.m. Before that, at 10:08 a.m., Ms. Nix of FCI sought approval of material from Mr. Long, the person she believed to be the RCE. Ex. D – Email Chain (Part 1), p. 2 (Bates Stamped FIC000471613). At 10:35 a.m., Mr. Long tells her that “anywhere it says RCE you can replace it with the word District which would be Jason or Travis.” *Id.* Thus, rather

than deny that he is the RCE, Mr. Long told Ms. Nix that she also needed to copy SCDOT personnel for approvals. Ms. Nix then responded “I did not know that.” Ex. D – Email Chain, dated February 25, 2016 (Part 2), p. 1 (Bates Stamped FIC 000193235). In other words, more than two years into the Project, FCI is now being told that submittals must be sent to SCDOT in addition to sending them to Mr. Long as the RCE. In its condemnation of Mr. Hutcherson, TSC leaves out Ms. Nix’s response revealing an absolute belief that Mr. Long was the RCE on the Project when she sent her February 25, 2016 email. Again, this exchange occurred more than two years into Project performance.

Even Mr. Hutcherson’s 11:04 p.m. email to Mr. Kirk does not demonstrate Mr. Hutcherson’s “knowledge that Long was not RCE” as TSC contends. *See* Mot. to Strike, p. 3. On the contrary, in that email, Mr. Hutcherson writes that Marty Long is “the designated RCE”. *See Id.* Mr. Hutcherson never says that Mr. Long is NOT the RCE. Rather, he expresses his exasperation that even though Mr. Long is the RCE and can and should be making decisions “per the Specifications,” Mr. Long sometimes unnecessarily creates a six-step process to get things done. *Id.* Thus, in a later email (not mentioned in TSC’s Motion to Strike), Mr. Kirk forwards Mr. Hutcherson’s email to others at FCI, telling them to send submittals to both Mr. Long and SCDOT and prepare to “tell them that the process has been broken since the beginning delaying the work....” Ex. F – Email Chain, dated February 25, 2016 (Part 3), p. 1 (Bates Stamped FIC000467318).

When viewed in its entirety, the February 25, 2016 email chain does not undermine Mr. Hutcherson’s Affidavit. It confirms it. Mr. Long of TSC began the Project introducing himself as the RCE. *See* Ex. B. SCDOT gave Mr. Long “contract authority” on the Project. *See* Ex. C. Per Mr. Hutcherson’s Affidavit, Mr. Long wielded that authority as the RCE. Hutcherson

Aff. ¶¶ 8-20. Years later, FCI demonstrated its firm belief that Mr. Long was the RCE with approval authority. See Ex. C-F, Email Chain (Parts 1-3). On February 25, 2016, Mr. Long chose to cede authority to SCDOT on a particular submittal. *Id.* Far from revealing knowledge that Mr. Long was not the RCE, Mr. Hutcherson's reaction reveals a concern that the individual who had been acting as and had authority as the RCE was making the process unduly cumbersome. *Id.* This convoluted history of TSC's control over FCI on the Project emphasizes the existence of a genuine issue of material fact concerning the nature of TSC's relationship with FCI, which should be presented to the jury to decide.

#### **V. FCI NEED NOT HAVE SUBMITTED A RULE 56(f) AFFIDAVIT**

On page 4, TSC cites Judge Few's concurring opinion to the decision in *Matter of Estate of Smith*, 419 S.C. 111, 120-21, 796 S.E. 2d 158, 163 (Ct. App. 2016) for the proposition that FCI's failure to file a Rule 56(f) affidavit bars FCI from seeking reconsideration of the Court's failure to delay a decision on summary judgment pending completion of discovery. Respectfully, the analysis set forth in Judge Few's concurrence has no precedential weight. Notably, Judge Lockemy provides a dissenting opinion completely disagreeing with Judge Few. Neither the concurrence nor the dissent established the law in South Carolina.

As set forth in FCI's Dec. 1 Motion, 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 v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 113, 410 S.E. 2d 537, 543 (1991). Dec. 1 Mot., p. 11. Thus, the Court in *Baughman* determined that filing a Rule 56(f) affidavit was not necessary if the need for further discovery was made known to the court. *Id.* at n.4. There, the Court held, "although Plaintiffs did not file an affidavit invoking this provision, other 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.” *Id.* at 112 n. 4, 410 S.E.2d at 544 n. 4. In both its Opposition to Summary Judgment and its arguments at the Hearing, FCI made known to this Court the need for further discovery. Indeed, TSC has since acknowledged this need in the Joint Motion and TSC’s Motion for additional time to respond to discovery. The rigors and complexities of discovery in this matter require additional time in which to present pertinent facts weighing upon the central issue of TSC’s relationship with FCI. *See Reid Aff., Ex. A.* For confirmation of this fact, the Court need only review the incomplete, discordant presentation of the February 25, 2016 email in TSC’s Motion to Strike.

FCI deserves the right to complete discovery in this matter to ensure that the Court and then the jury have a complete understanding of the relevant facts. This is necessary to combat inaccurate, incomplete presentations taken out of context. Through additional discovery since the Hearing, FCI has been able to demonstrate the inaccuracy of TSC’s claim that Mr. Long never held himself out as RCE. *See Dec. 1 Mot., p. 12* (TSC Int. Resp. 18 admits Mr. Long “used the title Resident Construction Engineer” contrary to its presentation in its Motion for Summary Judgment). FCI also has located evidence that Mr. Long introduced himself to FCI as the Resident Construction Engineer at the beginning of the Project and that SCDOT gave Mr. Long “contract authority” on the Project. *See Ex. C.* A deposition of Messrs. Long and Hutcherson undoubtedly would reveal additional facts bearing upon the critical issue of the parties’ “special relationship.” *See Reid Aff., Ex. A, ¶¶ 30-38.*

## **VI. CONCLUSION**

For the reasons set forth herein, FCI respectfully requests that the Court deny TSC’s Motion to Strike, that the Court include FCI’s Dec. 1 Motion and this Opposition in the record for



reconsideration, and that the Court allow FCI to file a supplemental Motion for Reconsideration should the Court enter a more formal Order in this matter.

Respectfully submitted this 12th day of December, 2023

/s/Mason A. Goldsmith, Jr.

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Flatiron Constructors, Inc.,

Plaintiff,

v.

TranSystems Corporation,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2022-CP-26-06116

**SCRCP 56(f) AFFIDAVIT OF CARTER  
REID IN SUPPORT OF PLAINTIFF'S  
MOTION TO RECONSIDER AND  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO STRIKE**

1. Personally appeared before me, Carter Reid, who, after being first duly sworn and deposed, said the following:
2. I am over eighteen, fully competent, and have personal knowledge to testify to the matters stated in this Affidavit.
3. I am an attorney at law, admitted *pro hac vice* to practice before the courts of South Carolina on this matter, and I am a partner at Watt, Tieder, Hoffar, & Fitzgerald, L.L.P., counsel for Plaintiff Flatiron Constructors, Inc. ("FCI").
4. I submit this affidavit in support of Plaintiff's Motion to Reconsider and Plaintiff's Opposition to Defendant's Motion to Strike Plaintiff's Motion to Reconsider.

**The Protracted Procedural History of this Dispute Justifies Additional Time for Discovery**

5. This litigation is part of a procedurally complex dispute resolution process in which the Parties have yet to complete discovery. The analysis relevant to TranSystems Corporation's ("TSC") Motion for Summary Judgment ("MSJ") depends upon the facts and circumstances surrounding the Project and TSC's relationship with FCI. Even though the Parties have exchanged almost two million documents, they have not had a full opportunity to review and present all relevant documentary evidence to this Court, gather sworn testimony from the central figure in

TSC's MSJ (Mr. Marty Long), or otherwise complete depositions of individuals with relevant knowledge of the factual circumstances of the dispute. In particular, the Parties have yet to complete discovery relevant to determining whether TSC had a "special relationship" with FCI as defined in the case of *Tommy L. Griffin Plumbing & Heating Co., v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995).

6. FCI initially filed this action against TSC on April 26, 2018, including counts for professional negligence, breach of contract, tortious interference with contract, and violation of South Carolina's Unfair Trade Practices Act ("SCUTPA").

7. The Parties jointly moved to stay the initial action which the court granted on December 4, 2018. The stay lasted until September 30, 2020.

8. Upon expiration of the stay, FCI moved to compel TSC to respond to discovery, including FCI's First Request for Production of Documents which had been propounded to TSC on October 19, 2020.

9. On April 9, 2021, the Court granted FCI's Motion to Compel TSC to produce requested documents. TSC then began a partial production of documents to FCI on June 30, 2021. The Parties continued to produce documents to one another periodically but still have not completed document production.

10. Due to the complexity of this action, FCI and TSC jointly moved for a complex case designation on October 4, 2021. When the court denied the joint motion, the Parties filed a consent order pursuant to Rule 40(j), removing the case from the docket. The order was signed on October 8, 2021, and filed by the court on October 11, 2021.

11. FCI and TSC continued to discuss needed discovery while the case was removed from the docket.



### **TSC's 25,000 Documents Are Still Being Produced**

12. On February 17, 2022, TSC notified FCI that TSC had discovered a group of approximately 25,000 documents that had not yet been produced to FCI. Aff. Ex. A – February 17, 2022 email. 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.*

13. On September 27, 2022, FCI reinstated the instant case, and the Court assigned a new case number. At the time of the reinstatement, TSC still had not produced the 25,000 documents referenced in its February 17, 2022, email.

### **FCI Did Not Have Time to Review the Substantial Production Before the Hearing**

14. TSC's Motion for Summary Judgment (“MSJ”) was filed on April 4, 2023. The briefing was not completed until August 2, 2023, when TSC filed its Reply to FCI's Opposition. The Court set the hearing on TSC's MSJ (the “Hearing”) for August 7, 2023.

15. Marty Long's status as Resident Construction Engineer (“RCE”) on the Project was not challenged by TSC until TSC's MSJ on April 4, 2023. This gave FCI just three months to review the millions of pages of documents produced by that time for relevance to Mr. Long's status as RCE. Notably, in its Reply in support of its MSJ at page 12, TSC acknowledges that “[t]he RCE's role, for the purposes of project supervision, was very similar to that of the engineer in *Tommy L. Griffin*.” Prior to the Hearing, FCI did not have sufficient time to locate, review and analyze all of the documents produced by the Parties related to Mr. Long's role as RCE. Moreover, as of the Hearing, document productions were incomplete such that depositions of key individuals, including Mr. Long, were impractical.

**Discovery was Incomplete and Ongoing at the Time of the Hearing**

16. The stay, removal of the case from the docket, and other procedural aspects of this litigation severely limited the time available to conduct meaningful discovery and to review all the documents produced in this matter by the time of the Hearing. The litigation involves many detailed activities, multiple individuals, and millions of documents spread out over the five or six year lifespan of Project construction. Moreover, even to fully understand a given email chain requires reference to multiple individual emails in that a particular document may not include all relevant emails in the chain.

17. Compounding FCI's document review difficulties was the fact that, as of the Hearing on August 7, 2023, TSC still had not produced the 25,000 documents referenced in its February 17, 2022 email.

18. As noted in FCI's Opposition and as argued by FCI at the Hearing, as of the Hearing date, "document productions are incomplete, and no depositions have been taken by either side." *See* Brief in Support of Defendant's Motion for Summary Judgment ("FCI's Opp."), p. 7.

19. Also at the Hearing, FCI referenced TSC's February 17, 2022, email acknowledging that TSC still had not produced approximately 25,000 documents responsive to FCI's First Request for Production of Documents. Thus, at the Hearing, FCI asked the court to refrain from rendering any judgment until discovery was completed.

20. On August 31, 2023, following the Hearing, FCI served its Second Request for Production of Documents and its First Set of Interrogatories on TSC. As of that date, the 25,000 documents referenced in TSC's February 17, 2022 email still had not been produced.

21. On October 4, 2023, TSC filed motions to extend the time to respond to requests for production and interrogatories. *See* Aff. Ex. B – TSC’s Amended Motion to Extend Response to FCI’s Interrogatories and Requests for Production (“TSC’s Motion for Extension”).

22. TSC’s Motion for Extension acknowledges the scale of production to date – “[t]he parties have produced over 2,000,000 pages of documents.” Further, it emphasizes that production of documents and response to FCI’s interrogatories “will require considerable time and effort.” *Id.*

23. On October 6, 2023, approximately two months after the Hearing, TSC produced approximately 13,000 of the 25,000 documents referenced by TSC in the February 17, 2022 email. (hereinafter “Post-Hearing Production”).

**FCI Exercised Due Diligence in its Review of the Millions of Pages of Documents Produced, and Additional Time is Needed to Complete that Review**

24. Reviewing the millions of pages of documents produced in this matter to find particular documents related to any specific issue is challenging and time-consuming. Moreover, without knowing the content of TSC’s promised production of an additional 25,000 documents, FCI could not reasonably prepare for or schedule depositions prior to the Hearing.

25. TSC’s Post-Hearing Production on October 6 contained evidence of Marty Long’s RCE status. *See* Motion to Reconsider, Ex. F-J (attached herein as Aff. Ex. C-G, respectively). Even though some of these documents may have existed in FCI’s files as well, this does not change the fact that the enormity of the overall production over multiple, separate productions, and the challenge of TSC’s RCE status for the first time in April of 2023 prohibited FCI from finding all relevant documents before the Hearing. Even with sophisticated discovery review software, three months was insufficient to properly uncover all evidence relevant to defend against TSC’s MSJ. Similarly, without knowing the content of TSC’s promised production of an additional 25,000 documents, FCI could not reasonably have deposed Mr. Long before the Hearing.

26. On October 18, 2023, the Parties filed a Joint Motion to Establish Complex Case Designation and Time for Trial. *See* Aff. Ex. H (hereinafter “Joint Motion”). By that time, the Parties had exchanged over one million documents containing at least twice as many pages and large native files. *See* Aff. Ex. H - Joint Motion, ¶ 3(a); *See also* Aff. Ex. B – TSC’s Motion to Extend.

27. In the Joint Motion, the Parties notified the Court that due to the complexity of the case and the five-year lifespan of the Project, they anticipated calling approximately a dozen witnesses and that “[t]he number of depositions to be taken will match or eclipse the estimated number of witnesses.” Aff. Ex. H, Joint Motion, ¶ 3(h). The Parties also joined in informing the Court that they had diligently proceeded with discovery up to that point. Aff. Ex. H.

28. Using discovery review software, FCI has now identified at least 12,738 documents relevant to Mr. Long’s assumption of authority as the RCE at the Project.

29. FCI continues to uncover documents relevant to TSC’s assumption of authority as the Project RCE and the “special relationship” between TSC and FCI as evidenced by the exhibits contained in its Motion to Reconsider and its Opposition to TSC’s Motion to Strike. *See* Motion to Reconsider, Ex. F-J (attached herein as Aff. Ex. C-G, respectively).

#### **Additional Discovery will Likely Uncover Additional Relevant Evidence**

30. As TSC’s Post-Hearing Production on October 6, 2023, demonstrates, relevant documentary evidence concerning the nature of TSC’s relationship with FCI continues to be discovered. *Id.*

31. Further, the Parties and their experts reasonably need additional time to properly review the millions of pages of documents produced thus far and to provide the court with all the relevant facts and circumstances concerning the nature of TSC’s relationship with FCI. Most important in



this regard would be the depositions of TSC personnel such as Mr. Long and Mr. Strub of TSC, regarding TSC's duties and assumption of authority on the Project.

32. TSC's recent responses to requests for production and answers to interrogatories provided after the Hearing also demonstrate the likely fruitfulness of additional discovery.

33. TSC's Response to Interrogatory No. 18, for example, states that "Marty Long used the title Resident Construction Engineer...." Aff. Ex. I – TranSystems' Answers to Flatiron Constructor's First Set of Interrogatories (hereinafter "Interrogatory Responses"). This admission is in direct contradiction of TSC's position in its MSJ Reply that FCI's assertion that Mr. Long held himself out as RCE was "implausible" and "incredible." What is using the title "RCE" if not holding oneself out as the RCE? A deposition of Mr. Long is likely to reveal why he used the title, how he got permission to use the title, what authority came along with using the title and a host of other pieces of information bearing upon the special relationship between TSC and FCI.

34. Exhibit 2 to TSC's Motion to Strike further demonstrates both the difficulties in piecing relevant information together in this matter and Mr. Long's assumption of authority on the Project. For instance, TSC's Exhibit 2 is incomplete. Review of other documents shows that more than two years into the construction, FCI's Ms. Nix did not know that certain submittals needed to also be sent to the SCDOT. She thought Mr. Long was the RCE. (Aff. Ex. J – Email Chain, dated February 25, 2016 (Part 1), p. 2 (Bates Stamped FIC000471613)). When Mr. Long told her she should also submit the documents to SCDOT, Ms. Nix told him that she "did not know that." Aff. Ex. K – Email Chain, dated February 25, 2016 (Part 2), p. 1 (Bates Stamped FIC000193235)). Mr. Kirk of FCI then emailed others at FCI that the process was broken based upon Mr. Hutcherson's position that Mr. Long had assumed RCE authority and yet was not taking action and was making the

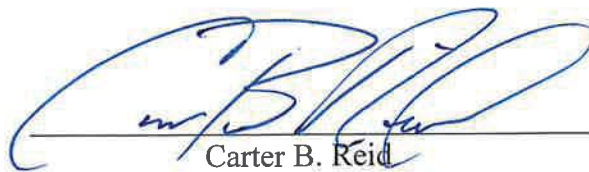
process more difficult. Aff. Ex. L – Email Chain, dated February 25, 2016 (Part 3), p. 1 (Bates Stamped FIC000467318).

35. Further documentary analysis and a deposition of Mr. Long undoubtedly will reveal that he assumed authority as RCE on the Project. Indeed, as set forth in an email early in the Project, Mr. Long called FCI and introduced himself as the Resident Construction Engineer. Aff. Ex. M – Email, dated October 29, 2013, p. 2 (Bates Stamped TSC00395298). SCDOT even emailed Mr. Long in 2014 that it had given him “contract authority” on the Project. Aff. Ex. N – Email, dated February 03, 2014, p. 1 (Bates Stamped FIC000148797) (“Marty, once Brian got your RCE access set up, I went in and gave you and Tom contract authority....”). All of these communications provide firm indications that a deposition of Mr. Long will likely give rise to meaningful, relevant evidence concerning TSC’s RCE status and its relationship with FCI.

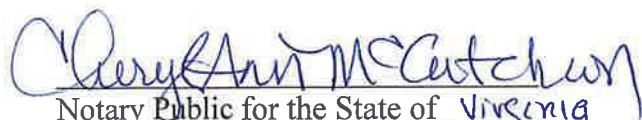
36. Depositions have yet to be conducted. Marty Long, the primary subject of TSC’s Motion for Summary Judgment, has provided no sworn testimony about his role on the Carolina Bays Project. In fact, he did not even provide an affidavit in support of TSC’s MSJ or Reply. FCI should be provided an opportunity to depose this central figure on the Project before the Court rules on summary judgment.

37. Completion of document productions followed by depositions of Marty Long, Peter Strub, Doug Kennedy, and other TSC personnel, as well as depositions of FCI Project Managers, are essential to understanding the facts and circumstances surrounding TSC’s role on the Project and its relationship with FCI. This discovery simply could not have been completed prior to the Hearing.

FURTHER AFFIANT SAYETH NOT.

  
Carter B. Reid

Subscribed and sworn to before me,  
This 12 day of December, 2023.

  
Notary Public for the State of Virginia  
My Commission Expires: 10/31/2026



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**Sent:** Thursday, February 17, 2022 12:55 PM  
**To:** Michael Wilkes <[mwilkes@wilkeslaw.com](mailto:mwilkes@wilkeslaw.com)>  
**Cc:** Dan Atkinson <[datkinson@wilkeslaw.com](mailto:datkinson@wilkeslaw.com)>; Alex Joyner <[ajoyner@wilkeslaw.com](mailto:ajoyner@wilkeslaw.com)>; Ellen Cheek <[echeek@wilkeslaw.com](mailto:echeek@wilkeslaw.com)>; Ashley Henderson <[ahenderson@wilkeslaw.com](mailto:ahenderson@wilkeslaw.com)>; Leslie Osman <[losman@watttieder.com](mailto:losman@watttieder.com)>; Dominick Weinkam <[dweinkam@watttieder.com](mailto:dweinkam@watttieder.com)>; Hanna Blake <[hblake@watttieder.com](mailto:hblake@watttieder.com)>  
**Subject:** RE: Flatiron v. TranSystems: RPD Issues

Mike,

I am in mediation. I will need to look into the issues you have raised. I will call you early next week to discuss them. Please let me know your availability. Thanks.

Carter

Carter B. Reid | Senior Partner



1765 Greensboro Station Place, Suite 1000 | McLean, VA 22102

**p:** 703.749.1028 | **e:** [creid@watttieder.com](mailto:creid@watttieder.com)

---

**From:** Michael Wilkes <[mwilkes@wilkeslaw.com](mailto:mwilkes@wilkeslaw.com)>  
**Sent:** Thursday, February 17, 2022 11:47 AM  
**To:** Carter Reid <[creid@watttieder.com](mailto:creid@watttieder.com)>  
**Cc:** Dan Atkinson <[datkinson@wilkeslaw.com](mailto:datkinson@wilkeslaw.com)>; Alex Joyner <[ajoyner@wilkeslaw.com](mailto:ajoyner@wilkeslaw.com)>; Ellen Cheek <[echeek@wilkeslaw.com](mailto:echeek@wilkeslaw.com)>; Ashley Henderson <[ahenderson@wilkeslaw.com](mailto:ahenderson@wilkeslaw.com)>; Leslie Osman <[losman@watttieder.com](mailto:losman@watttieder.com)>; Dominick Weinkam <[dweinkam@watttieder.com](mailto:dweinkam@watttieder.com)>  
**Subject:** Flatiron v. TranSystems: RPD Issues

**\*\*CAUTION! EXTERNAL EMAIL; when opening attachments and links be extremely careful\*\***

Carter,



I am writing regarding various RPD issues:

[1] **TCR Production:** We have just discovered that there exists another group of about 25,000 documents that CDS uploaded into Relativity from TSC but did not provide to us to review. This is a CDS error—long story of our digital times.... Of course, we are confirming we have “everything.” We are reviewing this new group of documents and will supplement our responses accordingly, probably within the next month [we are preparing for several trials during the next four months which have been delayed by Covid...].

[2] **FCI Production:** Attached are our 5.28.21 RPD to FCI, and FCI’s 8.16.21 Response. I understand that FCI has produced 1,098,992 pages of documents so far; however, FCI has not served supplemental written responses to TSC’s discovery requests. At some point, FCI’s should serve specific supplemental responses to each request, which we can discuss later as necessary. Note that we have served supplemental responses with TSC’s recent productions.

Today, my question is simple: Has FCI produced not only its documents, but any documents it received from SCDOT or any other source? Our RPD 6 requests: “All documents obtained by Flatiron via subpoena, FOIA request, or any other open source request related to the Project.” If FCI has produced documents responsive to RPD 6, please identify the bates range of the FCI documents and the bates range of documents responsive to RPD 6. If FCI has not produced any documents responsive to RPD 6, please advise why not.

Please call me in our Spartanburg office today or Charleston tomorrow, if you wish to discuss these issues.

Mike  
2.17.22

**Michael B.T. Wilkes**

864.591.2355 Spartanburg  
843.737.6229 Charleston  
864.580.1599 Mobile

127 Dunbar St. | Ste 200 | Spartanburg, SC 29306  
200 Meeting St. | Ste 205 | Charleston, SC 29401

[mwilkes@wajlawfirm.com](mailto:mwilkes@wajlawfirm.com)  
[www.wajlawfirm.com](http://www.wajlawfirm.com)

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

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

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

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

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

WILKES ATKINSON & JOYNER, LLC

October 4, 2023

s/ Michael B.T. Wilkes  
 Michael B.T. Wilkes, Esq. (S.C. Bar 6107)  
[mwilkes@wajlawfirm.com](mailto:mwilkes@wajlawfirm.com)  
 J. Alexander Joyner (S.C. Bar 101771)  
[ajoyner@wajlawfirm.com](mailto:ajoyner@wajlawfirm.com)  
 320 Broad St., Suite 220  
 Charleston, SC 29401  
 843.737.6229

- And -

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

*Attorneys for TranSystems Corporation*



**From:** GV-Marty Long </O=TRANSYSTEMS CORPORATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MLLONG>  
**To:** Kim Partenheimer (partenheimer@pbworld.com)  
**Sent:** 1/8/2014 8:27:13 PM  
**Subject:** FW: Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).  
**Attachments:** Carolina Bays Project Agenda.pdf; imaged21179.JPG; PRECON INVITE LIST.pdf

From: GV-Marty Long  
 Sent: Wednesday, January 08, 2014 3:24 PM  
 To: Andy Markunas (markunaa@horrycounty.org); Bert Parsons (albert.parsons@santeecooper.com); Bill Mattison (mattisonbr@scdot.org); Billy Ray Cox (billyray.cox@horryelectric.com); Brent Barker (brent.barker@htcinc.net); Brian Nickerson (nickersonbg@cecsinc.com); Christopher Stout (stoutcm@dhec.sc.gov); Craig Rivers (craig.rivers@meadhunt.com); David Gilreath (gilreath@horrycounty.org); GV-David Hoff; David Johnson (johnsondav@scdot.org); Dennis Townsend (townsenddl@scdot.org); CR-Doug Kennedy; Elizabeth Williams (elizabeth.g.williams@usace.army.mil); Evelyn Smart (evelyn.smart@uscg.mil); Frank Chapman (fhchapman@earthlink.net); Fred Crosby (crosbyf@horrycounty.org); Jason Poston (jposton@gswsa.com); Jason Thompson (thompsonjd@scdot.org); Jay Hawkins (hawkinswj@scdot.org); Jeff Burkett (jeff.burkett@meadhunt.com); CR-Jim Fisher; Johnson Dean (deanjb@scdot.org); Kelvin Waites (waiteskhorrycounty.org); Ken Beans (beanskhorrycounty.org); Kevin DuBose (dubosekw@scdot.org); Kim Partenheimer (partenheimer@pbworld.com); Kyle Berry (berrywk@scdot.org); Leah Quattlebaum (quattleblb@scdot.org); Lisa Bourcier (bourcierl@horrycounty.org); GV-Marty Long; Michael Cook (michael.cook@meanhunt.com); Mike Barbee (barbeemw@scdot.org); GV-Peter Strub; GV-Regena Wells; Robby McDonald (mcdonaldr@pbworld.com); Rocque Kneece (kneecerl@cecsinc.com); Ron Goodson (rgoodson@flatironcorp.com); Russ Touchberry (touchberrr@scdot.org); Sandra Rhodes (rhoess@horrycounty.org); Scott Rutherford (rutherfordds@horrycounty.org); Sonny Collins (ewcollins@schp.org); Steve Dimoro (sdimoro@flatironcorp.com); Steve Gosnell (gosnells@horrycounty.org); Ted Kirk (tkirk@flatironcorp.com); Todd Steagall (steagallrt@scdot.org); HU-Tom Mukai; Tom Warren (twarren@flatironcorp.com); Travis Hughes (travis.g.hughes@usace.army.mil); Travis Patrick (patricktm@scdot.org); Vance Langston (vance.langston@twcable.com); Will Fulton (fultonjw@scdot.org)  
 Cc: fchapman@RDA-usa.net  
 Subject: Partnering/Pre-construction Conference for the Carolina Bays Project (Hwy 31 Extension).

Ladies and Gentlemen

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

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

Date: January 24, 2014

Time: 9:00 AM

Facilitator: Frank Chapman with RDA

Precon: Martin Long with TranSystems

Location: Horry County Government & Justice Center

Multi-Purpose Room B (Second Floor)

1301 Second Avenue, Conway, SC

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

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

Thank you.

Martin Long

RCE

864.915.0741

Frank Chapman

Facilitator

803.261.2044

Martin L. Long

TranSystems  
200 Prather Park Dr  
Myrtle Beach, SC 29588  
Main: 864-234-0866

Fax: 864-527-6873  
Cell: 864-915-0741  
www.transystems.com

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ELECTRONICALLY FILED - 2023 Dec 12 2:13 PM - HORRY - COMMON PLEAS - CASE#2022CP2606116



**SAMPLE IDENTIFICATION CARD****CONCRETE**

SAMPLE ID: **526-14- 2475** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14  
 PCN: 036775BR01 DATE TO LAB: 10/02/14  
 SAMPLED BY: Galey, Brian (Tiny)  
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)  
☒ Job Control ☐ For Information Only (Choose One)

**SAMPLE INFORMATION**

MATERIAL: ConcCyl. 4000  
 DESCRIPTION: Concrete Cylinder, Class 4000  
 MANUFACTURER: S&W Ready Mix Concrete Co.  
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526  
 REPRESENTED QUANTITY: 9 OF 165 CY  
 SAMPLED FROM: Truck Mixer  
 JOB MIX NO.: 4000 DS  
 BREAK SPECIMEN AT: 3 @ 28 days  
 TO BE USED IN: Drilled Shaft with Wet & Dry  
 Excavation - 102" Diameter  
 OTHER INFORMATION: BENT 14-1 DS, SET-1

BRAND: ☐ Early Break  
 Cement: Giant Type: two  
 Fine Aggregate: American Coarse Aggregate: Vulcan  
 Air Entraining: oz./bag Admixture: oz./100 lbs.  
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.0 in.  
 AIR: 0.0% WATER ADDED: 20 gal. IN 9 CY  
 MIXED BY: Galey, Brian (Tiny) Temp: 84 °F  
 Entered By: Widdifield, Ellen Date: 10/02/14  
 S&ME Sample Results: \_\_\_\_\_  
 Check Sample Results: \_\_\_\_\_ ID: \_\_\_\_\_

**SAMPLE IDENTIFICATION CARD****CONCRETE**

SAMPLE ID: **526-14- 2476** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14  
 PCN: 036775BR01 DATE TO LAB: 10/02/14  
 SAMPLED BY: Galey, Brian (Tiny)  
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)  
☒ Job Control ☐ For Information Only (Choose One)

**SAMPLE INFORMATION**

MATERIAL: ConcCyl. 4000  
 DESCRIPTION: Concrete Cylinder, Class 4000  
 MANUFACTURER: S&W Ready Mix Concrete Co.  
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526  
 REPRESENTED QUANTITY: 63 OF 165 CY  
 SAMPLED FROM: Truck Mixer  
 JOB MIX NO.: 4000 DS  
 BREAK SPECIMEN AT: 3 @ 28 days  
 TO BE USED IN: Drilled Shaft with Wet & Dry  
 Excavation - 102" Diameter  
 OTHER INFORMATION: BENT 14-1 DS, SET-2

BRAND: ☐ Early Break  
 Cement: Giant Type: two  
 Fine Aggregate: American Coarse Aggregate: Vulcan  
 Air Entraining: oz./bag Admixture: oz./100 lbs.  
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.0 in.  
 AIR: 0.0% WATER ADDED: 20 gal. IN 9 CY  
 MIXED BY: Galey, Brian (Tiny) Temp: 86 °F  
 Entered By: Widdifield, Ellen Date: 10/02/14  
 S&ME Sample Results: \_\_\_\_\_  
 Check Sample Results: \_\_\_\_\_ ID: \_\_\_\_\_

**SAMPLE IDENTIFICATION CARD****CONCRETE**

SAMPLE ID: **526-14- 2477** SC FILE: 26.036775A.1 DATE SAMPLED: 10/01/14  
 PCN: 036775BR01 DATE TO LAB: 10/02/14  
 SAMPLED BY: Galey, Brian (Tiny)  
 SCDOT RCE: Long, Martin L. PROJECT DESCRIPTION: BRIDGE 1 (Over Intracoastal Waterway)  
☒ Job Control ☐ For Information Only (Choose One)

**SAMPLE INFORMATION**

MATERIAL: ConcCyl. 4000  
 DESCRIPTION: Concrete Cylinder, Class 4000  
 MANUFACTURER: S&W Ready Mix Concrete Co.  
 ADDRESS: 130 Winyah Rd. Conway, SC. 29526  
 REPRESENTED QUANTITY: 135 OF 165 CY  
 SAMPLED FROM: Truck Mixer  
 JOB MIX NO.: 4000 DS  
 BREAK SPECIMEN AT: 3 @ 28 days  
 TO BE USED IN: Drilled Shaft with Wet & Dry  
 Excavation - 102" Diameter  
 OTHER INFORMATION: BENT 14-1 DS, SET-3

BRAND: ☐ Early Break  
 Cement: Giant Type: two  
 Fine Aggregate: American Coarse Aggregate: Vulcan  
 Air Entraining: oz./bag Admixture: oz./100 lbs.  
 MIX USED 94: 7.4 : WATER: 36 SLUMP: 8.3 in.  
 AIR: 0.0% WATER ADDED: 15 gal. IN 9 CY  
 MIXED BY: Galey, Brian (Tiny) Temp: 82 °F  
 Entered By: Widdifield, Ellen Date: 10/02/14  
 S&ME Sample Results: \_\_\_\_\_  
 Check Sample Results: \_\_\_\_\_ ID: \_\_\_\_\_





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

## MEMORANDUM

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

**FROM:** D. L. Johnson, District Construction Engineer



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

**DATE:** February 9, 2016

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

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

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

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

DLJ:dlj

ec: Nick Waites, Assistant Construction Engineer

Jason Thompson, District Bridge Engineer

File: D5/Florence/DLJ

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



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

AN EQUAL OPPORTUNITY  
 AFFIRMATIVE ACTION EMPLOYER

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**From:** CR-Marty Long </O=TRANSYSTEMS CORPORATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MLLONG>  
**To:** campbelljp@scdot.org  
**Sent:** 7/18/2016 3:45:19 PM  
**Subject:** 26.036775A CBP - Question on Reporting  
**Attachments:** imageeb84fa.PNG

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

Thanks for your help!!

Marty Long  
RCE Carolina Bays  
864.915.0741

Martin L. Long



*Delivering the Transportation Experience for 50 Years*

**TranSystems**  
200 Prather Park Dr  
Myrtle Beach, SC 29588

Direct: 843-796-9381  
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Cell: 864-915-0741  
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**From:** Heck, Justin LT <Justin.C.Heck@uscg.mil>  
**To:** CR-Marty Long; Zercher, Jennifer N CIV; Lawrence, Eddie H CIV  
**CC:** PatrickTM@scdot.org; CR-Doug Kennedy  
**Sent:** 7/18/2017 8:59:08 PM  
**Subject:** RE: 60 Day Notice for Work in AICWW (South Carolina)

Good Afternoon Mr. Long,

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

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

Regards,

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

-----Original Message-----

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

Mr. Heck

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

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

Thanks for your help and guidance.

Marty Long

RCE

864.915.0741

From: McGrath, Ken [mailto:KMcGrath@flatironcorp.com]  
 Sent: Wednesday, July 12, 2017 1:44 PM  
 To: Zercher, Jennifer N CIV <Jennifer.N.Zercher@uscg.mil>; Heck, Justin LT <Justin.C.Heck@uscg.mil>  
 Cc: Lawrence, Eddie H CIV <Eddie.H.Lawrence@uscg.mil>; Fischer, Forrest <ffischer@flatironcorp.com>; MacFawn, Ian <IMacFawn@flatironcorp.com>; Beiter, Jeremiah <JBeiter@flatironcorp.com>; St. Martin, Jessica <jstmartin@flatironcorp.com>; Martel, Ryan <RMartel@flatironcorp.com>; CR-Marty Long <mllong@transystems.com>  
 Subject: RE: 60 Day Notice for Work in AICWW (South Carolina)

Mr. Heck,

Attached is our notice to place our barge and tugboat and temporarily block marine traffic to set steel girders for the new AICWW bridge. Schedules times are not set yet but between the dates listed we will be performing the work and will keep you up to date as the work draws closer to actual blockage times needed.

Thanks,

Ken McGrath

Project Engineer  
 Flatiron Construction Corp.

860 Aviation Parkway, Suite 100

Morrisville, NC 27560

803 517 5256 CELL

kmcgrath@flatironcorp.com <mailto:kmcgrath@flatironcorp.com>

[www.flatironcorp.com <https://urldefense.proofpoint.com/v2/url?u=http-3A\\_\\_www.flatironcorp.com\\_&d=DwMGaQ&c=0NKfg44GVknAU-XkWXjNzQ&r=K7nPVFDaWfoogoF\\_bZN9BWLGCvU5hC\\_XB\\_8FxEOjvX0&m=8kyZZbFh-LoXMTA32vMEXSx0WEZd\\_by-P7\\_T5bM93Xs&s=HHK6jilucts7O7JVY6KVwXDiS39hZTFvAbvr0pFduWc&e=>](https://urldefense.proofpoint.com/v2/url?u=http-3A__www.flatironcorp.com_&d=DwMGaQ&c=0NKfg44GVknAU-XkWXjNzQ&r=K7nPVFDaWfoogoF_bZN9BWLGCvU5hC_XB_8FxEOjvX0&m=8kyZZbFh-LoXMTA32vMEXSx0WEZd_by-P7_T5bM93Xs&s=HHK6jilucts7O7JVY6KVwXDiS39hZTFvAbvr0pFduWc&e=>)

LOGO - FLATIRON

Build the Best. Be the Best

From: Zercher, Jennifer N CIV [mailto:Jennifer.N.Zercher@uscg.mil]  
 Sent: Wednesday, July 12, 2017 10:28 AM  
 To: McGrath, Ken <KMcGrath@flatironcorp.com>  
 Cc: Lawrence, Eddie H CIV <Eddie.H.Lawrence@uscg.mil>; Heck, Justin LT <Justin.C.Heck@uscg.mil>  
 Subject: FW: 60 Day Notice for Work in AICWW (South Carolina)

Good morning Mr. McGrath,

Please fill out the attached Pre-Construction checklist for the project below. LT Justin Heck from Sector Charleston Waterways Division

will be your point of contact for waterways restrictions/closures.

LT Justin Heck  
USCG Sector Charleston (Waterways)  
(843) 740-3184  
Justin.c.heck@uscg.mil

Once we receive the updated information, we will update the Local Notice to Mariners with changes that LT Heck approves.

If you have any questions, please give me or Mr. Eddie Lawrence, (305) 415-6946, a call.

R,  
Jennifer Zercher  
Bridge Management Specialist  
U.S. Coast Guard District 7 Bridge Branch  
909 SE 1st Ave Ste 432  
Miami FL 33131-3050  
PH: 305.415.6740

-----Original Message-----

From: McGrath, Ken [<mailto:KMcGrath@flatironcorp.com>]  
Sent: Wednesday, July 12, 2017 9:16 AM  
To: Dragon, Barry CIV  
Cc: Fischer, Forrest; MacFawn, Ian; Beiter, Jeremiah; St. Martin, Jessica; Martel, Ryan  
Subject: [Non-DoD Source] 60 Day Notice for Work in AICWW (South Carolina)

Mr. Dragon,

I am writing to give the USCG the required the 60 day required notice of construction activities that require restriction, either total or partial, to be placed upon navigational interests, commercial or recreational marine traffic in the American Intercostal Waterway (AICWW) in Socastee, SC. This will require partial and full closure of the waterway for the placement of steel girders across the AICWW for the Carolina Bays Parkway construction project for the South Carolina Department of Transportation (SCDOT). The duration of the work period to erect the steel girders over the AICWW will be approximately 12 weeks.

If you have any questions feel free to call me at my cell phone number below.

Thanks,

Ken McGrath  
Project Engineer  
Flatiron Construction Corp.  
860 Aviation Parkway, Suite 100  
Morrisville, NC 27560  
803 517 5256 CELL  
[kmcgrath@flatironcorp.com](mailto:kmcgrath@flatironcorp.com)



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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Flatiron Constructors, Inc.,

Plaintiff,

v.

TranSystems Corporation,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2022-CP-26-06116

**JOINT MOTION TO ESTABLISH
COMPLEX CASE DESIGNATION AND
TIME FOR TRIAL**

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

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

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

(a) Nature of the case

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

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

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

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

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

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

(b) The number of witnesses for the plaintiff

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

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

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

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

(c) The number of witnesses for defendant

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

(d) Anticipated time needed to try the case

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

(e) Motions pending

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

(f) Additional motions anticipated before trial

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

(g) Discovery pending

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

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

(h) Additional discovery contemplated

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

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

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

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

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

Respectfully submitted this 18th day of October, 2023

s/Mason A. Goldsmith, Jr.

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

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Attorneys for Defendant TranSystems Corporation

| | | |
|------------------------------|---|---|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | C.A. No.: 2018-CP-26-02633 |
| |) | |
| Flatiron Constructors, Inc., |) | |
| |) | TRANSYSTEMS' ANSWERS TO FLATIRON |
| Plaintiff, |) | CONSTRUCTORS, INC.'S |
| |) | FIRST SET OF INTERROGATORIES |
| vs. |) | (1-27) |
| |) | |
| TranSystems Corporation, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

TranSystems Corporation ("TSC") hereby responds to Flatiron Constructors, Inc.'s First Set of Interrogatories ("Flatiron's Interrogatories") as follows:

General Objections

1. The following answers are made subject to and without waiver of any objections to the admissibility of these answers or any part thereof at trial or otherwise.

2. TSC objects to Flatiron's Interrogatories to the extent they seek information protected by the attorney-client privilege or the work-product doctrine.

3. The following answers are based upon information presently available to TSC after good faith investigation and in light of the present state of discovery. Said answers are made without prejudice to TSC's right to rely upon subsequently discovered facts and documents. TSC reserves the right to supplement these answers upon its further investigation and acquisition of information or documents that it does not possess, recall or presently have in its possession.

ANSWERS TO INTERROGATORIES

1. Identify all persons having knowledge of the facts or circumstances of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements; and summarize the knowledge of each such person

and indicate whether a written or recorded statement has been taken from each person and, if so, indicate who has possession of the written or recorded statement.

ANSWER: TranSystems notes that this case is at an early stage of discovery; therefore, TranSystems expressly reserves the right to supplement this response as it obtains additional information. Given the nature and scope of this claim, TranSystems will likely be required to supplement its response hereto:

1.0 Plaintiff Flatiron Constructors, Inc.

TranSystems incorporates herein by reference all witnesses identified by Flatiron in Flatiron's Answers to TranSystems Interrogatories, as well as any witnesses identified in supplemental responses thereto.

2.0 Defendant TranSystems Corporation –witnesses associated with TranSystems can be contacted via TranSystems' undersigned counsel.

2.1 Martin Long, P.E.

Long served as Project Manager for TranSystems for the Carolina Bays project. He is expected to testify regarding his interactions with Flatiron and his work with the SCDOT and Horry County for the Carolina Bays Project.

Long has not given written or recorded statements.

2.2 Peter Strub, P.E.

Strub is an executive with TranSystems, who negotiated and executed the TranSystems contract. He is expected to testify regarding TranSystems' contract and procedures for the company.

Strub has given an affidavit in this case, which has been provided to Flatiron.

2.3 Doug Kennedy

Kennedy was a senior bridge inspector for TranSystems for the Carolina Bays Project. He is expected to testify regarding his inspections for the Carolina Bays Project as well as his interaction with Flatiron.

TranSystems is unaware of any written or recorded statements from Kennedy.

2.4 Regina Wells

Wells was office administrator for TranSystems for the Carolina Bays Project. She is expected to testify regarding her handling and logging of submittals for the Project, as well as her interaction with Flatiron.

Wells has not given any written or recorded statements.

2.5 Chance Cargile

Cargile was a bridge inspector for TranSystems during girder installation and deck pours. He is expected to testify regarding his inspections, as well as his interactions with Flatiron.

Cargile has not given any written or recorded statements.

2.6 Allen Freeland

Freeland was a Senior Inspector for TranSystems. He is expected to testify regarding his bridge inspections on behalf of TranSystems.

Freeland has not given any written or recorded statements.

2.7 Jim Blackmore

Blackmore was a Foundation Inspector who oversaw inspection of drill shafts. He is expected to testify regarding his inspections, as well as his interactions with Flatiron.

Blackmore has not given any written or recorded statements.

3.0 SCDOT

3.1 Travis Patrick, P.E.

Patrick served as Resident Construction Engineer for SCDOT. He is expected to testify regarding his role in the Project, and his supervision of TranSystems.

TranSystems is unaware of whether Patrick has given any written or recorded statements.

3.2 Steve Nanney, P.E.

Nanney was the Bridge Construction Engineer for SCDOT. He is expected to testify regarding his observations and findings in his professional role.

TranSystems is unaware of whether Nanney has given any written or recorded statements.

3.3 Bill Madison, P.E.

Madison was Bridge Construction Engineer for the first two years of the Project. He is expected to testify regarding his findings and observations.

TranSystems is unaware of whether Madison has given any written or recorded statements.

4.0 **Horry County**

4.1 Jason Thompson, P.E.

Thompson was originally a bridge engineer for SCDOT; however, he eventually transferred to employment with Horry County. He is expected to testify regarding his work on the Project, and his interaction with Flatiron and TranSystems.

TranSystems is unaware of whether Thompson has given any written or recorded statements.

5.0 **S&ME, Inc.**

Greg Canavan, P.E.

Canavan is a geotechnical engineer with S&ME, Inc. He is expected to testify regarding his evaluation of the Project, and his interaction with TranSystems and Flatiron.

TranSystems is unaware of whether Canavan has given any written or recorded statements.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of TranSystems that relate to Flatiron's claim or TranSystems' defense in the case.

ANSWER: In lieu of a list, TSC has produced copies of all items in its possession responsive to this Interrogatory, in response to Flatiron's previously-served Requests for Production of Documents. As noted in the responses, TSC has not produced items protected by the Attorney-Client Privilege, nor has it identified those items via privilege log.

3. Set forth the names and addresses of all insurance companies that have issued liability insurance, property insurance, professional liability insurance, and other insurance coverage relating to TranSystems' work on the Project and set forth the number or numbers of the policies involved and the amount or amounts of coverage provided in each policy.

ANSWER: TranSystems objects to this Interrogatory as beyond the scope of discovery allowed by Rule 26, SCRCPP, because it seeks all insurance policies held by TranSystems. The Rules of Civil Procedure allow only for discovery of insurance agreements "under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Rule 26(b)(2), SCRCPP. Flatiron's request seeks information of all insurance coverage, much of which, like Workers Compensation or automobile coverage, would never be required to satisfy any potential judgment in this case. Subject to and without waiving this Objection, TranSystems states that TranSystems has certain coverages under a professional liability policy issued by Continental Casualty Company, bearing Policy Number AEH591904307, with limits of liability stated therein. TranSystems is producing a copy of the Policy, bearing Bates labels CNA 1 - 60, with premium information redacted, in response to Plaintiff's Second Requests for Production. TranSystems also possesses certain additional professional liability coverages, and TranSystems will produce copies and supplemental information regarding those policies.

4. If TranSystems has made claims with an insurer regarding the Project or damage arising from or connected to the Project, for each claim, please: State when the claim was made; identify the insurer to which the claim was made; state where the damage occurred; describe the nature of the damage and the alleged cause of the damage and describe the status of the claim.

ANSWER: TranSystems objects to this Interrogatory as seeking information prepared in anticipation of litigation by TranSystems and its insurer, which is exempt from discovery pursuant to Rule 26(b)(3). Subject to this objection, and in compliance with Rule 26(b)(2), SCRCF, TranSystems states that it notified its professional liability carrier of this claim, and it has responded by offering defense to same.

5. List the names and addresses of expert witnesses whom TranSystems proposes to call as witnesses at the trial of the case, state the subject matter on which each expert is expected to testify, and state the facts and opinions to which each expert is expected to testify and a summary of the grounds of each opinion.

ANSWER: TranSystems has not identified specific experts to provide trial testimony; however, it will do so in accordance with any Scheduling Order entered in this case. Further, TranSystems expressly reserves the right to supplement this response in accordance with any Scheduling Order entered by the Court in this case.

6. For each person known to TranSystems or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Flatiron of the important facts known to or observed by such witness or provide a copy of written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory 1.

7. Identify your involvement in prior lawsuits relating to allegations of negligent inspection. For each lawsuit, provide the case name, court name, date the complaint was filed, nature of the allegations, and the outcome or current status of the lawsuit.

ANSWER: TranSystems objects to this Interrogatory as overly broad and vague, because "allegations of negligent inspection" is insufficiently defined. Additionally, TranSystems

objects to this Interrogatory, because it is not limited in time or scope. Subject to these objections and the general objections above, TranSystems states that TranSystems has not been involved in any litigation asserted by a third-party non-client, based upon its provision of Construction, Engineering, Inspection and Testing Services. TranSystems is a defendant in one other civil action in South Carolina, but it is not related to inspection or testing services.

8. Identify and describe TranSystems' method of processing submittals and maintaining records of submittals and requests for information (RFI's). Provide a description of the steps involved in processing submittals, documentation generated during the submittal review process, methods used to maintain records of submittals and requests for information, and individuals or parties responsible for overseeing the submittal process and maintaining records of the submittal process.

ANSWER: TranSystems objects to this Interrogatory to the extent it requests company-wide methods of processing submittals for all projects, as the procedure varies project-to-project. This request is overbroad, due to the number and types of different submittals, and the fact that different submittals were forwarded to different supervisors at SCDOT. Subject to this objection, TranSystems states that its method for processing submittals and maintaining records of RFIs for the Project at issue was:

- a. Marty Long would review a submittal to verify it was appropriate for his review. If it was not, he would notify Flatiron who was the appropriate recipient for the submittal.
- b. Upon receipt, Long would add the submittal status for the running agenda item list for submittals for each bi-weekly project progress meeting.

- c. Shortly after receipt, Long would make comments in response to the submittal, as needed, or he would forward the submittal to the next person in the review chain. He would note the change of status of this on the agenda for the upcoming bi-weekly meeting.
- d. If Long had comments that needed a response from Flatiron, he would not take further action, other than status review at progress meetings, until he received a response to the comments.
- e. After forwarding to SCDOT personnel, Long would again change the status on the agenda and await a response from the person from SCDOT with authority for a specific response.
- f. After SCDOT approval, Long would notify Flatiron and note the approval in the upcoming agenda. The submittal would then be removed from subsequent agendas.

Each submittal chain, and each agenda and meeting minutes prepared by Long was uploaded to ProjectWise, and was available for review by all interested parties.

9. Identify all inspectors employed by or affiliated with TranSystems who were involved in the Project, and for each inspector, provide the following information: Full name; employment status (employee, independent contractor, e.g.); dates of employment or affiliation; roles and responsibilities on the Project; and dates the inspector was assigned to the Project and when they were on the Project site.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome. Flatiron is already in possession of a list of the inspectors, as referenced in Exhibit II.16 to Flatiron's Global Claim to the DRB. TranSystems incorporates by reference that Exhibit

as identifying all inspectors. This information is also included SCDOT's FOIA response to Flatiron. TranSystems objects to the Request for employment status and dates, as irrelevant to the claims presented and unduly burdensome to TranSystems. The daily reports, contained within that document, state the dates that the inspectors were on the site and performing inspections.

10. Identify the methods used by TranSystems for assessing requests for inspections on the Project, including a description of the process for accepting, processing, and responding to such requests, a description of documentation generated as part of the request for inspection process, and the individuals responsible for creating or maintaining documentation involved in the request for inspection process so identified.

ANSWER: TranSystems objects to the Interrogatory, because it implies a universal procedure for a wide variety of different circumstances. Subject to this objection, TranSystems states the general procedure followed for inspections was that Flatiron would produce a three-week schedule for construction, with all parties understanding the construction schedule was tentative based on progress, weather and availability of materials. Based on the schedule, Flatiron would schedule production and delivery of concrete for pouring. TranSystems would perform running inspections as available, but final inspections would typically be performed immediately prior to pouring of concrete, within 24 hours of the scheduled concrete pour. Requestors from Flatiron would vary, based on the field engineer responsible for a particular structure. Documentation would include the three-week schedule produced by Flatiron, as well as weekly day-by-day schedules produced by Flatiron, which were updated daily based on progress. Documentation produced by TranSystems would include the pre-pour checklist, to be signed by the assigned inspector for TranSystems. If TranSystems noted deficiencies or issues in the schedules produced

by Flatiron, Marty Long would notify if there were issues of non-compliance, like missing certifications or material tests.

11. Identify any and all deficiencies, defects, errors, omissions, or other issues in Flatiron's work, workmanship, or construction activities on the Project, and for each instance, provide the following information: date when the deficiency, defect, error, omission, or other issue was identified; the name of the inspector who identified the deficiency, defect, error, omission, or other issue; a detailed description of the deficiency, defect, error, omission, or other issue; an explanation of the reason for the deficiency, defect, error, omission, or other issue; and identify the steps taken by TranSystems after the deficiency, defect, error, omission, or other issue was identified.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, particularly given that TranSystems has presented no claim against Flatiron in this case. All communications and inspections were documented in writing, and were provided to Flatiron contemporaneously. Additionally, TranSystems has produced its project file, which includes all reports of deficiencies. Deficiencies could range in scope from minor compliance or missing paperwork, to work that failed to meet certification requirements for safety. It is impossible for TranSystems to identify every deficiency in a list form; however, TranSystems' files, as well as the reports provided to SCDOT and maintained in SCDOT's computer database will contain every documented deficiency, as well as the steps taken to respond to same.

12. Identify the methods employed by TranSystems to give notice to Flatiron of deficiencies, defects, errors, omissions, or other issues identified during inspections of Flatiron's work on the Project. Include a description of how notice is given, in what timeframe, and the individuals responsible for providing said notice.

ANSWER: TranSystems objects to this Request as overly broad and unduly burdensome, because there were a wide range of responses, based on the nature and extent of deficiency discovered. Subject to this Objection, TranSystems states that the general procedure for responses to deficiencies was as follows:

After the discovery of any deficiency, pursuant to the terms of its contract for services with Horry County, TranSystems notified SCDOT, Horry County, and Flatiron of any inspections revealing problems or concerns, and it provided comments to Flatiron for potential correction. Flatiron had the option to make changes, or to follow the escalation procedure provided in its contract with Horry County for resolution of any disputes. As to minor deficiencies, TranSystems would not notify Horry County or SCDOT, unless or until Flatiron refused to make changes to resolve the minor deficiencies and the dispute became part of the escalation process.

13. Identify all instances in which TranSystems instructed Flatiron to stop work, modify its work, suspend performance, or re-sequence work in relation to the Project, and for each instance, provide: Date of the instruction; nature and purpose of the instruction; grounds or reasons for the instruction; names and titles of individuals involved in giving or receiving the instruction; and written or documented communication conveying the instruction.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, because it contains no limit in scope as to the request. As the request is drafted, a minor paperwork revision would require the same response as a stop work order. Subject to this objection, TranSystems states that, at SCDOT's direction, it communicated partial project stop work orders on limited occasions, which were documented at the following locations in production:

- A. FIC000584029 – FIC000584033, from November 2016, regarding concrete issues at Bent 15;
- B. FIC000082888 – FIC000082935, from October 2016, involving concrete pours;
- C. FIC000030270, involving a temporary suspension of work in July, 2016;
- D. FIC000031582 – FIC000031589, involving lifting of a temporary suspension of work in August 2016;
- E. FIC000152248, addressing a SCDOT stop work order in December, 2015;
- F. FIC000180746, addressing a stop work order for Drilled Shafts in July, 2014; and
- G. FIC000021679, relating to a hold on mass pours pending approval of a revised Mass Concrete Plan, in December 2014.

14. Identify all instances where TranSystems sought instruction, permission, or approval from SCDOT to approve Flatiron's work, declare the work deficient, stop work, suspend performance, re-sequence work, or affect the ongoing work on the Project, and for each instance, provide: Date the instruction, permission, or approval from SCDOT was sought; description of the work related to the requested instruction, permission, or approval; names and titles of individuals involved in giving or receiving instruction, permission, or approval; and written or documented communication conveying the instruction.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, because it requests TranSystems to essentially provide a description of the entirety of its work on the project in an Interrogatory Answer. TranSystems has produced its available Project File, and SCDOT has produced its file to Flatiron, which contains all information responsive to this Interrogatory. The burden on Flatiron is equal to that for TranSystems to search SCDOT's file for this information.

15. Identify the methods used by TranSystems for documenting inspections performed on the Project, including a description of the process of inspection, a description of documentation generated as part of the inspection process, and individuals responsible for creating or maintaining documentation involved in the inspection process so identified.

ANSWER: SCDOT provided a form to be completed for every inspection of concrete pours, and all inspection protocols are listed in the 2004 SCDOT Manual for Construction, which has been produced in this case. Individual inspectors would complete the form appropriate for each inspection, and the inspection forms were maintained by being uploaded into Site Manager, the SCDOT database, and ProjectWise, as appropriate.

16. Identify all meetings, discussions, conferences, or communications by TranSystems to provide updates on the Project, whether they occurred regularly (daily, weekly, monthly, e.g.) or otherwise.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome, as it requires TranSystems to describe all work it did on this Project in an Interrogatory response. Subject to this objection, TranSystems states that it conducted bi-weekly project progress meetings, and daily meetings of Marty Long with Lou Hutcherson on every week day, to discuss project progress. TranSystems kept minutes of the bi-weekly meetings, which were uploaded to ProjectWise, and which were sent contemporaneously to Flatiron. Additionally, TranSystems would respond to email or other requests as needed. Those emails would have also been uploaded to ProjectWise.

17. Identify reports, summaries, logs, or other documents created to provide project updates.

ANSWER: TranSystems objects to this Interrogatory as overly broad and unduly burdensome. Further, the Interrogatory does not specify the people or entities to be updated on project status. Subject to this Objection, TranSystems states generally that it created the following categories of reports:

1. Bi-weekly meeting minutes;
2. Certification logs, which lists certification of materials;
3. Material testing log;
4. Rain log, documenting weather;
5. Inspectors Daily Work Reports;
6. Drill Shaft Logs;
7. Concrete Pre-Pour Checklist;
8. Stored Material Payment Report;
9. Change Order Log; and
10. ICWW Concrete and Rebar Installation Log.

All of these categories of reports were uploaded to SCDOT ProjectWise or Site Manager, as appropriate. Upon information and belief, Flatiron has obtained all of these reports via a Freedom of Information Act request to SCDOT. Additionally, Flatiron had to sign many of these reports as they were completed during construction.

18. Identify all persons acting as the Resident Construction Engineer (“RCE”) on the Project.

ANSWER: TranSystems objects to this Interrogatory as vague and insufficiently defined. Subject to this Objection, TranSystems states the following:

Although Marty Long used the title Resident Construction Engineer in his capacity with TranSystems, he never had authority as SCDOT's RCE. That authority is vested solely in an employee of SCDOT, under Section 101.2 of the SCDOT Standard Specifications. Travis Patrick was the primary Resident Construction Engineer for SCDOT for the Project. In 2017, Katherine Scott obtained the SCDOT title of Resident Construction Engineer, when Patrick became District 5 Assistant Construction Engineer. AJ Bostic also had a title of Resident Construction Engineer. Derrick Tindall also became Resident Construction Engineer for District 5.

19. Identify all instances in which TranSystems' inspection was requested, but the inspection was denied, and for each instance, provide: Date the inspection was requested; nature and purpose of the requested inspection; grounds or reasons for denying the inspection; names and titles of individuals involved in giving or receiving the denial; and written or documented communication conveying the request and denial.

ANSWER: There are no known instances where TranSystems was requested to perform an inspection, and such request was denied. Alleging that an inspection was denied would allege that portions of the project were built without an inspection, which such allegation is not supported by the project records. It is possible that a requested inspection was delayed allowing TranSystems inspectors to complete initiated inspections at other areas or awaiting Flatiron's Field Engineer to complete his/her QC as outlined in the project records or perform other inspections requested at the same time. As soon as an inspector was available to perform an inspection, it would be performed.

20. State in detail all facts and identify all documents upon which you rely in support of your Second Defense that "Flatiron's alleged damages were caused by its own negligence" (See TranSystems' Answer to Amended Complaint, ¶ 51, dated November 13, 2020).

ANSWER: SCDOT asserted errors on the part of Flatiron on multiple occasions, and TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

21. State in detail all facts and identify all documents upon which you rely in support of your Third Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God” (*See* TranSystems’ Answer to Amended Complaint, ¶ 52, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

22. State in detail all facts and identify all documents upon which you rely in support of your Fifth Defense that “Flatiron’s claims may be barred by the equitable doctrines or waiver, estoppel, and/or laches . . . based on Flatiron’s claims under its Construction Contract with Horry County” (*See* TranSystems’ Answer to Amended Complaint, ¶ 54, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this in full until it has had an opportunity to review all documents provided by SCDOT. TranSystems will supplement this response.

23. State in detail all facts and identify all documents upon which you rely in support of your Sixth Defense that “TranSystems is entitled to a setoff for any compensation received by Flatiron for the damages alleged in its Amended Complaint.” (*See* TranSystems’ Answer to Amended Complaint, ¶ 55, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this request in full until it has reviewed all documents from SCDOT and Flatiron. TranSystems reserves the right to supplement this response.

24. State in detail all facts and identify all documents upon which you rely in support of your Seventh Defense that “Flatiron’s claims against TranSystems may be barred by the doctrine of accord and satisfaction and/or satisfaction and release” (*See* TranSystems’ Answer to Amended Complaint, ¶ 56, dated November 13, 2020).

ANSWER: TranSystems cannot respond to this request in full until it has reviewed all documents from SCDOT and Flatiron. TranSystems reserves the right to supplement this response.

25. State in detail all facts and identify all documents upon which you rely in support of your Ninth Defense that “Flatiron’s alleged damages were caused by the intervening or superseding fault or breach of others and/or Acts of God” (*See* TranSystems’ Answer to Amended Complaint, ¶ 58, dated November 13, 2020).

ANSWER: Discovery is in an early phase in this case, and TranSystems continues to evaluate evidence, as well as its potential affirmative defenses. Accordingly, TranSystems reserves the right to supplement this response. Subject to this reservation, TranSystems states that significant portions of the delay claimed by Flatiron was a product of weather, which was not within the control of TranSystems. Additionally, in various locations, Flatiron has claimed delays related to weather, which would constitute Acts of God. TranSystems will supplement this response.

26. State in detail all facts and identify all documents upon which Mr. Peter Strub relied upon to claim that “[n]either TranSystems Corporation nor I ever considered or intended Flatiron to be a third-party beneficiary of TranSystems’ contract with Horry County.” (*See* TSC MSJ, ¶ 9, Ex. F – Affidavit of Peter Strub, P.E.).

ANSWER: Peter Strub is the person who executed and negotiated TranSystems' contract with Horry County, and he based his sworn testimony on his own personal knowledge held at the time of the Contract's execution, as well as the terms negotiated thereunder. Further, at the time of the execution of the TranSystems Contract, Flatiron was not hired as General Contractor, making it impossible for Flatiron to be an intended third party beneficiary of a contract entered before it agreed to do work on the Carolina Bays project.

27. State in detail all facts and identify all documents upon which Mr. Peter Strub relied to claim that "[a]lthough the TranSystems Contract included a document entitled 'Engineer Certification for Project Plans and Specifications,' signed by [Mr. Peter Strub], TranSystems never prepared, signed, or sealed any design plans for the Project. Accordingly, the Engineering Certification for Plans and Specifications was never performed by TranSystems for the Carolina Bays Project." (See TSC MSJ, ¶ 7, Ex. F – Affidavit of Peter Strub, P.E.).

ANSWER: TranSystems objects to this Interrogatory as posed, because it requests for TranSystems to identify documents to prove that something did not happen, which is impossible. There is no document, because it did not happen.

November 3, 2023

WILKES, ATKINSON & JOYNER, LLC



Michael B.T. Wilkes (S.C. Bar 6107)

mwilkes@wajlawfirm.com

J. Alexander Joyner (S.C. Bar 101771)

ajoyner@wajlawfirm.com

320 Broad St., Suite 220

Charleston, SC 29401

Phone: 843.737.6229

Fax: 864.591.1767

- And -

C. Daniel Atkinson (S.C. Bar 72721)
datkinson@wajlawfirm.com

127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Phone: (864) 591-1113

Attorneys for TranSystems Corporation

| | | |
|------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | C.A. No.: 2018-CP-26-02633 |
| |) | |
| Flatiron Constructors, Inc., |) | |
| |) | CERTIFICATE OF SERVICE |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| TranSystems Corporation, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

I hereby certify that I have this date, served a true and correct copy of *TranSystems Corporation's Answers to Flatiron Constructors, Inc.'s First Set of Interrogatories* via Email

only to the following counsel of record:

Mason A. Goldsmith, Jr., Esq.
 Elmore Goldsmith Kelley & deHoll, P.A.
 P.O. Box 1887
 Greenville, SC 29602
agoldsmith@elmoregoldsmith.com

Carter B. Reid, Esq.
 Watt, Tieder, Hoffar & Fitzgerald, LLP
 1765 Greensboro Station Place, Suite 1000
 McLean, VA 22102
creid@watttieder.com

November 3, 2023


 Judy J. Saad, Paralegal

Date: Thu, 25 Feb 2016 4:04:59 PM (UTC)
Sent: Thu, 25 Feb 2016 4:04:58 PM (UTC)
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval
From: Hutcherson, Lou <LHutcherso@flatironcorp.com>
To: Kirk, Ted <tkirk@flatironcorp.com>; Lieberman, Daniel <DLieberman@flatironcorp.com>;
CC: Gaidanowicz, Bryan <BGaidanowicz@flatironcorp.com>; Brumfield, Linda <LBrumfield@flatironcorp.com>; Sanborn, Todd <tsanborn@flatironcorp.com>; Nix, Lisa <LNix@flatironcorp.com>;

Mr. Kirk –

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

You would believe that Marty, the designated RCE has actual authority; that per the Specifications he has express authority; and the position title alone provides apparent authority; but, in actuality he does not possess, and nor will he demonstrate, any authority - as evidenced in the e-mail below. Decisions that the RCE should be making, and can make per the Specifications, are a two, three, four, five, and sometimes six step process.

Lou

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

Lisa Nix
 Cost Engineer
 Carolina Bays Parkway Extension
 843.655.6774 CELL

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

Lisa

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

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

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

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

From: mllong@transystems.com [mailto:mllong@transystems.com]
Sent: Thursday, February 25, 2016 10:19 AM
To: Nix, Lisa
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

Lisa

Do you have an actual sample I can send to the DOT?

From: Nix, Lisa [mailto:LNix@flatironcorp.com]
Sent: Thursday, February 25, 2016 10:08 AM
To: CR-Marty Long
Subject: Flatiron - Barrier Completion Date Stamp Material Approval

Marty,

Per the note on SCDOT drawing 702-305-00 the RCE is to approve the material for the completion date stamp in the barrier of the bridges.

"Recess numbers in the concrete using numbers from reusable / durable material that is approved by the RCE."

The numbers we have purchased are made out of Ultra High Molecular Plastic (UHMW) which is very reusable and durable. These are machined here in South Carolina and used on many bridge barriers in the state. I've attached a photo of the actual numbers for your use.

Keys features and benefits of UHMW plastic are:

1. Corrosion resistant & exhibits virtually no water absorption
2. Very low coefficient of friction
3. Abrasion, Wear, and Impact Resistant

This material is typically used for impact and high-wear applications.

Do you find this material to be acceptable?

If you have any further questions or need any additional information please let me know.

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

Date: Thu, 25 Feb 2016 10:51:44 PM (UTC)
Sent: Thu, 25 Feb 2016 10:52:31 PM (UTC)
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval
From: mllong@transystems.com
To: LNix@flatironcorp.com;

No problem 😊

From: Nix, Lisa [mailto:LNix@flatironcorp.com]
Sent: Thursday, February 25, 2016 10:40 AM
To: CR-Marty Long
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

I did not know that. But will know now for in the future.

Thanks Marty.

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

From: mllong@transystems.com [mailto:mllong@transystems.com]
Sent: Thursday, February 25, 2016 10:35 AM
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This material is typically used for impact and high-wear applications.

Do you find this material to be acceptable?

If you have any further questions or need any additional information please let me know.

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

Date: Thu, 25 Feb 2016 11:10:29 PM (UTC)
Sent: Thu, 25 Feb 2016 11:10:28 PM (UTC)
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval
From: Kirk, Ted <tkirk@flatironcorp.com>
To: Gaidanowicz, Bryan <BGaidanowicz@flatironcorp.com>; Lieberman, Daniel <DLieberman@flatironcorp.com>;

I guess I'm a bit sidetracked by our own form of submittal. Lisa shouldn't ride solo on this stuff and should at least copy the PM and appropriate Field Engineer. Talk to the staff about the importance of sharing and copying. Also this kind of response gives us a huge out. Start sending submittals to Marty and Travis and copy the reviewing authority all at once. When they resist or complain we need to tell them the process has been broken since the beginning delaying the work.

Ted Kirk

Vice President

Flatiron

Southeast Division

215 Southport Drive, Suite 1400

Morrisville, North Carolina 27560

919 460 5393 X8309 **PHONE**

919 460 5708 **FAX**

919 723 1299 **CELL**

www.flatironcorp.com

Build the Best. Be the Best.

From: Hutcherson, Lou
Sent: Thursday, February 25, 2016 11:05 AM
To: Kirk, Ted; Lieberman, Daniel
Cc: Gaidanowicz, Bryan; Brumfield, Linda; Sanborn, Todd; Nix, Lisa
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval

Mr. Kirk –

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

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Lisa Nix

Cost Engineer

Carolina Bays Parkway Extension

843.655.6774 **CELL**

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 Cost Engineer
 Carolina Bays Parkway Extension
 843.655.6774 CELL

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To: Nix, Lisa
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

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To: CR-Marty Long
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Do you find this material to be acceptable?

If you have any further questions or need any additional information please let me know.

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

From: GV-Peter Strub </O=TRANSSYSTEMS CORPORATION/OU=TRANSSYSTEMS/CN=RECIPIENTS/CN=PMS>
To: GV-Marty Long
CC: HU-Tom Mukai; GV-David Hoff
Sent: 12/11/2013 1:03:12 PM
Subject: Re: CBP

I am okay with Jan 13/14 or the week of Jan 20. Jan 15-17 I am at an ACEC ExCom meeting in New Orleans.

Peter

Sent from my iPhone

On Dec 11, 2013, at 7:52 AM, "GV-Marty Long" <mllong@transystems.com> wrote:

FYI

From: GV-Marty Long
Sent: Tuesday, December 10, 2013 9:35 AM
To: 'Rudloff, Paul'
Cc: Warren, Tom; Kirk, Ted; DiMuro, Steve; Johnson, David L; Berry, Kyle (BerryWK@scdot.org)
Subject: RE: CBP

Thanks Paul

Do any of the dates in mid-January work for you listed below? When do you expect to submit your CPM schedule?

Thanks again!

From: Rudloff, Paul [<mailto:prudloff@flatironcorp.com>]
Sent: Tuesday, December 10, 2013 9:32 AM
To: GV-Marty Long
Cc: Warren, Tom; Kirk, Ted; DiMuro, Steve
Subject: RE: CBP

See attached Precon Invite List with Flatiron attendees. Sorry for the holdup

Paul T. Rudloff
Flatiron Construction Corp
215 Southport Dr.
Suite 1400
Morrisville, NC 27560
919-460-5393 ext 8319
813-786-5205 cell
prudloff@flatironcorp.com

From: mllong@transystems.com [<mailto:mllong@transystems.com>]
Sent: Thursday, December 05, 2013 7:56 AM
To: Rudloff, Paul
Cc: Warren, Tom; twmukai@transystems.com; dbhoff@transystems.com
Subject: RE: CBP

Good Morning Paul

The DOT would like to schedule the partnering/precon meeting the week of January 13-17 or early the week of January 20th. Could you please provide 2 or 3 dates that Flatiron would be available in that time period? The meeting will be somewhere in Horry County.

Thanks
Marty Long
RCE
864.915.0741

From: Rudloff, Paul [<mailto:prudloff@flatironcorp.com>]
Sent: Tuesday, October 29, 2013 3:17 PM
To: GV-Marty Long
Cc: Warren, Tom
Subject: CBP

Martin, thanks for calling and introducing yourself as the Resident Engineer for our Carolina Bays III project. We will keep you in the loop as to when we may be ready for a preconstruction meeting. Tom Warren who is copied on this email will be the project manager.
Thanks for your time

Paul T. Rudloff
Flatiron Construction Corp
215 Southport Dr.
Suite 1400
Morrisville, NC 27560
919-460-5393 ext 8319
813-786-5205 cell
prudloff@flatironcorp.com

Date: Mon, 3 Feb 2014 3:29:14 PM (UTC)
Sent: Mon, 3 Feb 2014 3:25:44 PM (UTC)
Subject: RE: Construction Forms
From: Long, Martin L - TranSystems <MLLong@transystems.com>
To: Patrick, Travis M <PatrickTM@scdot.org>;
Attachments: 02031401.PDF

Yes. See below. I've attached some of the DN 37 that I have so far.

Regena Wells: Resident Admin
 Bobbie Hemmingway: Inspector
 Doug Kennedy: Inspector
 Jim Blackwell: Inspector
 Michael Cook: Inspector
 Neal McClure: Inspector

From: Patrick, Travis M [mailto:PatrickTM@scdot.org]
Sent: Monday, February 03, 2014 10:16 AM
To: GV-Marty Long; GV-Tom Mukai
Subject: RE: Construction Forms

Marty,

Once Brian got your RCE access set up, I went in and gave you and Tom contract authority on 26.036775A. You should both be able to access it in Site Manager now. Do you have a list of people that will need to be set up in Site Manager with Inspector level and Resident Admin level access?

Travis M. Patrick, PE

Resident Construction Engineer – Horry County
 South Carolina Department of Transportation
 4145 Hwy 701 North
 Conway, SC 29526
 Office: 843-365-2106
 Fax: 843-365-0338

From: Parnell, Brian
Sent: Monday, February 03, 2014 9:59 AM
To: Patrick, Travis M; Long, Martin L - TranSystems
Subject: RE: Construction Forms

Done

From: Patrick, Travis M
Sent: Monday, February 03, 2014 9:56 AM
To: Long, Martin L - TranSystems; Parnell, Brian
Subject: RE: Construction Forms

Brian,

Marty's account id is showing up in SiteManager, but it looks like he only has inspector level access. Have he and Tom Mukai been set up with RCE level access? It's also set up showing they're in District 7. That should be changed to reflect them working in District 5.

Travis M. Patrick, PE

Resident Construction Engineer – Horry County
 South Carolina Department of Transportation
 4145 Hwy 701 North
 Conway, SC 29526
 Office: 843-365-2106
 Fax: 843-365-0338

From: Long, Martin L - TranSystems
Sent: Monday, February 03, 2014 9:12 AM
To: Parnell, Brian
Cc: Patrick, Travis M
Subject: RE: Construction Forms

Brian

I completed the NTP form last Monday but don't seem to be able to find my project on Site Mgr. Can you help?

From: Parnell, Brian [mailto:ParnellJB@scdot.org]
Sent: Monday, February 03, 2014 7:40 AM
To: GV-Marty Long
Subject: RE: Construction Forms

SharePoint access should be available to everyone on the network. Are you accessing it on the VMware client through the DOC site or by clicking on the link?
 Your SiteManager account is currently active. Are you still having issues logging in?

Brian

From: Long, Martin L - TranSystems
Sent: Thursday, January 30, 2014 4:23 PM
To: Parnell, Brian
Subject: FW: Construction Forms

Brian

Do we need another log in and password to get into this? I can log into VM but not to Sharepoint. Also I cannot log into Site Manager today.

From: Johnson, David L [mailto:JohnsonDAV@scdot.org]
Sent: Tuesday, December 10, 2013 3:38 PM
To: Partenheimer, Kim J - Parsons Brinckerhoff, Inc; GV-Marty Long
Subject: FW: Construction Forms

From: Parnell, Brian
Sent: Thursday, December 05, 2013 2:08 PM
To: D0District Construction Engineers; D0Resident Construction Engineers
Cc: D8Construction Office
Subject: Construction Forms

CMS Users,

The Director of Construction office has made the decision to discontinue the use of the Construction Management System

(also known as the Construction Forms system). We are moving to fillable pdfs located on the SCDOT Extranet page under "Documents" / "Construction Forms" (easily accessible to internal personnel through the link on the DOC Intranet page under "Resources" or here: <http://extranet2.sharepoint.dot.state.sc.us/ce/default.aspx>). Some of the forms have been updated and will continue to be changed as needed. Prime contractors are also able to access these forms to complete and submit to agency personnel.

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100.03
100.09
100.10
100.11
100.24
100.26

Also, the following forms will need to be stored in the Construction SharePoint site (<http://depts.sharepoint.dot.state.sc.us/Construction/default.aspx>) in the Correspondence folder when completed:

100.10
100.11
800.02

Please discontinue use of the Construction Management System effective 1/1/2014 and feel free to notify me of any questions or concerns.

Brian Parnell
Construction Support Manager
South Carolina Department of Transportation
803-737-1147
parnelljb@scdot.org

EXHIBIT B

From: GV-Peter Strub </O=TRANSSYSTEMS CORPORATION/OU=TRANSSYSTEMS/CN=RECIPIENTS/CN=PMS>
To: GV-Marty Long
CC: HU-Tom Mukai; GV-David Hoff
Sent: 12/11/2013 1:03:12 PM
Subject: Re: CBP

I am okay with Jan 13/14 or the week of Jan 20. Jan 15-17 I am at an ACEC ExCom meeting in New Orleans.

Peter

Sent from my iPhone

On Dec 11, 2013, at 7:52 AM, "GV-Marty Long" <mllong@transystems.com> wrote:

FYI

From: GV-Marty Long
Sent: Tuesday, December 10, 2013 9:35 AM
To: 'Rudloff, Paul'
Cc: Warren, Tom; Kirk, Ted; DiMuro, Steve; Johnson, David L; Berry, Kyle (BerryWK@scdot.org)
Subject: RE: CBP

Thanks Paul

Do any of the dates in mid-January work for you listed below? When do you expect to submit your CPM schedule?

Thanks again!

From: Rudloff, Paul [<mailto:prudloff@flatironcorp.com>]
Sent: Tuesday, December 10, 2013 9:32 AM
To: GV-Marty Long
Cc: Warren, Tom; Kirk, Ted; DiMuro, Steve
Subject: RE: CBP

See attached Precon Invite List with Flatiron attendees. Sorry for the holdup

Paul T. Rudloff
Flatiron Construction Corp
215 Southport Dr.
Suite 1400
Morrisville, NC 27560
919-460-5393 ext 8319
813-786-5205 cell
prudloff@flatironcorp.com

From: mllong@transystems.com [<mailto:mllong@transystems.com>]
Sent: Thursday, December 05, 2013 7:56 AM
To: Rudloff, Paul
Cc: Warren, Tom; twmukai@transystems.com; dbhoff@transystems.com
Subject: RE: CBP

Good Morning Paul

The DOT would like to schedule the partnering/precon meeting the week of January 13-17 or early the week of January 20th. Could you please provide 2 or 3 dates that Flatiron would be available in that time period? The meeting will be somewhere in Horry County.

Thanks
Marty Long
RCE
864.915.0741

From: Rudloff, Paul [<mailto:prudloff@flatironcorp.com>]
Sent: Tuesday, October 29, 2013 3:17 PM
To: GV-Marty Long
Cc: Warren, Tom
Subject: CBP

Martin, thanks for calling and introducing yourself as the Resident Engineer for our Carolina Bays III project. We will keep you in the loop as to when we may be ready for a preconstruction meeting. Tom Warren who is copied on this email will be the project manager.
Thanks for your time

Paul T. Rudloff
Flatiron Construction Corp
215 Southport Dr.
Suite 1400
Morrisville, NC 27560
919-460-5393 ext 8319
813-786-5205 cell
prudloff@flatironcorp.com

EXHIBIT C

Date: Mon, 3 Feb 2014 3:29:14 PM (UTC)
Sent: Mon, 3 Feb 2014 3:25:44 PM (UTC)
Subject: RE: Construction Forms
From: Long, Martin L - TranSystems <MLLong@transystems.com>
To: Patrick, Travis M <PatrickTM@scdot.org>;
Attachments: 02031401.PDF

Yes. See below. I've attached some of the DN 37 that I have so far.

Regena Wells: Resident Admin
 Bobbie Hemmingway: Inspector
 Doug Kennedy: Inspector
 Jim Blackwell: Inspector
 Michael Cook: Inspector
 Neal McClure: Inspector

From: Patrick, Travis M [mailto:PatrickTM@scdot.org]
Sent: Monday, February 03, 2014 10:16 AM
To: GV-Marty Long; GV-Tom Mukai
Subject: RE: Construction Forms

Marty,

Once Brian got your RCE access set up, I went in and gave you and Tom contract authority on 26.036775A. You should both be able to access it in Site Manager now. Do you have a list of people that will need to be set up in Site Manager with Inspector level and Resident Admin level access?

Travis M. Patrick, PE

Resident Construction Engineer – Horry County
 South Carolina Department of Transportation
 4145 Hwy 701 North
 Conway, SC 29526
 Office: 843-365-2106
 Fax: 843-365-0338

From: Parnell, Brian
Sent: Monday, February 03, 2014 9:59 AM
To: Patrick, Travis M; Long, Martin L - TranSystems
Subject: RE: Construction Forms

Done

From: Patrick, Travis M
Sent: Monday, February 03, 2014 9:56 AM
To: Long, Martin L - TranSystems; Parnell, Brian
Subject: RE: Construction Forms

Brian,

Marty's account id is showing up in SiteManager, but it looks like he only has inspector level access. Have he and Tom Mukai been set up with RCE level access? It's also set up showing they're in District 7. That should be changed to reflect them working in District 5.

Travis M. Patrick, PE

Resident Construction Engineer – Horry County
 South Carolina Department of Transportation
 4145 Hwy 701 North
 Conway, SC 29526
 Office: 843-365-2106
 Fax: 843-365-0338

From: Long, Martin L - TranSystems
Sent: Monday, February 03, 2014 9:12 AM
To: Parnell, Brian
Cc: Patrick, Travis M
Subject: RE: Construction Forms

Brian

I completed the NTP form last Monday but don't seem to be able to find my project on Site Mgr. Can you help?

From: Parnell, Brian [mailto:ParnellJB@scdot.org]
Sent: Monday, February 03, 2014 7:40 AM
To: GV-Marty Long
Subject: RE: Construction Forms

SharePoint access should be available to everyone on the network. Are you accessing it on the VMware client through the DOC site or by clicking on the link?
 Your SiteManager account is currently active. Are you still having issues logging in?

Brian

From: Long, Martin L - TranSystems
Sent: Thursday, January 30, 2014 4:23 PM
To: Parnell, Brian
Subject: FW: Construction Forms

Brian

Do we need another log in and password to get into this? I can log into VM but not to Sharepoint. Also I cannot log into Site Manager today.

From: Johnson, David L [mailto:JohnsonDAV@scdot.org]
Sent: Tuesday, December 10, 2013 3:38 PM
To: Partenheimer, Kim J - Parsons Brinckerhoff, Inc; GV-Marty Long
Subject: FW: Construction Forms

From: Parnell, Brian
Sent: Thursday, December 05, 2013 2:08 PM
To: D0District Construction Engineers; D0Resident Construction Engineers
Cc: D8Construction Office
Subject: Construction Forms

CMS Users,

The Director of Construction office has made the decision to discontinue the use of the Construction Management System

(also known as the Construction Forms system). We are moving to fillable pdfs located on the SCDOT Extranet page under "Documents" / "Construction Forms" (easily accessible to internal personnel through the link on the DOC Intranet page under "Resources" or here: <http://extranet2.sharepoint.dot.state.sc.us/ce/default.aspx>). Some of the forms have been updated and will continue to be changed as needed. Prime contractors are also able to access these forms to complete and submit to agency personnel.

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Please discontinue use of the Construction Management System effective 1/1/2014 and feel free to notify me of any questions or concerns.

Brian Parnell
Construction Support Manager
South Carolina Department of Transportation
803-737-1147
parnelljb@scdot.org

EXHIBIT D

Date: Thu, 25 Feb 2016 4:04:59 PM (UTC)
Sent: Thu, 25 Feb 2016 4:04:58 PM (UTC)
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval
From: Hutcherson, Lou <LHutcherso@flatironcorp.com>
To: Kirk, Ted <tkirk@flatironcorp.com>; Lieberman, Daniel <DLieberman@flatironcorp.com>;
CC: Gaidanowicz, Bryan <BGaidanowicz@flatironcorp.com>; Brumfield, Linda <LBrumfield@flatironcorp.com>; Sanborn, Todd <tsanborn@flatironcorp.com>; Nix, Lisa <LNix@flatironcorp.com>;

Mr. Kirk –

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

You would believe that Marty, the designated RCE has actual authority; that per the Specifications he has express authority; and the position title alone provides apparent authority; but, in actuality he does not possess, and nor will he demonstrate, any authority - as evidenced in the e-mail below. Decisions that the RCE should be making, and can make per the Specifications, are a two, three, four, five, and sometimes six step process.

Lou

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

Lisa Nix
 Cost Engineer
 Carolina Bays Parkway Extension
 843.655.6774 CELL

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

Lisa

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

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

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

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

From: mllong@transystems.com [mailto:mllong@transystems.com]
Sent: Thursday, February 25, 2016 10:19 AM
To: Nix, Lisa
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

Lisa

Do you have an actual sample I can send to the DOT?

From: Nix, Lisa [mailto:LNix@flatironcorp.com]
Sent: Thursday, February 25, 2016 10:08 AM
To: CR-Marty Long
Subject: Flatiron - Barrier Completion Date Stamp Material Approval

Marty,

Per the note on SCDOT drawing 702-305-00 the RCE is to approve the material for the completion date stamp in the barrier of the bridges.

"Recess numbers in the concrete using numbers from reusable / durable material that is approved by the RCE."

The numbers we have purchased are made out of Ultra High Molecular Plastic (UHMW) which is very reusable and durable. These are machined here in South Carolina and used on many bridge barriers in the state. I've attached a photo of the actual numbers for your use.

Keys features and benefits of UHMW plastic are:

1. Corrosion resistant & exhibits virtually no water absorption
2. Very low coefficient of friction
3. Abrasion, Wear, and Impact Resistant

This material is typically used for impact and high-wear applications.

Do you find this material to be acceptable?

If you have any further questions or need any additional information please let me know.

Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

EXHIBIT E

Date: Thu, 25 Feb 2016 10:51:44 PM (UTC)
Sent: Thu, 25 Feb 2016 10:52:31 PM (UTC)
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval
From: mllong@transystems.com
To: LNix@flatironcorp.com;

No problem 😊

From: Nix, Lisa [mailto:LNix@flatironcorp.com]
Sent: Thursday, February 25, 2016 10:40 AM
To: CR-Marty Long
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

I did not know that. But will know now for in the future.

Thanks Marty.

Lisa Nix
 Cost Engineer
 Carolina Bays Parkway Extension
 843.655.6774 CELL

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

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To: Nix, Lisa
Subject: RE: Flatiron - Barrier Completion Date Stamp Material Approval

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Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

EXHIBIT F

Date: Thu, 25 Feb 2016 11:10:29 PM (UTC)
Sent: Thu, 25 Feb 2016 11:10:28 PM (UTC)
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval
From: Kirk, Ted <tkirk@flatironcorp.com>
To: Gaidanowicz, Bryan <BGaidanowicz@flatironcorp.com>; Lieberman, Daniel <DLieberman@flatironcorp.com>;

I guess I'm a bit sidetracked by our own form of submittal. Lisa shouldn't ride solo on this stuff and should at least copy the PM and appropriate Field Engineer. Talk to the staff about the importance of sharing and copying. Also this kind of response gives us a huge out. Start sending submittals to Marty and Travis and copy the reviewing authority all at once. When they resist or complain we need to tell them the process has been broken since the beginning delaying the work.

Ted Kirk

Vice President

Flatiron

Southeast Division

215 Southport Drive, Suite 1400

Morrisville, North Carolina 27560

919 460 5393 X8309 **PHONE**

919 460 5708 **FAX**

919 723 1299 **CELL**

www.flatironcorp.com

Build the Best. Be the Best.

From: Hutcherson, Lou
Sent: Thursday, February 25, 2016 11:05 AM
To: Kirk, Ted; Lieberman, Daniel
Cc: Gaidanowicz, Bryan; Brumfield, Linda; Sanborn, Todd; Nix, Lisa
Subject: FW: Flatiron - Barrier Completion Date Stamp Material Approval

Mr. Kirk –

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

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Lisa Nix
 Cost Engineer
 Carolina Bays Parkway Extension
 843.655.6774 CELL

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Thanks,

Lisa Nix
Cost Engineer
Carolina Bays Parkway Extension
843.655.6774 CELL

RECEIVED

Aug 13 2024

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

s/K. Jay Anthony

K. Jay Anthony, Esq. (S.C. Bar # 77433)

Anthony Law, LLC
650 E. Washington Street
Greenville, SC 29601
janthony@anthonylawsc.com

Mason A. Goldsmith, Jr., Esq. (S.C. Bar # 2182)
Elmore Goldsmith Kelley & Deholl, P.A.
55 Beattie Place, Suite 1050
Greenville, SC 29602
(864) 255-9500
agoldsmith@elmoregoldsmith.com

Carter B. Reid, Esq. (*pro hac vice*)
Hanna Lee Blake, Esq. (*pro hac vice*)
Robert B. Cimmino, Esq. (*pro hac vice*)
Watt, Tieder, Hoffar & Fitzgerald, LLP
1765 Greensboro Station Place, Suite 1000
McLean, VA 22102
(703) 749-1028 (phone)
creid@watttieder.com

Counsel for Appellant

RECEIVED

Aug 26 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2022-CP-26-06116

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

K. Jay Anthony, Esq. (S.C. Bar # 77433)

Anthony Law, LLC
650 E. Washington Street
Greenville, SC 29601
janthony@anthonylawsc.com

Mason A. Goldsmith, Jr., Esq. (S.C. Bar # 2182)
Elmore Goldsmith Kelley & Deholl, P.A.
55 Beattie Place, Suite 1050
Greenville, SC 29602
(864) 255-9500
agoldsmith@elmoregoldsmith.com

Carter B. Reid, Esq. (*pro hac vice*)
Hanna Lee Blake, Esq. (*pro hac vice*)
Robert B. Cimmino, Esq. (*pro hac vice*)
Watt, Tieder, Hoffar & Fitzgerald, LLP
1765 Greensboro Station Place, Suite 1000
McLean, VA 22102
(703) 749-1028 (phone)
creid@watttieder.com

Counsel for Appellant

Michael B.T. Wilkes (SC Bar # 6107)
James Alexander Joyner (SC Bar # 101771)
Charles Daniel Atkinson (SC Bar # 72721)

Wilkes Atkinson & Joyner, LLC
127 Dunbar Street
Ste 200
Spartanburg, SC 29306
datkinson@wajlawfirm.com
mwilkes@wajlawfirm.com
ajoyner@wajlawfirm.com

Counsel for Respondent

Index

Orders

Order Striking Case from Docket Pursuant to SCRCP 40(j), October 11, 2021.....1197

| | | |
|------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF HORRY |) | C.A. NO. 2018-CP-26-02633 |
| |) | |
| Flatiron Constructors, Inc., |) | |
| |) | CONSENT ORDER STRIKING |
| Plaintiff, |) | CASE FROM ACTIVE DOCKET |
| |) | PURSUANT TO RULE 40(j), SCRPC |
| v. |) | |
| |) | |
| TranSystems Corporation, |) | |
| |) | |
| Defendant. |) | |
| |) | |

THIS MATTER COMES BEFORE ME upon motion of the Plaintiff, and with the consent of Defendant as evidenced by their consent attached to this Order, seeking to strike this action from the active Jury Docket for Horry County in accordance with Rule 40(j) of the South Carolina Rules of Civil Procedure. This action has not previously been stricken pursuant to Rule 40(j), SCRPC.

NOW THEREFORE, upon motion of the Plaintiff, and with the consent of the Defendant, it is hereby ORDERED, ADJUDGED AND DECREED, that this case be stricken without prejudice from the active Jury Trial Docket in accordance with the agreement of the parties pursuant to Rule 40(j), SCRPC, with leave to restore within one year from the date of this Order pursuant to the provision of said Rule.

[JUDICIAL SIGNATURE TO FOLLOW]

WE SO STIPULATE AND CONSENT as of October 6, 2021.

s/L. Franklin Elmore

L. Franklin Elmore (S.C. Bar No.1889)
Elmore Goldsmith Kelley & deHoll, P.A.
55 Beattie Place, Suite 1050
Greenville, South Carolina 29602
(864) 255-9500
felmore@elmoregoldsmith.com

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Greensboro Station Place, Suite 1000
McLean, VA 22102
(703) 749-1028 (phone)
creid@watttieder.com

Attorneys for Flatiron Constructors, Inc.

s/ C. Daniel Atkinson

WILKES LAW FIRM, P.A.

Michael B.T. Wilkes, Esq. (S.C. Bar 6107)
mwilkes@wilkeslaw.com
J. Alexander Joyner, Esq. (S.C. Bar 101771)
ajoyner@wilkeslaw.com
Brian G. Livingston (S.C. Bar 102764)
blivingston@wilkeslaw.com
200 Meeting St., Suite 205
Charleston, SC 29401
843.737.6229

- and -

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

Attorneys for TranSystems Corporation



Horry Common Pleas

Case Caption: Flatiron Constructors Inc VS TranSystems Corporation

Case Number: 2018CP2602633

Type: Order/Strike Case From Active Roster

Resident Circuit Court Judge, 15th Judicial Circuit

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2021-10-08 16:27:19 page 3 of 3

RECEIVED

Aug 26 2024

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

s/K. Jay Anthony

K. Jay Anthony, Esq. (S.C. Bar # 77433)

Anthony Law, LLC
650 E. Washington Street
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Counsel for Appellant

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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.

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Respondent.

FINAL BRIEF OF APPELLANT

/s/ Carter B. Reid

K. Jay Anthony, Esq. (S.C. Bar 77433)
Anthony Law, LLC
650 E. Washington Street
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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 SCRPC 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. Enft 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:

| <i>Tommy L. Griffin I</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 occasions . . .” (R. p. 918). |

| | |
|--|---|
| | <p>“TSC often made unilateral decisions in the field . . . that delayed, hindered or otherwise negatively impacted FCI’s work.” (R. p. 918).</p> |
| <p>“Engineer supervised the construction.” 320 S.C. at 56, 463 S.E.2d at 89.</p> | <p>“TSC oversaw all aspects of FCI’s performance of [Work].” (R. p. 917).</p> <p>“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)</p> <p>TSC was “responsible for the day-to-day operation and administration of the project.” (R. p. 248)</p> <p>“TSC wielded substantial influence and power over FCI and impacted the progression and completion of FCI’s work on the Project.” (R. p. 918).</p> |
| <p>“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.</p> | <p>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).</p> <p>TSC “on multiple occasions . . . rejected FCI’s work” (R. p. 918).</p> <p>TSC also “repeatedly exercised its right to reject or stop FCI’s work.” (R. p. 918).</p> |

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. 1157). 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,

August 26, 2024

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Aug 27 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis

Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation,

Respondent.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION AND SUMMARY

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

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

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

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

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

COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT CORRECTLY INTERPRET *TOMMY L. GRIFFIN I* AS HOLDING THAT THE EXISTENCE OF A “SPECIAL RELATIONSHIP” FOR PURPOSES OF TORT DUTY MUST BE DETERMINED BY FACT SPECIFIC CIRCUMSTANCES ON A CASE-BY-CASE BASIS?
- II. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT FAILED TO PRESENT EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT RELATED TO THE PERSON HOLDING THE DUTIES OF RESIDENT CONSTRUCTION ENGINEER FOR SCDOT AS SET FORTH IN THE RELEVANT CONTRACT DOCUMENTS?
- III. BECAUSE THE EXISTENCE OF DUTY FOR NEGLIGENCE AND NEGLIGENCE-BASED CONTRACT ACTIONS ARE DEPENDENT ON THE FACTS OF EACH CASE, HAS APPELLANT PRESENTED FACTS SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO ANY DUTY OWED BY RESPONDENT TRANSYSTEMS TO APPELLANT?
- IV. DID APPELLANT WAIVE ANY OBJECTIONS TO AN ALLEGEDLY PREMATURE RULING BY FAILING TO REQUEST ANY DISCOVERY OR FILE ANY MOTION SEEKING A DELAY IN RULING PRIOR TO THE HEARING ON TRANSYSTEMS’ MOTION FOR SUMMARY JUDGMENT?
- V. HAS APPELLANT FAILED TO PRESERVE FOR APPELLATE REVIEW ANY DISPUTES RELATED TO TRANSYSTEMS’ OBTAINING SUMMARY JUDGMENT ON APPELLANT’S CLAIMS FOR BREACH OF CONTRACT BROUGHT BY THIRD PARTY BENEFICIARY?
- VI. HAS APPELLANT IMPERMISSIBLY RAISED NEW ARGUMENTS ON APPEAL WHICH WERE NOT PRESENTED TO THE TRIAL COURT?

COUNTER-STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNTER-STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

Unless otherwise specified elsewhere in these specifications, **the RCE will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract.**

The RCE has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor for failure to correct unsafe conditions for its workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders of the RCE; for periods as the RCE deems necessary due to unsuitable weather; for conditions considered unsuitable for prosecution of the work; or for any other conditions or reason that the RCE deems to be in the public interest. No additional compensation is paid to the Contractor because of such suspensions of work.

The RCE is not authorized to increase the obligation of the Department [of Transportation] under the Contract except as provided herein.

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

Our Supreme Court has clearly stated:

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

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

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

ARGUMENT

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

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

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

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

It is undisputed that Appellant's claims are for a purely economic loss. In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995) ("*Tommy L. Griffin I*"), the Supreme Court of South Carolina evaluated whether design professionals owe duties in tort to third parties. The Supreme Court explicitly and clearly stated that "[w]hether such a duty exists will depend on the facts and circumstances of each case." *Id.* at 55-6, 463 S.E.2d at 89 (emphasis added). Appellant presents a patently incorrect argument when it contends that "an engineer who has construct supervisory responsibilities, such as the power to inspect work and halt construction progress, has a special relationship with the contractor, giving rise to an extra-contractual duty on the engineer's part not to negligently supervise the work." (Appellant's Initial Brief, pp. 19 – 20.) This contention by Appellant both misstates the facts of this case, as clearly established by the record, as well as the law of South Carolina. As noted in the Standard Specifications, only SCDOT's RCE has authority to suspend the work or to withhold payments to Flatiron. (R. p. 763, § 105.1.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As this court has stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To be considered and ruled upon in an appeal:

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

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

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

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

CONCLUSION

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

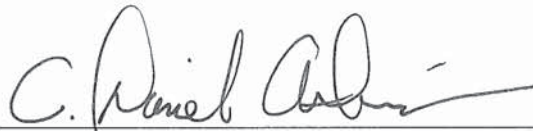
Our Supreme Court has held that "whether ... a duty exists [between a design professional and a third party] will depend on the facts and circumstances of each case." *Tommy L. Griffin I*, 320 S.C. at 55-56, 463 S.E.2d at 89. Appellant's entire appellate argument is built upon the flawed premise that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

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

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

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

August 26, 2024



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Aug 27 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis

Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructors, Inc.,

Appellant,

v.

TranSystems Corporation,

Respondent.

CERTIFICATE OF COUNSEL

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

August 26, 2024



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Aug 28 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Flatiron Constructors, Inc.,

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Respondent.

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ARGUMENT

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

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

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

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

¹ As stated in the Appellant Brief, any reliance by TSC on foreign law regarding this standard should be disregarded. See Appellant Brief at 18-21

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

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

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

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

“asserted” such an absence of evidence.² Respondent Brief at 31. TSC cannot meet its burden, as shown by the ample evidence before the Court of the special relationship between TSC and FCI. See Appellant Brief at 35-37. Instead, TSC presents a series of straw man arguments immaterial to the special relationship analysis. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). TSC’s arguments are insufficient to meet its initial burden on summary judgment.

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

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

³ TSC’s repeated claim that FCI cites an improper scintilla standard is puzzling and false. See Respondent Brief at 8, 18, 31, & 40. FCI never cited the scintilla standard when it was inapplicable. This includes each of FCI’s nine uses of the word “scintilla” at the SJ hearing. See Respondent Brief at 8. *Kitchen Planners*, decided on August 23, 2023, thirteen (13) days *after* the SJ Hearing, clarified that the scintilla standard no longer applied in South Carolina. 440 S.C. 456, 460, 892 S.E.2d 297, 300. The Parties each briefed the trial court on the change in law. (R. p. 1004-1005); (R. p. 1013-1015). As such, TSC is well aware of the change and the reason why FCI cited to the “scintilla” standard prior to August 23, 2023. Since the date *Kitchen Planners* was decided, FCI has not once used the word “scintilla” in any briefing, including in its Initial Brief on appeal. TSC’s repeated false accusation that FCI misused the scintilla standard should be disregarded. Since *Kitchen Planners* was decided, the only party to use the word “scintilla” has been TSC.

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

| <i>Tommy L. Griffin I</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. 271). |
| “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 demands made 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 occasions” (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. 271).

“ TSC wielded substantial influence and power over FCI and impacted the progression and completion of FCI’s work on the Project.” (R. p. 917-918). |

| | |
|--|--|
| <p>“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.</p> | <p>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).</p> <p>TSC “on multiple occasions . . . rejected FCI’s work” Hutcherson (R. p. 918).</p> <p>TSC also “repeatedly exercised its right to reject or stop FCI’s work.” (R. p. 918).</p> |
|--|--|

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

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

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

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

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

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

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

S.E.2d at 86. TSC's powers and FCI's complaints about TSC's negligent wielding of those powers are similar to the facts and circumstances in *Tommy L. Griffin I*. See Appellant Brief at 35-37. Whether TSC actually performed its contractual design obligations is inconsequential to the special relationship analysis.

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

As held in *Tommy L. Griffin I* and *Cullum*, the facts and circumstances material to the existence of a special relationship are those that show TSC's authority or control over FCI's work. As reflected in the chart above, the record is replete with evidence of TSC's authority and control over FCI's work, including Mr. Hutcherson's first-hand knowledge of TSC's authority on the Project, TSC's obligations under the Project Contracts, and TSC's concession that it was the RCE Representative. Though holding the title of "SCDOT RCE" with "final decision-making authority" would indicate that TSC possessed significant authority over FCI's work, the absence of that title is not dispositive of that authority.⁶ Indeed, while denying it was the "SCDOT RCE," TSC has conceded that it operated "as a Representative of the SCDOT RCE . . . had 'the authority to reject defective material and suspend any work that is being improperly performed subject to the final decision of the [SCDOT] RCE.'" Respondent Brief at 37⁷; (R. p. 957). As

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

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

set out in Appellant's Brief, the RCE Representative had expansive authority under the Project Contracts. *See* Appellant Brief at 25. As such, even without the "SCDOT RCE" title, TSC had authority and control material to the special relationship analysis. Regardless of the title TSC held, FCI presented compelling evidence of TSC's exercise of significant authority and control over FCI's work. This authority was consistent with the authority wielded by the engineer in *Tommy L. Griffin I* and, at a minimum, establishes a genuine issue of material fact precluding summary judgment.

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

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

FCI's former Project Manager, Lou Hutcherson, supplied testimony about TSC's authority on the Project based on his firsthand knowledge of the day-to-day activities of the Project. (R. p. 916-918). TSC's Initial Brief does not refute that TSC, in fact, wielded this authority or exercised such control over FCI's work. In fact, it concedes that TSC had some of the same authority Mr. Hutcherson testified to in his affidavit. *See* Respondent Brief at 36 ("TranSystems had 'the authority to reject defective material and suspend any work that is being improperly performed subject to the final decision of the [SCDOT] RCE.'"). TSC instead ignores almost all of Mr.

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

TSC also argues for its own narrow and selective interpretation of Mr. Hutcherson’s February 25, 2016 email, claiming that the email shows Mr. Hutcherson “knew” that TSC lacked SCDOT RCE authority. See Respondent Brief at 9, 16-17, 33-35, 37-38. This skewed reading in TSC’s favor is inappropriate on summary judgment and wrong. As described in FCI’s initial brief, reading the email in context shows that Mr. Hutcherson is not merely describing TSC’s lack of authority. See Appellant Brief at 38-39. Instead, Mr. Hutcherson is frustrated at Mr. Long’s refusal to exercise his authority and is lamenting the effect of that refusal to his colleagues. *Id.* Again, whether TSC was the “SCDOT RCE” is inconsequential to the special relationship status. However, Mr. Hutcherson states that Mr. Long is “the designated RCE” and has authority consistent with that designation. TSC asks this Court to ignore this declaration from Mr. Hutcherson and to instead make an out-of-context reading of only the second half of the email, interpreting the evidence in TSC’s favor. Again, this inverts the interpretive standards on summary judgment.⁹

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

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

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

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

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

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

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

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

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

The trial court refused to consider FCI's affidavit testimony regarding the need for additional time for discovery on the basis that the affidavit was not in technical conformity with SCRCP Rule 56(f). This was in error. In *Baughman*, the court did not require "strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court." *Baughman*, 306 S.C. at 112 n. 4, 410 S.E.2d at 544 n. 4. FCI properly argued before the court that summary judgment was premature because more discovery was needed. (R. p. 887,904, 907,914); (R. p. 188-191). The trial judge did not rule upon FCI's request at the hearing. Following the hearing and prior to the SJ Order, FCI repeatedly requested additional time and filed an SCRCP 56(f) affidavit supporting this request. (R. p. 1017-1020;1026-1035); (R. p. 1107-1108; 1112-1113; 1116-1124). Under such circumstances, failure to consider FCI's SCRCP 56(f) affidavit citing strict compliance with the time requirements of SCRCP 56(f) is unwarranted.¹¹

Further, the trial court refused even to consider FCI's SCRCP 56(f) affidavit. This constitutes an abuse of discretion. The SJ Order, issued after FCI's SCRCP 56(f) affidavit was filed, found that "Plaintiff filed no affidavits pursuant to Rule 56(f), SCRCP, prior to or at the hearing on the Motion for Summary Judgment." (R. p. 53). In short, the trial court failed to consider the affidavit except to find that it was not filed prior to the SJ Hearing. The trial court "was mandatorily required to at least evaluate and consider the affidavit" *Schmidt v. Courtney*, 357

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

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

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

TSC argues that FCI has not presented facts sufficient to overcome the SJ Order's agency finding¹³, but this is not the issue FCI raised on appeal. *See* Appellant Brief at 43-44; *see also* Respondent Brief at 46-47. FCI did not substantively challenge the factual finding of agency; rather, it challenged the propriety of such a finding in this case on summary judgment. *See* Appellant Brief at 46-47. FCI contends that an agency determination on summary judgment was inappropriate as such a finding is (i), unrelated to the special relationship analysis, (ii) contrary and prejudicial to claims remaining before the trial court, and (iii) premature on summary judgment. *See id.*

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

August 26, 2024

/s/ K. Jay Anthony

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Flatiron Constructors, Inc., Appellant,

v.

TranSystems Corporation, Respondent.

Appellate Case No. 2024-000171

Appeal From Horry County
Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2025-UP-416
Heard October 8, 2025 – Filed December 10, 2025

REVERSED AND REMANDED

Kenneth Jay Anthony, of Anthony Law, LLC, and Mason A. Goldsmith, Jr., of Elmore Goldsmith Kelley & deHoll, P.A., both of Greenville; and Robert Cimmino, Carter B. Reid, and Hanna Lee Blake, all of McLean, Virginia, all for Appellant.

Charles Daniel Atkinson and Michael B.T. Wilkes, both of Wilkes Atkinson & Joyner, LLC, of Spartanburg; and James Alexander Joyner, of Wilkes Atkinson & Joyner, LLC, of Charleston, all for Respondent.

PER CURIAM: Flatiron Constructors, Inc. (Flatiron) appeals the trial court's grant of summary judgment on its claim for professional negligence against TranSystems Corporation (TSC). Flatiron sued TSC for negligent supervision and design of a parkway construction project in Horry County (the Project), claiming TSC's actions caused a delay in the Project and financial loss to Flatiron. On appeal, Flatiron claims the trial court erred in granting summary judgment because TSC failed to meet its initial burden of showing the "absence of evidence of a genuine issue of material fact" regarding its special relationship with Flatiron. It alternatively argues the trial court erred because Flatiron presented evidence demonstrating a genuine issue of material fact regarding their special relationship. Flatiron further argues the trial court erred by (1) prematurely dismissing Flatiron's additional claims before discovery was complete and (2) making factual findings regarding agency that were improper, unnecessary, and unfairly prejudicial. We reverse the grant of summary judgment and remand to the trial court.

1. We hold the trial court erred in granting summary judgment because there is a genuine issue of material fact as to whether there was a special relationship between the parties such that TSC owed Flatiron a duty. *See Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) ("Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law."); *Thompkins v. Festival Ctr. Grp. I*, 306 S.C. 193, 195-96, 410 S.E.2d 593, 594 (Ct. App. 1991) (holding that when a party makes a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial" (quoting Rule 56(e), SCRPC)). We find further inquiry into the facts is necessary to determine the extent of the parties' relationship.

Based on *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones, & Goulding, Inc.*¹ and *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital*², we must consider all of the facts and circumstances in determining whether a special relationship exists. *See Tommy L. Griffin*, 320 S.C. at 55-56, 463 S.E.2d at 89 ("Whether such a duty exists will depend on the facts and circumstances of each case."); *Cullum*, 344 S.C. at 433, 544 S.E.2d at 842 (explaining "it is a factual issue [as to] whether these circumstances give rise to a

¹ 320 S.C. 49, 463 S.E.2d 85 (1995).

² 344 S.C. 426, 544 S.E.2d 838 (2001).

special relationship"). Although we acknowledge it is difficult from precedent to determine the exact facts and circumstances that create a special relationship, we find there was enough evidence presented in this case to establish a genuine issue of material fact as to this issue.

We acknowledge evidence was presented supporting TSC's argument that Travis Patrick was the Resident Construction Engineer (RCE) for the South Carolina Department of Transportation (SCDOT) and therefore Patrick had supervisory authority over the Project—not Martin Long, an engineer at TSC. For example, although there was an Organizational Chart listing Long as the RCE, it demonstrates Long reported to Patrick. The Standard Specifications for Highway Construction incorporated in the contract between Horry County and TSC (the TSC Contract) lists the RCE as a SCDOT official and provides that the RCE will decide all questions that arise and has the authority to suspend work or withhold payments. The Scope of Services document, also included in the TSC Contract, states SCDOT will provide daily supervision over the project and make final decisions and the project engineer provided by TSC will report directly to the SCDOT RCE. The Intergovernmental Agreement (the IGA) between Horry County, SCDOT, and the South Carolina Infrastructure Bank requires SCDOT to oversee all planning, design, engineering, and inspection of the Project. And, Patrick sent two separate emails in which he signed off as "Resident Construction Engineer, SCDOT."³

However, in the light most favorable to Flatiron, we find sufficient evidence was presented to create an issue of fact as to the relationship between the parties, and whether, based on that relationship, TSC owed a duty to Flatiron. *See Tommy L. Griffin*, 320 S.C. at 56, 463 S.E.2d at 89 (holding the engineer owed a duty to Griffin to not "negligently design or negligently supervise the project" where the engineer supervised the construction and had the right to inspect and stop construction). Hutcherson's affidavit stated TSC (1) "wielded substantial influence and power over" Flatiron; (2) "often made unilateral decisions in the field (without

³ We note that additional evidence was presented to the trial court in Flatiron's motion to reconsider. For example, in a February 2016 email a Flatiron project engineer and manager stated, "You would believe that [Long], the designated RCE has actual authority; that per the [Standard] 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 . . .*" Additionally, Long also stated he was a consultant and the RCE would either be Patrick or Jason Thompson, SCDOT Bridge Engineer.

first consulting [Horry County] or SCDOT"); (3) "repeatedly exercised its right to reject or stop [Flatiron]'s work"; (4) oversaw construction activities; (5) coordinated and processed pay applications; and (6) inspected and rejected work. The Scope of Services portion of the TSC Contract states TSC will provide a project manager who is responsible for the daily operation, daily supervision, and administration of the Project. Specifically, we find there was evidence to support the fact that Long acted as RCE for SCDOT and used that power to make decisions for the Project. A December 2015 email from Long to Hutcherson stated, "The SCDOT has instructed [TSC] to have Flatiron stop all work on [a contract removal project.]" Thompson, who was copied on the email, responded to Long, stating his email was correct, "but the stop work call should have been made by the RCE. This type of scenario is what [TSC was] hired for." The Organizational Chart lists Long as the RCE. Moreover, TSC acknowledged in its brief that Long's title with TSC was RCE, that TSC is a representative of the SCDOT RCE, and that TSC had authority to reject defective material and suspend work.⁴

In *Tommy L. Griffin*, our supreme court noted that the engineer not only designed the project for the county, but that it also supervised the project. *Id.* In finding that the engineer owed a duty to the contractor not to negligently design or supervise the project, the court pointed out that the engineer "had the right, among other rights, to inspect the construction and to halt construction." *Id.* The *Tommy L. Griffin* court clearly focused on the engineer's authority and interactions with the contractor, not on the parties' respective titles under their contract. In the case at hand, although SCDOT may have retained the authority to make final decisions when necessary, it appears that it delegated the everyday inspection and supervision of the Project to TSC. The TSC Contract provides that TSC was to ensure inspection for all phases of the Project and that its management duties included verification and approval of contractor pay requests. TSC also had authority to reject defective material and suspend work, which Hutcherson claims it did repeatedly. Its authority to halt work was acknowledged by SCDOT. Just like the engineer in *Tommy L. Griffin*, TSC had the right and duty to inspect and halt construction. Based on the supreme court's analysis and holding in that case,

⁴ In its motion to reconsider, Flatiron also included an email from January 2014, in which numerous SCDOT officials were recipients, and Long stated the email was "on behalf of Horry County and SCDOT" and listed himself as "RCE." Evidence also included a memorandum on SCDOT letterhead that lists Long as the RCE. In July 2016, in an email from Long to SCDOT, he signed off as "RCE Carolina Bays." In July 2017, Long sent an email in which Patrick was copied and stated, "I am the RCE for the SCDOT over the Carolina Bays Parkway Project."

we find there is evidence establishing a genuine issue of material fact as to whether there was a special relationship between TSC and Flatiron.⁵

2. Flatiron argues the trial court erred by dismissing its claims prematurely—before document discovery was complete and depositions had been taken. Because we reverse and remand to the trial court, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

3. We find the issue of whether the trial court erred by making factual findings regarding agency is not preserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review."); *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) (stating Rule 59(e), SCRC motions "are used to preserve those [issues] that have been raised to the trial court but not ruled upon"). The trial court initially filed a Form 4 order on November 22, 2023, granting summary judgment on Flatiron's negligence claim, finding no special relationship between the Parties, and therefore, TSC did not owe a duty to Flatiron. The Form 4 order also stated a detailed order would follow. This order does not make any findings regarding agency. Flatiron filed its motion to reconsider in response to the Form 4 order on December 1 and did not include any arguments on agency. The final order, filed on December 27, included findings that TSC was an agent of Horry County. We acknowledge that the ruling in the final order did not change the outcome of the Form 4 order. However, Flatiron has raised an issue with the trial court's findings in the final order for the first time on appeal. By failing to file a motion to reconsider the final order's findings of fact regarding agency or to amend its original motion to alert the trial court of the alleged error, we hold Flatiron has not preserved this issue for our review.

REVERSED AND REMANDED.

MCDONALD, HEWITT, and TURNER, JJ., concur.

⁵ TSC argues that SCDOT did not hold them out as an agent or give them actual authority and therefore it could not have had any authority over Flatiron. However, we agree with Flatiron's argument, which essentially states the key analysis is not whether TSC wielded authority *as* SCDOT RCE; instead, it is whether TSC actually wielded authority. Precedent also suggests that another key fact for a special relationship is the professional duty of reasonable

competence that is independent of any contract, such as the duty owed by a professional engineer. *See Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503, 515 (Ill. 1994) (cited in *Tommy L. Griffin*, 320 S.C. at 55, 463 S.E.2d at 89).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructors, Inc.

Appellant,

v.

TranSystems Corporation

Respondent.

RESPONDENT’S PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the Respondent TranSystems Corporation (“Respondent”) submits this Petition for Rehearing of the referenced case, wherein the Court of Appeals issued an Order of Reversal and Remand on December 10, 2025. Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions this Court for rehearing for the following reasons:

1. This Court Failed to Explicitly State that Duty Is a Question of Law.

The first step for the Trial Court and for this Court in analysis of the underlying issues is whether there is any duty owed, before applying facts:

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The issue of negligence is a mixed issue of law and fact. The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case. The existence and scope of the duty are questions of law. Thereafter, the jury [or finder of fact] determines whether a breach of the duty has occurred, and the resulting damages.

Staples v. Duell, 329 S.C. 503, 506-7, 494 S.E.2d 639, 641 (Ct. App. 1997). Further, “[i]f there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law.” *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). “For [allegedly] negligent conduct to be actionable, it must violate some specific legal duty owed to the plaintiff.” *Cummins Atl., Inc. v. Sonny’s Camp-N-Travel Mart, Inc.*, 481 F. Supp. 2d 531, 535 (2007) (applying South Carolina law).

This Court erred in applying *Tommy L. Griffin I* as applicable precedent, when that case dealt with a different discipline of engineer operating under a different contract for services. It is undisputed that Respondent provided Construction Engineer Inspection and Testing Services for the Project, not design or Engineer of Record services, which were provided in *Tommy L. Griffin I*.¹ Neither Appellant nor this Court have identified any case in South Carolina which recognizes a duty owed by a Construction Engineering Inspection and Testing (“CEIT”) service provider to a general contractor where there is no privity of contract; therefore, the Court must make express findings as to whether or not there is a duty of care owed. The Court properly recognized “...it is difficult from precedent to determine the exact facts and circumstances that create a special relationship” but despite that acknowledgment, concluded that “...we find there was enough evidence to create a genuine issue of material fact as to the issue.” (Court of Appeals Order, p. 3.) This finding does not comply with applicable precedent. This Court’s Order failed to expressly

¹ The Record on Appeal and arguments clearly demonstrate that SCDOT administered the Project and oversaw all design and engineering. (R. p. 781.)

acknowledge that “[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 a directed verdict [or summary judgment].” *Steinke v. S.C. Dep’t of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999).

Stated directly – there is no precedent in South Carolina stating that a CEIT Services provider hired by an Owner to monitor the work of a contractor owes a duty to the contractor, and this Court erred in conflating the duties of a design engineer acting as a Construction Administrator (as in *Tommy L. Griffin I*) with those of a CEIT Services Provider. This Court failed to state whether a CEIT Services provider owes duties to a General Contractor, the quality of whose work it is the CEIT Services provider’s express duty to evaluate. As stated below, the applicable contracts clearly demonstrate there is no such duty for this type of highway contract. It is clear from the contract documents in the Record on Appeal that SCDOT acted in the role of the engineer in *Tommy L. Griffin*. Whether there is a duty is not an issue of fact, it is an issue of law. Here, however, this Court decided the case as though the question of duty was a question of fact.

Our Supreme Court has clearly placed resolving the threshold issue of duty upon courts acting at law, and not upon factfinders:

The determination of the existence of a duty is solely the responsibility of the court. Whether the law recognizes a particular duty is an issue of law to be determined by the Court. An affirmative legal duty exists **only** if created by statute, contract relationship, status, property interest, or some other special circumstance.

Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003) (emphasis added).

While this Court correctly acknowledged a limited amount of guidance from precedent, this Court did not consider clear guidance provided by regulations and contract relationships and status, and the omission of such analysis is an error requiring rehearing. Stated simply, there is no legal duty

created by statute (and there must be a finding of no duty pursuant to regulations adopted pursuant to statutory authority, discussed below). Moreover, (i) any such legal duty is disclaimed and denied by the applicable contracts and conditions incorporated therein; (ii) status does not—and cannot—create a duty in this specific situation; (iii) no property interest creates a duty; and finally, (iv) Appellant fails to identify any special circumstances to justify ignoring applicable customs, contracts, and existing regulations. Therefore, there is no duty owed by Respondent to Appellant.

For example, the Intergovernmental Agreement, which governed the relationships under review here, expressly states “[t]he SCDOT will administer the Project for the County.” (R. p. 781.)² That document, governing the parties’ relationships further states “[t]he SCDOT shall 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 necessary activities or functions of the Project**.” (Respondent Final Brief; p. 9, R., p. 781.) (Emphasis added.) The IGA could not be clearer that SCDOT, and not Flatiron, had this authority, and that any potential duties owed under *Tommy L. Griffin I* were owed by SCDOT to Appellant, and not by Respondent to Appellant.

Further, Appellant’s own contract expressly instructs Appellant: “**Do not construe advice given by the RCE’s representative as in any way binding on the RCE or the [SCDOT] or as releasing the Contractor from the fulfillment of the terms of the [Construction] Contract.**” (Respondent’s Final Brief, p. 11; R. p. 974.) (Emphasis added.) Further, the Standard Specifications incorporated into Appellants contract state “[u]nless otherwise specified elsewhere

² Although the copies of the Record provided by Appellant do not have the IGA paginated, the statement is at Article V, Section 5.1 on p. 10 of the IGA.

in these specifications, the RCE³ will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract.” (Respondent’s Final Brief, p. 12; R. p. 973.)

This Court erred in determining that the self-serving Affidavit of Lou Hutcherson created an issue of fact which overrode the controlling contracts, applicable regulations, and even the express contemporaneous email correspondence of Hutcherson himself. Even though the affidavit did not say that Hutcherson believed that Marty Long was RCE for SCDOT, this Court stated that the testimony created an issue of fact sufficient to deny summary judgment. It is clear from this Court’s Order, that this Court found that Respondent met its initial burden of stating there was no material fact, and that, accordingly, the burden shifted to Appellant to “demonstrate specific, **material facts** exist to give rise to a genuine issue.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (interpreting Fed. R. Civ. P. 56).

To survive summary judgment (and to obtain reversal), Appellant “must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence,” as set forth in the self-serving Hutcherson affidavit. *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013) (interpreting Fed. R. Civ. P. 56). This Court failed to properly consider what the Hutcherson Affidavit did not say – namely that Hutcherson never said he thought Long was SCDOT’s RCE (as reflected by his email correspondence during the Project). There simply is no evidence to create a genuine issue of material fact, because of the uncontradicted evidence from the governing contracts, applicable law, and the functioning of the Project.

³ RCE is expressly defined in the Standard Specifications as an SCDOT Official and/or Office. (R., p. 972.)

This case does not involve a one-off contract, where precedent is unimportant. The Standard Specifications and SCDOT Contracts for Construction are used statewide, and they need to be reliable and easy to understand and apply. If this Court finds that the plain language of these contracts and specifications can be overridden by self-serving affidavits building inference upon inference, the necessary assignment of risk and predictability of standard government contracts becomes useless, greatly increasing costs of construction and the risks to the public. Accordingly, this Court should grant the Petition for Rehearing.

2. This Court Failed to Determine Whether Appellant’s Assertion of Legal Duty Creates an Impermissible Conflict of Interest.

The Court failed to rule upon Respondent’s arguments related to conflict of interest rules, which are critical in any evaluation of duty in this case. Because the regulations governing engineering practice expressly prohibit conflicts of interest, this Court cannot recognize a duty at law which creates by its operation a conflict of interest for a professional engineer.

As noted to the Trial Court and to this Court, the General Assembly authorized the Board of Registration for Professional Engineers and Land Surveyors (the “Board”) to “promulgate regulations necessary to carry out the provisions [of the chapter governing licensure and regulation of professional engineers.” S.C. Code Ann. § 40-22-60(A).

In enacting the Rules of Professional Conduct for Professional Engineers, the Board stated:

The Rules of Professional Conduct as promulgated herein are an exercise of the police power vested in the South Carolina State Board of Registration for Professional Engineers and Surveyors by virtue of the acts of the legislature, and as such the South Carolina State Board of Registration for Professional Engineers and Surveyors is authorized to establish conduct, policy and practices in accordance with the powers herein above stated.

S.C. Code Ann. Reg. § 49-300(C). The Board further expressly states:

The Engineer or Surveyor shall avoid conflicts of interest.

A. The Engineer or Surveyor shall conscientiously strive to avoid conflicts of interest with employer or client, but when unavoidable, the Engineer or Surveyor shall forthwith disclose the circumstances to their employer or client. In addition the Engineer or Surveyor shall avoid all known conflicts of interest with their employer or client and shall promptly inform their employer or client of any business association, interests, or circumstances which could influence their judgment or the quality of their service.

B. The Engineer or Surveyor shall not accept compensation, financial or otherwise, from more than one party for services on the same project at the same time, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to, by all interested parties.

C. The Engineer or Surveyor shall not solicit or accept financial or other valuable considerations from material or equipment suppliers for specifying their projects.

D. The Engineer or Surveyor shall not solicit or accept gratuities, directly or indirectly from contractors, their agents, or other parties dealing with their client or employer in connection with work for which they are responsible.

E. When in public service as a member, advisor, or employee of a governmental body or department, the Engineer or Surveyor shall not participate in considerations or actions with respect to services provided by them or their organization in private engineering or surveying practices.

S.C. Code Ann. Reg. § 49-304. This regulation clearly bars conflicts, without complete disclosure of potential conflicts, and it further bars compensation from multiple parties at the same time, unless fully disclosed and agreed to “by all interested parties.” S.C. Code Ann. Reg. § 49-300(D). Flatiron, which bears the burden of proof, has provided no evidence of any waiver of conflict by all interested parties. Further, if an engineer cannot have conflicting benefits without full agreement and disclosure, he also cannot have potentially-conflicting liabilities without full disclosure and agreement.

Before both the Trial Court and this Court, Respondent argued that the Rules of Professional Conduct for Engineers barred a recognition of the duty that Appellant asserts. In considering whether the Rules of Professional Conduct, which have been adopted as administrative regulations in South Carolina, bar the duty sought by Appellant, this Court was required to interpret the above regulations regarding conflicts, but it did not do so. The first step of such an analysis (before this Court and at the Trial Court) is to “determine whether the language of the ... regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014).

The meaning of the regulation governing conflicts is clear – engineers must avoid conflicts of interest, and conflicts can only be waived if fully disclosed and agreed to by all parties. S.C. Code Ann. Reg. § 49-304(B). Further, “[r]egulations authorized by the legislature have the force of law.” *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 458 S.E.2d 535, 537 (1995).

A CEIT services provider for a road project is bound by contract and regulations to protect Owner and future Owner (Horry County and SCDOT) as well as the motoring public. By stating that there is at least a genuine issue of material fact as to whether a “special relationship” existed between a CEIT services provider and the General Contractor—who is of adverse interest to SCDOT/Owner—this Court has presumed a novel common law duty, which directly conflicts with the established regulatory law.

The duties of an engineer to his client, as determined by S.C. Code Ann. Reg. § 49-304 are analogous to the duty to avoid conflicts attributable to attorneys. *Accord* Rule 1.7, Rule 407, SCACR (noting lawyers must avoid concurrent conflicts of interest, which can be waived under conditions including each affected client giving informed consent confirmed in writing). The

requirements of this legal regulation closely mirror the common law regarding duty for attorneys, with South Carolina’s courts noting that “[g]enerally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).

Under South Carolina law, “[r]egulations are interpreted using the same rules of construction as statutes.” *Murphy v. S.C. Dep’t of Health & Envtl. Control*, 396 S.C. 633, 639-40, 723 S.E.2d 191, 195 (2012). “When interpreting a regulation, [courts] look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation’s operation.” *Id.* at 640 723 S.E.2d at 195. “Where the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper.” *Kiawah Dev. Partners, II, supra*, 411 S.C. at 39, 766 S.E.2d at 720-21.

Applied here, the Board of Engineering clearly instructs engineers to avoid conflicts, absent written waivers of conflicts by all parties. S.C. Code Ann. Reg. § 49-304. At no point has Appellant identified any written waiver of conflicts signed by any party. In contrast, in *Tommy L. Griffin I*, the contract for the engineer provided for contract administration and site control which was incorporated into the Contractor’s contract, which effected a written waiver signed by all parties. Further, the Board of Engineers bars engineers from accepting compensation from more than one party on a project at the same time. S.C. Code Ann. Reg. § 49-304. The only logical interpretation is that an engineer should be limited—in both compensation and liability—to one party at a time on a project.

The Court assumed an undefined duty in the present case, in clear conflict with regulations promulgated pursuant to statute. By doing so, this Court failed to give effect to the Rules of Professional Conduct for Engineers, which is an improper interpretation of a regulation. This Court was required to analyze the applicable regulation, because “[t]he construction of a regulation is a question of law to be determined by the court.” *S.C. Dep’t of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). Accordingly, Respondent’s Petition for Rehearing should be GRANTED.

SUGGESTION FOR *EN BANC* REHEARING

Pursuant to Rule 219, SCACR, Respondent respectfully suggests that the Court of Appeals provide an *en banc* rehearing in this Appeal. The basis for this suggestion is that this case involves a question of exceptional importance, as the assigned panel properly noted the limited precedent governing potential duties of care owed by engineers to third parties, and there is no precedent setting forth the duty of care owed by a CEIT services provider to a general contractor. Further, as noted above, the ruling in this case potentially impacts the enforcement of regulations promulgated by the Board of Registration for Professional Engineers and Land Surveyors, and it also impacts the reliability and predictability of the Standard Specifications used by the S.C. Department of Transportation, potentially impacting both costs of construction and the safety of construction of public highway projects. Accordingly, this case is one of exceptional importance, making a hearing before the full Court of Appeals prudent.

CONCLUSION

It is clear that CEIT Services are separate and distinct from those services provided by an Engineer of Record who administered a contract in *Tommy L. Griffin I*. Accordingly, that case is not and cannot be conclusive precedent for this Court in a determination of duty here. This Court

is required to make a finding specifically as to whether a CEIT Services provider owes a duty to a General Contractor regarding the rigor employed by the CEIT Services provider in its inspection and testing of work. To be clear, such a duty would constitute a clear conflict of interest with the CEIT provider's duty to its clients, Horry County and SCDOT, and its implied duty for the safety of the general public. There is no clear law governing this issue, and this Court must make a determination as a matter of law, just as the Trial Court properly did. Finally, there can be no issue of fact as to compliance with duties, unless or until there is a finding of a duty. Accordingly, Respondent's Petition for Rehearing should be GRANTED.

December 29, 2025

s/ C. Daniel Atkinson

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The South Carolina Court of Appeals

Flatiron Constructors, Inc., Appellant,

v.

TranSystems Corporation, Respondent.

Appellate Case No. 2024-000171

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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