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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2019-CP-40-01358  
Appellate Case No. 2020-001205

Amanda Godfrey .....Petitioner

vs.

Richland County and AOS Contractors, Inc.  
.....Respondents

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**RESPONDENT AOS CONTRACTORS, INC.’S INITIAL BRIEF**

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## **COUNTER STATEMENT OF ISSUES ON APPEAL**

- I. DID THE CIRCUIT COURT PROPERLY GRANT SUMMARY JUDGMENT TO THE RESPONDENT GENERAL CONTRACTOR WHERE APPELLANT'S EXPERT TESTIFIED THE SLOPE AT ISSUE WAS UNSTABLE PRIOR TO THE CONSTRUCTION PROJECT AND CONSTRUCTION ACTIVITIES DID NOT CAUSE DAMAGE TO APPELLANT'S PROPERTY?
- II. DID THE CIRCUIT COURT PROPERLY APPLY THE COMPETING AFFIDAVIT RULE TO AN EXPERT AFFIDAVIT THAT CONTRADICTED THE EXPERT'S PRIOR DEPOSITION TESTIMONY AND WAS SUBMITTED THE WEEK BEFORE THE SUMMARY JUDGMENT HEARING IN AN EFFORT TO MANUFACTURE A GENUINE ISSUE OF MATERIAL FACT?
- III. DOES THE COMPETING AFFIDAVIT RULE REQUIRE A PARTY OPPOSING AN AFFIDAVIT TO FILE A MOTION TO STRIKE OR OTHERWISE ASSERT ITS POSITION TEN DAYS PRIOR TO A DISPOSITIVE MOTIONS HEARING?
- IV. DID THE CIRCUIT COURT PROPERLY DENY APPELLANT'S MOTION FOR RECONSIDERATION WHERE APPELLANT'S EXPERT SUBMITTED A SECOND AFFIDAVIT THAT INTRODUCED NEW ISSUES AND CONTAINED AN UNSATISFACTORY EXPLANATION FOR CONTRADICTING HIS DEPOSITION TESTIMONY?
- V. SHOULD THE FAILURE OF APPELLANT TO ESTABLISH THE STANDARD OF CARE FOR A GENERAL CONTRACTOR SERVE AS AN ADDITIONAL SUSTAINING GROUND FOR AFFIRMING THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT?

## **INTRODUCTION**

The circuit court's grant of summary judgment in favor of AOS Contractors, Inc. ("AOS") should be affirmed because Appellant Amanda Godfrey ("Appellant") has failed to present any evidence creating a genuine issue of material fact with respect to the claims asserted.

## **STATEMENT OF THE CASE**

This lawsuit concerns a steep embankment at the rear of Appellant's property where Appellant's property meets the City of Columbia's ("City") property. Appellant alleges the embankment is not stable, which has damaged her property. Appellant filed her original Complaint on November 17, 2016 against the City of Columbia only. Appellant subsequently amended her Complaint on February 8, 2017, adding as defendants Richland County ("County"), Alta Planning & Design, and AOS, which participated in a construction project on the City's property adjacent to Appellant's property in the late 2015-2016 time frame.

AOS timely answered the Amended Complaint, denying that its work was negligent or that it caused any damage to Appellant's property. Appellant subsequently filed a Second Amended Complaint on September 12, 2017 against the same Defendants, asserting additional causes of action against the City and the County. AOS timely answered the Second Amended Complaint, again denying that its work was negligent or that it caused any damage to Appellant's property.

The parties proceeded with discovery and Appellant was deposed on November 14, 2017. Appellant's expert, Bill Matthews, P.E., was deposed on May 10, 2018. The action was then dismissed pursuant to a Rule 40(j) Order dated July 30, 2018 and was restored by an Order dated March 7, 2019.

AOS moved for summary judgment March 20, 2020, including within its motion all grounds, legal arguments, and supporting exhibits. A hearing on AOS's Motion for Summary Judgment, along with the City's and County's Motions for Summary Judgment, was set for July 16, 2020. On July 9, 2020, Appellant submitted affidavits of several people, including expert Bill Matthews who had previously been deposed. On July 14, 2020, AOS submitted a Supplemental Brief in Support of Summary Judgment in which it challenged the affidavit of Mr. Matthews. Also on July 14, 2020, Appellant submitted her Memo in Opposition to all Defendants' motions.

A hearing was held by remote means before The Honorable Robert E. Hood on July 16, 2020, in which counsel for all parties participated and had an opportunity to present oral argument to the court. On July 28, 2020, the circuit court issued an Order granting AOS's Motion for Summary Judgment.

On August 5, 2020, Appellant filed a Motion to Re-open and to Reconsider, along with another affidavit of expert Bill Matthews. On August 14, 2020, AOS filed a Memo in Opposition to Plaintiff's Motion to Reconsider. On August 18, 2020, the circuit court issued an Order denying Plaintiff's Motion to Re-open and Reconsider.

Appellant filed a Notice of Appeal initiating this appeal on August 27, 2020.

### **STANDARD OF REVIEW**

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

A motion for summary judgment shall be granted “if 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 judgment as a matter of law.” Rule 56(c), SCRCP (emphasis added). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citing *Bankers Trust of S.C. v. Benson*, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

### **STATEMENT OF FACTS**

Appellant is the current owner of the property located at 1715 Gadsden St. in Columbia and has resided there since 2012. This lawsuit concerns a steep embankment at the rear of Appellant’s property where Appellant’s property meets the City’s property.

In 2015, Phase II of the Vista Greenway Project was put out for bid. This project involved the construction of a pedestrian path from Elmwood Avenue to Finlay Park in downtown Columbia. The project was to be located on City property, and one section of the path ran at the bottom of the embankment in question.

AOS submitted its bid to construct phase II of the Vista Greenway project in August of 2015. (8/26/15 Bid Form for Vista Greenway Phase Two). Subsequently, in October 2015, the Columbia area suffered historic rainfall and flooding. After this weather event, on November 11, 2015, Appellant wrote to the City identifying significant erosion occurring on the embankment:

more of the embankment is sliding down the hill with the continued rains we are having. This all started with the historical flooding in October when all of the kudzu was washed to the bottom of the embankment. With nothing there to prevent further wash-outs and the continued rain in our area, the condition is getting worse.

(11/11/2015 Email Exchange between Amanda Godfrey and City officials, p. 2.) Appellant included photographs in her correspondence to illustrate the condition of the embankment and the washed away kudzu. (*Id.*)

It is undisputed that Appellant's November 11, 2015 communication to the City was prior to any construction activity associated with the Vista Greenway project, as AOS received notice to proceed with the project on November 20, 2015. (11/20/15 Notice to Proceed.) Despite having "gone on record" concerning her complaint with the condition of the City-owned embankment prior to any construction activities, Appellant included AOS in her Amended Complaint.

Appellant's complaint from the outset of this litigation is that she believes the embankment is not stable pursuant to a 2011 geotechnical report, which she attached to the original Complaint.<sup>1</sup> (Complaint, p. 1, ¶5.) In connection with prosecuting her action, Appellant retained a geotechnical engineer, Bill Matthews, P.E., as an expert. Mr. Matthews agreed with the opinion of the 2011 geotechnical report, concluding that the embankment was not stable because of its severe slope. (Matthews Deposition, p. 12:22–14:10.) AOS, of course, had nothing to do with this embankment at the time of the 2011 geotechnical report or at the time that Appellant complained to the City following the October 2015 historic rainfall event. Mr. Matthews acknowledged this fact, and based on his review of the discovery record and site visit, he was unable to opine that any

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<sup>1</sup>To the extent that Appellant complained of AOS's removal of vegetation on the slope – the vast majority of which the October 2015 flooding removed – it is undisputed that the vegetation has since grown back. (*See* Matthews Deposition, p. 41:2-7; November 2017 photograph attached as Exhibit H to AOS's Motion for Summary Judgment.)

construction activity had caused damage to Appellant's property or otherwise criticize AOS's handling of the project.

Based on Appellant's expert's inability to offer an opinion that AOS violated the standard of care or caused damage to Appellant's property, the circuit court granted summary judgment to AOS.

## ARGUMENT

### **I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO AOS BECAUSE APPELLANT'S EXPERT TESTIFIED THE SLOPE AT ISSUE WAS UNSTABLE PRIOR TO THE CONSTRUCTION PROJECT AND AOS'S CONSTRUCTION ACTIVITIES DID NOT CAUSE DAMAGE TO APPELLANT'S PROPERTY.**

In order to recover on either of her causes of action, Appellant must demonstrate that AOS has caused some damage to Appellant's property. *Steinke v. S.C. Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999)(stating the elements of negligence); *O'Cain v. O'Cain*, 322 S.C. 551, 562, 473 S.E.2d 460, 466 (Ct. App. 1996)(stating the elements of nuisance). Proving a causal link between construction activities and resulting damage to a neighboring property is plainly a subject for expert testimony, and Appellant appropriately retained an expert, Bill Matthews, P.E., to investigate the embankment at issue and render causation opinions. Mr. Matthews was deposed on May 10, 2018 and testified extensively concerning his opinions of the embankment and its impact on Appellant's property. Mr. Matthews' general opinion was that that the embankment on the City property is not stable based on the fact that it is too steep:

Q. And so your general opinion is that that slope is not stable; is that correct?

A. Yes.

Q. And that opinion is primarily based on the dimension of the slope; is that fair?

A. Yes.

Q. Okay. Was the slope stable at the time of the GS2 report?

A. GS2 indicated that it was not; that it had an insufficient factor of safety relative to the slope stability.

Q. And that's the reason that they made several recommendations for how to address that slope, correct?

A. Yes.

Q. Okay. Can you offer any comparisons of the stability of the slope at the time of the GS2 report versus today?

A. I would say it's similar when you talk about stability and slope stability modeling. An insufficient factor of safety indicates that a failure can happen. It does not provide any timing. We don't know whether that would be tomorrow, whether it will be a month or a year from now; it just simply says that it's -- it has an insufficient factor of safety. So it could occur at any time.

Q. And that was your opinion as well in your report is that you weren't putting a timeline on when failure may occur, correct?

A. That's correct.

Q. And there's no way to -- is there any way to do that?

A. No.

Q. Okay. You just -- basically you know that it wasn't stable back then and it isn't stable now, so you provided a recommendation of how to remedy it; is that a fair summary?

A. Yes.

(Matthews Deposition, p. 12:22–14:10.)

As demonstrated by this testimony, Mr. Matthews' opinion that the embankment was not stable was not based on any activity that took place during the Vista Greenway project, but rather upon his observations as to the geometry of the slope, which he testified was insufficient going back to 2011 when GS2 issued its report. In other words, Mr. Matthews' opinions were wholly unrelated to any work performed by AOS during the Vista Greenway project. He later made this opinion explicit in his testimony, as follows:

Q. So you would agree with me that although the kudzu was sort of in a dormant state when you visited the property, but has grown back and covers the slope, right?

A. Yes.

Q. So given the historical background of when Ms. Godfrey first identified and notified the city of this erosion problem and then the documents we looked at with respect to construction – do you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

Q. You can't testify to a reasonable degree of engineering certainty, for example, that any clearing and grubbing of any particular portion of the slope has caused a crack in the patio, correct?

A. I cannot.

Q. Or has caused a portion of the brick wall's foundation to be undermined, correct?

A. Correct.

(Matthews Deposition, p. 41:3 – 41:24.)

Not only did Mr. Matthews draw no causal link between the Vista Greenway project and Appellant's alleged property damage, he expressed no criticism of AOS's handling of the embankment issue. To provide some additional context, within the first couple weeks of the project AOS identified that the October 2015 flooding had dramatically changed the condition of the embankment and raised concerns about both the feasibility and appropriateness of the design professional's instruction to re-shape the embankment to a 1:1 slope. Mr. Matthews agreed with AOS's conduct and found it acted appropriately with respect to this issue:

Q. And just for the record, this is May 19th, 2016 – a letter from Michael Sheu and Kristen Puckett with the City of Columbia to Brian King of the Richland County PDT office, correct?

A. Yes.

Q. And in this short letter the city indicates that it would, quote, like to leave the areas located between station 15 to station 19 at the Laurel Street bridge as is, correct?

A. Yes.

Q. And it further states the city has determined that the existing kudzu located in the area will serve as erosion control, correct?

A. Yes.

Q. Okay. Based on this, do you have any criticisms of AOS as the contractor for not reshaping slopes in accordance with the Alta plans?

A. No.

Q. Do you have any criticisms of AOS for not installing erosion control measures based on this?

A. No.

Q. The contractor, from what you reviewed, basically did exactly what you would have expected them to do; is that fair?

A. Based on what I've reviewed, yes.

Q. And you agree that AOS raised this issue in December of 2015, and requested guidance on how to proceed?

A. Correct.

Q. Okay. And until they were provided with that guidance, you wouldn't expect them to take further action on this embankment would you? Once they've raised their hand and said we've got an issue here -- as a design professional, you wouldn't expect a contractor to go out and touch that, would you?

A. No.

(Matthews Deposition, p. 32:25 – 34:4.)

Appellant may have an issue with erosion in between her property and the City's. Nevertheless, during his deposition, Appellant's own expert could not identify any criticisms of AOS's work on the Vista Greenway project or identify any causal link between the project and Appellant's alleged property damage.<sup>2</sup> If anything, Mr. Matthews' testimony drives home the fact that the erosion issue, to the extent that it is ever proven to exist, is a product of the geometry of the City's embankment and has existed since at least 2011 when GS2 concluded the slopes in the area of the project were not stable. It simply took a historic rainfall to manifest the issue, a fact that Appellant acknowledged in her deposition:

Q: And if the embankment behind your house had been just totally untouched, nothing had been done to it at all, is it fair to say you would still be sitting here today because you believe there needs to be a permanent fix to the embankment behind the house?

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<sup>2</sup> The week before the hearing on AOS's Motion for Summary Judgment, Appellant's expert submitted an affidavit contradicting his sworn deposition testimony. This issue is fully discussed in Section III, *infra*, which is the reason it is not addressed in this Section of Respondent's argument.

A. After the flood, yes. That is why we notified the City.

(Amanda Godfrey Deposition, p. 101:5-11.)

Appellant's brief attacks Appellant's own testimony, arguing that the foregoing testimony should be disregarded because it is improper "opinion" testimony. Appellant testified that the historic October 2015 rainfall and flooding is what created or revealed the erosion issue that she now complains of, and that she would be seeking the exact same remedy today whether or not the Vista Greenway Project ever took place. It is not an *opinion*, but an undisputed *fact*, that the erosion issue manifested itself after the historic flooding in October 2015 and before the Vista Greenway Project even commenced. (11/11/2015 Email Exchange between Amanda Godfrey and City officials, p. 2; 11/20/15 Notice to Proceed.)

Appellant cites to no authority for the proposition that her testimonial admission should be disregarded. Appellant's brief goes on to merely re-hash her affidavit testimony, which only serves to confirm that the embankment issue predated the Vista Greenway Project. The circuit court properly concluded that there is no issue of fact concerning this point, which coupled with Appellant's expert's acknowledgement that AOS did not cause any damage to Appellant, creates a clear record supporting summary judgment. The circuit court properly concluded that AOS did not violate any standard of care or cause any damage to Appellant, and its Order granting summary judgment to AOS should be affirmed.

**II. THE CIRCUIT COURT PROPERLY APPLIED THE COMPETING AFFIDAVIT RULE TO EXCLUDE AN EXPERT AFFIDAVIT THAT CONTRADICTED THE EXPERT’S PRIOR DEPOSITION TESTIMONY AND WAS SUBMITTED THE WEEK BEFORE THE SUMMARY JUDGMENT HEARING IN AN EFFORT TO MANUFACTURE A GENUINE ISSUE OF MATERIAL FACT.**

After years of litigation<sup>3</sup>, AOS moved for summary judgment on March 20, 2020. A hearing on AOS’s motion for summary judgment was set for July 16, 2020. The week before the hearing, on July 9, 2020, Appellant submitted an affidavit of expert Bill Matthews in connection with opposing AOS’s motion for summary judgment. As addressed in detail above, Mr. Matthews had previously offered extensive deposition testimony on May 10, 2018 concerning the expert opinions he had developed in the matter. The overarching opinions from Mr. Matthews’ deposition testimony were that the geometry of the embankment was the principal issue and nothing AOS did in the area caused or contributed to that condition. The subsequent affidavit of Mr. Matthews contradicted his prior sworn testimony, and the trial court properly disregarded this attempt to manufacture a genuine issue of material fact.

A trial court may exclude an affidavit when it was submitted “to contradict that party’s own prior sworn statement” in “an attempt to create a sham issue of material fact.” *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014)(quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). In distinguishing between a “sham” or “competing” affidavit and a correcting or clarifying affidavit, the following considerations provide guidance:

- (1) whether an explanation is offered for the statements that contradict prior sworn statements;
- (2) the importance to the litigation of the fact about which there is a contradiction;
- (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
- (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
- (5) whether the previous sworn testimony indicates the witness was confused at the time;
- (6) when, in relation to summary judgment, the second affidavit is submitted.

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<sup>3</sup> Suit was originally filed in 2016 as Civil Action No. 16-CP-40-06901.

*Cothran*, 357 S.C. at 218, 592 S.E.2d at 633. Each of the *Cothran* considerations is satisfied by this affidavit submission the week before the hearing on AOS's Motion for Summary Judgment.<sup>4</sup>

Mr. Matthews' affidavit contradicts his sworn deposition testimony in numerous respects, including on the critical issue in this case as to AOS, namely the alleged liability of AOS for causing damage to Appellant's property. The following comparison illustrates the contradiction:

#### **NEW AFFIDAVIT TESTIMONY**

In my opinion, and to a reasonable degree of engineering certainty, the removal of the kudzu and the vegetation from the eastern slope by AOS contributed to the erosion that has occurred on the eastern slope.

(7/9/20 Affidavit of Bill Matthews, p. 10, ¶ 35.)

#### **PRIOR DEPOSITION TESTIMONY**

Q. So given the historical background of when Ms. Godfrey first identified and notified the city of this erosion problem and then the documents we looked at with respect to construction – do you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

(Matthews' Deposition, p. 41:8-15.)

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#### **NEW AFFIDAVIT TESTIMONY**

The plaintiff's brick wall had been damaged as a result of the acts and omissions of the City and AOS. This is my opinion to a reasonable degree of engineering certainty, . . . .

(7/9/20 Affidavit of Bill Matthews, p. 10, ¶ 37.)

#### **PRIOR DEPOSITION TESTIMONY**

Q. You can't testify to a reasonable degree of engineering certainty, for example, that any clearing and grubbing of any particular portion of the slope has caused a crack in the patio, correct?

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<sup>4</sup> Appellant submitted yet another affidavit of Mr. Matthews following the circuit court's grant of summary judgment. As that affidavit was not part of the record before the circuit court at the summary judgment hearing, it is not addressed in this section.

A. I cannot.

Q. Or has caused a portion of the brick wall's foundation to be undermined, correct?

A. Correct.

(Matthews' Deposition, p. 41:16-24.)

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### NEW AFFIDAVIT TESTIMONY

In my opinion, and to a reasonable degree of engineering certainty, AOS was negligent in removing the kudzu and the vegetation on the slope adjacent to the plaintiff's property and in removing the kudzu and vegetation from the slope when there was no plan in place to protect the stability of the slope and in removing vegetation outside the area that was supposed to be cleared under the terms of the contract.

(7/9/20 Affidavit of Bill Matthews, p. 10, ¶ 38.)

### PRIOR DEPOSITION TESTIMONY

[d]o you have any opinion that any particular construction activity has caused the issues you've identified with Ms. Godfrey's property?

A. No.

(Matthews' Deposition, p. 41:11-15.)

....

Q. Okay. Based on this, do you have any criticisms of AOS as the contractor for not reshaping slopes in accordance with the Alta plans?

A. No.

Q. Do you have any criticisms of AOS for not installing erosion control measures based on this?

A. No.

Q. The contractor, from what you reviewed, basically did exactly what you would have expected them to do; is that fair?

A. Based on what I've reviewed, yes.

(Matthews' Deposition, p. 33:14 – 33:25.)

Just as in *McMaster*, “The last-minute submission of the affidavit indicates [Appellant] was attempting to create an issue of fact for purposes of summary judgment.” *McMaster*, 411 S.C. at 151, 767 S.E.2d at 458. Each of the *Cothran* considerations is addressed, as follows:

(1) Mr. Matthews offers no explanation for the statements that contradict his prior sworn testimony. In fact, his prior deposition testimony is not acknowledged at all. “A deponent ‘cannot create a conflict and resist summary judgment with an affidavit that ... does not give a satisfactory explanation of why the testimony is changed.’” *McMaster*, 411 S.C. at 149, 767 S.E.2d at 457 (quoting *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir.2000)).

(2) The contradictory testimony goes to the crux of the theory of liability against AOS. Mr. Matthews testified that he had no opinion about any construction activity causing damage to Appellant. His affidavit submitted before the hearing contradicts his sworn testimony by stating that construction activities did cause damage to Appellant. He has changed his opinion about the central issue in the case as it pertains to AOS.

(3) Mr. Matthews was deposed in May of 2018. AOS produced its project file to all parties at the latest on November 29, 2017, in response to the City’s discovery requests. All other parties produced documents prior to Mr. Matthews’ deposition. Mr. Matthews had performed a site inspection, issued an expert report, and had a full opportunity to perform any analysis he desired prior to his deposition. He also testified that he had not been asked to perform any further work, research, or investigation at the time of his deposition, and that he did not plan to do anything further to develop his opinions in the matter. (Matthews Deposition, p. 120:18-25.) Mr. Matthews’ affidavit does not explain that his testimony changed based on documents produced subsequent to his deposition. There is no issue of Mr. Matthews’ access to information prior to his deposition.

(4) Mr. Matthews’ deposition testimony is compared to his affidavit testimony above. He previously testified that he had no opinion concerning AOS’s work causing damage to Appellant. The week before the summary judgment hearing, his opinion was the opposite of his prior sworn testimony.

(5) Mr. Matthews is a professional engineer and an expert witness, specially retained by Appellant for this litigation, to testify within his area of expertise. The date of his deposition was fixed by agreement of counsel, with due consideration to the schedule of the witness. His affidavit makes no suggestion that he was inadequately prepared or confused at the time of his deposition.

6) Mr. Matthews' contradictory affidavit was submitted a week before the hearing on AOS's motion for summary judgment, more than two years after his deposition testimony and three months after AOS quoted his testimony in its motion for summary judgment.

The Supreme Court has addressed the competing affidavit rule in the same context as the instant case, where a party submitted a contradictory expert affidavit in an attempt to defeat summary judgment:

Harris Teeter relied on the deposition testimony of two experts, Levick and Charles Scarminach, to defeat summary judgment. Even if we were to accept Harris Teeter's argument that Levick and Scarminach were qualified to render an expert opinion, we agree with the trial court that their deposition testimony failed to present evidence of a breach of the standard of care or a genuine issue of material fact regarding proximate cause. Harris Teeter apparently recognized the clear insufficiency of the Scarminach and Levick testimony, for it submitted post-deposition affidavits in an attempt to rescue its malpractice claims. The trial court properly characterized these post-deposition affidavits as "sham" affidavits.

*Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010).

The crux of Matthews' opinion during his deposition was that the slope at issue is not stable because of its geometry – i.e., it is simply too steep. (Matthews Deposition, p. 12:22–14:10.) This factor alone informed his opinion that the slope was not stable in 2011 (4-5 years before the project) and remained unstable after the project. (*Id.*) Clearly, there is a difference of opinion about the stability of the slope, as another geotechnical engineering firm, Terracon, issued a report stating that the slope was stable. That dispute is between neighboring landowners, Appellant and the City. And that dispute has no bearing on AOS, which according to Appellant's expert did exactly what he "would have expected them to do" when confronting this project in the months

following the historic 2015 rainfall and flooding. (Matthews' Deposition, p. 33:23 – 33:25.) The last-minute affidavit of Appellant's retained expert squarely contradicted his prior testimony and was clearly produced solely for the purpose of defeating AOS's Motion for Summary Judgment. The circuit court properly disregarded the affidavit, and summary judgment in favor of AOS should be affirmed.

### **III. THE COMPETING AFFIDAVIT RULE DOES NOT REQUIRE A PARTY OPPOSING AN AFFIDAVIT TO FILE A MOTION TO STRIKE OR OTHERWISE ASSERT ITS POSITION TEN DAYS PRIOR TO A DISPOSITIVE MOTIONS HEARING.**

AOS filed its Motion for Summary Judgment, including all grounds, legal arguments, and exhibits on March 20, 2020, and the motion was set for hearing on July 16, 2020. On July 9, 2020, the week prior to the summary judgment hearing, Appellant submitted an affidavit of her expert that squarely contradicted that expert's prior sworn deposition testimony in an effort to manufacture a genuine issue of material fact. AOS asserted the competing affidavit rule through supplemental briefing filed on July 14, 2020, within five (5) days of Appellant filing the affidavit, and two (2) days prior to the hearing.

Appellant argues that that the circuit court erred in not providing Appellant at least ten (10) days to respond to AOS's position that such an affidavit should not be considered. Appellant arrives at this argument by referring to Respondent's "Motion to Strike" Matthews' affidavit. AOS did not file a motion to strike, and there is nothing in the record referencing AOS asserting a motion to strike. Rather, as addressed above, AOS argued to the circuit court that the contradictory affidavit should not be considered, and the circuit court agreed.

Appellant cites no case authority for the proposition that asserting the competing affidavit rule requires a motion to strike or ten (10) days' notice. In canvassing the case law applying the competing affidavit rule, no such requirement appears. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010); *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d

629 (2004); *McMaster v. Dewitt*, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014). The absence of any reference to such a requirement makes sense, as a party arguing that a last-minute affidavit should not be considered is necessarily forced to craft its position on short notice. Indeed, the notice requirement sought by Appellant would effectively result in an automatic continuance of the hearing in most cases, as the competing affidavit rule frequently arises in situations where a party files an affidavit within days of a dispositive motions hearing, as was the case here.

The circuit court did not err in considering the application of the competing affidavit rule in make its ruling on AOS's Motion for Summary Judgment, and the circuit court's Order should be affirmed.

**IV. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION FOR RECONSIDERATION BECUASE APPELLANT'S EXPERT'S SECOND AFFIDAVIT INTRODUCED NEW ISSUES AND OFFERED AN UNSATISFACTORY EXPLANATION FOR CONTRADICTING HIS DEPOSITION TESTIMONY.**

Appellant requested that the circuit court reconsider its Order granting summary judgment to AOS based on yet another affidavit from expert Bill Matthews, filed August 5, 2020. The August affidavit was an apparent attempt to provide an explanation for why Mr. Matthews' first affidavit contradicted his deposition testimony.<sup>5</sup> Whether or not the circuit court considered the contents of Mr. Matthews' August affidavit, it properly denied Appellant's Motion for Reconsideration.

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<sup>5</sup> Appellant's Motion for Reconsideration stated that there was only one inconsistency between Mr. Matthews' deposition and his affidavit despite the fact that the circuit court's Order identified multiple contradictions. Regardless of the number of contradictions, what matters is that the testimony was contradictory on a dispositive issue in the case – namely, whether AOS caused Appellant any damage. (*See* Order Granting AOS's Motion for Summary Judgment dated July 28, 2020, p. 4-6.)

“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Appellant’s Motion for Reconsideration presented a new issue – namely that her expert performed additional work justifying his contradictory opinions – that could have been presented prior to judgment. Mr. Matthews was deposed in 2018 and had full access to the property and all pertinent facts at the time of his deposition. He testified that he had not been asked to perform any further work, research, or investigation at the time of his deposition, and that he did not plan to do anything further to develop his opinions in the matter. (Matthews Deposition, p. 120:18-25.) AOS filed its motion for summary judgment, including all grounds, legal arguments, and exhibits on March 20, 2020, nearly four (4) months prior to when the motion was ultimately heard. Yet, Appellant waited until the week before the summary judgment hearing, July 9, 2020, to submit a new affidavit contradicting the expert’s prior testimony. There was no impediment to the expert explaining in his July 9, 2020 affidavit that his new, contradictory opinions were predicated on additional investigation and analysis, as would be expected if that was in fact the case.<sup>6</sup> The circuit court was well within the bounds of its discretion to not consider this affidavit on the basis that it raised an issue that could have been raised prior to the judgment.

Even if the circuit court considered the expert’s explanation for why he contradicted his prior testimony, his explanation does not alter the application of the competing affidavit rule. The competing affidavit rule is not defeated merely by providing *any* explanation for the changed testimony; it requires, *inter alia*, a *satisfactory* explanation. *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 457 (Ct. App. 2014)(quoting *Torres v. E.I. Dupont De Nemours & Co.*, 219

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<sup>6</sup> In addition, Appellate was under a continuing obligation to supplement her discovery responses throughout the litigation. Appellant never produced any supplemental discovery responses or documents identifying any additional work that was performed by Mr. Matthews after his 2018 deposition.

F.3d 13, 20 (1st Cir.2000))("A deponent 'cannot create a conflict and resist summary judgment with an affidavit that . . . does not give a satisfactory explanation of why the testimony is changed.'"). The expert's explanation for his contradictory opinions is that he performed "substantially more work", was provided with affidavits from the Appellant and Appellant's husband, was provided with a "detailed history of the facts leading up to the lawsuit", and conducted another site visit. (8/5/20 Affidavit of Bill Matthews, p. 1.)

It is important to note that the affidavits of the Appellant and Appellant's husband that supposedly supported Mr. Matthews' "new" opinions were also filed the week before the summary judgment hearing on July 9, 2020. Moreover, Appellant's argument does not address the fact that Appellant had been deposed prior to Mr. Matthews' deposition, and he therefore had access to her sworn deposition testimony at that time. Furthermore, Mr. Matthews had conducted a site inspection of Appellant's property prior to his 2018 deposition and presumably had access to Appellant's husband's view of the facts if he had deemed such information important to developing his opinions. The August affidavit does not explain how access to Appellant's and her husband's self-serving, last-minute affidavits would reasonably alter his professional opinions in the matter. With respect to the "detailed history" he was provided, he fails to explain how the document impacted his opinions or why he was not privy to that information prior to his 2018 deposition, at which point written discovery and document production had been substantially completed.

Mr. Matthews had access to all pertinent information when he agreed that AOS "did exactly what [he] would have expected them to do" under the circumstances it was presented with. (Matthews Deposition, p. 33:22 – 33:25.) Whether or not the circuit court considered the August affidavit, the *Cothran* considerations point squarely in the direction of excluding Matthews' July affidavit, and the circuit court was correct in denying Appellant's Motion for Reconsideration.

Appellant also includes an argument that the circuit court should have continued the hearing on AOS's Motion for Summary Judgment because the City had moved for a protective order as to questions asked during the City's 30(b)(6) deposition. Appellant does not explain how the issues presented in the City's Motion for Protective Order would have had any impact on the issues presented in AOS's Motion for Summary Judgment. Appellant likewise has not cited to or identified the City's Motion for Protective Order in its Designation of Matters to be Included in the Record on Appeal. Respondent respectfully submits that Appellant has not articulated how the City's objection to certain questions during its 30(b)(6) deposition constitutes a basis to reverse the circuit court's grant of summary judgment. As such, the order denying Appellant's Motion for Reconsideration should be affirmed.

**V. APPELLANT'S FAILURE TO ESTABLISH THE STANDARD OF CARE CONSTITUTES AN ADDITIONAL SUSTAINING GROUND FOR AFFIRMING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT.**

Pursuant to Rule 220(c), SCACR, AOS submits that the record before the circuit court supports an additional sustaining ground in that Appellant failed to establish the standard of care for AOS as a the general contractor of phase II of the Vista Greenway project. "Regardless of the area in which the prospective expert witness practices, he must set forth the applicable standard of care . . . and he must demonstrate to the court that he is familiar with the standard of care." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). While *David* arose in the context of a medical malpractice action, this principle applies with equal force in any case where expert testimony is required to understand the subject matter because it is not within "the ambit of common knowledge". *Id.* See also *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010)(holding in products liability action that "expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge"); *S.E. Hous. Found. v. Smith*, 380 S.C. 621, 649, 670 S.E.2d 680, 695 (Ct. App. 2008)(finding expert testimony

was required because “the standard of care for legal malpractice is outside the ambit of the common knowledge of laypersons”).

Mr. Matthews is a geotechnical engineer. He has practiced geotechnical engineering in South Carolina since coming to the state in 1990, and 90% of his time is devoted to developing geotechnical engineering reports for new construction. (Matthews Deposition, p. 5:23-7:10.) Nowhere in Matthews’ deposition testimony or multiple affidavits does he set forth the applicable standard of care for AOS, which is a general contractor. His improper July affidavit comes closest, wherein he states that he reviewed AOS’s website and is of the opinion that it “knew or should have known that the removal of vegetation from a steep slope can compromise the stability of the slope”. (Matthews 7/9/20 Affidavit, p. 9 ¶ 29.) This testimony does not approach articulating the standard of care for a general contractor under the same or similar circumstances. What is left is merely the conclusory affidavit opinion of a geotechnical engineer that removal of vegetation a couple of years prior to his involvement contributed to erosion on the slope. He certainly may be qualified by his experience as a geotechnical engineer to evaluate a slope and render such an opinion, but these statements are insufficient to establish the standard of care for a general contractor in AOS’s position, as required under South Carolina law.

This position was not expressly argued to the circuit court because at the time that AOS filed its Motion for Summary Judgment, Mr. Matthews was on record as stating that AOS acted how he would have expected a competent contractor to act under the same or similar circumstances. Thus, there would have been no reason to raise Mr. Matthews’ failure to establish the standard of care, as he had no criticisms of AOS.

Respondent takes this opportunity to point out that this same reasoning and argument would apply to Appellant’s additional expert, Jeremy Ray, P.E., if the Court is willing to consider Mr. Ray’s affidavit testimony. Appellant’s brief quotes from a September 5, 2017 affidavit

provided by Mr. Ray, a structural engineer who issued an affidavit in connection with Appellant asserting a claim against design professional Alta Planning & Design. As a preliminary matter, AOS respectfully submits that the Court should disregard Appellant's reference to Mr. Ray's affidavit. Appellant at no point raised or argued Mr. Ray's affidavit testimony to the circuit court<sup>7</sup>; it was therefore improper to present it to this Court and argue that the circuit court "ignored evidence from Jeremy Ray". (Appellant's Initial Brief, p. 16.)

The Supreme Court has clearly explained preservation requirements:

[D]ifferent preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

*I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000)(emphasis added). Based on Respondent's review of the lower court record, there is no citation or reference to Mr. Ray's affidavit in any of the many filings concerning AOS's Motion for Summary Judgment or during oral argument at the hearing. Consequently, Appellant's contentions regarding the Ray affidavit are not preserved for appeal and should be disregarded.

In the event the Court is willing to consider the affidavit of Mr. Ray, AOS submits that it (a) does not purport to establish the applicable standard of care for AOS, or (b) create a genuine issue of material fact as to whether AOS violated the standard of care. While it references AOS, the affidavit only expressly refers to the design professional, Alta, failing to meet the minimum standard of care.

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<sup>7</sup> Appellant filed this affidavit with the circuit court on September 18, 2020, a month after the circuit court denied Appellant's Motion to Reconsider and a week after Appellant's Notice of Appeal.

Therefore, AOS respectfully requests that the Court disregard Appellant's citation to Mr. Ray's affidavit because it was not argued to the circuit court; in the alternative, AOS requests that the Court find as an additional sustaining ground that Appellant's engineer experts did not establish the standard of care for AOS as a general contractor.

### **CONCLUSION**

For the reasons stated herein, the Court should affirm the trial court's award of summary judgment to AOS Contractors, Inc.

Respectfully submitted,

Date: March 1, 2021.

*s/Joshua D. Shaw*

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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Case No. 2019-CP-40-01358  
Appellate Case No. 2020-001205

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Amanda Creel Godfrey, Appellant,

v.

City of Columbia, Richland County, Alta Planning & Design, and  
AOS Contractors, Inc., Defendants,

of which Richland County and AOS Contractors, Inc. are the  
Respondents.

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PROOF OF SERVICE

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The undersigned hereby certifies that on March 1, 2021, a copy of **AOS Contractors, Inc.’s Initial Brief** was served on counsel of record for the Appellant and Respondents via email containing the above referenced document to counsel’s individual AIS email address pursuant to South Carolina Supreme Court COVID Order 2020-05-29-02 as follows:

**RECEIVED**

**Mar 01 2021**

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March 1, 2021

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**RE: Amanda C. Godfrey v. AOS Contractors, Inc.**  
**Case No.: 2019-CP-40-01358**  
**Appellate Case Number: 2020-001205**

Dear Ms. Kitchings:

In accordance with Rules 208 and 209, SCACR, and the Supreme Court's Order re Operations of the Appellate Courts dated May 29, 2020, please find attached for filing PDF copies of the **Initial Brief of Respondent AOS Contractors, Inc., Respondent AOS Contractors, Inc.'s Designation of Matter to be Included in the Record on Appeal, and Proofs of Service** in the above referenced matter. Pursuant to the aforementioned Supreme Court Order, I do not plan to submit hard copies of these documents to the Court of Appeals unless the Court otherwise requests. I would kindly ask that you file the attached documents and please return an electronic version bearing the Court's file stamp thereon.

By copy of this letter I am herewith advising and serving same via email to all known counsel of record.

Very truly yours,

*s/Joshua D. Shaw*

Joshua D. Shaw

JSW/jbw

Enclosures

cc: All Counsel of Record (*via e-mail only*)