PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2025-UP-416 (S.C. Ct. App. filed Dec. 10, 2025)

Flatiron Constructors, Inc., Respondent,

v.

TranSystems Corporation, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 21, 2026.

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR IN FAILING TO DETERMINE THAT THE CONFLICT OF INTEREST BETWEEN PETITIONER AND RESPONDENT FORECLOSED ANY POTENTIAL FINDING OF LEGAL DUTY?

2. DID THE COURT OF APPEALS' ANALYSIS OF DUTY AS INVOLVING PRIMARILY FACTUAL QUESTIONS, RATHER THAN A LEGAL QUESTION, CONFLICT WITH PRIOR DECISIONS OF THIS COURT?

STATEMENT OF THE CASE

This case presents important questions concerning whether a Professional Engineering Firm providing Construction Engineering, Inspection and Testing Services retained by a project owner can owe a duty of care to a contractor whose work that provider was specifically hired to inspect. The Court of Appeals erred in finding that respondents raised factual issues precluding summary judgment in petitioner TranSystems' favor. This Court should grant review for at least two reasons. *First*, this case presents a novel legal question regarding the application of engineering professional conduct regulations to determinations of tort duty. That question has significant, statewide ramifications: the Standard Specifications which provide for final authority for highway contract decisions to be made by the Resident Construction Engineer for the S.C. Department of Transportation are incorporated into nearly every highway project, and that clear delineation of responsibility is accounted for in the dispute resolution procedures incorporated into highway contracts In reversing the Trial Court's grant of summary judgment to TranSystems, the Court of Appeals held—with no meaningful analysis—that a duty can exist

even where such a duty would by its very nature create a conflict of interest for the contracted engineer in light of the Rules of Professional Conduct for Engineers. The Court of Appeals was wrong in that determination—as a matter of consistency with the Rules of Professional Conduct, logic, and policy, this Court should take the opportunity to weigh in on this critical issue and clarify that such circumstances are precisely when summary judgment *is* appropriate. *Second*, the Court of Appeals' opinion conflicts with this Court's prior decisions establishing that the existence of a legal duty is a question of law for the court. Here, the contract and the Rules of Professional Conduct foreclose, as a matter of law, the possibility that TranSystems had a special relationship with respondent such that any duty was owed. The decision below turned the relevant analysis on its head, creating an unreasonably high bar for any defendant—and certainly any defendant engaged in the common tripartite contract structure present here—seeking to obtain relief via summary judgment based on the absence of duty. The petition for certiorari should be granted to correct these significant errors and avoid the pervasive consequences for construction contracts statewide that inevitably will follow if the decision below is allowed to stand.

This case involves disputes relating to construction of the Carolina Bays Parkway (the "Project") in Horry County. Respondent Flatiron Constructors, Inc. ("Flatiron") contracted with Horry County to construct the Project, for an initial price of $97,868,086.99 (the "Construction Contract"). (R. p. 683.) Flatiron filed this action on April 26, 2018, claiming a breach of contract (with no privity of contract and which claim was later dismissed by the Trial Court), as well as alleged breaches of common law duty by TranSystems Corporation ("TranSystems"). As discussed in greater detail below, TranSystems contracted with Horry County, the Project's Owner, to provide Construction Engineering, Inspection, Testing Services, which largely

involved inspecting and analyzing Flatiron's work, and reporting finding the SCDOT, which had ultimate decision-making authority for any interpretations of the Construction Contract or Flatiron's work. (R. pp. 825-831.) That claim also included two causes of action not at issue in this appeal. (R. pp. 71 – 80.) Simultaneously, Flatiron filed a payment claim with the S.C. Department of Transportation ("SCDOT") seeking additional payment under the Construction Contract from Horry County and/or SCDOT. This payment claim ultimately resulted in a separate civil action, 2022-CP-26-06970, filed against Horry County and SCDOT in the Court of Common Pleas for Horry County (the "Horry Claim"). The Horry Claim was dismissed, and Flatiron ultimately filed a Stipulation of Dismissal as to the Horry Claim on June 22, 2023.

To allow prosecution of the Horry Claim, Flatiron and TranSystems agreed to two stays of the case pending agency review. (R. pp. 92 – 94; R. pp. 95 – 97.) After Flatiron pursued discovery, TranSystems sought a stay and protective order to allow for completion of the SCDOT claim process. (R. pp. 106 – 109.) Flatiron opposed this motion, arguing that stays and delays would prejudice Flatiron. (R. pp. 260 – 268.) When the case appeared on a Trial Roster, the parties struck the case from the trial docket, pursuant to Rule 40(j), SCRCP, on October 7, 2021. (R. pp. 138 – 139.) The case was restored to the active docket on September 27, 2022. (R. pp. 12 – 14.)

Based on the language in the contracts at issue, on April 4, 2023, TranSystems filed a Motion for Summary Judgment on the negligence claim on the basis that there was "no contractual relationship or special relationship to create tort duties owed by [TranSystems] to [Flatiron]." (R. p. 141.) On the same date, TranSystems filed its supporting brief fully explaining its arguments, and placing Flatiron on notice of what issues would be argued before the Trial Court. (R. p. 288.) TranSystems specifically noted that it contracted with Horry

County to provide CEIT Services, but that it never contracted with Flatiron for any services. (R. p. 238.) TranSystems argued that recognition of a tort duty owed by TranSystems to Flatiron would create an impermissible conflict of interest for TranSystems' provision of CEIT Services to Horry County for the Project. (R. p. 299.) Specifically, TranSystems argued that S.C. Code of Regs §49-304 bars conflicts of interest, and that recognition of a special relationship between TranSystems and Flatiron created a conflict of interest, violating the enacted regulations. (R. pp. 300-302.)

The Trial Court conducted a hearing on TranSystems' Motion for Summary Judgment on August 7, 2023. (R. p. 166.) TranSystems emphasized that under the Construction Contract, Flatiron was notified that it could not rely on advice given by TranSystems, and that all final decisions were to be made by SCDOT's RCE. (R. p. 180, ll. 7-14.)

On November 22, 2023, the Trial Court issued a Form 4 Order, granting partial summary judgment to TranSystems on Flatiron's claims for negligence and breach of contract. (R. pp. 15-16.) Flatiron moved to reconsider that order on December 1, 2023. (R. pp. 153-154.) On December 7, 2023, TranSystems moved to strike Flatiron's Motion to Reconsider. (R. pp. 155-165.) On December 27, 2023, the Trial Court issued an Order granting TranSystems partial summary judgment on the negligence and contract claims. (R. pp. 42-67.) On the same date, the Trial Court denied Flatiron's Motion to Reconsider. (R. pp. 68-70.)

Flatiron filed a Notice of Appeal with the Court of Appeals on January 26, 2024. Ultimately, Flatiron abandoned its appeal as to claims for breach of contract by third party beneficiary. The Court of Appeals conducted oral argument on October 8, 2025. On December 10, 2025, the Court of Appeals issued an unreported per curiam order, which reversed the Trial Court's Order Granting Partial Summary Judgment. On December 29, 2025, TranSystems filed

a Petition for Rehearing, and a suggestion for an *en banc* rehearing. In that Petition, TranSystems requested the Court of Appeals to grant rehearing to make an explicit finding that whether an alleged tortfeasor has a duty to a plaintiff is a question of law for the court to decide, and TranSystems also requested rehearing for the Court of Appeals to make an explicit finding whether Flatiron's assertion of legal duty on the part of TranSystems created an impermissible conflict of interest. The Court of Appeals denied the Petition for Rehearing in its January 21, 2026, Order. TranSystems now petitions for a Writ of Certiorari to review that Order.

STATEMENT OF RELEVANT FACTS

Of particular importance to this case is the relationship (or lack thereof) between Flatiron and TranSystems. Flatiron and TranSystems were not in privity, and in fact, TranSystems was hired to assist the Owner and SCDOT in assessing the work of Flatiron, which is inherently an adversarial position. TranSystems' role under its contract was to provide a Project Engineer who was "responsible for ensuring an appropriate level of inspection for all phases and aspects of the [P]roject." (R. p. 825.) TranSystems' Project Engineer reported directly to SCDOT's Resident [Construction] Engineer." TranSystems' scope included provision of services 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, and ensure compliance with applicable state laws regarding environmental issues. (R. p. 825.) Every aspect of TranSystems' work for the Project required it to review, analyze, and criticize the work of Flatiron, which inherently places the parties in an adversarial position, which is the opposite of a special relationship.

For background, Horry County, the Owner for the Project, contracted with SCDOT to

administer the Project for Horry County, as part of an Intergovernmental Agreement among Horry County, SCDOT, and the South Carolina Transportation Infrastructure Bank. (R. p. 772.) Under that Intergovernmental Agreement, SCDOT was required to "oversee all planning, design, engineering, right-of-way acquisition, **contract administration, inspection,** awarding of contracts, the review and payment of contracts, construction for the Project and each Component Project, and any related activities or functions of the Project." (R. p. 781, § 5.1.) (Emphasis added.) This is a position akin to that of Jordan, Jones & Goulding in *Tommy L. Griffin.* At the conclusion of the Project, SCDOT's State Highway engineer was required to "recommend to the SCDOT Commission the acceptance of the [Project] into the State Highway System, as defined by S.C. Code Ann. § 57-5-10." (R. p. 785, § 5.7.)

Separately and independently, Horry County contracted with TranSystems (in the "TSC Contract") on December 15, 2011, to provide certain construction, engineering, inspection and testing services ("CEIT Services") for the Project. (*See* R. p. 806.) Under the TSC Contract, TranSystems' CEIT Services were supervised by SCDOT's Resident Construction Engineer, which provided daily supervision and made final decisions as necessary. (R. p. 825.) Accordingly, neither SCDOT nor Horry County gave TranSystems authority to make any decisions to bind either SCDOT or Horry County. (R. p. 825.) The TSC Contract expressly states that TranSystems is employing TranSystems "to furnish personnel and render professional engineering services **for use and benefit of the County.**" (R. p. 806.) (Emphasis added.)

Separately, Flatiron entered the Construction Contract with Horry County for construction of the Project. (R. pp. 684-685). The Construction Contract was entered on December 6, 2013, nearly two years after the TSC Contract. (R. p. 684.) The Construction Contract incorporated the 2007 Standard Specifications of SCDOT, as well as the Proposal,

Contract, and Bond of SCDOT, dated 2007. (R. p. 684.) The initial contract value was $97,868,086.99. (R. p. 511.) The 2007 Standard Specifications, incorporated into the Construction Contract, expressly required Flatiron to "[p]erform the work and furnish materials in reasonably close conformity with the lines, grades, cross-sections, dimensions, and material requirements, including tolerances shown on the Plans or indicated in the Specifications." (R. pp. 764-765, § 105.3(1).) Under the Construction Contract, final review and approval of Flatiron's conformity with the required parameters was performed by SCDOT's Resident Construction Engineer, and the SCDOT Resident Construction Engineer made the final determination as to whether SCDOT would accept any non-conforming construction. (R. p. 764-765, §105.3(2-3).)

SCDOT's 2007 Standard Specifications clearly define "RCE," as referenced in Specification §105.3, as an "SCDOT Official" bearing the title "Resident Construction Engineer." (R. pp. 969-972, §101.2.) Further, the Standard Specifications include an entire section on the SCDOT Resident Construction Engineer, defining that official's role:

> Unless otherwise specified elsewhere in these specifications, **the RCE will determine the amount and quantity of the several kinds of work performed and materials furnished, which are to be paid for under the [Construction] Contract.**
>
> The RCE has the authority to suspend the work, wholly or in part, or to withhold further payments to the Contractor for failure to correct unsafe conditions for its workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders of the RCE; for periods as the RCE deems necessary due to unsuitable weather; for conditions considered unsuitable for prosecution of the work; or for any conditions or reason the RCE deems to be in the public interest. No additional compensation is paid to the Contractor because of such suspensions of work.
>
> The RCE is not authorized to increase the obligation of the Department [of Transportation] under the Contract except as provided herein.

(R. p. 973, §105.1.) (Emphasis added.)

From the TSC Contract, it is clear that TranSystems' client is Horry County, with TranSystems being retained "to furnish personnel and render professional engineering services for use and benefit of the County in the development of the [P]roject." (R. p. 806.) The TSC Contract, with incorporated provisions, was the entire agreement between Horry County and TranSystems. (R. p. 819, ¶ Y.) Further, the TSC Contract clearly stated that "SCDOT's Resident Engineer or his designee will provide daily supervision on the project and will make final decisions when necessary." (R. p. 825.) There are no modifications to the TSC Contract produced or entered into the record showing that TranSystems' obligations ever changed from the TSC Contract, or that Horry County ever made any written waiver of potential conflicts to allow TranSystems to assume obligations to Flatiron.

Similarly, the Construction Contract demonstrated that the ultimate decision-maker for issues under the Construction Contract was SCDOT's Resident Construction Engineer:

> Authorized representatives of the RCE may inspect all work done and all materials furnished. ... The RCE's representative has the authority to reject defective material and to suspend any work that is being improperly performed **subject to the final decision of the RCE.** The RCE's representative is not authorized to alter or waive provisions of the [Construction] Contract, to approve or accept any portion of the work, or to issue instructions contrary to the Plans and the Specifications. In no case will the RCE's representative act as superintendent or perform other duties for the Contractor or interfere with the management of the work by the Contractor's superintendent. **Do not construe advice given by the RCE's representative as in any way binding on the RCE or the [SCDOT] or as releasing the Contractor from the fulfillment of the terms of the [Construction] Contract.**

(R. p. 974, § 105.9.) (Emphasis added.) In acting as an authorized CEIT Services representative for the RCE, any decisions made by TranSystems were temporary and non-binding, and

Flatiron's recourse to any decision was to SCDOT's RCE.

In the Amended Complaint, Flatiron incorrectly contends that TranSystems owed Flatiron a duty not to negligently design or supervise the Project. (R. p. 87, ¶ 29.) Flatiron also incorrectly contends, among other things, that TranSystems failed to properly perform contract administration duties (which belonged to SCDOT not TranSystems), added procedures and inspection protocols (the final decision for all of which belonged to SCDOT, not TranSystems), and unreasonably refused to accept Flatiron's Notice of Claims (decisions to which are expressly delegated to SCDOT, not TranSystems). (R. p. 87, ¶ 30.) TranSystems argued, and the Trial Court ruled, that there is no duty owed by TranSystems to Flatiron, and that Flatiron can obtain relief, if entitled to it, on all of the claims asserted, by seeking relief from Horry County and/or SCDOT under the claims procedure of the Construction Contract. (R. pp. 36-38.)

ARGUMENT

1. The Court of Appeals Erred in Failing to Rule That the Conflict of Interest Between TranSystems and Flatiron Foreclosed Any Potential Finding of Legal Duty Owed By TranSystems to Flatiron.

This Petition should be granted because the courts of South Carolina must apply lawfully enacted regulations, including the Rules of Professional Conduct for Engineers. By recognizing a potential duty owed by TranSystems to a party adverse to TranSystems' client, Horry County, the Court of Appeals erred by rendering S.C. Code Ann. Regs. § 49-304 meaningless, by potential recognizing a special relationship where one should be barred as an impermissible conflict of interest.

Rule 242(b)(3), SCACR, states that a consideration in favor of certiorari is the presence of a novel legal issue. One novel legal issue supporting certiorari under Rule 242(b)(3), SCACR,

in this case is the application of the South Carolina Rules of Professional Conduct for Engineers to the claims presented. In the Briefing at the Trial Court and at the Court of Appeals and in the Petition for Rehearing, TranSystems has argued that TranSystems can owe no legal duty to Flatiron in the performance of its TSC Contract with Horry County, and there can be no special relationship, because recognizing such a relationship would constitute an impermissible conflict of interest.

In the present case, Flatiron seeks to recognize a duty never before recognized in South Carolina, creating a duty of care owed by a CEIT Services Provider to the Contractor whose work the CEIT Services Provider is hired to review on behalf of SCDOT, Horry County, and the motoring public. This duty directly contradicts the written expectations of the Standard Specifications which SCDOT imposes on every highway contract, and it will fundamentally alter the role and responsibility of inspectors and will also significantly increase the cost and risk of litigation associated with state highway project.

Although the Court of Appeals is correct that *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.,* 320 S.C. 49, 55-6, 463 S.E.2d 85, 89 (1995), requires considerations of the facts and circumstance of a case, the Court of Appeals failed to account for the controlling facts and circumstances in this specific case – the Construction Contract, the TSC Contract, and the Rules of Professional Conduct for Engineers. In this case, and as directly stated to the Court of Appeals in the Petition for Rehearing, after discussion in briefing at the Trial Court and for the Court of Appeals, the ethics rules for engineers, which have the force of law in South Carolina, must control. South Carolina's courts cannot recognize a special relationship or a common law duty which creates impermissible conflicts of interest.

In *Eastern Steel Constructors, Inc. v. City of Salem,* 549 S.E.2d 266 (W. Va. 2001), the

West Virginia Supreme Court stated that whether there is a duty of care may be determined by rules of professional conduct for a profession. *Id.* at 275. The same rule should and must apply in South Carolina, because "[r]egulations authorized by the legislature have the force of law." *Goodman v. City of Columbia,* 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995).

The South Carolina State Board of Registration for Professional Engineers and Land Surveyors has enacted Rules of Professional Conduct as an "exercise of the police power vested in the South Carolina State Board of Registration for Professional Engineers and Surveyors by virtue of the acts of the legislature." S.C. Code Ann. Regs. § 49-300(C); see also S.C. Code Ann. § 40-22-60 (authorizing Board to promulgate regulations to carry out duties). Those Rules of Professional Conduct require engineers to "at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public and ... [to] conduct their practice to fulfill this obligation." S.C. Code Ann. Regs. § 49-301(A). Addressing conflicts, the Regulations state:

> The Engineer or Surveyor shall avoid conflicts of interest.
>
> A. The Engineer or Surveyor shall conscientiously strive to avoid conflicts of interest with employer or client, but when unavoidable, the Engineer or Surveyor shall forthwith disclose the circumstances to their employer or client. In addition the Engineer or Surveyor shall avoid all known conflicts of interest with their employer or client and shall promptly inform their employer or client of any business association, interests, or circumstances which could influence their judgment or the quality of their service.
>
> B. The Engineer or Surveyor shall not accept compensation, financial or otherwise, from more than one party for services on the same project at the same time, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to, by all interested parties.
>
> C. The Engineer or Surveyor shall not solicit or accept financial or other valuable considerations from material or equipment suppliers

for specifying their projects.

> D. The Engineer or Surveyor shall not solicit or accept gratuities, directly or indirectly from contractors, their agents, or other parties dealing with their client or employer in connection with work for which they are responsible.
>
> E. When in public service as a member, advisor, or employee of a governmental body or department, the Engineer or Surveyor shall not participate in considerations or actions with respect to services provided by them or their organization in private engineering or surveying practices.

S.C. Code Ann. Regs. § 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.

This engineering professional standard is very similar to that imposed on attorneys, which bars representation of a client if there is a current conflict of interest, and which defines a current conflict of interest as occurring where: (1) the representation of one client will be directly adverse to another client; or (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. Rule 1.7, RPC, Rule 407, SCACR. Our courts presume prejudice to parties where lawyers represent conflicting interests. *Gonzales v. State,* 419 S.C. 2, 12, 795 S.E.2d 835, 840 (2017). Presumably, this is because of the importance of the duties assumed by attorneys in representing clients. Engineers have similarly important duties not only to clients but to the public at large, and courts cannot, through the common law,

force engineers into conflicts which potentially harm public safety.

Further, S.C. Code Ann. Regs. § 49-304(B) states that an engineer cannot accept compensation from more than one party for the same project at the same time, or for services relating to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties. If an engineer cannot accept compensation from multiple parties without disclosure and agreement of all involved, then the converse must also be true – an engineer cannot owe a client a duty to vigorously inspect the work of the client's counterparty to a contract, while simultaneously owing the counterpart a duty not to be too vigorous in those same inspections. That would be akin to finding that attorneys owe opponents a duty not to represent their clients too vigorously.

At present, the Court of Appeals has allowed there to be a fact inquiry by a trial judge to determine if there is a special relationship owed by TranSystems, a CEIT services provider, to Flatiron, a contractor whose work TranSystems has specifically been retained to review for compliance with design and safety standards. That standard would create an impermissible conflict between TranSystems' duty to its client and the public at large and a new purported duty to a third party, whose work TranSystems explicitly contracted to review. (See, e.g., R. p. 825 (defining scope of work for TranSystems).) This is a critical legal issue, of importance to the entire population of South Carolina. As discussed above, TranSystems' role, which is clearly set forth in the applicable contracts, is to act on behalf of Horry County, SCDOT, and the public that funded the road and will use it, to ensure that construction is safe and in compliance with the contracts and applicable laws and regulations. This is, by design, a role that is adversarial to Flatiron, whose work is being reviewed and criticized. Flatiron's own Amended Complaint contends that TranSystems was too vigorous in its inspections (R. pp. 87-88), which means that

the argument is that TranSystems was too diligent in performing duties for its clients, Horry County, SCDOT, and the people of South Carolina. If any court in this state recognizes this to be an actual legal duty, it has created law to force engineers into conflicts between duties to clients and contractors, which clearly violates the Rules of Professional Conduct for Professional Engineers.

In considering whether the Rules of Professional Conduct, which have been adopted as administrative regulations in South Carolina, bar the duty asserted by Flatiron, both the Trial Court and the Court of Appeals were required to interpret the above regulations regarding conflicts. The Trial Court did, but the Court of Appeals did not, even after the requirement was presented in a Petition for Rehearing. The first step of such an analysis 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). By creating a potential special relationship which is a clear conflict, the Court of Appeals failed to follow this Court's directive to utilize the clear meaning of the regulation.

2. The Court of Appeals' Analysis of Duty as Involving Primarily Factual Questions, Rather Than a Legal Question, Conflicts with Prior Decisions of This Court.

Pursuant to Rule 242(b)(3), SCACR, one basis for granting a Petition for Writ of Certiorari is if the decision of the Court of Appeals conflicts with a prior decision of the Supreme Court. Rule 242(b)(3), SCACR. The Supreme Court has directly and clearly stated that "[w]hether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis by Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). "Without a duty, there is no

actionable negligence." *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). In its Petition for Rehearing, TranSystems requested a finding that duty is a question of law, and a further finding of whether a CEIT Services provider hired by an Owner to monitor the work of a contractor owes a duty to the contractor. The Court of Appeals failed to make such findings.

The analysis of the relationships among Horry County, SCDOT, TranSystems and Flatiron must begin and end with the contracts which establish these relationships. In a nearly $100,000,000 construction contract, parties must be allowed to clearly fedine their roles, risks and responsibilities; however, the Court of Appeals failed to recognize that reality, which has been made clear by this Court:

> When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.

C.A.N. Enters, Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377-8, 373 S.E.2d 584, 586 (1988). Despite this clear instruction from this Court, the Court of Appeals used only extrinsic evidence as bases for its purported genuine issues of fact, despite the lack of any ambiguity in any of the relevant contracts. There are literally hundreds of pages of contract language in the Record, and that language, which is not ambiguous, was more than sufficient to sustain the Trial Court finding as a matter of law that TranSystems had no special relationship with Flatiron. n its unpublished opinion, the Court of Appeals incorrectly cites *Cullum Mechanical Construction, Inc. v. South Carolina Baptist Hospital*, 344 S.C. 426, 544 S.E.2d 838 (2001), as authority that further factual inquiry is necessary in this case prior to any decision on duty as a matter of law. (Court of Appeals Opinion, p. 2.) In fact, the basis in *Cullum* that

required further factual inquiry was language in the construction contract documents which may have given rise to a duty of care. *See Cullum*, 344 S.C. at 433, 544 S.E.2d at 842 (stating that special conditions in contract documents may have given rise to special relationship). In that case, the Supreme Court specifically referenced contractual obligations the architect assumed related to reduction of retainage as mandating further factual inquiry into status of a potential special relationship. In this case, the Court of Appeals failed to identify any contractual language that potentially created a duty – presumably because the TSC Contract and the Construction Contract make it clear that Flatiron's decisionmaker was the RCE for SCDOT and that the role was not performed by TranSystems.

a. The Court of Appeals Contradicted Supreme Court Precedent in the "Evidence" Cited in Finding an Alleged Genuine Issue of Material Fact Barring Summary Judgment, Where None Existed.

In erroneously finding there to be a genuine issue of material fact as to duty, the Court of Appeals completely disregarded the clear, unambiguous language of both the Construction Contract and the TSC Contract, in clear contradiction of Supreme Court precedent. Specifically, the Supreme Court has stated:

> When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.

C.A.N. Enters, Inc., 296 S.C. at 377-8, 373 S.E.2d at 586 (1988). "The question of whether a contract is ambiguous is a question of law", which must therefore be determined by a court. *N. Am. Rescue Prods. V. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015). "A contract's language is ambiguous [only] when it is capable of more than one meaning or its meaning is

unclear." *Id.* The Court of Appeals made no findings of ambiguous contracts in its unpublished order. Such a finding should have been made prior to any consideration of extrinsic evidence by the Court of Appeals.

Despite clear direction from this Court that courts should not consider extrinsic evidence in the absence of contractual ambiguity, and the applicable Construction Contract explicitly defining RCE as an "SCDOT Official" with the title "Resident Construction Engineer," the Court of Appeals erroneously used extrinsic evidence in the form of affidavits, documents, and email correspondence to conclude that there was evidence to support the fact that [Marty] Long[, a TranSystems employee,] acted as RCE for SCDOT and used that power to make decisions for the Project." (Court of Appeals Opinion, p. 4.) Essentially, the Court of Appeals used an affidavit and documents to render the Construction Contract and TSC Contract's assignment of duties and responsibilities utterly meaningless. In *C.A.N. Enterprises*, this Court properly stated "[w]e are without authority to alter a contract by construction or to make new contracts for the parties"; however, in its unpublished opinion, the Court of Appeals used extrinsic evidence to make an interpretation that a non-SCDOT official could be RCE, in direct contradiction of the Construction Contract. The Court of Appeals considered extrinsic evidence without finding ambiguity in the Construction Contract or the TSC Contract, in violation of Supreme Court precedent; therefore, Certiorari is proper.

b. The Court of Appeals Erred in Its Interpretation of *Tommy L. Griffin* and In Finding South Carolina Precedent Recognized a Duty for CEIT Service Providers.

The Court of Appeals' purported *Tommy L. Griffin* analysis does not follow the guidance this Court provided in this case, because it attempted to apply a legal standard to this case, which

was developed under entirely different facts and circumstances. One of the primary statements in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 320 S.C. 49, 463 S.E.2d 85 (1995), is that it used analogies to lawyers and accountants to analyze whether a special relationship exists sufficient to give rise to a duty of care. *Id.* at 55, 463 S.E.2d at 89. There, the Supreme Court held that "whether such a duty [of care] exists will depend on the facts and circumstances of each case." *Id.* at 55-6, 463 S.E.2d at 89. Despite this explicit finding of circumstance dependence, the Court of Appeals applied an entirely different circumstance from *Griffin,* which involved an engineer of record with ultimate authority for pay applications and stopping construction, to this case, which involved a CEIT Service provider whose contract explicitly stated it did not have final authority for contract decisions or stopping work.

The Court of Appeals' opinion acknowledged "it is difficult from precedent to determine the exact facts and circumstances that create a special relationship," but it erroneously found there to be sufficient evidence in this case to create a genuine issue of material fact as to a potential special relationship. (Court of Appeals Opinion, p. 3.) The lack of clear precedent provides a further basis for Certiorari, because it means that this case involves a novel legal issue.

Flatiron has identified no case which found there to be a special relationship between a CEIT Services Provider in privity with an owner, specifically tasked to review a contractor's work for compliance, and a contractor, particularly when contracts for both the CEIT Services Provider and the Contractor provide the CEIT Services Provider does not have final decision-making authority. Accordingly, this case presents a novel question of law, which under Rule 242(b)(1), SCACR, is a basis for review by the Supreme Court. *Id.*

The proper test for duty in the context of a design professional should be whether the

contractor or person asserting a duty had a right to rely on actions by the design professional. *See, e.g., Eastern Steel Constructors, Inc. v. City of Salem,* 549 S.E.2d 266 (W. Va. 2001) (considering right of contractor to rely on actions of design professional in determining whether special relationship exists). In *Eastern Steel,* the West Virginia Supreme Court analyzed the liability of an engineer who designed a project (which is factually different from the present case), and determined there was a duty of care owed to a contractor who was entitled to rely on design documents prepared by that engineer as part of a bid for a project. Importantly, that court also stated:

> We note that the exact nature of the specific duty owed by a design professional *may* be impacted by provisions contained in the various contracts entered among the parties (e.g. the contract between the owner and the design professional, and the contract between the owner and the contractor), provided that such contractual provisions do not conflict with the law. In addition, the duty of care may be further defined by rules of professional conduct promulgated by agencies charged with overseeing the specific profession of which a defendant is a member.[1]

Id. at 275.

Restatement (Second) of Torts § 552 (Am. Law Inst. 1977) is helpful in illustrating this point, stating:

> INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS.
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability for pecuniary loss caused to them by their **justifiable reliance upon the information,** if he fails to exercise reasonable care or competence in obtaining or communicating the information.

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[1] Petitioner agrees that regulations and professional rules help determine duty, as discussed above.

> (2) The liability stated in subsection (1) is limited to loss suffered:
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. (Emphasis added.) In the context of engineering services, § 552 provides an appropriate means of assessing whether there is a special relationship giving rise to a tort duty. In *Tommy L. Griffin,* the engineer made plans and made binding decisions (per the terms of its contract), with regard to payment and stopping work. *Tommy L. Griffin, supra,* 320 S.C. at 56, 463 S.E.2d at 89.[2] Accordingly, the contractor in that case could rely on the information and guidance provided. In *Cullum,* contract documents potentially created a duty because the Architect had authority to reduce retainage. *Cullum, supra,* 344 S.C. at 433, 544 S.E.2d at 842. Similarly, because the architect could address retainage, subcontractors could potentially rely on actions taken by the architect with regard to retainage.

In 1997, this Court adopted the § 552 standard of liability for accountants to non-clients. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (footnote 3). The Court found that, with regard to non-clients, an accountant owes a duty to exercise reasonable care or competence in communicating information. *Id.* Parties to legal malpractice claims have attempted to create liability to non-clients citing § 552, and some courts have tied that analysis to issues of whether the third parties asserting liability were justified in relying on actions or representations by attorneys. *See, e.g., Commonwealth Land Title Ins. Co. v. Laws,* 2007-CP-23-3706, MSJ Order by Hill, G. (Ct. Co. Pl. 2008) (provided herewith).

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[2] Similarly, the *Griffin* court's findings regarding implied warranties for reliance upon plans are built on the foundation of Restatement (Second) of Torts § 552 liability.

Applying § 552 to this case, there clearly can be no duty owed by TranSystems to Flatiron, a non-client. Flatiron argues that contract documents require an inference that TranSystems provided design documents; however, Flatiron identified no design documents on which Flatiron relied to its detriment. Accordingly, that is no basis for liability by TranSystems. Flatiron argues that TranSystems' CEIT Services harmed Flatiron by slowing the Project and Flatiron's payment, but that claim fails, because Flatiron's own Construction Contract expressly states that Flatiron was not required to rely on decisions by TranSystems, because all of TranSystems' decisions were subject to final review by the RCE for SCDOT, and that Flatiron was directly instructed in its Construction Contract to not "construe advice given by the RCE's representative[, TranSystems,] as in any way binding on the RCE or the [SCDOT] or as releasing the Contractor from the fulfillment of the terms of the [Construction] Contract." (R. p. 974, § 105.9.) Further, Flatiron had the ability to seek redress and did in fact seek redress against Horry County and SCDOT for the actions of the RCE. The unambiguous language of the Construction Contract tells Flatiron it cannot justifiably rely on actions of TranSystems, and it must look to the SCDOT RCE for answers. Accordingly, applying § 552 to analyze whether there is a special relationship, the Court of Appeals should have affirmed the Trial Court's finding of no special relationship and no duty of care. Therefore, this Court should grant Certiorari to rule on the novel legal issue presented as to the potential duty of care owed by a CEIT Services Provider to a non-client.

CONCLUSION

Although the Court of Appeals issued an opinion, contending that this is a case based solely on facts, the reality is the opposite. The Court of Appeals' finding, while failing to explicitly state that the issue presented is an issue of law, recognizes the possibility of a special

relationship and duty of care when such a relationship is foreclosed as a matter of law by the Rules of Professional Conduct for Engineers. Courts must defer to co-equal branches of government, and here, by recognizing a potential tort duty in conflict with lawfully enacted regulations, the Court of Appeals has infringed on the rights of the Executive Branch to act on authority delegated by the Legislative Branch. Further, it creates a new tort exposure for a third party, when Flatiron could already seek redress for improper interpretation of the Construction Contract or safety regulations against the SCDOT, based on the express authority of the SCDOT RCE, which is established in SCDOT's Standard Specifications. Doing so changes the parties' expectations for specifications applicable to nearly every SCDOT Project. This is a vitally important issue which should be addressed by South Carolina's highest court. The Construction Contract provided a remedy for Flatiron against the Owner. (R. pp. 768 – 770.) Flatiron filed suit against Horry County and SCDOT under that procedure; therefore, there is no need to abrogate regulations to create a remedy, when Flatiron already had one available.

For the reasons stated above, Petitioner TranSystems Corporation respectfully requests this Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
COMMONWEALTH LAND TITLE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JAMES TERRY LAWS, ESQ., WILLIAM)
C. HOOD, ESQ., AND JILL COX, AS)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF JOHN A. COX,)
)
Defendants.)
)
WILLIAM C. HOOD, ESQ.,)
)
Third-Party Plaintiff,)
)
vs.)
)
JILL COX, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF JOHN A. COX,)
)
Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No.: 2007-CP-23-3706

ENTERED COMPUTER

ORDER GRANTING DEFENDANT WILLIAM C. HOOD, ESQ.'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the motion of Defendant and Third-Party Plaintiff William C. Hood, Esq. ("Hood") for summary judgment on all claims alleged against Hood in Plaintiff's Second Amended Complaint. The Court heard Hood's Motion on July 17, 2008, at 2:00 p.m. For the reasons stated below, Hood's Motion for Summary Judgment is hereby GRANTED.

FINDINGS OF FACT

Because this is a Motion for Summary Judgment, all facts summarized below are presented in the light most favorable to Plaintiff, the non-moving party.

This case arises out of a transaction (the "Transaction") for the sale of a parcel of land on Highway 25 in Greenville County, South Carolina (hereinafter referenced as "the Property"). Defendant John A. Cox ("Cox") entered into a contract for the sale of the Property to Jon Heard and James Heard (the "Heards"). The Heards retained Defendant J. Terry Laws, Esq. ("Laws") to represent them in the closing of the sale of the Property. In connection with their purchase of the Property, the Heards obtained a loan from the Bank of Travelers Rest, and as part of the loan process, the Heards obtained a policy of title insurance from Plaintiff Commonwealth Land Title Insurance Company ("Commonwealth").

The Property was part of a larger parcel of land that previously had been owned entirely by Cox. The larger parcel was subject to a mortgage to American Federal Bank ("the American Federal Mortgage"), as well as several other mortgages. Because of repeated subdivisions of Cox's Highway 25 land holdings and because multiple mortgages attached to the Property at various times, the title status of the Property was confusing.

In preparing for the closing of the sale of the Property to the Heards, Cox retained Hood to prepare the deed transferring the Property. Hood's only role in the in the Transaction was preparing the deed transferring the Property from Cox to the Heards, and Hood billed Cox $100 for his work. (*See* January 24 Letter, as defined below). Hood did not represent Commonwealth or the Heards in the sale of the Property, as conceded by Commonwealth's counsel at the hearing on Hood's Motion for Summary Judgment. (*See* Deposition of William C. Hood, pp. 14-16) (hereinafter "Hood Deposition") (noting that Hood was retained by Cox and that Hood knew Laws was handling the closing).

In connection with Hood's preparing the deed, Hood drafted a letter to Laws dated January 24, 2002 (the "January 24 Letter"). In the January 24 Letter, Hood stated that the Property had been

encumbered by several mortgages, but that Hood paid off these encumbrances when he closed previous transactions involving the Property. The January 24 Letter further stated that Hood "would record [satisfaction affidavits for the mortgages] if the mortgages [were] still open." (*See* January 24 Letter). Attached to the January 24 Letter in the facsimile transmission were several documents, including a copy of the deed and an unexecuted affidavit stating that the American Federal Mortgage was satisfied.[1] Shortly after drafting and faxing the January 24 Letter, Hood further reviewed the title status of the Property, at which time he realized that the American Federal Mortgage still encumbered the Property. Accordingly, on January 25, 2002, Hood attempted to fax a second letter to Laws (the "January 25 Letter") stating that "[Hood] did not pay [the American Federal Mortgage] off but [Hood] got a release of a portion of the property [that was previously sold by Cox]." (*See* January 25 Letter). In the January 25 Letter, Hood reported to Laws that the American Federal Mortgage still bound the Property to be sold by Cox to the Heards. (*See* January 25 Letter).

Laws denies receiving the January 25 Letter. However, Laws' file produced through discovery in this case contained the fax cover sheet for the January 25 Letter, which bears a fax transmission stamp from Hood's office dated January 25, 2002. Hood identified the coversheet, and further testified that he personally prepared the coversheet. (*See* Hood Deposition, pp. 31, 57-58, and 132-137.) Additionally, in a letter that Laws' counsel sent to Hood's counsel with the intent that it constitute Laws' response to Hood's Requests for Admissions, Laws' counsel admitted that the cover sheet was found in Laws' file. (*See* June 5, 2008, Letter from Stewart to Atkinson). Because this Court is obligated to view the facts in the light most favorable to Commonwealth for purposes of this Summary Judgment Motion, the Court assumes that Laws received only the January 25 fax cover sheet, and not the January 25 Letter.

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[1] No party has presented any evidence that the affidavit include in the facsimile transmission containing the

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Hood was not an approved attorney for Commonwealth; therefore, he was not allowed to make any certifications of title pursuant to Commonwealth's guidelines. Because Laws was the only approved attorney for Commonwealth in the Transaction, he was the only attorney allowed to certify title to Commonwealth. (See Deposition of Mark Hershberger, Commonwealth's 30(b)(6) deponent, pp. 72-74) (hereinafter "Hershberger Deposition"). Commonwealth, through its 30(b)(6) designee, has admitted that Laws served as Commonwealth's agent for the purposes of issuing a title insurance policy for the Property. (*See* Hershberger Deposition, pp. 17-18, and 20) (noting authority of agents for issuance of policy and conceding that Laws acted as Commonwealth's agent for the Transaction).

Hood believed that the January 24 Letter clearly anticipated further communication from Laws, if Laws expected Hood to take any action on encumbrances upon the Property. Specifically, the January 24 Letter stated that Hood had paid the American Federal Mortgage but that he was unsure whether the American Federal Mortgage (as well as a Carolina First Mortgage) had ever been satisfied of record. (*See* Hood Deposition, pp. 21-25). Further, Hood stated that he would record satisfactions, "if in fact they [were] still open." (*See* January 24 Letter). Hood's January 24 Letter demonstrates that he had not reviewed the title status at the Register of Deed's Office, because he states uncertainty as to whether mortgages had been satisfied. Further, his statement that he would take action on mortgages "if they [were] still open" indicates that Hood expected Laws to communicate with him further if Laws expected Hood to take further action. (*See* Hood Deposition, pp. 21-25.) Hood testified that no communication occurred between Hood and Laws prior to the closing on the Property, other than the January 24 Letter and the January 25 Letter, both of which were transmitted by Hood to Laws by fax only. (Hood Deposition, pp. 17-19). Laws denied being able to recall exactly what communication with Hood occurred prior to the closing; however, he

January 24 Letter was ever executed by Hood.

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recalled receiving Hood's January 24 Letter. (Deposition of Terry Laws, pp. 77-78) (hereinafter "Laws Deposition").

Laws closed the sale of the Property on or after February 1, 2002. He did not satisfy the American Federal Mortgage, and Cox accepted payment at the closing without satisfying such mortgage. Further, Laws did not report the American Federal Mortgage to Commonwealth; therefore, Commonwealth did not exclude the American Federal Mortgage from the title insurance policies that Travelers Rest Title issued for the Property.

Eventually, Cox defaulted on the American Federal Mortgage, which had been assumed by Central Carolina Bank ("CCB") before the February 1, 2002, closing on the Property. CCB initiated foreclosure proceedings in 2004, and Laws reported a claim to Commonwealth. Commonwealth then satisfied the American Federal Mortgage, and assumed CCB's rights under the American Federal Mortgage.

PROCEDURAL HISTORY

Commonwealth filed suit against Laws and Cox in this action on June 12, 2007. Because Commonwealth satisfied the American Federal Mortgage on behalf of the Heards, it asserted claims on its own behalf, but it also asserted claims on behalf of the Heards through subrogation. Commonwealth amended its Complaint to add Hood as a party on August 28, 2007. Commonwealth further amended its pleadings on December 17, 2007, to change Cox's identification to the Estate of John A. Cox. All of Commonwealth's claims against Hood are alleged in the "Second Claim for Relief" in Plaintiff's Second Amended Complaint. In the Second Claim for Relief, Commonwealth asserts claims against Hood for "legal malpractice and negligence."

Hood timely answered and asserted a third-party claim and a cross-claim against the Estate of John A. Cox. Hood is currently litigating the timeliness of his claims against the Estate of John A.

Cox in the Probate Court for Anderson County.

On May 8, 2008, Hood moved for summary judgment with respect to Commonwealth's claims against him. On July 14, 2008, Commonwealth submitted its Brief in Opposition to Hood's Motion for Summary Judgment, and attached to that brief as exhibits: (1) the January 24 Letter (with an unexecuted affidavit included with the January 24 Letter in the January 25, 2002, fax transmission to Laws); (2) the January 25 Letter; (3) excerpts from the deposition of Hood; and (4) excerpts from the deposition of Laws. Commonwealth did not present any expert testimony, affidavits or opinions supporting its claims against Hood.

CONCLUSIONS OF LAW

Hood is entitled to summary judgment pursuant to Rule 56, SCRCP, with respect to Commonwealth's claims against him, because there is no genuine issue of material fact related to Hood's alleged liability to Commonwealth. Hood is entitled to judgment as a matter of law when the facts before the Court are viewed in the light most favorable to Commonwealth. *See* Rule 56, SCRCP; *see also Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001) (interpreting standard in summary judgment motions).

This Court shall consider separately Commonwealth's claims for legal malpractice and negligence/negligent misrepresentation. In its Brief in Opposition to Hood's Motion for Summary Judgment, Commonwealth appeared to change from the negligence theory asserted in its pleadings to a negligent misrepresentation theory. Accordingly, Commonwealth's negligence/negligent misrepresentation claims shall be considered together.

A. Legal Malpractice Claim

"To prevail in a legal malpractice claim, the plaintiff must satisfy the following four elements: (1) the existence of an attorney-client relationship; (2) breach of duty by the attorney; (3)

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damage to the client; and (4) proximate causation of [the] client's damage by the breach." *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005), *quoting Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). Commonwealth's legal malpractice claim against Hood fails because Hood did not have an attorney-client relationship with either Commonwealth or the Heards, and also because Commonwealth has not proved by expert testimony any breach by Hood of a duty of care.

Laws served as the attorney for the Heards at the closing, and Hood represented Cox, to the extent that Hood drafted the deed transferring the Property from Cox to the Heards. Neither Commonwealth nor any of the other parties have presented any evidence demonstrating that an attorney-client relationship ever existed between Hood and Commonwealth, or between Hood and the Heards. In fact, Commonwealth has not contended that an attorney-client relationship existed between Hood and Commonwealth or between Hood and the Heards. Because Commonwealth thus cannot meet the first element of its legal malpractice claim, Hood is entitled to summary judgment on such claim.

Hood is also entitled to summary judgment on Commonwealth's legal malpractice claim because Commonwealth has not established any professional duty owed by Hood to the Heards or to Commonwealth. "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without such a duty, there can be no actionable negligence." *Rogers v. S.C. Dep't of Parole and Cmty. Corr.*, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). By logical extension, without a duty of care owed by an attorney in a legal malpractice action, there can be no professional negligence. As noted above, Commonwealth has failed to establish an actionable duty in this case through expert testimony, even though Rule 702, SCRE, requires testimony from an expert qualified through knowledge, skill, experience, training or

education where scientific, technical or other specialized knowledge is required to assist the trier of fact in understanding the evidence or issues. Duties of care owed by attorneys to laypersons are clearly outside the scope of knowledge of jurors, and must be established through competent expert testimony. Because Commonwealth has not produced such expert testimony, it has failed to identify a duty sufficient to survive Hood's Motion for Summary Judgment.

B. Negligence/Negligent Misrepresentation Claim

The negligence claim pled in Commonwealth's Second Amended Complaint appears to be based on a common law theory of negligence, with respect to which Commonwealth asserted (1) the existence of a duty owed by Hood to Commonwealth (or the Heards); (2) breach of the duty; (3) that the breach was the actual and proximate cause of Commonwealth's injury; and (4) that Commonwealth suffered an injury or damages. *See Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (outlining elements of negligence actions); *see also* Commonwealth's Second Amended Complaint. This common law negligence claim against Hood fails, however, because Commonwealth has not identified a duty sufficient to subject Hood to common law negligence liability.

Further, Commonwealth never identified an expert to testify regarding any duties owed by Hood to Commonwealth or the Heards. Although Commonwealth's Second Amended Complaint appears to argue that facsimile communication was an improper means of transmitting information between attorneys, what constitutes proper means of communication between attorneys is outside the scope of lay knowledge. Under Rule 701(c), SCRE, laypersons cannot provide opinion testimony regarding matters requiring "special knowledge, skill, experience or training." *Id.* This generally means that lay opinion becomes inadmissible when it ventures "beyond the realm of common experience." *Certain Underwriters at Lloyds, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir.

2000); see also *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). Only a qualified expert may provide an opinion regarding what constitutes proper means of communication between legal professionals, and Commonwealth has identified no such expert. Accordingly, Hood is entitled to summary judgment on Commonwealth's claims for common law negligence.

In its summary judgment opposition brief presented to the Court on July 14, 2008, Commonwealth for the first time argued that Hood is liable to Commonwealth or the Heards because Hood allegedly breached a duty created by Section 552 of the Restatement (Second) of Torts, which the American Law Institute has entitled "Information Negligently Supplied for the Guidance of Others." Commonwealth's Brief cited the four elements of common law negligence stated above and asserted that South Carolina's Supreme Court recognized and adopted Section 552 in its entirety in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997). While the South Carolina Supreme Court did recognize a duty as outlined by Section 552 in *ML-Lee*, it did so with respect to claims for negligent misrepresentation, rather than common law negligence.

The *ML-Lee* Court's decision comports with the plain language of Section 552, which states:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts §552(1). The elements for negligent misrepresentation in South Carolina are thus nearly identical to those for a claim under Section 552. By way of comparison, to prove a case for negligent misrepresentation under South Carolina's common law, a plaintiff must prove the following elements:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant

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> owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied the representation; and (6) the plaintiff suffered a pecuniary loss as a result of his reliance upon the representation.

West v. Gladney, 341 S.C. 127, 133-34, 533 S.E.2d 334, 337 (Ct. App. 2000). This comparison reveals that Restatement §552 simply reiterates the grounds for negligent misrepresentation claims in South Carolina.

Commonwealth has not asserted an actionable claim against Hood for negligent misrepresentation. Commonwealth has not pled the six elements required for a negligent misrepresentation claim against Hood in any of its complaints in this action, and Commonwealth did not move at the hearing on Hood's Motion for Summary Judgment to amend Commonwealth's Second Amended Complaint to supplement its purported claim for negligent misrepresentation. "To state a claim for negligent misrepresentation, a plaintiff must allege [the six elements outline in *West, supra*]." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 284-85 (Ct. App. 1993). At the hearing, Commonwealth's counsel asserted that Commonwealth's Second Amended Complaint was sufficient to state a claim for negligent misrepresentation. However, Commonwealth's Second Amended Complaint does not even allege all six required elements for negligent misrepresentation, because it does not allege that Commonwealth or the Heards justifiably relied on any representation by Hood, and because it fails to reference any pecuniary interest that Hood held in the subject transaction.[2] Although courts are required to construe pleadings so "as to do substantial justice to all parties," courts should "not, however, write into the pleadings allegations and defenses that are not presented." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541-42, 537 S.E.2d 559,

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[2] Hood did not move to challenge Commonwealth's Second Amended Complaint under Rule 12(b)(6), SCRCP, at the initial pleading stage, because Commonwealth's Second Amended Complaint did not purport to state a claim for negligent misrepresentation. The Second Amended Complaint entitled its claim "negligence" and it stated the four elements required to state a claim for common law negligence.

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561 (Ct. App. 2000), *citing Davis v. Montieth*, 289 S.C. 176, 345 S.E.2d 724 (1986). In the present case, Commonwealth has not asserted facts or allegations sufficient to meet the required elements for the tort of negligent misrepresentation as required under Rule 8, SCRCP. Commonwealth has not stated all of the required elements for a negligent misrepresentation claim in its Second Amended Complaint; therefore, Hood is entitled to judgment as a matter of law on Commonwealth's attempted claim for negligent misrepresentation.

Even if Commonwealth had properly pleaded a claim for negligent misrepresentation, which this Court finds that Commonwealth has not done, Hood would still be entitled to summary judgment on such a claim. As stated above, a successful claim of negligent misrepresentation requires that the plaintiff prove six elements. *See West v. Gladney*, 341 S.C. 127, 133-34, 533 S.E.2d 334, 337 (Ct. App. 2000) (stating elements required for a negligent misrepresentation claim). Hood is also entitled to summary judgment on Commonwealth's purported cause of action for negligent misrepresentation because Commonwealth has failed to present evidence sufficient to create a factual issue for the required element of justifiable reliance.

Any reliance in this case on Hood's representations with respect to the Property would have been received and relied upon by Laws, as Commonwealth's and the Heard's agent for title insurance. Commonwealth, through its 30(b)(6) designee, has admitted that Laws served as Commonwealth's agent for purposes of the issuance of title insurance policies. By virtue of serving as the Heards' attorney and title insurance agent, Laws also served as an agent for the Heards in the Transaction. Based on agency principles, Laws' actions are therefore imputable to Commonwealth and the Heards. Accordingly, whether Commonwealth and its insureds, the Heards, justifiably relied on Hood's alleged representations depends upon whether Laws justifiably relied on said representations.

In considering the date for the alleged justifiable reliance in this case, the pertinent date is the date that the alleged reliance caused harm to Commonwealth and the Heards. Commonwealth and the Heards did not suffer any damage until the closing transferring the Property, which occurred on or about February 1, 2002. Accordingly, such date is the date of any claimed justifiable reliance in this case.

At the hearing on this motion, Commonwealth's counsel argued that justifiable reliance is always a fact issue to be determined by a jury; however, *Hit Products Corp. v. Anchor Financial Corp.*, 111 F. Supp. 2d 723 (D.S.C. 1999), demonstrates that South Carolina courts may properly determine such issue as a matter of law. In *Hit Products*, the district court interpreted South Carolina law as allowing a finding of justified reliance "in a negligent misrepresentation claim 'only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." *Id.* at 727, *quoting Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996). After stating the standard for justifiable reliance, the *Hit Products* court granted the defendant bank summary judgment on a negligent misrepresentation claim based on the bank's representations concerning the financial condition of a distributor of the plaintiff's products. The court determined that the plaintiff did not justifiably rely on the bank's representations, because the plaintiff had superior knowledge of the distributor's financial condition due to the plaintiff's extensive financial dealings with the distributor. *Id.*

Commonwealth's justified reliance argument fails as a matter of law with respect to Hood for several reasons.[3] First, Commonwealth's own 30(b)(6) deponent, Mark Herschberger, testified that Commonwealth's policies, as expressed in company manuals, required Commonwealth's approved attorneys and title agents, rather than sellers' attorneys, to report any defects to title, including

[3] As mentioned above, this Court must view the facts in the light most favorable to the non-moving party;

mortgages. Further, according to Commonwealth's own written policies, Commonwealth's approved attorneys, rather than sellers' attorneys, were required by Commonwealth to ensure that satisfactions were obtained to resolve defects. (*See* Commonwealth Manual for Approved Attorneys, pp. 4-5) (noting obligation to report or resolve defects); (*see also* Hershberger Deposition, pp. 74, and 126-127) (noting that mortgage prevents marketable title and that approved attorneys have duty to verify that insured is receiving marketable title). Herschberger also testified that if the satisfaction could not be obtained by Commonwealth approved attorneys, Commonwealth, through its title insurance agents, was required to except the defect from title coverage. (Hershberger Deposition, p. 123). One of five statutorily-allowed actions must have been taken to satisfy the American Federal Mortgage, and Herschberger testified that Hood's statements in the January 24 Letter do not provide sufficient assurance of satisfaction for Commonwealth to deem the mortgage legally satisfied. (See Hershberger Deposition, pp. 115-119). Accordingly, based on Commonwealth's own policies, Commonwealth should not have insured the Property without excepting the American Federal Mortgage. Commonwealth's own written policies and procedures demonstrate that Commonwealth was not justified in relying on the January 24 Letter to issue title insurance for the Property which did not except the American Federal Mortgage from coverage.

Hershberger's testimony as Commonwealth's 30(b)(6) designee constitutes an admission on Commonwealth's behalf that Commonwealth's reliance on the January 24 Letter was not justified. *See* Rule 30(b)(6), SCRCP. Accordingly, no material factual issue exists as to whether Commonwealth's reliance on the January 24 Letter was justified with respect to Commonwealth's claims against Hood. In fact, Hershberger's testimony probably constitutes proper expert testimony (subject to Hershberger's qualification by this Court as an expert) proving that Commonwealth's

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therefore, the Court must assume that Laws never received the January 25 Letter.

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alleged reliance upon the January 24 Letter was not justified, and this expert testimony has not been contested through any admissible evidence presented by Commonwealth.

Second, in a claim for negligent misrepresentation, "[t]here is no liability for casual statements, representations as to a matter of law, or matters which [the] plaintiff could ascertain on his own in the exercise of due diligence." *Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996), *quoting AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "Reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." *Id., citing O.C. Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992). As noted above and, Commonwealth, through its agent, had actual knowledge of the American Federal Mortgage due to the agent's title search, and the January 24 Letter clearly indicates that Hood performed no title search. Hood did not have superior knowledge of the status of the Property's title on the date of the closing; therefore, Commonwealth was not justified in relying on the January 24 Letter in closing the Transaction.

Third, "there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter." *Id., citing O.C. Gruber, supra,* 309 S.C. at 20, 419 S.E.2d at 800. In this case, Commonwealth, through its agent, performed an actual title search, while Hood's statements regarding title status in the January 24 Letter were based on memory. (Hood Deposition, pp. 23-24). Further, through an agent, Commonwealth knew of the American Federal Mortgage, and, at the time of closing knew that there was not a legal satisfaction of record. Commonwealth's own 30(b)(6) testimony demonstrates that Commonwealth knew (or at the very least its agent knew) that the American Federal Mortgage existed, and the January 24 Letter was not sufficient to establish a justified reliance on the alleged satisfaction of the American Federal Mortgage, because the January

24 Letter was not one of the five statutorily-allowed methods of satisfaction outlined in Hershberger's testimony.

Because Commonwealth has failed to create an issue of material of fact with regard to the justifiable reliance element of its purported negligent misrepresentation action, Hood is entitled to judgment as a matter of law on the negligent misrepresentation cause of action.

For these reasons, Defendant William C. Hood, Esq.'s Motion for Summary Judgment is hereby GRANTED. Hood is granted summary judgment on all claims presented against him by Commonwealth. Accordingly, this Court orders an entry of judgment for Hood on Commonwealth's claims against Hood, and this Order constitutes a final judgment on all of Commonwealth's claims against Hood, pursuant to Rule 54(b), SCRCP. This Court expressly finds that there is no just reason for delaying final judgment on Commonwealth's claims against Hood, due to the expense associated with Hood's continued involvement in this litigation and Hood's need for finality on Commonwealth's claims in order to resolve Hood's claims against the Estate of John A. Cox.

IT IS SO ORDERED.

August 27, 2008

Greenville, South Carolina

D. Garrison Hill
Resident Judge, Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2007CP2303706

Commonwealth Land Title Insurance Company *vs.* James Terry Laws

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

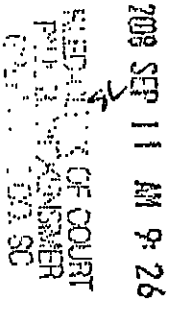
☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

- SEE ATTACHED ORDER -



Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - D. GARRISON HILL

This judgment was entered on the 9/11/08, and a copy mailed first class this 9/11/08, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

Paul B. Wickensimer - Clerk of Court

CPFORM4M

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2025-UP-416 (S.C. Ct. App. Filed Dec. 10, 2025)

Flatiron Constructors, Inc.,

Petitioner,

v.

TranSystems Corporation,

Respondent.

PROOF OF SERVICE

I certify that on **February 20, 2026**, I have served, or caused to be served, TranSystem's Petition for *Writ of Certiorari* and *Referenced Case* on the following Counsel for Respondent via E-mail, addressed and U.S.P. S, as follows:

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s/ C. Daniel Atkinson
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February 20, 2026

South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: **Flatiron Constructors, Inc., Appellant vs. TransSystems Corporation, Respondent**
Appellate Case No. 2024-000171

Dear Sir or Madam:

On behalf of Respondent TranSystems Corporation, please see attached for filing in this case:

1. Petition for Writ of Certiorari
2. Copy of Order in Commonwealth v. Laws, provided as precedent cited.
3. Proof of Service.

A check for the filing fee is being mailed to you today via U.S. Mail pursuant to the Supreme Court's Order of April 30, 2024, we are not submitting an appendix.

Sincerely,

C. Daniel Atkinson (S.C. Bar #72721)
datkinson@wajlawfirm.com

Enclosures
CDA:jpt

cc: Mason A. Goldsmith, Jr., Esq.
K. Jay Anthony, Esq.
Carter B. Reid, Esq.
Clerk of S.C. Court of Appeals

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