THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis

Case No.: 2022-CP-26-06116

Appellate Case No. 2024-000171

Flatiron Constructors, Inc.

Appellant,

v.

TranSystems Corporation

Respondent.

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the Respondent TranSystems Corporation ("Respondent") submits this Petition for Rehearing of the referenced case, wherein the Court of Appeals issued an Order of Reversal and Remand on December 10, 2025. Pursuant to Rule 221(a), SCACR, Respondent respectfully petitions this Court for rehearing for the following reasons:

1. **This Court Failed to Explicitly State that Duty Is a Question of Law.**

The first step for the Trial Court and for this Court in analysis of the underlying issues is whether there is any duty owed, before applying facts:

> The issue of negligence is a mixed issue of law and fact. The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case. The existence and scope of the duty are questions of law. Thereafter, the jury [or finder of fact] determines whether a breach of the duty has occurred, and the resulting damages.

Staples v. Duell, 329 S.C. 503, 506-7, 494 S.E.2d 639, 641 (Ct. App. 1997). Further, "[i]f there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law." *Madison v. Babcock Ctr., Inc.,* 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). "For [allegedly] negligent conduct to be actionable, it must violate some specific legal duty owed to the plaintiff." *Cummins Atl., Inc. v. Sonny's Camp-N-Travel Mart, Inc.,* 481 F. Supp. 2d 531, 535 (2007) (applying South Carolina law).

This Court erred in applying *Tommy L. Griffin I* as applicable precedent, when that case dealt with a different discipline of engineer operating under a different contract for services. It is undisputed that Respondent provided Construction Engineer Inspection and Testing Services for the Project, not design or Engineer of Record services, which were provided in *Tommy L. Griffin I.*[1] Neither Appellant nor this Court have identified any case in South Carolina which recognizes a duty owed by a Construction Engineering Inspection and Testing ("CEIT") service provider to a general contractor where there is no privity of contract; therefore, the Court must make express findings as to whether or not there is a duty of care owed. The Court properly recognized "…it is difficult from precedent to determine the exact facts and circumstances that create a special relationship" but despite that acknowledgment, concluded that "…we find there was enough evidence to create a genuine issue of material fact as to the issue." (Court of Appeals Order, p. 3.) This finding does not comply with applicable precedent. This Court's Order failed to expressly

[1] The Record on Appeal and arguments clearly demonstrate that SCDOT administered the Project and oversaw all design and engineering. (R. p. 781.)

acknowledge that "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict [or summary judgment]." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999).

Stated directly – there is no precedent in South Carolina stating that a CEIT Services provider hired by an Owner to monitor the work of a contractor owes a duty to the contractor, and this Court erred in conflating the duties of a design engineer acting as a Construction Administrator (as in *Tommy L. Griffin I*) with those of a CEIT Services Provider. This Court failed to state whether a CEIT Services provider owes duties to a General Contractor, the quality of whose work it is the CEIT Services provider's express duty to evaluate. As stated below, the applicable contracts clearly demonstrate there is no such duty for this type of highway contract. It is clear from the contract documents in the Record on Appeal that SCDOT acted in the role of the engineer in *Tommy L. Griffin*. Whether there is a duty is not an issue of fact, it is an issue of law. Here, however, this Court decided the case as though the question of duty was a question of fact.

Our Supreme Court has clearly placed resolving the threshold issue of duty upon courts acting at law, and not upon factfinders:

> The determination of the existence of a duty is solely the responsibility of the court. Whether the law recognizes a particular duty is an issue of law to be determined by the Court. An affirmative legal duty exists **only** if created by statute, contract relationship, status, property interest, or some other special circumstance.

Hendricks v. Clemson Univ., 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003) (emphasis added). While this Court correctly acknowledged a limited amount of guidance from precedent, this Court did not consider clear guidance provided by regulations and contract relationships and status, and the omission of such analysis is an error requiring rehearing. Stated simply, there is no legal duty

created by statute (and there must be a finding of no duty pursuant to regulations adopted pursuant to statutory authority, discussed below). Moreover, (i) any such legal duty is disclaimed and denied by the applicable contracts and conditions incorporated therein; (ii) status does not—and cannot—create a duty in this specific situation; (iii) no property interest creates a duty; and finally, (iv) Appellant fails to identify any special circumstances to justify ignoring applicable customs, contracts, and existing regulations. Therefore, there is no duty owed by Respondent to Appellant.

For example, the Intergovernmental Agreement, which governed the relationships under review here, expressly states "[t]he SCDOT will administer the Project for the County." (R. p. 781.)[2] That document, governing the parties' relationships further states "[t]he SCDOT shall oversee **all** planning, design, **engineering**, right-of-way acquisition, **contract administration**, **inspection**, awarding of contracts, **the review and payment of contracts**, **construction for the Project and each Component Project, and any necessary activities or functions of the Project.**" (Respondent Final Brief; p. 9, R., p. 781.) (Emphasis added.) The IGA could not be clearer that SCDOT, and not Flatiron, had this authority, and that any potential duties owed under *Tommy L. Griffin I* were owed by SCDOT to Appellant, and not by Respondent to Appellant.

Further, Appellant's own contract expressly instructs Appellant: "**Do not construe advice given by the RCE's representative as in any way binding on the RCE or the [SCDOT] or as releasing the Contractor from the fulfillment of the terms of the [Construction] Contract.**" (Respondent's Final Brief, p. 11; R. p. 974.) (Emphasis added.) Further, the Standard Specifications incorporated into Appellants contract state "[u]nless otherwise specified elsewhere

[2] Although the copies of the Record provided by Appellant do not have the IGA paginated, the statement is at Article V, Section 5.1 on p. 10 of the IGA.

in these specifications, the RCE[3] will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the Contract." (Respondent's Final Brief, p. 12; R. p. 973.)

This Court erred in determining that the self-serving Affidavit of Lou Hutcherson created an issue of fact which overrode the controlling contracts, applicable regulations, and even the express contemporaneous email correspondence of Hutcherson himself. Even though the affidavit did not say that Hutcherson believed that Marty Long was RCE for SCDOT, this Court stated that the testimony created an issue of fact sufficient to deny summary judgment. It is clear from this Court's Order, that this Court found that Respondent met its initial burden of stating there was no material fact, and that, accordingly, the burden shifted to Appellant to "demonstrate specific, **material facts** exist to give rise to a genuine issue." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (interpreting Fed. R. Civ. P. 56).

To survive summary judgment (and to obtain reversal), Appellant "must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence," as set forth in the self-serving Hutcherson affidavit. *Dash v. Mayweather,* 731 F.3d 303, 311 (4th Cir. 2013) (interpreting Fed. R. Civ. P. 56). This Court failed to properly consider what the Hutcherson Affidavit did not say – namely that Hutcherson never said he thought Long was SCDOT's RCE (as reflected by his email correspondence during the Project). There simply is no evidence to create a genuine issue of material fact, because of the uncontradicted evidence from the governing contracts, applicable law, and the functioning of the Project.

[3] RCE is expressly defined in the Standard Specifications as an SCDOT Official and/or Office. (R., p. 972.)

This case does not involve a one-off contract, where precedent is unimportant. The Standard Specifications and SCDOT Contracts for Construction are used statewide, and they need to be reliable and easy to understand and apply. If this Court finds that the plain language of these contracts and specifications can be overridden by self-serving affidavits building inference upon inference, the necessary assignment of risk and predictability of standard government contracts becomes useless, greatly increasing costs of construction and the risks to the public. Accordingly, this Court should grant the Petition for Rehearing.

2. **This Court Failed to Determine Whether Appellant's Assertion of Legal Duty Creates an Impermissible Conflict of Interest.**

The Court failed to rule upon Respondent's arguments related to conflict of interest rules, which are critical in any evaluation of duty in this case. Because the regulations governing engineering practice expressly prohibit conflicts of interest, this Court cannot recognize a duty at law which creates by its operation a conflict of interest for a professional engineer.

As noted to the Trial Court and to this Court, the General Assembly authorized the Board of Registration for Professional Engineers and Land Surveyors (the "Board") to "promulgate regulations necessary to carry out the provisions [of the chapter governing licensure and regulation of professional engineers." S.C. Code Ann. § 40-22-60(A).

In enacting the Rules of Professional Conduct for Professional Engineers, the Board stated:

> The Rules of Professional Conduct as promulgated herein are an exercise of the police power vested in the South Carolina State Board of Registration for Professional Engineers and Surveyors by virtue of the acts of the legislature, and as such the South Carolina State Board of Registration for Professional Engineers and Surveyors is authorized to establish conduct, policy and practices in accordance with the powers herein above stated.

S.C. Code Ann. Reg. § 49-300(C). The Board further expressly states:

> The Engineer or Surveyor shall avoid conflicts of interest.

> A. The Engineer or Surveyor shall conscientiously strive to avoid conflicts of interest with employer or client, but when unavoidable, the Engineer or Surveyor shall forthwith disclose the circumstances to their employer or client. In addition the Engineer or Surveyor shall avoid all known conflicts of interest with their employer or client and shall promptly inform their employer or client of any business association, interests, or circumstances which could influence their judgment or the quality of their service.
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> B. The Engineer or Surveyor shall not accept compensation, financial or otherwise, from more than one party for services on the same project at the same time, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to, by all interested parties.
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> C. The Engineer or Surveyor shall not solicit or accept financial or other valuable considerations from material or equipment suppliers for specifying their projects.
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> D. The Engineer or Surveyor shall not solicit or accept gratuities, directly or indirectly from contractors, their agents, or other parties dealing with their client or employer in connection with work for which they are responsible.
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> E. When in public service as a member, advisor, or employee of a governmental body or department, the Engineer or Surveyor shall not participate in considerations or actions with respect to services provided by them or their organization in private engineering or surveying practices.

S.C. Code Ann. Reg. § 49-304. This regulation clearly bars conflicts, without complete disclosure of potential conflicts, and it further bars compensation from multiple parties at the same time, unless fully disclosed and agreed to "by all interested parties." S.C. Code Ann. Reg. § 49-300(D). Flatiron, which bears the burden of proof, has provided no evidence of any waiver of conflict by all interested parties. Further, if an engineer cannot have conflicting benefits without full agreement and disclosure, he also cannot have potentially-conflicting liabilities without full disclosure and agreement.

Before both the Trial Court and this Court, Respondent argued that the Rules of Professional Conduct for Engineers barred a recognition of the duty that Appellant asserts. In considering whether the Rules of Professional Conduct, which have been adopted as administrative regulations in South Carolina, bar the duty sought by Appellant, this Court was required to interpret the above regulations regarding conflicts, but it did not do so. The first step of such an analysis (before this Court and at the Trial Court) is to "determine whether the language of the … regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014).

The meaning of the regulation governing conflicts is clear – engineers must avoid conflicts of interest, and conflicts can only be waived if fully disclosed and agreed to by all parties. S.C. Code Ann. Reg. § 49-304(B). Further, "[r]egulations authorized by the legislature have the force of law." *Glover by Cauthen v. Suitt Constr. Co.,* 318 S.C. 465, 458 S.E.2d 535, 537 (1995).

A CEIT services provider for a road project is bound by contract and regulations to protect Owner and future Owner (Horry County and SCDOT) as well as the motoring public. By stating that there is at least a genuine issue of material fact as to whether a "special relationship" existed between a CEIT services provider and the General Contractor—who is of adverse interest to SCDOT/Owner—this Court has presumed a novel common law duty, which directly conflicts with the established regulatory law.

The duties of an engineer to his client, as determined by S.C. Code Ann. Reg. § 49-304 are analogous to the duty to avoid conflicts attributable to attorneys. *Accord* Rule 1.7, Rule 407, SCACR (noting lawyers must avoid concurrent conflicts of interest, which can be waived under conditions including each affected client giving informed consent confirmed in writing). The

requirements of this legal regulation closely mirror the common law regarding duty for attorneys, with South Carolina's courts noting that "[g]enerally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions,* 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).

Under South Carolina law, "[r]egulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health & Envtl. Control,* 396 S.C. 633, 639-40, 723 S.E.2d 191, 195 (2012). "When interpreting a regulation, [courts] look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." *Id.* at 640 723 S.E.2d at 195. "Where the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper." *Kiawah Dev. Partners, II, supra,* 411 S.C. at 39, 766 S.E.2d at 720-21.

Applied here, the Board of Engineering clearly instructs engineers to avoid conflicts, absent written waivers of conflicts by all parties. S.C. Code Ann. Reg. § 49-304. At no point has Appellant identified any written waiver of conflicts signed by any party. In contrast, in *Tommy L. Griffin I,* the contract for the engineer provided for contract administration and site control which was incorporated into the Contractor's contract, which effected a written waiver signed by all parties. Further, the Board of Engineers bars engineers from accepting compensation from more than one party on a project at the same time. S.C. Code Ann. Reg. § 49-304. The only logical interpretation is that an engineer should be limited—in both compensation and liability—to one party at a time on a project.

The Court assumed an undefined duty in the present case, in clear conflict with regulations promulgated pursuant to statute. By doing so, this Court failed to give effect to the Rules of Professional Conduct for Engineers, which is an improper interpretation of a regulation. This Court was required to analyze the applicable regulation, because "[t]he construction of a regulation is a question of law to be determined by the court." *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.,* 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). Accordingly, Respondent's Petition for Rehearing should be GRANTED.

SUGGESTION FOR *EN BANC* REHEARING

Pursuant to Rule 219, SCACR, Respondent respectfully suggests that the Court of Appeals provide an *en banc* rehearing in this Appeal. The basis for this suggestion is that this case involves a question of exceptional importance, as the assigned panel properly noted the limited precedent governing potential duties of care owed by engineers to third parties, and there is no precedent setting forth the duty of care owed by a CEIT services provider to a general contractor. Further, as noted above, the ruling in this case potentially impacts the enforcement of regulations promulgated by the Board of Registration for Professional Engineers and Land Surveyors, and it also impacts the reliability and predictability of the Standard Specifications used by the S.C. Department of Transportation, potentially impacting both costs of construction and the safety of construction of public highway projects. Accordingly, this case is one of exceptional importance, making a hearing before the full Court of Appeals prudent.

CONCLUSION

It is clear that CEIT Services are separate and distinct from those services provided by an Engineer of Record who administered a contract in *Tommy L. Griffin I*. Accordingly, that case is not and cannot be conclusive precedent for this Court in a determination of duty here. This Court

is required to make a finding specifically as to whether a CEIT Services provider owes a duty to a General Contractor regarding the rigor employed by the CEIT Services provider in its inspection and testing of work. To be clear, such a duty would constitute a clear conflict of interest with the CEIT provider's duty to its clients, Horry County and SCDOT, and its implied duty for the safety of the general public. There is no clear law governing this issue, and this Court must make a determination as a matter of law, just as the Trial Court properly did. Finally, there can be no issue of fact as to compliance with duties, unless or until there is a finding of a duty. Accordingly, Respondent's Petition for Rehearing should be GRANTED.

December 29, 2025

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