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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

Supreme Court Appellate Case No. 2026-000386
Unpublished Opinion No. 2025-UP-416 (S.C. Ct. App. filed Dec. 10, 2025)
Court of Appeals Case No. 2024-000171
Court of Common Pleas Case No. 2022-CP-26-06116

Flatiron Constructors, Inc., Respondent,

v.

TranSystems Corporation, Petitioner.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	3
STANDARD OF REVIEW	10
ARGUMENT.....	12
I. This Court Should Affirm the Court of Appeals’ Opinion Because There Remain Genuine Issues of Material Fact Regarding the Parties’ Relationship.	12
A. Under <i>Tommy L. Griffin I</i> and <i>Cullum</i> , the Genuine Issues of Material Fact Concerning TSC’s Authority and Control Preclude a Judgment that No Duty Exists.	12
B. The Court of Appeals Correctly Applied Rule 56 to the Competing Evidence.....	16
II. The Court Should Affirm the Court of Appeals’ Opinion Because TSC Cannot Convert South Carolina’s Facts-and-Circumstances Inquiry Into a Contract-Only Question of Law.	18
A. South Carolina Law Distinguishes the Legal Duty Question From the Disputed Factual Predicate on Which It Depends.....	19
B. The Project Contracts Are Relevant, But They Do Not Conclusively Define TSC’s Relationship with FCI to the Exclusion of the Remaining Record.....	22
C. SCDOT’s Retention of Final Authority Does Not Eliminate TSC’s Separate Day-to- Day Authority.	25
D. The Parol Evidence Rule Does Not Exclude Evidence of TSC’s Actual Relationship With FCI.	27
III. The Court Should Reject TSC’s Benefit-and-Reliance Test Because It Is Unpreserved and Contrary to South Carolina Law.	28
A. TSC Did Not Present Its Benefit-and-Reliance Test Below.	28
B. Even if Preserved, TSC’s Benefit-and-Reliance Test Is Contrary to South Carolina Law.	30
IV. TSC’s Professional Obligations Do Not Foreclose Its Duty of Care to FCI.	37
A. Professional Standards Do Not Immunize an Engineer From the Duty Not to Negligently Supervise a Project.....	38
B. TSC Has No Conflict of Interest.....	42
C. An Engineer’s Professional Obligations Support Accountability for Negligence, Not Immunity From It.....	45
CONCLUSION	46

TABLE OF AUTHORITIES

<u>CASES</u>	PAGE(S)
<i>16 Jade St., LLC v. R. Design Constr. Co.</i> , 405 S.C. 384, 747 S.E.2d 770 (2013)	40
<i>A.R. Moyer, Inc. v. Graham</i> , 285 So. 2d 397 (Fla. 1973).....	13
<i>Barker v. Sauls</i> , 289 S.C. 121, 345 S.E.2d 244 (1986)	23
<i>Baughman v. Am. Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	10
<i>Beachwalk Villas Condo. Ass’n v. Martin</i> , 305 S.C. 144, 406 S.E.2d 372 (1991)	30, 31
<i>Brockbank v. Best Cap. Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000)	11
<i>Carroll v. Isle of Palms Pest Control, Inc.</i> , 446 S.C. 177, 918 S.E.2d 532 (2025)	29, 33
<i>Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.</i> , 336 S.C. 423, 520 S.E.2d 809 (Ct. App. 1999), <i>rev’d</i> , 344 S.C. 426, 544 S.E.2d 838 (2001)	23, 24, 36
<i>Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.</i> , 344 S.C. 426, 544 S.E.2d 838 (2001)	1, 2, 11, 12, 13, 14, 16, 18, 19, 20, 22, 23, 24, 36, 45
<i>Davidson & Jones, Inc. v. New Hanover Cnty.</i> , 41 N.C. App. 661, 255 S.E.2d 580 (1979).....	35
<i>Dixon v. Texas Co.</i> , 222 S.C. 385, 72 S.E.2d 897 (1952)	23, 33
<i>Eastern Steel Constructors, Inc. v. City of Salem</i> , 209 W. Va. 392, 549 S.E.2d 266 (2001).....	35, 40
<i>EBWS, LLC v. Britly Corp.</i> , 181 Vt. 513, 928 A.2d 497 (2007)	29
<i>Fay v. Grand Strand Reg’l Med. Ctr., LLC</i> , 412 S.C. 185, 771 S.E.2d 639 (Ct. App. 2015).....	20
<i>Georganne Apparel v. Todd</i> , 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991).....	37
<i>Gilliland v. Elmwood Props.</i> , 301 S.C. 295, 391 S.E.2d 577 (1990)	28, 37

<i>Grace & Naeem Uddin, Inc. v. Singer Architects, Inc.</i> , 278 So. 3d 89 (Fla. Dist. Ct. App. 2019)	14
<i>Grimsley v. S.C. L. Enft Div.</i> , 415 S.C. 33, 780 S.E.2d 897 (2015)	10
<i>Hendricks v. Clemson Univ.</i> , 353 S.C. 449, 578 S.E.2d 711 (2003)	13, 19, 21, 39
<i>Hill v. Polar Pantries</i> , 219 S.C. 263, 64 S.E.2d 885 (1951)	30, 31
<i>Kennedy v. Columbia Lumber & Mfg. Co.</i> , 299 S.C. 335, 384 S.E.2d 730 (1989)	31, 33
<i>Kitchen Planners, LLC v. Friedman</i> , 440 S.C. 456, 892 S.E.2d 297 (2023)	10, 16
<i>Langley v. Boyter</i> , 284 S.C. 162, 325 S.E.2d 550 (1984), rev'd, 286 S.C. 85, 332 S.E.2d 100 (1985)	30
<i>Lloyd v. Walters</i> , 276 S.C. 223, 277 S.E.2d 888 (1981)	37
<i>Madison ex rel. Bryant v. Babcock Ctr., Inc.</i> , 371 S.C. 123, 638 S.E.2d 650 (2006)	37
<i>Nat'l Sav. Bank of D.C. v. Ward</i> , 100 U.S. 195 (1879)	31, 32
<i>Oblachinski v. Reynolds</i> , 391 S.C. 557, 706 S.E.2d 844 (2011)	21, 30
<i>Quail Hill, LLC v. Cnty. of Richland</i> , 387 S.C. 223, 692 S.E.2d 499 (2010)	11, 16
<i>Roberts v. Hunter</i> , 310 S.C. 364, 426 S.E.2d 797 (1993)	21
<i>Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.</i> , 282 S.C. 415, 321 S.E.2d 46 (1984)	37
<i>S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.</i> , 289 S.C. 373, 346 S.E.2d 324 (1986)	19, 21, 32, 34, 35, 36
<i>Shaw v. Psychemedics Corp.</i> , 426 S.C. 194, 826 S.E.2d 281 (2019)	13, 23, 35, 46
<i>Smith v. Haynsworth, Marion, McKay & Geurard</i> , 322 S.C. 433, 472 S.E.2d 612 (1996)	39
<i>Spence v. Wingate</i> , 395 S.C. 148, 716 S.E.2d 920 (2011)	19, 39, 41, 42

<i>Terlinde v. Neely</i> , 275 S.C. 395, 271 S.E.2d 768 (1980)	35
<i>Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.</i> , 320 S.C. 49, 463 S.E.2d 85 (1995)	1, 2, 5, 6, 8, 9, 12, 13, 14, 15, 17, 18, 19, 21, 22, 23, 25, 27, 30, 31, 32, 33, 36, 37, 39, 41, 43, 45, 46
<i>Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.</i> , 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002).....	25
<i>Town of Summerville v. City of N. Charleston</i> , 378 S.C. 107, 662 S.E.2d 40 (2008)	10
<i>True v. Monteith</i> , 327 S.C. 116, 489 S.E.2d 615 (1997)	10
<i>Tupper v. Dorchester Cnty.</i> , 326 S.C. 318, 487 S.E.2d 187 (1997)	11
<i>Unlimited Servs., Inc. v. Macklen Enters., Inc.</i> , 303 S.C. 384, 401 S.E.2d 153 (1991)	37
<i>U.S. ex rel. L.A. Testing Lab 'y v. Rogers & Rogers</i> , 161 F. Supp. 132 (S.D. Cal. 1958).....	14
<i>Vaughan v. Town of Lyman</i> , 370 S.C. 436, 635 S.E.2d 631 (2006)	20
<i>Wright v. PRG Real Est. Mgmt., Inc.</i> , 426 S.C. 202, 826 S.E.2d 285 (2019)	10, 20, 22

STATUTES

S.C. Code Ann. § 40-1-70.....	38
S.C. Code Ann. § 40-22-2.....	38, 46
S.C. Code Ann. § 40-22-70.....	38

REGULATIONS

S.C. Code Ann. Regs. 49-100	1, 38, 46
S.C. Code Ann. Regs. 49-300	38
S.C. Code Ann. Regs. 49-301	43, 44
S.C. Code Ann. Regs. 49-304	38, 39, 40, 42, 43

RULES

Rule 1.9, RPC, Rule 407, SCACR.....	39
Rule 242(d)(1), SCACR.....	28

Rule 56, SCRCF.....	2, 10, 11, 12, 19, 21, 27
---------------------	---------------------------

SECONDARY SOURCES

<i>Legal Aspects of Architecture, Engineering, and the Construction Process</i> (Justin Sweet ed., 1994)	46
Restatement (Second) of Torts § 552.....	10, 29
Restatement (Third) of Torts § 6 cmt. b	29, 31

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply this Court's decisions in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.* and *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital* by holding that there existed a genuine issue of material fact precluding summary judgment regarding whether the facts and circumstances establish the special relationship on which the existence of any duty owed by TranSystems to Flatiron depends?
2. Did the Court of Appeals correctly decline to hold that the Rules of Professional Conduct for Engineers immunize a supervising engineer from the duty this Court recognized in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.* not to negligently supervise the contractor whose work it controls?

STATEMENT OF THE CASE

Flatiron Constructors, Inc. ("FCI") brought this professional negligence action in 2018 based on harm FCI suffered at the hands of TranSystems Corporation ("TSC") during the construction of the Carolina Bays Parkway extension project (the "Project") in Horry County. FCI was the prime contractor for the Project and TSC was placed in an oversight position by Horry County and SCDOT, which engaged TSC to perform construction, engineering, and inspection services ("CEI"). The summary judgment record contains competing evidence concerning the nature and extent of TSC's authority over FCI, but it is undisputed that TSC had the authority to inspect all work done and all materials furnished by FCI, to reject and suspend FCI's work, to direct FCI to perform certain work, and to administer submittals. FCI's Complaint was based on the allegation that TSC abused and misused that authority by rejecting FCI's contractually compliant work based on incorrect readings of the Project specifications, improperly suspending work, delaying submittal reviews past the contractual deadline, imposing unreasonable standards and requirements, and needlessly demanding information. These abuses caused extreme delays

and cost escalation, extending a project expected to take just three years and three months to over five years.

TSC disputes the legal significance of FCI's evidence and contends that the Project contracts reserved final authority to SCDOT. Under *Tommy L. Griffin I* and *Cullum*, however, and viewing the evidence in the light most favorable to FCI, that competing evidence presents a genuine issue of material fact concerning the relationship on which any duty depends. FCI does not ask this Court to hold that a duty exists as a matter of law. Rather, it asks the Court to reject TSC's request for summary dismissal while there remain genuine issues of material fact.

The trial court adopted TSC's proposed order verbatim and summarily dismissed FCI's negligence claim. The order treated TSC's contract with Horry County as dispositive and resolved disputed inferences concerning TSC's actual authority and conduct against FCI. The Court of Appeals reversed. Applying *Tommy L. Griffin I*, *Cullum*, and the Rule 56 standards, it held that genuine issues of material fact exist concerning the parties' relationship and further factual inquiry was necessary. (App. 1339-42). After rehearing was denied, this Court granted certiorari.

TSC now asks this Court to reinstate summary dismissal of FCI's negligence claim and hold that no duty exists as a matter of law, relying in part on a benefit-and-reliance test not presented below. The issue before this Court is therefore narrow: given that the case is early in discovery, there is competing evidence, and considering all evidence in the light most favorable to FCI, did the Court of Appeals correctly find that there is a genuine issue of material fact as to whether TSC and FCI had a special relationship giving rise to a legal duty? As the Court of Appeals correctly applied the applicable standards and case law, this Court should affirm and remand for further proceedings.

STATEMENT OF THE FACTS

- The Project and TSC's Role -

The Carolina Bays Parkway extension consisted of 7.45 miles of new highway through Horry County, a 3,633-foot bridge across the Intracoastal Waterway, several minor bridges, and associated roadwork. (App. 322). Horry County owned the project. Under an Intergovernmental Agreement (“IGA”) among the County, SCDOT, and the South Carolina Transportation Infrastructure Bank, SCDOT agreed to administer the project and oversee its design, contract administration, inspection, and construction through services that “shall be obtained from third-party consultants or contractors by or on behalf of the County.” (App. 793).¹

Horry County retained TSC before it retained FCI. On December 15, 2011, Horry County contracted with TSC to provide CEI Services for the Project, defined in TSC’s contract as “construction management, construction engineering, assurance and acceptance inspection, sampling, testing, and construction survey verifications to determine compliance with the contract requirements.” (App. 819, 837). On November 7, 2013, SCDOT, on behalf of the County, awarded the construction contract for the Project to FCI in the amount of \$97,868,087. (App. 322, 695).

The Construction Contract incorporated SCDOT’s 2007 Standard Specifications and included a substantial completion date that was 1,220 calendar days (approximately three years and three months) from the Notice to Proceed (“NTP”). (App. 296, 337). FCI began work on the Project in March 2014. (App. 87). FCI provided a realistic, achievable schedule for substantially completing the Project within the specified 1,220 calendar-day time period following the NTP.

¹ TSC states that “the contracts could not be more clear” and asserts that the IGA was “necessary to secure” Project financing and “specifically provid[ed] that the Department would provide ‘oversight of design and construction for the Project.’” Appellant’s Br., p. 24. The language TSC quotes is not in the IGA, and funding was already secured when the IGA was signed (App. 784-85).

Despite FCI's efforts, the Project was significantly delayed, and substantial completion was not achieved until 2019, five years after the NTP. (App. 952).

**- The Contracts Placed FCI's Work Under
TSC's Daily Supervision, Inspection, and Approval -**

TSC's Scope of Services provides:

Consultant shall provide a Project Engineer over the project. This person will be responsible for the day-to-day operation and administration of the project. This project will be the Project Engineer's sole responsibility. SCDOT's Resident Engineer or his designee will provide daily supervision on the project and will make final decisions when necessary. The Project Engineer will report directly to SCDOT's Resident Engineer or his designee. The Project Engineer will be responsible for ensuring an appropriate level of inspection for all phases and aspects of the project. The Project Engineer will direct a staff of Project Inspectors that will carry out the majority of the inspection, sampling, and testing responsibilities on the project.

(App. 837).² TSC's contract made it "responsible for the day-to-day operation and administration of the project" and "for ensuring an appropriate level of inspection for all phases and aspects of the project," (App. 837), required it to perform "all necessary Quality Acceptance inspection, sampling, and on-site testing" of FCI's work, (App. 839-41), and to "interface and coordinate with the Contractor's QC personnel on a daily basis." (App. 839). It assigned TSC "Construction submittals & tracking," "Contractor pay requests and estimate generation" with "Verification and approvals," "Claims review," and "Partnering and disputes management." (App. 838). TSC now calls its role "limited to working as a 'consultant' who would inspect the contractor's work." Appellant's Br., p. 5.

The Standard Specifications, which governed FCI's contract and which TSC was engaged to administer, vest significant authority in the Resident Construction Engineer, or RCE, and its

² As discussed below, this contract language is not determinative, and it is a disputed issue of fact whether TSC's actions during the Project demonstrate that it took on the role of the Resident Construction Engineer and actually wielded broad authority over FCI.

representatives. These parties “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” (App. 989 (§ 105.1)).³ The RCE’s representatives “may inspect all work done and all materials furnished,” and each 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.” (App. 990 (§ 105.9)). Work performed without that inspection “may be ordered removed and replaced at the Contractor’s expense.” (App. 990 (§ 105.10)).

As described below, whether TSC held the title of RCE remains disputed. However, TSC conceded to the trial court that it acted as the “RCE’s Representative” with the power to “inspect all work done and all materials furnished,” “reject defective material,” and “suspend any work that is being improperly performed subject to the final decision of the RCE.” (App. 973, 990 (§ 105.9)). As noted by the Court of Appeals, whatever its title, TSC exercised extensive supervisory authority over FCI’s work. (App. 1342).

- Long Held Himself Out as the RCE, SCDOT Treated Him as the RCE, and TSC Concedes It Was at Least the RCE’s Representative -

The engineer in *Tommy L. Griffin I* owed the contractor a duty because the engineer “supervised the construction” and “had the right, among other rights, to inspect the construction

³ The RCE possessed additional extensive rights to exercise control over the Project, namely the right to: “decide all questions that may arise” regarding Project Contract requirements (App. 989); “suspend the work” (App. 989); determine construction requirements (App. 776, 989); and accept or reject Work (App. 989-90). These rights are expanded in the Construction Contract to include the right to: receive certain documentation from FCI, including for RCE approval (App. 354-55, 364-65, 368-69, 392, 448-49, 452); determine the date of substantial completion (App. 336-37); charge FCI for liquidated damages (App. 337); determine the necessity of certain work (App. 361-62, 368-69, 440-41, 443); and direct FCI to perform certain Work (App. 449-50, 455-56).

and to halt construction.” *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 56, 463 S.E.2d 85, 89 (1995) (hereinafter *Tommy L. Griffin I*). On this Project, TSC had the same authority. TSC’s defense is that the RCE was an SCDOT employee, Travis Patrick, and that TSC merely inspected. But this argument fails for two reasons: 1) there is evidence that shows that TSC claimed to be the RCE and exercised broad powers over FCI; and 2) as the Court of Appeals noted, the actual authority, not the technical title, is what is important to the “special relationship” analysis.

The SCDOT/TranSystems organizational chart for the project lists TSC’s Martin Long as “TRANSYSTEMS RCE” and no SCDOT employee is listed as RCE. (App. 958). Long signed meeting minutes and project correspondence as the Resident Construction Engineer, (App. 944-48, 952-57), and in July 2017 wrote, “I am the RCE for the SCDOT over the Carolina Bays Parkway Project.” (App. 1341). Louis Hutcherson, FCI’s project manager, testified that “TSC served as the owner’s on-site representative” and TSC’s Martin Long “held himself out as . . . (‘SCDOT’) Resident Construction Engineer.” (App. 932). In December 2015, after Long relayed an SCDOT instruction to stop FCI’s work on an abutment, SCDOT’s District Bridge Engineer, Jason Thompson, replied: “Your email is correct, but 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.**” (App. 943; *see* App. 1341) (emphasis added). TSC’s Opening Brief does not mention the exchange. In short, the fact that TSC proclaimed itself to be the RCE, and SCDOT personnel acted as if TSC were the RCE, is evidence that TSC exercised vast powers and authority over FCI like that in *Tommy L. Griffin I*. At a minimum, TSC concedes that it acted as the “RCE’s Representative” with associated broad powers and authority over FCI.

**- TSC Supervised, Inspected, Rejected, and Stopped FCI's Work,
and Controlled FCI's Access to the Owner -**

Louis Hutcherson served as FCI's project manager and dealt with TSC daily. (App. 932-33). Hutcherson's affidavit is the only first-hand account of the Project in the record and every statement it contains remains uncontested by TSC. Nearly everything FCI required from Horry County or SCDOT passed through TSC, who was "FCI's point-of-contact on the Project through which most Project communications and documentation between FCI and the owner/SCDOT was funneled." (App. 933 ¶ 4). "FCI was required to and did engage with TSC daily to perform FCI's work." (*Id.*). TSC received FCI's submittals, pay requests, and inspection requests, (App. 933 ¶ 7), and "unilaterally determined whether and when to transmit to the owner/SCDOT FCI's submittals and requests for relief." (App. 934 ¶ 8).

In the field, TSC "oversaw all aspects of FCI's performance of its obligations and the work called for in the construction contract." (App. 933 ¶ 5). TSC inspected the materials FCI furnished and the work it performed, approved or rejected them "per TSC's interpretation of the contract requirements," and "was authorized and/or permitted to order FCI to remove and replace materials and completed work." (App. 933 ¶ 6, 936 ¶ 17). When FCI needed direction in the field, TSC decided "whether to resolve issues in the field timely to enable the work to proceed or whether to delay work and elevate issues for the owner's or SCDOT's input." (App. 935 ¶ 12). TSC determined "whether FCI and/or its subcontractors could proceed with the work, must stand down and/or perform rework," and on multiple occasions "exercised its right to reject or stop FCI's work" based on an "erroneous interpretation of the Projects specifications." (App. 933 ¶ 6, 934 ¶¶ 10, 11). In short, as Mr. Hutcherson stated in his affidavit, "FCI and its subcontractors could not perform, progress or complete work without TSC's inspection and approval." (App. 936 ¶ 16).

**- TSC's Negligent Supervision Caused Significant Delays on the Project
and Increased FCI's Costs -**

In July 2014, FCI submitted to Long FCI's amended installation plan for the bridge's drilled-shaft foundations, the deep concrete columns that support the bridge. The Standard Specifications required SCDOT to return a revised submittal within seven days. Long "did not even open the resubmittal, let alone submit it to SCDOT for approval, for 44 days," and "[w]ithout the approval of this submittal, FCI was unable to progress critical portions of the work." (App. 935-36 ¶ 15). In June 2015, TSC demanded documentation for FCI's crane operator beyond the requirements of OSHA, and FCI produced the documentation, because "[d]ue to the control TSC possessed on the Project, FCI was forced to give time and effort even to clearly meritless demands made by TSC." (App. 935 ¶ 14). Also, TSC's inspectors "refused to conduct inspections, which caused FCI's work to stall," or "halted inspections before they were complete." (App. 936 ¶ 16).

FCI's interrogatory responses describe the same pattern across the Project. TSC rejected work that complied with the contract. TSC allowed submittal reviews to run past the contractual deadline. TSC imposed inspection and testing procedures the contract did not require, staffed the bridge inspections with personnel who lacked bridge experience, and interpreted the specifications in ways that dictated FCI's means and methods. (App. 858-63).

TSC says that it should not be held responsible for doing "too good" of a job for its client and cites to a heading in FCI's interrogatory responses to suggest that FCI's claim boils down to TSC's "overzealous" inspection. Appellant's Br., p. 1, 34; (App. 305). This is not FCI's position. FCI contends that TSC did its job negligently, in numerous specific instances, and because of the power it held over FCI, caused FCI harm.

- The Proceedings Below -

FCI's negligence claim, the only claim before this Court, alleges that TSC was hired to supervise FCI's work, held the power to stop it, and exercised that power negligently, causing FCI to incur significant costs.⁴ FCI alleges that TSC has a professional duty not to negligently supervise the work, "arising separate and distinct from any contractual duties between Transystems and Horry County." (App. 91 ¶ 29).

TSC moved for summary judgment early in discovery, before any deposition had been taken, and before document production was complete. (App. 903). Two months after the August 7, 2023 hearing on TSC's motion for summary judgment, the parties jointly told the court that "more document production remains to be performed," and that the case required "testimony of an exceptionally large number of fact witnesses" to testify to "scores of construction events on a complex, public infrastructure project performed over the course of at least five years" and "[t]he number of depositions to be taken will match or eclipse the estimated number of witnesses." (App. 151-52, 154). In its motion, TSC argued that its contract with the County foreclosed any duty to FCI. (App. 299-308). FCI opposed with the Hutcherson affidavit and the project documents described above. (App. 897-930). The trial court granted the motion in a Form 4 order and directed TSC to draft the full order, which the court signed and adopted verbatim on December 27, 2023. (App. 18-20, 21-45, 46-71).⁵

⁴ The contractor's claims in *Tommy L. Griffin I* were also brought against the supervising engineer after "[t]he County paid Griffin for all of the extra costs which County agreed were caused by County, but County refused to compensate Griffin for costs incurred by Griffin as a result of Engineer's acts." 320 S.C. at 51-52, 463 S.E.2d at 86-87.

⁵ The order's central finding, repeated throughout TSC's brief, is that SCDOT's RCE had "final decision-making authority over TSC's CEIT Services." (App. 52). The order cites Standard Specifications Section 105.1 for that finding. But that section addresses the RCE's authority over the contractor's work, not TSC or CEIT services. (App. 989). The finding therefore has no apparent

The Court of Appeals reversed. It acknowledged the evidence supporting TSC’s position that Travis Patrick was the RCE, (App. 1340), reviewed the record, and found that “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.” (App. 1341). It held that the record presents “a genuine issue of material fact as to whether there was a special relationship between the parties such that TSC owed Flatiron a duty,” because “the key analysis is not whether TSC wielded authority as SCDOT RCE; instead, it is whether TSC actually wielded authority.” (App. 1339, 1342). The court denied rehearing. (App. 1344-56). TSC’s petition for a writ of certiorari raised, for the first time, a reliance test drawn from Restatement (Second) of Torts § 552. FCI’s Return objected that TSC had not preserved the argument. This Court granted the petition on June 17, 2026.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo and applies the same standard as the trial court. *See* Rule 56, SCRCPP; *see also Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008). TSC, as the moving party seeking a judgment that no duty exists, bears the initial burden of demonstrating the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). FCI, the non-moving party, defeats summary judgment by presenting evidence supporting a reasonable inference that a genuine issue of material fact exists. *See Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). In

source other than TSC’s proposed order. Indeed, when TSC’s brief describes what “the trial court observed,” TSC cites to its own proposed order. Appellant’s Br., p. 40 (citing App. 28-29).

conducting that review, the Court must view the evidence and all reasonable inferences in the light most favorable to FCI. *See Grimsley v. S.C. L. Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015); *see also True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) (“In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party.”).

Summary judgment is a “drastic remedy . . . ‘[that] 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). It is proper only 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.” Rule 56(c), SCRPC; *see also Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001) (hereinafter *Cullum*). Thus, TSC is entitled to dismissal on summary judgment on the basis that no duty exists only if there is no genuine issue of material fact concerning the relationship on which the duty determination depends.

Summary judgment is also inappropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *See Brockbank v. Best Cap. Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) (citing *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)). It “should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

ARGUMENT

This appeal presents a narrow Rule 56 question. For more than three decades, South Carolina law has recognized that a supervising engineer may owe a contractor a duty when the facts establish a special relationship. TSC nevertheless asks this Court to hold that no duty exists here as a matter of law. There exists a genuine issue of material fact concerning the parties' relationship. Thus, the Court of Appeals correctly reversed summary judgment and remanded.

I. This Court Should Affirm the Court of Appeals' Opinion Because There Remain Genuine Issues of Material Fact Regarding the Parties' Relationship.

TSC asks this Court to reverse the Court of Appeals' opinion and hold, as a matter of law, that it is categorically exempt from the duty this Court established in *Tommy L. Griffin I*. TSC asserts that the Court of Appeals "treat[ed] the existence of a duty in this case as a factual question irresolvable on summary judgment." Appellant's Br., p. 35. It did not. The Court of Appeals did not decide that duty is always a factual question or that it can never be resolved on summary judgment. Instead, it identified the duty recognized in *Tommy L. Griffin I*, considered the evidence on both sides, drew all reasonable inferences in FCI's favor, and held that "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." (App. 1339). That is precisely *Cullum's* holding: summary judgment is improper when the duty determination depends on disputed facts.

A. Under *Tommy L. Griffin I* and *Cullum*, the Genuine Issues of Material Fact Concerning TSC's Authority and Control Preclude a Judgment that No Duty Exists.

This Court has long recognized that a professional engineer may owe a contractor a duty when "there is a special relationship between the alleged tortfeasor and the injured party not arising in contract." *Tommy L. Griffin I*, 320 S.C. at 55, 463 S.E.2d at 88. This Court made clear that whether the relationship exists "will depend on the facts and circumstances of each case." *Id.* at

55-56, 463 S.E.2d at 89; *see also Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (“An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.”). Thus, while the governing legal rule is settled, its application depends on the parties’ factual relationship and the circumstances of the particular case.

Six years after *Tommy L. Griffin I*, this Court applied that principle at summary judgment in *Cullum*, 344 S.C. at 433, 544 S.E.2d at 842. The Court reversed summary judgment for an architect with control over subcontractor payments, holding that whether those circumstances gave rise to a special relationship, and therefore a duty, was a factual issue. *Id.* This Court explained that summary judgment was inappropriate because “further inquiry into the facts of the case is desirable to clarify the application of the law.” *Id.* As such, where, as here, there is a genuine issue of material fact regarding the parties’ relationship, TSC is not entitled to summary judgment. *Id.*

As reflected in *Tommy L. Griffin I*, the facts and circumstances material to the special relationship are those concerning the engineer’s authority and control over the contractor. 320 S.C. at 56, 463 S.E.2d at 89 (“Engineer supervised the construction. Engineer had the right, among other rights, to inspect the construction and to halt construction.”); *see also Cullum*, 344 S.C. at 430-33, 544 S.E.2d at 840-42 (architect’s authority to certify payments and adjust retainage, even with no power to stop work, presented a factual issue); *Shaw v. Psychomedics Corp.*, 426 S.C. 194, 199, 826 S.E.2d 281, 283 (2019) (laboratory “possesses and exercises control” over the drug testing process, creating a duty).

Although not binding, and by way of example, Florida courts apply similar principles under similar circumstances. *See, e.g., A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 401 (Fla. 1973) (supervising professional’s control over the contractor with power to stop work carries a duty

“commensurate with his control of the construction project”) (citations omitted); *Grace & Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 92 (Fla. Dist. Ct. App. 2019) (consulting architect’s supervisory control over the contractor’s performance created a duty, even without final decision making authority, finding that “[t]he power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor”) (citing *U.S. ex rel. L.A. Testing Lab’y v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958) (relied upon by this Court in *Tommy L. Griffin I* as an example of courts finding a duty based on a special relationship between design professionals and contractors)).

FCI asks only that this Court find, as the Court of Appeals did, that the record here permits a reasonable inference that TSC occupied the kind of supervisory relationship the engineer occupied in *Tommy L. Griffin I* and consequently, as in *Cullum*, that the existence of the special relationship cannot be resolved conclusively on summary judgment. In contrast, TSC asks this Court to declare that no duty exists as a matter of law despite substantial record evidence creating a genuine issue of material fact. 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 responsible for “ all project plan and specification reviews . . . involved in the preparation and production of the project plans and specifications.” (App. 832). TSC was “ responsible for the day-to-day operation and administration of the project. ” (App. 837).
“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” (App. 990). TSC also “ repeatedly exercised its right to reject or stop FCI’s work. ” (App. 934 ¶ 11).

“Engineer made demands of [Contractor] which were not in the contract.” 320 S.C. at 51, 463 S.E.2d at 86.	“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.” (App. 935 ¶ 14). “TSC rejected FCI’s work based upon erroneous interpretation of the Project specifications – which occurred on multiple occasions” (App. 934 ¶ 10). “TSC often made unilateral decisions in the field . . . that delayed, hindered or otherwise negatively impacted FCI’s work.” (App. 934 ¶ 10).
“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].” (App. 933 ¶ 5). “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.” (App. 933 ¶ 6). TSC was “responsible for the day-to-day operation and administration of the project.” (App. 837). “TSC wielded substantial influence and power over FCI and impacted the progression and completion of FCI’s work on the Project.” (App. 933-34 ¶ 8).
“Engineer had the right, among other rights, to inspect the construction and to halt construction.” 320 S.C. at 56, 463 S.E.2d at 89.	TSC had the right to “inspect all work done and all materials furnished” and “the authority to reject defective material and to suspend any work that is being improperly performed” (App. 990). TSC “on multiple occasions . . . rejected FCI’s work” (App. 934 ¶ 10). TSC also “repeatedly exercised its right to reject or stop FCI’s work.” (App. 934 ¶ 11).

The Court of Appeals in this matter considered the same categories of evidence supporting the finding of a duty in *Tommy L. Griffin I*. The items above bear on the relationship on which any duty owed by TSC depends because it addresses who exercised day-to-day supervisory authority over FCI, who could inspect or halt FCI’s work, and how that authority operated in practice. TSC admits in its Opening Brief that it exercised the authority at issue in *Tommy L. Griffin I*, including

“inspections, approvals, and stop-work orders.” *See* Appellant’s Br., p. 24. The Court of Appeals, therefore, correctly stated that “the key analysis is not whether TSC wielded authority *as SCDOT RCE*; instead, it is whether TSC actually wielded authority.” (App. 1342 (emphasis added)).

B. The Court of Appeals Correctly Applied Rule 56 to the Competing Evidence.

To defeat TSC’s Motion for Summary Judgment and to prevail at the Court of Appeals, FCI need only demonstrate a genuine issue of material fact concerning the special relationship between TSC and FCI. *See Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301; *Cullum*, 344 S.C. at 432-33, 544 S.E.2d at 841-42. Even if the material facts were undisputed, summary judgment would be improper because the parties dispute the conclusion to be drawn from them. *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505.

The trial court did not apply that standard. The trial court’s order resolved the factual disputes against FCI, the non-moving party, by interpreting evidence and contracts in TSC’s favor and ignoring substantial record evidence outside of TSC’s contract with the County. For example, the trial court order proclaims, “there is no need for further inquiry into facts or circumstances, because the unambiguous conditions are set forth in the plain, unambiguous Project Contracts.” (App. 60). The order was issued before the parties completed what both sides agreed would be extensive discovery.

The trial court order ignores record testimony relevant to the existence of a “special relationship,” including Mr. Hutcherson’s testimony on TSC’s role in funneling communications between FCI and SCDOT, TSC’s field oversight of FCI’s work, TSC’s administrative control over the Project, TSC’s right to interpret the Specifications in the field, and TSC’s exercise of its right to reject or stop work. (App. 933-34). All of this evidence was ignored on the basis 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” (App. 53). It further

provides that “[i]f Hutcherson believed Long was RCE for SCDOT, he could and should have expressly said so in his affidavit.” (App. 54). The trial court therefore ignored facts and circumstances particularly relevant to the “special relationship” determination under *Tommy L. Griffin I*. Instead, the court focused exclusively on the technical designation of the SCDOT RCE.

Yet, South Carolina case law provides that the key analysis is the authority actually wielded by TSC, not whether TSC held a certain title. As reflected in the chart above, the record is replete with evidence of TSC’s authority and control over FCI’s work. 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. *See Appellant’s Br.*, p. 39-40. Indeed, while denying it was the “SCDOT RCE,” TSC has conceded that it operated “[a]s a Representative of the SCDOT RCE” and “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.’” (App. 1308). That conceded authority is sufficiently similar to *Tommy L. Griffin I* to deny summary judgment in TSC’s favor.

TSC’s principal contrary evidence at the Court of Appeals was a February 2016 email chain in which Long wrote that wherever a plan note says RCE, “you can replace it with the word District.” (App. 169). Read whole, the chain shows FCI’s engineer asking Long to approve material because “[t]he drawing states the RCE is to approve the material.” (App. 169). Long declined. (App. 169). FCI’s project manager forwarded the exchange that morning, complaining that Long, “the designated RCE,” had “express authority” under the Specifications but would not exercise it, meaning that “[d]ecisions that the RCE should be making, and can make per the Specifications, are a two, three, four, five, and sometimes six step process.” (App. 169). That is a

contemporaneous example of FCI's delay claim and an example of a factual dispute regarding TSC's role on the Project. (App. 1340 n.3).

The Court of Appeals reviewed the record (App. 1340-42), identified evidence supporting both parties' accounts (App. 1340-41), viewed that evidence in the light most favorable to FCI as the non-moving party (App. 1340), and concluded that genuine issues of material fact precluded summary judgment. (App. 1341-42). The Court of Appeals correctly left the disputed factual predicate for further proceedings. In so doing, the Court of Appeals adhered to South Carolina precedent noting:

Based on *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.* and *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital*, 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 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.

(App. 1339-40). The Court of Appeals did not decide that TSC owed FCI a duty, nor did it hold that all similarly situated engineers owe a duty. It held only that, based on the record before it, TSC was not entitled to summary dismissal of FCI's negligence claim.

II. The Court Should Affirm the Court of Appeals' Opinion Because TSC Cannot Convert South Carolina's Facts-and-Circumstances Inquiry Into a Contract-Only Question of Law.

TSC argues that, because duty is generally a question of law, the Court must resolve every fact bearing on the parties' relationship from the Project Contracts alone, and that the Court of Appeals erred both by converting duty into a jury question and by considering evidence of TSC's actual conduct. *See Appellant's Br.*, p. 35-40. TSC misunderstands South Carolina law and the Court of Appeals' opinion. In South Carolina, the court determines whether the law recognizes a

duty between persons in a particular relationship. But when the existence or nature of that relationship depends on disputed facts, the factfinder must resolve them before the court can apply the legal rule. That distinction follows directly from *Tommy L. Griffin I*, *Cullum*, and Rule 56, and it supports affirmance of the Court of Appeals and remand here.

A. South Carolina Law Distinguishes the Legal Duty Question From the Disputed Factual Predicate on Which It Depends.

The question of “whether [a duty] should be imposed between two classes of people is a question for the court.” *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 927 (2011) (quoting *Hendricks*, 353 S.C. at 459, 578 S.E.2d at 715-16). “A tort-feasor’s duty arises from his relationship to the injured party.” *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325-26 (1986) (hereinafter *State Ports Authority*). South Carolina law requires two related inquiries. The first is legal: whether South Carolina law recognizes that a person in the alleged relationship may owe the asserted duty. The second is factual: whether the parties actually occupied that relationship. The court resolves the first inquiry. The factfinder resolves the second when material facts or reasonable inferences are disputed.

Tommy L. Griffin I answered the first question for design professionals and contractors:

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 between the parties or with third parties.

320 S.C. at 55, 463 S.E.2d at 89. The Court then identified the facts supporting that relationship:

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.

Id. at 56, 463 S.E.2d at 89. Finally, it prescribed a facts-and-circumstances inquiry, stating: “[w]hether such a duty exists will depend on the facts and circumstances of each case.” *Id.* at 55-

56, 463 S.E.2d at 89.

Cullum demonstrates how that inquiry operates at summary judgment. After the lower courts held that an architect owed no duty to a subcontractor, this Court reversed, holding:

Generally, an architect does not have a duty to assure payment to subcontractors; however, special conditions in these contract documents may have given rise to a special relationship with subcontractors, and therefore a duty of care. We find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum, which would give rise to a duty on the part of Architect.

344 S.C. at 433, 544 S.E.2d at 842.

TSC relies on this Court's decision in *Wright v. PRG Real Estate Mgmt., Inc.* for the proposition that, where there is no duty, a "defendant in a negligence action is entitled to a judgment as a matter of law." 426 S.C. at 212, 826 S.E.2d at 290; Appellant's Br., p. 16, 35. That proposition does not answer the questions here. However, the next paragraph in *Wright* explains:

The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder.

Id. (quoting *Vaughan v. Town of Lyman*, 370 S.C. 436, 446-47, 635 S.E.2d 631, 637 (2006)). The Court therefore reversed summary judgment and held that "a jury must resolve the unique factual questions pertinent to the existence of" the duty. *Id.* at 220-21, 826 S.E.2d at 295; *see also Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 194, 771 S.E.2d 639, 644 (Ct. App. 2015) ("Although the court must determine whether the law recognizes a duty, '[t]he existence of a physician-patient relationship is a question of fact for the jury.'"). Thus, *Wright* confirms, rather than defeats, the distinction applied below.

TSC argues that if the Court of Appeals is affirmed, "practically every professional liability dispute" will become "irresolvable at summary judgment," because a plaintiff will always be able to allege facts about the parties' relationship. Appellant's Br., p. 36. This misunderstands the role

of summary judgment. A trial court remains free to grant summary judgment where the undisputed facts place the defendant within or outside a recognized relationship, and it remains obligated to deny summary judgment where, as here, the facts material to the existence of that relationship are disputed. *See Rule 56(c), SCRPC*. In short, courts in South Carolina grant summary judgment on duty in two situations, and the Court of Appeals' holding disturbs neither.

In the first situation, the law recognizes no duty between the two classes of persons at all, so no fact about the particular parties can create one. Examples of this are found in the cases TSC invokes. In *Hendricks*, this Court declined to recognize a duty running from an academic advisor to a student, 353 S.C. at 457-59, 578 S.E.2d at 714-16, and in *Oblachinski v. Reynolds*, this Court declined to recognize a duty running from an examining physician to a person later accused of abuse. 391 S.C. 557, 563, 706 S.E.2d 844, 847 (2011). *See Appellant's Br.*, p. 35-36. A trial court facing a claim of that kind may grant summary judgment without examining the record, because the answer does not depend on the record. TSC cannot argue that this case falls in that category because *Tommy L. Griffin I* recognized the duty running from a supervising engineer to a contractor thirty years ago.

In the second situation, the law recognizes the duty for the class, but the facts that place the parties inside or outside the relationship are undisputed. For example, in *State Ports Authority*, this Court answered a certified question on facts the Court assumed to be true, 289 S.C. at 375 n.1, 346 S.E.2d at 325 n.1, and in *Roberts v. Hunter*, the undisputed facts permitted a directed verdict that no doctor-patient relationship existed and therefore no attendant duty was created. 310 S.C. 364, 367, 426 S.E.2d 797, 799 (1993). A trial court facing a claim of that kind may also grant summary judgment, because there is nothing for a factfinder to decide. As demonstrated in this brief, TSC cannot place this case in that category either.

That means this Court is faced with a third circumstance in which the law recognizes the duty between the two classes of persons, and the facts that determine whether these parties occupied the relationship are disputed. In that situation, summary judgment is not available. *See Cullum*, 344 S.C. at 433, 544 S.E.2d at 842 (reversing summary judgment because “it is a factual issue whether these circumstances give rise to a special relationship”); *Wright*, 426 S.C. at 217-18, 826 S.E.2d at 293 (where “there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder”). The Court of Appeals held only that this case is in the third situation. (App. 1339). That holding does not enlarge the class of cases going to trial or shrink the class of cases resolvable on summary judgment.

B. The Project Contracts Are Relevant, But They Do Not Conclusively Define TSC’s Relationship with FCI to the Exclusion of the Remaining Record.

TSC objects to the Court of Appeals’ consideration of the facts and circumstances, arguing that TSC’s interpretation of its contract with Horry County is the only evidence relevant to the special relationship analysis and that sworn affidavit testimony concerning TSC’s actual conduct is “irrelevant” and “immaterial.” Appellant’s Br., p. 36-37. TSC’s demand that this Court limit its analysis to the Project Contracts has two related parts. First, it contends that its contract with Horry County and the engineering regulations conclusively define its relationship with FCI. *See* Appellant’s Br., p. 22-26. Second, it contends that any evidence of how TSC actually exercised authority is irrelevant. *See* Appellant’s Br., p. 35-38. TSC thus asks this Court to decide the special relationship issue “regardless of any evidence of TSC’s actual on-the-ground conduct.” Appellant’s Br., p. 39. But this is simply not the holding of this jurisdiction’s case law, and no South Carolina decision confines the facts and circumstances inquiry to contractual text. *Tommy L. Griffin I* considered what the engineer did during construction, 320 S.C. at 51-52, 463 S.E.2d at

86-87, and *Cullum* considered how the architect exercised its contractual authority, 344 S.C. at 431, 544 S.E.2d at 841. Both decisions examined the relationship as it operated in practice.

The Project Contracts are relevant to the analysis in *Tommy L. Griffin I* as part of the facts and circumstances courts must consider because they are evidence of TSC's undertaking to render professional services, carrying with it a duty independent of TSC's contract. *See Tommy L. Griffin I*, 320 S.C. at 54-55, 463 S.E.2d at 88 (engineer undertook to design and supervise the project, but this Court recognized that a duty "arising independently of any contract duties" supports tort); *see also Dixon v. Texas Co.*, 222 S.C. 385, 389, 72 S.E.2d 897, 899 (1952) (breach that "arises out of a liability independently of the personal obligation undertaken by contract" is a tort). The professional undertaking giving rise to a duty may run through a contract with someone other than the injured plaintiff. *See Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986) (duty "may be derived from the tort-feasor's contractual relationship with another"); *see also Shaw*, 426 S.C. at 198, 826 S.E.2d at 283 (a laboratory's duty to the employee "may arise from the laboratory's contractual relationship with the employer," and that the lack of privity "does not preclude the imposition of a duty."). While TSC's duty may arise from its professional undertaking to supervise FCI's work on the Project, the terms of TSC's contract with a third party, Horry County, cannot insulate TSC from liability to FCI. The reversal of the Court of Appeals' decision in *Cullum* is particularly instructive on this point.

In *Cullum*, the architect undertook, among other things, to review and certify payments to the general contractor. *Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.*, 336 S.C. 423, 429-30, 520 S.E.2d 809, 812-13 (Ct. App. 1999), *rev'd*, 344 S.C. 426, 544 S.E.2d 838 (2001). The Architect had the power to withhold payment certification if the general contractor did not pay subcontractors. *Id.* The general contractor was obligated to supply performance and payment

bonds that would ensure subcontractors were paid for labor and materials they supplied on the project. *Id.* at 430, 520 S.E.2d at 813. The bonds were never supplied and subcontractors went unpaid, but the Architect continued to certify payment to the general contractor. *Id.* at 429-30, 520 S.E.2d at 812-13. The Court of Appeals dismissed a claim from an unpaid subcontractor and adopted reasoning materially similar to TSC's, but this Court reversed.

The Court of Appeals described the contract documents in *Cullum* as follows:

The General Conditions to the Contract for Construction contained the following provision: . . . The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or a Subcontractor or (3) between any persons or entities other than the Owner and Contractor. . . . The Standard Form Agreement that Owner executed with Architect contained this language in Provision 9.7: "Nothing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect."

Id. at 428 n.4, 520 S.E.2d at 812 n.4. The Court of Appeals relied on those contractual limitations, the absence of "specific contractual authority to halt construction," and its conclusion that the architect did not administer payments for the subcontractor's benefit to find that the architect had no duty to the general contractor. *Id.* at 431-32, 520 S.E.2d at 814.

This Court reversed the Court of Appeals' decision after considering both the contract documents and evidence of the architect's conduct, including that the architect "knew there was not a payment bond and that subcontractors were not being paid, Architect continued to certify payments and reduced the amount Owner retained from the payments from ten percent to five percent." 344 S.C. at 431, 544 S.E.2d at 841. The holding turned on "whether these circumstances give rise to a special relationship." *Id.* at 433, 544 S.E.2d at 842.

Contractual disclaimers in the architect's contract in *Cullum* could not conclusively negate the existence of a special relationship. TSC's attempt to do the same here should be rejected. The affidavits, correspondence, organizational materials, project records, and Project Contracts are

relevant to the authority arising from TSC's undertaking to supervise FCI's work on the Project. The facts-and-circumstances test does not limit the inquiry to the Project Contracts.

C. SCDOT's Retention of Final Authority Does Not Eliminate TSC's Separate Day-to-Day Authority.

TSC argued below that the "central and obvious difference" between this case and *Tommy L. Griffin I* is that the engineer there had ultimate decision-making authority, while arguing that SCDOT retained final authority here. (App. 1295).⁶ In its reply, FCI pointed out that nowhere in the published *Tommy L. Griffin I* opinion, the subsequently published *Tommy L. Griffin II* opinion, or in the underlying briefing did the Supreme Court, Court of Appeals, or parties ever discuss the engineer's final decision-making authority. (App. 1329); *see also Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002). TSC, nonetheless, continues to make unsupported claims about the details of the contracts at issue in *Tommy L. Griffin I*. *See* Appellant's Br., p. 27 ("The engineer's contract gave it direct supervisory and decision-making authority over the contractor."). Any effort to compare the scope of TSC's contractual authority and the engineer's authority in *Tommy L. Griffin I* should be disregarded because there is no contractual language available for comparison.

Regardless, TSC's argument regarding its lack of "final decision-making authority" is unavailing. TSC treats SCDOT's scope of authority and TSC's delegated operational authority as mutually exclusive. The Project Contracts do not. The IGA provides that SCDOT will administer

⁶ TSC's Scope of Services states, under the heading "Project Management" that: "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." (App. 837). TSC's interpretation of SCDOT's so-called "final decision making authority" omits key language from this provision, including: "when necessary" from SCDOT's power to make final decisions and "or his designee" regarding responsibility for day-to-day supervision (Appellant's Br., p. 25).

the Project, but also contemplates that the County “shall appoint a designee to serve as the day-to-day contact for the County” and requires that “[p]reconstruction and construction services shall be obtained from third-party consultants or contractors by or on behalf of the County.” (App. 793). TSC was retained to provide those services. (App. 320-772). The Standard Specifications likewise grant the RCE’s representative extensive authority to inspect work, reject defective material, and suspend improperly performed work. In that regard, Section 105.9, titled “Authority and Duties of the RCE’s Representatives,” provides in full:

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.

(App. 990) (emphasis added). TSC conceded below that it served as the RCE’s representative and possessed the authority Section 105.9 confers. (App. 1297-99).

The limitations TSC cites restrict the RCE representative’s power to “alter or waive the provisions” of the Construction Contract between FCI and Horry County. They do not erase the representative’s operational authority in this section or any other. For example, § 105.10 provides that “[a]ny 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.” (App. 990) (emphasis added). Even if SCDOT retained the right to make a final decision, that does not establish that TSC lacked authority to inspect, reject, or suspend work in the first instance.

TSC's own prior position underscores the factual dispute. It told the Court of Appeals that "[t]he 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." (App. 1298). It also acknowledged that "it is clear that Long was a Representative of RCE," with "the authority to reject defective material and to suspend any work that is being improperly performed subject to the final decision of the RCE." (App. 973 (quoting Standard Specifications § 105.9)). Those concessions cannot be reconciled with TSC's present contention that evidence in the record of its actual exercise of that authority is irrelevant. The record also contains evidence that TSC exercised that authority. *See supra* Part I.A. At a minimum, the interaction between SCDOT's allegedly retained final authority and TSC's delegated and exercised day-to-day authority presents a genuine issue of material fact that cannot be resolved against FCI on summary judgment.

D. The Parol Evidence Rule Does Not Exclude Evidence of TSC's Actual Relationship With FCI.

TSC separately argues that the Court of Appeals erred by considering sworn affidavit testimony concerning TSC's conduct. *See* Appellant's Br., p. 38-40 ("[E]ven if Hutcherson's affidavit could create a genuine dispute of material fact, the court of appeals *erred by considering it at all.*") (emphasis added). TSC argues that its relationship with FCI is defined not by its conduct toward FCI, but by its contract with a third party, Horry County, and therefore Mr. Hutcherson's testimony is extrinsic evidence barred by the parol evidence rule. *Id.* But that argument conflates evidence offered to vary a contract's terms with evidence offered to establish the parties' actual relationship for purposes of a tort claim.

Rule 56(c) expressly directs courts to consider pleadings, depositions, answers to interrogatories, admissions, and affidavits. Rule 56(c), SCRCF. The Hutcherson affidavit and

FCI's interrogatory responses describe TSC's conduct, authority, and control on the Project. (App. 858-63, 932-37). They do not seek to alter TSC's agreement with Horry County.

"The parol evidence rule has been held inapplicable to tort causes of action . . . since the rule is one of substantive contract law." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) (holding that neither the parol evidence rule nor a merger clause barred the tort claim). FCI offered the record evidence to show what occurred between TSC and FCI during construction, not to amend or interpret TSC's contract with the County. The Court of Appeals properly considered that evidence in determining whether the record presented a factual dispute concerning the parties' relationship.

III. The Court Should Reject TSC's Benefit-and-Reliance Test Because It Is Unpreserved and Contrary to South Carolina Law.

TSC's principal argument is that "a legal duty sufficient to support a tort suit exists only where the defendant has offered its services for the plaintiff's benefit, such that the plaintiff can reasonably rely on the defendant's prudent provision of those services." Appellant's Br., p. 15. That test was not presented to the Court of Appeals and should not be considered here. TSC's test repackages implied warranty principles as a limit on tort liability, yet no South Carolina court has applied such a test to a negligence claim against a supervising engineer. Even if the test were the law, the record would present genuine issues on both elements. This Court should affirm the Court of Appeals' decision and reject TSC's newly-presented test.

A. TSC Did Not Present Its Benefit-and-Reliance Test Below.

This Court reviews the questions the petition raised, and the petition may only raise questions that were raised in the Court of Appeals. Rule 242(d)(1), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

TSC's test has changed at every stage of this case and no court in this case has ruled on the test TSC now presents. In its brief to the Court of Appeals, TSC only mentions benefit and reliance twice and neither reference relates to a tort duty. First, TSC claimed that FCI could not establish apparent agency because it had not shown that it "relied on any such representation" by SCDOT. (App. 1307). Second, TSC argued FCI lacked third-party-beneficiary rights because TSC and Horry County never "intended to create a direct, rather than an incidental or consequential, benefit" to FCI. (App. 1316).⁷ Accordingly, neither of these arguments raised at the Court of Appeals offers benefit and reliance as an element of a special relationship.

Furthermore, TSC's Petition for Certiorari introduced the Restatement (Second) of Torts § 552 for the first time, and FCI objected that the argument was unpreserved. *See* TSC Pet. at 19-21; *see also* FCI Return at 14 n.5. In its Opening Brief, TSC presented a new benefit and reasonable reliance test that it claims it derived from the Restatement (Second) and (Third) of Torts and decisions of this Court. Appellant's Br., p. 15-19. Neither lower court ruled on this test.

The questions on which certiorari was granted ask whether the engineering regulations foreclose a duty and whether the Court of Appeals erred in treating the existence of the relationship as a question of fact. Prior to its petition, TSC never presented the combined benefit-and-reliance test it now asks this Court to adopt. A substantive test with elements neither lower court considered

⁷ TSC mischaracterized this case as one in which the courts in Vermont required reliance on professional services to create a special relationship. (App. 303). In *EBWS*, the parties at issue were in privity and the defendant was a contractor being sued by its customer. *EBWS, LLC v. Britly Corp.*, 181 Vt. 513, 515, 928 A.2d 497, 501 (2007). The question before the court involved a narrow exception to its economic loss doctrine in which "the determining factor is the type of relationship created between the parties," in particular whether the defendant contractor was a "professional" for purposes of Vermont's bar to recovery of economic losses for parties in privity. *Id.* at 524-25, 928 A.2d at 508. South Carolina has no such privity bar for torts related to tortfeasors undertaking to perform professional services. *See Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 187, 918 S.E.2d 532, 537 (2025).

substitutes a new argument and analysis for the one both lower courts performed and should not be decided for the first time by this Court. *See, e.g., Oblachinski*, 391 S.C. at 563-64, 706 S.E.2d at 847 (declining to decide whether there was a duty based on a recklessness theory that was pled in the plaintiff's complaint, because "at no time during the arguments on the motion before the circuit court, at the post-trial motion stage, or in briefs or oral argument before us was the issue of recklessness raised" and therefore the issue was not before the Court (citing *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state . . . do not answer questions they are not asked.")).

B. Even if Preserved, TSC's Benefit-and-Reliance Test Is Contrary to South Carolina Law.

TSC's new benefit-and-reliance test is unsupported by South Carolina law, rooted in outdated privity principles, and is contrary to this Court's precedent. South Carolina does not require proof of benefit or reliance to establish a special relationship giving rise to a professional duty. To the contrary, this Court has already rejected the substance of TSC's newly-proposed test.

1. TSC's Test Is a Privity Defense Renamed.

South Carolina has abolished the privity defense to tort liability and TSC seeks to revive it through a so-called benefit-and-reliance test despite the fact that this Court in *Tommy L. Griffin I* expressly declined to "resurrect the privity defense" on similar facts. *Tommy L. Griffin I*, 320 S.C. at 56, 463 S.E.2d at 89. TSC's test asks whether the professional furnished something the plaintiff was entitled to rely upon, and whether the plaintiff relied. Appellant's Br., p. 15-22. That is the inquiry South Carolina uses for implied warranty, not for negligence. "[I]f a party furnishes plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." *Beachwalk Villas Condo. Ass'n v. Martin*, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991) (quoting *Hill v. Polar Pantries*, 219 S.C. 263, 271, 64 S.E.2d

885, 888 (1951)). *Tommy L. Griffin I* decided the negligence and implied warranty questions separately, reinstating both causes of action on different reasoning. 320 S.C. at 56-57, 463 S.E.2d at 89. The tort claim survived because the engineer owed the contractor a duty not to negligently design or supervise. 320 S.C. at 56, 463 S.E.2d at 89. The implied warranty claim survived because “one who undertook to design and oversee a construction project for another impliedly warranted the design and quality of construction despite the lack of privity between the parties.” *Id.* at 56-57, 463 S.E.2d at 89 (citing *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); *Beachwalk Villas*, 305 S.C. at 146, 406 S.E.2d at 374). TSC takes the rationale of the implied warranty claim and presents it as the rule of the negligence claim.

In TSC’s account, *Tommy L. Griffin I* “recognizes only that a construction engineer and a contractor can have a special relationship when the engineer’s services are intended to be relied upon by the contractor, such as when the engineer is tasked with designing the project,” Appellant’s Br., p. 16, and a special relationship exists “only where the engineer is tasked with responsibilities (such as designing construction plans) that are ‘intended to serve as a basis for reliance by the contractor in preparing a bid.’” Appellant’s Br., p. 28 (quoting Restatement (Third) of Torts § 6 cmt. b). That is the implied warranty of plans and specifications, which runs from the party who furnishes plans to the contractor who follows them. This is not FCI’s claim.

TSC traces its benefit and reliance test to *National Savings Bank of the District of Columbia v. Ward*, 100 U.S. 195 (1879). Appellant’s Br., p. 17, 20-21. *Ward* is a decision about privity where the Court ruled that “where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.” *Id.* at 206. South Carolina abandoned that rule as a limit on professional liability decades ago, and this Court has sought “to still all whispers of its

continued existence.” *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 345, 384 S.E.2d 730, 736 (1989). *Ward’s* own exception, for “an act performed in pursuance of some legal duty,” is the one *Tommy L. Griffin I* applied.

2. South Carolina Does Not Require Benefit or Reliance to Establish a Special Relationship Giving Rise to a Duty.

TSC attributes the benefit-and-reliance test to this Court, citing *Tommy L. Griffin I* for the proposition that a special relationship arises “when the engineer’s services are intended to be relied upon by the contractor, such as when the engineer is tasked with designing the project,” and *State Ports Authority* for the proposition that “reliance and dependency are hallmarks of any ‘special relationship.’” Appellant’s Br., p. 16, 19. TSC presents its test as a restatement of “decisions of this Court.” *Id.* at 16. Neither decision contains TSC’s test. Read in full, each case locates the duty in the relationship between the professional and the injured party, and each recognized a duty to a plaintiff who neither benefited from the professional’s engagement nor relied on its work.

a. Duty Arises from the Parties’ Relationship, Not from the Injured Party’s Benefit or Its Reliance on the Tortfeasor.

The holding of *Tommy L. Griffin I* is short and does not mention or suggest any requirement of benefit or reliance:

In the case *sub judice*, 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.

320 S.C. at 56, 463 S.E.2d at 89.

The tort claim addressed by the Court “turns on the determination of the source of the duty plaintiff claims the defendant owed,” and a tort action lies “[w]hen, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract.” *Id.* at 54-55, 463 S.E.2d at 88. The Court saw “no logical reason to insulate design professionals from

liability” when the professional “owes a professional duty to the plaintiff.” *Id.* at 55, 463 S.E.2d at 89. The words “rely,” “reliance,” “benefit,” and “intended” appear nowhere in that analysis.

The contractor in *Tommy L. Griffin I* did not complain of a design it relied upon. It complained that the engineer “wrongfully closed the job for nearly a month due to false allegations of OSHA violations,” “made demands of Griffin which were not in the contract,” “wrote a disparaging letter to Griffin’s bonding company,” and “erroneously interpreted the contract to the County and Griffin.” 320 S.C. at 51, 463 S.E.2d at 86-87. Each act exercised supervisory authority over the contractor’s work. None is a service “offered . . . for the plaintiff’s benefit.” The engineer worked for the County, was paid by the County, and closed the job on the County’s project. TSC’s test is incompatible with the holding in *Tommy L. Griffin I*.

Tommy L. Griffin I described its holding as a restatement of traditional concepts in modern terms and built it on decisions that located the duty in the relationship between the design professional and contractor. In *Kennedy v. Columbia Lumber & Manufacturing Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989), this Court adopted a framework that “focuses on activity, not consequence”: a builder who “acts in a way as to violate a legal duty” is liable “both in contract and in tort,” and the economic loss rule applies only “where duties are created solely by contract.” *Id.* at 345-47, 384 S.E.2d at 737. In *Carroll v. Isle of Palms Pest Control, Inc.*, 446 S.C. 177, 918 S.E.2d 532 (2025), decided last year, this Court reaffirmed *Tommy L. Griffin I* and stated the boundary between contract and tort without any reference to benefit or reliance. *Id.* at 187, 918 S.E.2d at 537. This Court found that the economic loss rule “does not apply . . . to the rendering of services by professionals, such as accountants, lawyers, engineers, and architects,” and what separates tort from contract is “some ‘active negligence or misfeasance’ that occurs outside the terms of the contract.” *Id.* at 187, 918 S.E.2d at 537-38 (quoting *Dixon*, 222 S.C. at 389, 72 S.E.2d

at 899). None of those decisions turned on whether the plaintiff was the intended beneficiary of the defendant's services or relied on them.

State Ports Authority is TSC's principal South Carolina authority for the test. Appellant's Br., p. 19 (citing *State Ports Authority*, 289 S.C. at 376-77, 346 S.E.2d at 326). TSC claims that "the existence of a legal duty depends on whether the defendant offered a specialized professional service to be performed for the benefit of the plaintiff and whether the plaintiff reasonably could rely on the defendant to provide it with that service." *Id.* Nothing in *State Ports Authority* supports the test TSC attributes to it.

Here is what this Court actually said in *State Ports Authority*: "A tort-feasor's duty arises from his relationship to the injured party. . . . This relationship may arise out of the tort-feasor's contractual relationship with a third party." 289 S.C. at 376, 346 S.E.2d at 325-26. The opinion's only mention of "reliance" does not relate to the holding. *Id.* ("Consultants such as BAH may be found liable in negligence to non-contracting parties who have reasonably relied on their reports in taking some action."). This Court's holding follows that sentence:

We hold a duty to use due care, running from a consultant to the commercial competitor who is being critiqued, arises when the consultant undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over the other.

Id. at 376-77, 346 S.E.2d at 326. The plaintiff was the S.C. Ports Authority, the competitor injured by the defendant consultant's report. The consultant's engagement was not for the plaintiff's benefit, but for the benefit of the Georgia Ports Authority. *Id.* at 375, 346 S.E.2d at 325. The plaintiff did not rely on the report because it was the subject of the report. *Id.* ("The Georgia Ports Authority (GPA) contracted with Booz-Allen & Hamilton (BAH), a consulting firm, to do a report comparing the merits of the Savannah port with the Charleston port for commercial traffic.").

This Court found that a duty ran from the reporting consultant to the S.C. State Ports Authority because it was the direct object of the consultant's undertaking as "the commercial competitor who is being critiqued" and the consultant "knew or should have known the report was intended to be used by GPA as a marketing device." *Id.* at 376-77, 346 S.E.2d at 326. *State Ports Authority* supports FCI's claims, because, like in that case, FCI is the contractor TSC was hired to supervise, the direct object of TSC's undertaking in the same sense that the Ports Authority was the direct object of the consultant's investigation and report. This requirement also explains the Court's decision not to extend the duty to those whose commercial profit depends on the use of the port. *Id.* at 377, 346 S.E.2d at 326.

The close nexus between the tortfeasor and the injured party is essential to the creation of a duty arising out of a special relationship. This nexus is apparent where the plaintiff is the object of the professional undertaking and suffers foreseeable injuries arising from the negligent performance. *See, e.g., State Ports Authority*, 289 S.C. at 376-77, 346 S.E.2d at 326 (duty to the competitor "being critiqued," but no duty to those whose relationship was "far too attenuated"); *Shaw*, 426 S.C. at 199, 199 n.1, 826 S.E.2d at 283, 283 n.1 (the purpose of the professional's work was to drug test the employee and economic injury was therefore foreseeable); *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (builder owed duty to subsequent home purchaser and "[t]he key inquiry is foreseeability, not privity"). Other courts outside of South Carolina have described a similar feature, such as a "close nexus," *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 398, 549 S.E.2d 266, 272 (2001), or a duty flowing "from the parties' working relationship," *Davidson & Jones, Inc. v. New Hanover Cnty.*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584 (1979).

Each case relied upon by TSC recognizes a duty to the party at whom the professional's work was directed, whether or not that party was the client, the beneficiary, or a relying party. Neither states the test TSC attributes to it. TSC's test is not a restatement of *Tommy L. Griffin I* and *State Ports Authority*. It is a new substitute test without support.

b. This Court Rejected TSC's Formulation in *Cullum*.

Each component of TSC's benefit-and-reliance test was rejected when this Court reversed the Court of Appeals in *Cullum*. The Court of Appeals in *Cullum* refused to find a duty running from the architect to a subcontractor on four grounds, and TSC advances each one here:

<i>Cullum</i> Court of Appeals (reversed)	TSC's Opening Brief
Architect's contract "limits Architect's contractual duties to Owner's benefit." 336 S.C. at 431, 520 S.E.2d at 813.	TSC's services were "for [the] use and benefit of [Horry] County." Appellant's Br., p. 23 (quoting App. 818).
"Nothing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party." <i>Id.</i> at 428 n.4, 520 S.E.2d at 812 n.4.	"Nowhere in the contract, however, did TranSystems undertake duties owed to Flatiron." Appellant's Br., p. 23.
Architect "did not have specific contractual authority to halt construction." <i>Id.</i> at 432, 520 S.E.2d at 814.	TSC "did not administer the construction contract as the ultimate decisionmaker." Appellant's Br., p. 28.
Architect did not act "for the subcontractor's benefit." <i>Id.</i>	"[T]he dispositive inquiry is whether the defendant operated for the plaintiff's benefit." Appellant's Br., p. 19.

This Court reversed *Cullum* and held that "it is a factual issue whether these circumstances give rise to a special relationship," and that "further inquiry into the facts of the case is desirable to clarify the application of the law." 344 S.C. at 433, 544 S.E.2d at 842. This Court rejected every reason the Court of Appeals used in *Cullum* to resist a finding of duty. Thus, the closest South Carolina has come to adopting TSC's test ended with this Court rejecting it. It should do so again.

The Court of Appeals applied *Tommy L. Griffin I* and *Cullum* as written. It held that "[t]he

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,” and “[j]ust like the engineer in *Tommy L. Griffin*, TSC had the right and duty to inspect and halt construction.” (App. 1341).⁸

IV. TSC’s Professional Obligations Do Not Foreclose Its Duty of Care to FCI.

TSC asserts that a licensing board’s rules of professional conduct requiring disclosure of conflicts to a client, and authorizing Board discipline for noncompliance, extinguish a common law duty recognized in South Carolina for more than 30 years. They do not.

In *Tommy L. Griffin I*, this Court examined established principles of professional tort liability across multiple professions, including attorneys, architects, and accountants, and recognized that a professional duty may, in appropriate circumstances, extend to third parties independent of contractual privity. 320 S.C. at 55-56, 463 S.E.2d at 88-89 (citing *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888 (1981) (attorneys); *Gilliland v. Elmwood Props.*, 301 S.C. 295, 391 S.E.2d 577 (1990) (architects); *Georganne Apparel v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991) (accountants)). Based on that analysis, this Court concluded there was “**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 between the parties or with third parties.” *Id.* at 55, 463 S.E.2d at 89 (emphasis added). TSC now urges this Court to abandon that

⁸ TSC’s test, even if adopted, would not produce judgment for TSC. It would produce two fact questions. Whether FCI would have benefited from TSC’s undertaking to supervise its work on the Project and whether FCI relied upon such supervision are factual questions not resolved below and would require remand. See *Unlimited Servs., Inc. v. Macklen Enters., Inc.*, 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (the “general rule is that questions concerning reliance and its reasonableness are factual questions for the jury”); *Roundtree Villas Ass’n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984) (remand where duty arose upon the defendant’s undertaking, leaving questions of fact not resolved below); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 146, 638 S.E.2d 650, 662 (2006) (issues not addressed by the parties may be explored on remand).

reasoning by holding that a duty to third parties can never arise due to an alleged conflict of interest. That position would require a fundamental departure from South Carolina’s professional negligence jurisprudence and could shield a wide range of professionals subject to conflict-avoidance rules.

A. Professional Standards Do Not Immunize an Engineer From the Duty Not to Negligently Supervise a Project.

The South Carolina Rules of Professional Conduct for Engineers and Land Surveyors (the “Rules”) do not preclude the creation of duties to third parties on the basis that such a duty would create a conflict of interest. *See* S.C. Code Ann. Regs. 49-100 *et seq.* Nor does a duty to exercise reasonable care in supervising a contractor’s work create a “conflict of interest” under the Rules. The conflict of interest provisions prescribe how an engineer must address such relationships. The Rules do not confer tort immunity.

The Rules are “promulgated in accordance with the Code of Laws of South Carolina (1976, as amended), Title 40, Chapter 22” and “delineate specific obligations engineers and surveyors must meet.” S.C. Code Ann. Regs. 49-300. The purpose of Title 40, Chapter 22 is, among other things, to “safeguard life, health, and property and to promote the public welfare,” “promote the accountability for engineering practice,” and to “support licensure as the basis of accountability.” S.C. Code Ann. § 40-22-2. The Board may determine licensure requirements, establish a code of professional ethics, and discipline licensees “in a manner provided for in this article.” S.C. Code Ann. § 40-1-70 (powers granted to the Board under S.C. Code Ann. § 40-22-70).

The Rules state that the “Engineer or Surveyor shall avoid conflicts of interest.” S.C. Code Ann. Regs. 49-304. The term “conflicts of interest” is not defined, but the Rules mandate that engineers disclose any “business association, interests, or circumstances which could influence their judgment or the quality of their service.” *Id.* 49-304(A). These provisions also allow

engineers to accept compensation from multiple parties for services on the same project, provided “the circumstances are fully disclosed and agreed to, by all interested parties.” *Id.* 49-304(B). This disclosure-and-consent framework permits, rather than categorically prohibits, third-party relationships. The Rules nowhere purport to affect duties arising independently under law.

Thus, the Rules govern professional discipline, not the existence of civil duties. They neither extinguish the duty recognized in *Tommy L. Griffin I* nor convert a permissible project relationship into immunity.

1. Ethical Rules May Define the Standard of Care, but They Do Not Create or Extinguish Legal Duties.

This Court has already distinguished professional conduct rules from civil duties. In *Hendricks*, this Court observed that “[a]n affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.” *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714 (the Court does not include professional licensing regulations among its enumerated sources of affirmative legal duties). In *Spence v. Wingate*, an attorney argued that his duty to a former client was “limited to the requirements of Rule 1.9” of the Rules of Professional Conduct. 395 S.C. at 161, 716 S.E.2d at 927. The Court disagreed. *Id.* (citing *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714). “It is the breach of a duty, not the breach of a rule, that is of determinative import.” *Id.* (citing *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 436 n.5, 472 S.E.2d 612, 614 n.5 (1996)). The rules “are intended for guidance and disciplinary purposes, not to form the basis for civil litigation,” and duties owed to the plaintiff “are not controlled by the Rules of Professional Conduct.” *Id.* at 161-62, 716 S.E.2d at 927. The duty in *Spence* arose from the parties’ relationship. The professional rule was, at most, evidence of what that relationship required. *Id.*

The Court in *16 Jade Street, LLC v. R. Design Construction Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013) applied the same principle to a licensing statute similar to the statute relied upon by TSC. The trial court read a licensee’s “professional responsibility” under the Residential Home Builders Act to include civil liability. *Id.* at 389, 747 S.E.2d at 773. This Court reversed, stating: “we disagree with the court’s conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual’s license are to be meted out specifically by the appropriate licensing board, not a civil court.” *Id.* at 390, 747 S.E.2d at 773. The licensing regime and negligence law occupy separate spheres. A license neither creates nor repeals a tort duty.⁹

2. Even If a Conflict Existed, the Rules Prescribe Disclosure, Not Immunity from Liability for the Engineer’s Own Negligence.

Under Regulation 49-304(A), when a conflict “with employer or client” is unavoidable, “the Engineer or Surveyor shall forthwith disclose the circumstances to their employer or client.” S.C. Code Ann. Regs. 49-304(A). Subsection B bars compensation from more than one party on the same project “unless the circumstances are fully disclosed and agreed to, by all interested parties.” *Id.* 49-304(B). The Regulation does not excuse an engineer facing a conflict from an otherwise applicable duty. It requires disclosure.

TSC conflates an engineer’s obligation to disclose compensation arrangements from multiple parties on the same project with an alleged immunity from liability for violating legal

⁹ TSC again puts forth *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001) for the proposition that in West Virginia, the “existence and scope of a duty . . . may be defined by . . . relevant ‘rules of professional conduct.’” Appellant’s Br., p. 36; *see also* TSC Pet. at 10-11 (“The same rule should and must apply in South Carolina . . .”). As explained in FCI’s return, the West Virginia Supreme Court in *Eastern Steel* found that the *existence* of a special relationship that creates a duty is not based upon the professional licensure rules, but the *scope* of an existing duty may be further defined by said rules. *See* FCI Return at 14-15; *see also Eastern Steel*, 209 W. Va. at 401, 549 S.E.2d at 275.

duties to third parties. No aspect of this tortured reading holds water. In a dual-compensation arrangement, the engineer has privity with both entities, which is distinct from owing a duty to a third party based on a special relationship. TSC is in privity only with Horry County and accepts no compensation from FCI. The existence of a special relationship with FCI is not regulated or prohibited by the Rules.

TSC's argument fully unravels upon its treatment of disclosure and waiver. TSC argues that disclosure and consent here "are cold comfort" because "there is no agreement in which to make the required disclosures." Appellant's Br., p. 32 (TSC cites to no authority for the proposition that only privity can make a waiver effective).¹⁰ In its rehearing petition below, TSC went further and faulted FCI for producing "no evidence of any waiver of conflict by all interested parties." (App. 1350-51). Under TSC's inverted view of its own ethical rules, when TSC violates its ethical obligation to avoid conflicts of interest, TSC does not need to produce evidence that the conflict was waived, but the party with whom TSC is allegedly conflicted must produce that evidence. In effect, TSC argues that it is immune from tort liability because it failed to satisfy its own ethical obligation to avoid a conflict of interest with Horry County by agreeing to supervise FCI's work. On that theory, FCI must disprove the alleged conflict through evidence of waiver before TSC may be held liable for its negligent supervision of FCI's work.

¹⁰ In its petition for rehearing, TSC invents contract terms from *Tommy L. Griffin I*, claiming without support that "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." (App. 1352). No part of this analysis appears in *Tommy L. Griffin I* or elsewhere. TSC has yet to explain how the Rules permit a duty in *Tommy L. Griffin* and every other related professional liability case but forbids one here. As FCI noted below, neither the decisions nor publicly available briefing in *Tommy L. Griffin I* include the contract terms necessary to support the analysis TSC asks this Court to adopt.

This Court resolved this issue in *Spence*. Wingate, the attorney in that case, “never informed Mrs. Spence of any potential conflict of interest that he had in representing the estate, nor did he seek her consent to, or a waiver of, any conflict of interest.” 395 S.C. at 153, 716 S.E.2d at 923. The Court did not hold that the undisclosed conflict extinguished his duty. It held that the duty survived and that the statute he invoked “does not purport to eliminate all obligations or duties the attorney might have to parties arising by other means.” *Id.* at 161-62, 716 S.E.2d at 927-28. A professional who fails to disclose a conflict answers to the licensing authority and, where a duty exists, may be liable in tort. The failure to disclose does not create immunity.

B. TSC Has No Conflict of Interest.

Regulation 49-304 addresses an engineer’s compensation and business interests. It does not treat the relationship between a supervising engineer and contractor as a conflict. Moreover, Horry County paid TSC to supervise FCI, so that relationship did not itself create a conflict.

1. The Engineering Rules Permit Engineers to Serve on Projects Involving Third Parties.

Regulation 49-304 has five operative subsections governing financial or business interests. None regulates the existence of legal duties. Subsection A requires disclosure of conflicts “with employer or client” and of “any business association, interests, or circumstances which could influence their judgment or the quality of their service.” S.C. Code Ann. Regs. 49-304(A). Subsection B prohibits accepting “compensation, financial or otherwise, from more than one party for services on the same project” without disclosure and consent. *Id.* 49-304(B). Subsection C prohibits accepting “financial or other valuable considerations from material or equipment suppliers for specifying their projects.” *Id.* 49-304(C). Subsection D prohibits accepting “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.” *Id.* 49-304(D).

Subsection E addresses engineers in public service. *Id.* 49-304(E). TSC was paid by one party, accepted nothing from FCI, and had no business interest in FCI's work. Under the Regulation's text, TSC had no conflict to disclose.

2. The Engineering Rules Do Not Treat a Supervising Engineer's Relationship With the Contractor as a Conflict of Interest.

Regulation 49-304 addresses a conflict "with employer or client," arising from a "business association, interests, or circumstances which could influence their judgment or the quality of their service." S.C. Code Ann. Regs. 49-304(A). A legal duty to inspect with reasonable care is not a business association or a competing interest. It is the service Horry County paid TSC for. Nothing in the duty *Tommy L. Griffin I* recognized pulls the engineer away from its client, because the client has no interest in negligent supervision.

TSC's attorney analogy fails because the professional obligations of engineers differ fundamentally from those of lawyers. While lawyers are hired to advocate for their clients against opposing clients, engineers are licensed to reach a correct result, regardless of whom it favors. TSC's example states that "an attorney retained by Client A to litigate against Party B owes loyalty and zealous advocacy duties to Client A and therefore cannot concurrently owe duties to Party B." Appellant's Br., p. 32. This comparison does not apply here because unlike Party B, FCI was hired by the same client as TSC to work towards a common goal. Accordingly, TSC's negligent supervision of FCI's work advances no one's interests: not the public's, not the County's, and not FCI's. TSC neither meets its professional obligation to the public nor violates any alleged prohibition against conflicts of interest when it supervises FCI's construction. Nor is TSC permitted to escape liability for negligently supervising FCI's work in the name of zealous advocacy against what TSC perceives as its "adversary" despite that adversary being hired to work for the same client as TSC. Further, the engineer's primary professional obligation is to the public,

not its client. *See* S.C. Code Ann. Regs. 49-301(A) (“The Engineer or Surveyor shall at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public.”). If the client overrules the engineer’s judgment in a way that endangers the public, the engineer must “notify other proper authority.” *Id.* 49-301(B).

3. The “Adversity” TSC Describes Is Not a Conflict of Interest Under the Rules.

TSC characterizes FCI’s complaint as being that TSC did “too good” a job. Appellant’s Br., p. 1, 34. It is not. A supervising engineer that rejects compliant work has not inspected rigorously; it has inspected wrongly. An inspector who sits on a critical submittal for 44 days has not been diligent; it has been absent. FCI does not claim that TSC held it too tightly to the specifications. It claims that TSC held it to requirements the specifications do not contain and failed to perform the ones they do. (App. 858-63, 936). FCI complains not of competent supervision, but of negligent supervision.

Woven throughout TSC’s Petition is the assertion that TSC and FCI occupy inherently adversarial positions. TSC Pet. at 5, 9, 13. TSC describes its role as one that “by design . . . is adversarial to Flatiron, whose work is being reviewed and criticized.” *Id.* at 13. This characterization is factually incorrect and legally self-defeating.

TSC’s own contract confirms that serving the County required working with FCI, not merely against it. Both FCI and TSC were hired to perform services for the County and were not inherently adverse. TSC’s client did not regard cooperation with the contractor as disloyalty to the owner. It required it. The Scope of Services required TSC to “interface and coordinate with the Contractor’s QC personnel on a daily basis.” (App. 839). TSC’s contract management tasks included “Partnering and disputes management,” “Contractor pay requests and estimate generation,” with “Verification and approvals,” and “Claims review.” (App. 838). The

Construction Contract TSC administered contains a partnering covenant under which the Contractor and Department agreed that “[e]ach will avoid hindering the other’s performance” and “[e]ach will cooperate in the common endeavor of the Contract.” (App. 336). When FCI sought relief from TSC’s inspection practices in 2017, SCDOT convened a partnering meeting that “resulted in TranSystems receiving instructions to cooperate with Flatiron’s rebar installation process.” (App. 861).

TSC’s contract required it to “furnish personnel and render professional engineering services for use and benefit of the County.” (App. 818). Its Scope of Services required it to “ensure that quality materials are being incorporated into the [P]roject, ensure that quality workmanship is utilized on the [P]roject, ensure that the work of the contractor is progressing in accordance with the proposed schedule.” (App. 837). When performed competently, these quality assurance obligations benefit the owner (who gets its contracted-for project), the contractor (who meets its contractual obligations), and the public. There is nothing inherently adversarial about competent professional supervision and inspection.

Even if TSC’s relationship with FCI were adversarial (which it is not), it would not result in immunity from liability. Under TSC’s theory, the *more* authority a professional exercises and the more “adversarial” the relationship, the *less* accountable the professional becomes. This contradicts the rationale in *Tommy L. Griffin I* and *Cullum* that with increased authority and control over the contractor (a special relationship) comes corresponding responsibility (a duty of care).

C. An Engineer’s Professional Obligations Support Accountability for Negligence, Not Immunity From It.

TSC closes with a prediction that recognizing a duty will create risk because the risk of “untold liability would loom over every construction project,” inspectors will grow timid, the cost of CEI services and of public construction “will inevitably increase,” and public safety will suffer.

Appellant's Br., p. 30, 33-35, 38. Thirty years of *Tommy L. Griffin I* have produced none of these results and this Court has addressed these concerns in the past and found duties nonetheless. Without a duty, the professional "is effectively immunized from liability," and recognizing the duty "advances a major policy goal of tort law: deterrence." *Shaw*, 426 S.C. at 200, 826 S.E.2d at 284. Recognizing a duty in *Shaw* meant the laboratory was "more likely to implement measures that ensure better accuracy." *Id.* at 200, 826 S.E.2d at 284.¹¹ FCI had no control over whom TSC assigned, how they were trained, or whether they read the specifications before rejecting work. A duty of care gives the party holding that control a reason to staff the job competently.

The alternative TSC proposes is immunity. TSC's argument would mean that it and every professional with similar obligations in South Carolina could act with impunity toward any party with whom it has a special relationship by creating a conflict of interest. This result is irreconcilable with the Rules' own stated purpose to "safeguard life, health, and property" and to "promote the accountability for engineering practice." S.C. Code Ann. § 40-22-2. It would be a perverse reading of rules designed to promote accountability within the engineering profession to conclude that they *immunize* engineers from accountability for professional negligence.

CONCLUSION

For the foregoing reasons, FCI respectfully requests that this Court affirm the Court of Appeals' reversal of summary judgment and remand this case for further proceedings. As set forth

¹¹ TSC cites to *Legal Aspects of Architecture, Engineering, and the Construction Process* 314 (Justin Sweet ed., 1994), for the proposition that the complexity of a construction project "makes it unlikely that expansion of professional liability [in this context] will place responsibility on the party on whom it ought to be placed." The sentence immediately preceding the language TSC quotes makes the opposite point, stating that "[e]xpanded liability can be and has been justified as a process for allocating responsibility to the persons who are responsible and who can best spread the loss." *Id.* Besides being multiple editions out of date and published the year before *Tommy L. Griffin I* was decided, it supports a finding of duty for the same reasons previously articulated by this Court.

above, the record presents genuine issues of material fact concerning the relationship between FCI and TSC, and neither TSC's unpreserved benefit-and-reliance test nor the Rules of Professional Conduct for Engineers entitles TSC to the categorical judgment of no duty it seeks.

Respectfully submitted,

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