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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

On Petition for Writ of Certiorari from the Court of Appeals of South Carolina
Unpublished Opinion No. 2025-UP-416 (S.C. Ct. App. filed Dec. 10, 2025)

Flatiron Constructors, Inc., Respondent,

v.

TranSystems Corporation, Petitioner.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242(g), SCACR, Petitioner TranSystems Corporation ("TranSystems") files this Reply to Respondent Flatiron Constructors, Inc.'s ("Flatiron") Return in Opposition to TranSystems' Petition for Writ of Certiorari.

Stated simply, both the Court of Appeals and Flatiron vastly understate the significance of the Court of Appeals' ruling, which invents a new duty never before recognized in South Carolina out of whole cloth. Under the Court of Appeals' decision, a Construction Engineering Inspection and Testing Services ("CEIT Services") provider retained to review and analyze a contractor's work owes a duty to that contractor which is adverse to the interests of the CEIT Services Provider's Client. Whether that duty can even exist raises a novel legal question regarding the application of engineering professional conduct regulation to determinations of tort duty. Neither the Court of Appeals nor Flatiron have identified any South Carolina case which recognizes a duty owed by a CEIT Services Provider employed by an owner to the general contractor, where that CEIT Services Provider did not have final decision-making authority. Even the Court of Appeals acknowledged a limited amount of precedent on which it could rely in its order reversing the Trial Court. (Ct. of Appeals Dec. 10, 2025 Order, p. 3.) In opposing the Petition, Flatiron attempts to ignore all this by skipping directly to the assumption that there is a special relationship between the CEIT provider and contractor. But in reality, there is no support for any such special relationship between Flatiron, the contractor, and TranSystems, the CEIT Services provider. This case is the exact type of case involving a significant issue of law, which is appropriate for resolution by the Supreme Court of South Carolina. Flatiron bears the burden of proof regarding duty, and it has failed to provide evidence demonstrating the existence of a duty owed by TranSystems. The

Circuit Court properly applied the facts to the law, and the Court of Appeals erred in reversing the Circuit Court.

The Court of Appeals' opinion also conflicts with this Courts prior decisions establishing that the existence of a legal duty is a question of law for the court, because the Court of Appeals relied too heavily on alleged factual disputes. Further, the Court of Appeals erred by finding there to be issues of fact, which were neither genuine nor material, in violation of this Court's holding in *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023). The unambiguous contracts control the scope of duty, not self-serving affidavits which do not allow for reasonable inferences of duty when viewed in context.

ARGUMENT

I. 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.

Under South Carolina law, "[a]n affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." *Madison v. Babcock Ctr., Inc.,* 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). There has been no evidence that any statute, contract, status or property interest created a legal duty owed by TranSystems to Flatiron; therefore, any analysis of duty rests on whether there is a special relationship between the parties giving rise to such a duty. There is not—and Flatiron's arguments to the contrary fail.

Flatiron erroneously urges this Court to determine that *Tommy L. Griffin* creates a near universal duty of care owed by professional engineers to contractors, and that position directly conflicts with the actual case language, which states "[w]hether such a duty [of care] exists will depend on the facts and circumstances of each case." *Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones & Goulding, Inc.,* 320 S.C. 49, 55-6, 463 S.E.2d 85, 89 (1995); *see also*

Respondent's Return, pp. 9 – 10. In reality, this Court's holding in that case was that the relationships of parties (largely set by contract) determine whether a professional owes a duty of care in tort to a potential claimant.

And Flatiron's contention that there is no adversarial nature in the relationship between owner and contractor borders on the absurd – a contractor is economically driven to do the minimum work necessary for the highest price, which an owner is economically driven to obtain the maximum work necessary for the least price. The tripartite relationship among Flatiron, TranSystems and SCDOT is clear: (1) SCDOT serves as arbiter of competing interests between Owner and Contractor, but remains obligated to protect public safety; (2) TranSystems is a consultant retained by the Owner, expected to act in fidelity with the Owner's interests; and (3) Flatiron must have all disputes under the Construction Contract resolved by SCDOT. TranSystems' duties, other than those to its client, are owed to the general public and people of South Carolina, because TranSystems is obligated to protect public safety. Of course, in this case, Horry County, as a subdivision of South Carolina, has the same obligation as SCDOT and TranSystems to protect public health and safety. *See* S.C. Const. Ann. Art. I, § 3 (noting protection of life, liberty and property).

A. Flatiron's Position, and the Court of Appeals' Ruling, Impermissibly Seeks to Impose a Duty of Care on a Party in a Position Adversarial to Flatiron.

Respondent's attempt to argue that TranSystems owed a duty of care to Flatiron are unavailing.

1. <u>The contract establishes the relationship between the parties here.</u>

The record is clear—and indeed Flatiron agrees—that Flatiron had no privity with TranSystems. Return, p. 17. To the contrary, Flatiron's construction contract with Horry County (the "Construction Contract"), specifically instructed Flatiron, that TranSystems, as an authorized

representative of SCDOT's Resident Construction Engineer "may inspect all work done and all materials furnished[, and that any interim decisions to reject defect materials or suspend work were] … subject to the final decision of the [SCDOT] RCE." (R. p. 974, § 105.9.)[1] The Construction Contract, further instructs Flatiron not to: "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.)

By contrast, Flatiron *does* have privity with Horry County and SCDOT, which allowed Flatiron to make claims against Horry County and SCDOT for alleged incorrect decisions and poor supervision. Under the Construction Contract, Flatiron had a specified claims procedure for "all claims for additional time or compensation under [the Construction Contract]." (R. p. 768.) Flatiron pursued that relief through that claims procedure, and through C.A. File No. 2022-CP-26-06970, filed against Horry County and SCDOT (the "SCDOT Action"), which was ultimately dismissed.[2] In fact, Flatiron twice stayed *this* action to allow for SCDOT agency review to proceed. (R. pp. 1-4, 106-109.)

In other words, the contract clearly spells out against whom TranSystems can bring claims and against whom it cannot. And the contractual language lends no support for any sort of relationship—or duty—permitting recovery by TranSystems from Flatiron. In fact, the

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[1] Under the Standard Specifications incorporated into Flatiron's Construction Contract, RCE is explicitly defined under "SCDOT Officials and Offices," meaning that SCDOT employ the RCE (R. p. 972.) By interpreting the unambiguous term "SCDOT Officials and Offices" to constitute an issue of fact as to whether an employee outside of SCDOT acted as RCE, the Court of Appeals erred as a matter of law. *See, e.g., Watson v. Underwood,* 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014) (holding that extrinsic evidence cannot be used to give a contract meaning different from that indicated by its plain terms).

[2] Court-filed copies of the Complaint and the Stipulation of Dismissal without Prejudice of the SCDOT action are filed herewith as Exhibit A to this Brief.

construction contract informed Flatiron that Flatiron had no special relationship with TranSytems. The Construction Contract clearly defined the person with authority to review and reject or approve Flatiron's work, and that party was SCDOT's Resident Construction Engineer, stating "[u]nless otherwise specified elsewhere in these specifications, the RCE will decide all questions that may arise regarding the quality and acceptability of materials furnished, the work performed, the rate of progress of the work; the interpretation of the Plans and Specifications; acceptable fulfilment of the Contract by the Contractor; disputes and mutual rights between Contractors; and compensation for the work." (R. p. 973, § 105.1). It is ironic that Flatiron accuses TranSystems of seeking a second bite of the apple for Petitioning for Certiorari, when Flatiron's entire claim against TranSystems is, in fact, an impermissible second bite at the apple itself, attempting to target them because it has tried—and failed—to bring its more direct claims.

Whether there is privity of contract is not always determinative of whether a special relationship exists; however, in this case, all parties were careful to delineate scopes of work and duty by contract, in an effort to avoid confusion. The Construction Contract makes it clear that Flatiron is not owed a duty by TranSystems, because Flatiron is instructed it cannot rely on advice from TranSystems. As this Court found in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 241-2, 489 S.E.2d 470, 472 (1997), a key factor determining whether there can be liability for professional actions outside privity, is whether the party claiming harm could justifiably rely on the information provided. Here, Flatiron was expressly told that it could not do so; therefore, there is no basis for tort liability.

"When a contract is entered into freely and voluntarily, contractual limitations are normally enforced [by South Carolina Courts]." *Maybank v. BB&T Corp.,* 416 S.C. 541, 573, 787 S.E.2d 498, 515 (2016). "[South Carolina's Supreme Court] has generally upheld limitations of liability

and exculpatory clauses, finding they are commercially reasonable." *Id.* This must also be true for clear and explicit delineations of duty and responsibility set forth in contracts drafted and negotiated by departments and political subdivisions of the State of South Carolina. Nor is there any legal authority which prohibits parties to the Construction Contract from limiting actions related to contract interpretation to claims against SCDOT and/or Horry County rather than TranSystems (which acted as SCDOT's consultant). Thus, there is no basis in the contract for Flatiron's claim.

2. Nor is there any other "special relationship" which can give rise to such a claim.

Other than an incorrect reliance on *Tommy L. Griffin,* Respondent has failed to identify any basis to support a finding of a special relationship between Flatiron and TranSystems.

i. The logic of *Eastern Steel* is persuasive.

Respondent states that an opinion which states "the duty of care may be further defined by rules of professional conduct promulgated by the agencies charged with overseeing the specific profession of which a defendant is a member" does not state that duties of care can be defined by rules of professional conduct. *See* Return, p. 14; *see also Eastern Steel Constructors, Inc. v. City of Salem,* 549 S.E.2d 266, 275 (W. Va. 2001). The West Virgina Supreme Court of Appeals provided this analysis immediately prior to stating "we hold that when a special relationship exists between a design professional and a contractor, the specific parameters of the duty of care owed … must be defined **on a case-by-case basis**." *Id.* (emphasis added). This is entirely consistent with this Court's holding in *Tommy L. Griffin. Tommy L. Griffin*, *supra*, 320 S.C. at 55-6, 463 S.E.2d at 89 (noting analysis of special relationship is on case-by-case basis). The sole variation between West Virginia and South Carolina is terminology – West Virginia separates special relationship from duty, while South Carolina blends the terms. With the slight variance in

terminology, the reality is that duty must be determined on a case-by-case basis, and the major factors are the contracts and any professional regulations which are applicable.

ii. The General Assembly has dictated that professional engineering is subject to regulation, and any scope of common law duty must comply with legislative action.

Our General Assembly has subjected engineering in South Carolina to regulation, [i]n order to safeguard life, health, and property and to promote the public welfare." S.C. Code Ann. § 40-22-2. The General Assembly further delegated to the Board of Registration for Professional Engineers and Land Surveyors authority to "promulgate regulations necessary to carry out the provisions of [the statutory chapter regulating engineering]." S.C. Code Ann. § 40-22-60. Those regulations include the Rules of Professional Conduct for Engineering. Based on the Rules of Professional Conduct for Engineers, an engineer must avoid conflicts of interest. S.C. Code Regs. § 49-304. Of course, Flatiron self-servingly contends the regulation is meaningless, but this Court cannot make such an analysis. *See Sparks v. Palmetto Hardwood, Inc.,* 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (noting statutes must receive practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers).[3] Lawyers, like engineers, are obligated to avoid conflicts of interests. Lawyers, like engineers, can face liability in limited circumstances to non-clients. This would include intended third-party beneficiaries of legal work, particularly in the context of estate work. *See Fabian v. Lindsey,* 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014) (recognizing tort duty owed to third-party beneficiaries of wills).

[3] Regulations are interpreted using the same rules of construction as statutes. *Murphy v. S.C. Dep't of Health and Envtl. Control,* 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012).

iii. Flatiron incorrectly claims "a duty to exercise reasonable care in supervising a contractor's work [does not] create a 'conflict of interest' under the Rules." [p. 16].

Review is by its very nature adversarial. Under its contract, TranSystems is expected to act to "ensure that quality materials are being incorporated into the project, ensure that quality workmanship is utilized on the project, ensure that the work of the contractor is professing in accordance with the proposed schedule, and ensure that compliance with applicable state laws regarding environmental issues. (R. p. 248.) This requires TranSystems to question Flatiron, and to approach all representations with appropriate skepticism. It is clearly an adversarial relationship, because TranSystems is charged with protecting its client's interests, and ensuring that Flatiron meets its obligations. In choosing priorities, TranSystems is always obligated to protect its client's interests. Any argument to the contrary flies in the face of the complex contract documents for this project.

iv. South Carolina's common law cannot recognize duties of care which create conflicts of interest disallowed by statutes or regulations.

Alternatively, Flatiron claims that the rules of professional conduct do "not preclude the creation of duties to third parties on the basis that such a duty would create a conflict of interest" in any event. Return, p. 16. This position is non-sensical. It is undisputed that there are no South Carolina cases which recognize a tort duty owed by a CEIT Services provider to a contractor outside of privity. Accordingly, Flatiron seeks to recognize a new duty, which directly conflicts with a lawfully enacted regulation. This Court has long recognized "a state agency's rulemaking power as … authority to 'fill up the details' of the laws promulgated by the General Assembly." *Ahrens v. State,* 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011) (internal citations omitted). The Board of Engineering has recognized under its authority a ban on conflicts absent express waivers,

Flatiron cannot escape that through some new common law duty. Where there are conflicts, and there is to be payment by multiple parties for the same work, the engineer must have full disclosure and agreement by all parties for the relationship. S.C. Code Regs. § 49-304(B). That same rule must apply to potential liabilities, and it did in *Tommy L. Griffin,* where the construction contract acknowledged the engineer's authority for payment approval and stopping work. Such an arrangement does not exist in this case.

B. Respondents and the Court of Appeals Vastly Overextend the Limited Holding of *Tommy L. Griffin.*

At bottom, Flatiron essentially contends that any time a contractor interacts with a professional engineer who performs inspections, those facts create a special relationship between that contractor and engineer. This is patently incorrect and directly conflicts with this Court's ruling in *Tommy L. Griffin* that "[w]hether such a duty [of care] exists will depend on the facts and circumstances of each case." *Tommy L. Griffin*, *supra*, 320 S.C. at 55-6, 463 S.E.2d at 89.

Flatiron attempts to recast *Tommy L. Griffin* as supporting its position because the Court ultimately recognized a special relationship in that case. But it is the *reasoning* of that decision, not the outcome on the particular facts presented, that is controlling here. In its analysis, this Court used the analogy of holding lawyers and accountants liable in tort for malpractice, even sometimes outside of the scope of privity. *Tommy L. Griffin, supra,* 320 S.C. at 55, 463 S.E.2d at 89. The Supreme Court reasoned that this was because attorneys can have liability to third-party beneficiaries of legal services. Similarly, if an engineer provides sealed plans, it knows a contractor and an owner will rely on them, and it therefore owes those parties duties related to the plans. *See, e.g., Beachwalk Villas Condo. Assoc. v. Martin,* 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991). But no such third-party beneficiary situation exists in this case.

First, Flatiron already sued TranSystems under a third-party beneficiary theory of breach of contract. (R. p. 88.) The Circuit Court granted TranSystems partial summary judgment on that cause of action. (R. pp. 38 – 40.) Flatiron did not appeal that ruling as part of this appeal; therefore, that ruling is now the law of the case. *See Judy v. Martin,* 381 S.C. 458-9, 674 S.E.2d 151, 153 (2009) (holding party is precluded from relitigating after appeal matters which were not raised on appeal).

Second, as discussed *supra*, the question as to whether a professional owes a third party a duty based on a special relationship outside of privity requires consideration of that professional's obligations. Here, TranSystems owed duties to its client (Horry County), SCDOT, and the public. There is no document or other evidence assigning TranSystems duties to Flatiron, and the totality of relationships shows that it is a conflict. By contrast, in *Tommy L. Griffin,* the engineer had the right to inspect construction and halt construction, which TranSystems did not have. *Tommy L. Griffin, supra,* 320 S.C. at 56, 463 S.E.2d at 89. The Construction Contract establishes that Flatiron was explicitly told it could not rely on advice from TranSystems, and that it was provided a means of recovery against SCDOT, which held the position of directly reviewing and ruling upon Flatiron's work. SCDOT, not TranSystems, held the position of the engineer in *Tommy L. Griffin*, and there is no basis to extend it here. For lawyers, this Court finds that a concurrent conflict of interest exists if "there is a 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 a lawyer." RPC 1.7(a)(2), Rule 407, SCACR. The same risk exists for engineers, and it bars South Carolina's courts from recognizing a duty or special relationship which clearly conflicts with the regulations governing engineers. In *Tommy L. Griffin,* the client waived a potential conflict by signing a contract which allowed its engineer to make payment decisions

and shut down work; neither SCDOT nor Horry County executed such a contract in this case. Accordingly, in this case, there is no duty of care owed by TranSystems to Flatiron, because there is no such duty under South Carolina law.

C. That the Opinion is Non-Precedential Does Not Negate the Scope of Expansion of Duty Here.

As noted above, the Court of Appeals' decision established a duty never previously recognized in South Carolina. Although the ruling may not constitute binding precedent, it is persuasive authority when similar issues are presented. The Court of Appeals itself noted that there is limited precedent available on this issue. Further, in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,* 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), the Court of Appeals refused to reverse a trial court which used an unpublished opinion as persuasive authority because it involved the same defendant with the same lawyer making the same argument. *Id.* at 555, 813 S.E.2d at 299. Were the same ruling applied here, every project TranSystems did in South Carolina would be subject to the ruling in this case. Accordingly, this ruling has a potentially very significant impact on TranSystems provision of CEIT services in SCDOT projects. Further, this expansion of duty subjects TranSystems to a nearly $40.0 claim, where Flatiron had a specified claim procedure it followed, which was specified by the Construction Contract. Again, this entire suit provides Flatiron with a second bite at the apple which it waived by the Construction Contract.

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

This Court has unequivocally 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). Thus, unless there are material factual disputes, summary judgment on the issue is appropriate. In raising potential issues of fact to defeat a motion for summary judgment,

"it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd,* 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

In its return, Flatiron states that TranSystems interpretation of the Construction Contract and TranSystems' contract is "myopic"; however, TranSystems had provided the unambiguous language of the documents which define the relationships among the relevant parties. These are the exact facts and circumstances which must be evaluated to determine whether any special relationship exists between Flatiron and TranSystems. Because the Construction Contract provides no ambiguity, courts cannot consider extrinsic evidence to interpret the meaning of the Construction Contract. (R. p. 974, § 105.9.) The Circuit Court properly applied this rule, but the Court of Appeals did not.

Flatiron accuses TranSystems of ignoring competing evidence, when the plain reality is that no court can consider extrinsic evidence to interpret a Construction Contract which unambiguously establishes the relative duties and relationships of the relevant parties. *See, C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Comm'n,* 296 S.C. 373, 377-8, 373 S.E.2d 584, 586 (1988) (holding that when contract is unambiguous, it must be construed according to terms parties have used, and that extrinsic evidence giving contract any different meaning is inadmissible).

There is no need to rely on extrinsic facts or testimony to determine any potential special relationship, because Flatiron voluntarily entered the Construction Contract, which provides there is no special relationship between TranSystems and Flatiron, by informing Flatiron that it cannot rely on advice from TranSystems. The issue of duty is one of law, and one that has been defined by contract as a matter of law. No consideration of extrinsic evidence is appropriate, and the Court of Appeals erred (despite clear briefing setting for the law) by considering it.

By considering the Hutcherson affidavit and other evidence offered by Flatiron, the Court of Appeals considered improper extrinsic evidence to interpret an unambiguous contract. The Construction Contract defined RCE as an SCDOT official, not as an outside independent contractor—that creates no ambiguity requiring extrinsic evidence. (R. p. 972.) That extrinsic evidence was thus inadmissible under Rule 402, SCRE. A fact is material "if the facts alleged are of such a nature as to constitute a legal defense or are of such nature as to affect the result of the action." *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct. App. 1988). And an inadmissible piece of extrinsic evidence cannot create a dispute of fact.

Even if the court properly could consider extrinsic evidence, the Hutcherson Affidavit should not have moved the needle here. As the Court of Appeals acknowledged in its December 10, 2025 Order, Hutcherson *knew* the reality of Long's role. He sent an email internal to Flatiron in 2016 stating that Marty Long "does not possess, nor will he demonstrate any authority." (Order, p. 3, FN 3; R. p. 1193.) This was written angrily in response to an email in which Long properly reported the chain of command, stating that he was a consultant, and that RCE meant District "which would be Jason or Travis."[4] (R. p. 1194.) In 2023, Hutcherson testified by affidavit that Long "held himself out as South Carolina Department of Transportation's RCE." (R. p. 916.) He never said he believed Long to be RCE. He cannot manufacture a factual dispute with his affidavit where his own prior words show that there is none. A dispute about a material fact is only genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."

[4] The referenced "Travis" is Travis Patrick, with whom Hutcherson corresponded, in 2015, and whose signature identified him as "Resident Construction Engineer, District 5 Special Projects, South Carolina Department of Transportation." (R. p. 981.) Hutcherson was involved in electronic correspondence with Patrick in 2015, wherein he sought Patrick's approval for items within the scope of authority of SCDOT's RCE. (R. p. 980.)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (interpreting Fed. R. Civ. P. 56). There is no genuine issue – the record, uncontradicted by Hutcherson's affidavit, shows that Hutcherson knew Patrick was SCDOT RCE, and that RCE was an SCDOT issue. There is no evidence to contradict that finding by a jury. Further, the affidavit is offered as extrinsic evidence to support an unambiguous contract; therefore, it is inadmissible.

CONCLUSION

This case involves a novel legal issue, but it is capable of repetition in literally ever South Carolina construction project involving SCDOT, potentially impacting hundreds and hundreds of millions, and perhaps billions, of dollars in South Carolina business. The Court of Appeals ruling recognizes a duty that the parties clearly and explicitly eliminated through written contract, entered by sophisticated business entities. It also recognizes a common law duty in conflict with existing professional regulations for engineers and does so by considering extrinsic evidence which is barred by law for use in clarifying an unambiguous contract.

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

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