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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001563

Cynthia Wright and Richard Wright, …….. Appellants

v.

South Carolina Department of, Transportation, Pilot Travel Centers, LLC, Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering and Consulting, Inc., and Munlake Contractors, Inc.

Of Whom

South Carolina Department of, Transportation, Pilot Travel Centers, LLC, Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering and Consulting, Inc., …… Respondents.

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellants Cynthia and Richard Wright ("the Wrights") petition the Court for rehearing and reconsideration of Opinion No. 5921 filed July 6, 2022. Wright v. S.C. Dep't of Transp., Op. No. 5921 (S.C. Ct. App. filed July 6, 2022) (Howard Adv. Sh. No. 24 at 20) (hereafter "Opinion"). The Wrights specifically ask the Court to reconsider: (1) whether Respondents Pilot Travel Centers, LLC ("Pilot"), Speedway LLC ("Speedway"), and Ashley Land Surveying, Inc. f/k/a Ashley Engineering and Consulting ("Ashley") owed a duty to the Wrights; and (2) whether Respondent South Carolina Department of Transportation ("SCDOT") met its burden to obtain summary judgment on affirmative defenses arising from section 15-78-60(5), (15) of the South Carolina Tort Claims Act ("SCTCA").

BACKGROUND

The Wrights suffered severe injuries after being thrown from their motorcycle in a collision on Highway 17A in Summerville, South Carolina on October 6, 2012. (R. p. 74 ¶¶ 27, 30). At this location, Highway 17A is a multilane surface road in a heavily traveled area near a "very busy" intersection and within a few hundred feet of an Interstate 26 interchange. (R. p. 628, lines 2-3; 636, lines 18-19; 642 at 113, lines 8-9). At the time of the collision, the Wrights were traveling past Pilot Travel Center, a gas station and convenience store which also houses a McDonald's restaurant. A competing gas station and convenience store is located directly across the street.

Respondents Pilot and Speedway were part of a joint venture in 2001 that set out to redesign an existing gas station on the property to create a Pilot Travel Center. (R. p. 646 ¶¶ 5-6). During that process, Pilot and Speedway planned driveways to connect their premises to Highway 17 and, through their construction agent Ashley, submitted an "encroachment permit" to SCDOT to facilitate the driveways' construction. (R. p. 647 ¶ 8; 653). Pilot, Speedway, and Ashley's design included three driveways to serve passenger vehicles and commercial trucks. The Wrights contend

SCDOT violated accepted professional standards when it approved the plan to construct one or more of these driveways in an area that was unreasonably close to an adjacent intersection. (R. p. 656 at 11, line 23 – p. 12, line 4; 669 at 169, lines 15-22; 670 at 173, lines 11-16).

Pilot and Speedway also learned SCDOT had a plan in place to install a raised, non-transversable median across the center of Highway 17A and running nearly the full length of Pilot Travel Center. (R. p. 675). A non-transversable median is specifically intended to increase safety for highway motorists by limiting left turns at locations that are either very busy or perilously close to an existing intersection. (R. p. 630, lines 6-7; 666 at 101, lines 9-25). Pilot and Speedway worried the planned non-transversable median could harm its business by making it harder for potential customers to make a left turn in to its parking lot. (R. p. 633, lines 10-23). Accordingly, they discussed the issue with SCDOT and eventually "negotiated" a resolution that would remove the proposed non-transversable median and replace it with a flush, painted median. (R. p. 675).

As the Wrights rode along Highway 17A on October 6, 2012, a vehicle driven by Daniel Sena attempted a left turn across the painted median. (R. p. 74 ¶ 29; 677). Mr. Sena did not see the Wrights and struck their motorcycle during his turn. According to Mr. Sena, if a non-transversable median had been installed in front of Pilot Travel Center, then it "could have prevented my accident and a lot more accidents and any more to come." (R. p. 644 at 119, lines 2-4.).

In response to the Wrights' legal claims, Pilot moved for summary judgment on May 6, 2016 and its motion was heard by the Honorable Roger M. Young, Sr. on April 10, 2017. (R. pp. 164-81). In an order received May 4, 2017, the circuit court granted Pilot's motion finding Pilot owed the Wrights no duty to support their negligence claims. (R. p. 11). The Wrights filed a timely motion under Rule 59(e), SCRCP on May 9. 2017, which was denied in an order for which the Wrights received written notice on July 14, 2017. (R. pp. 16-17). SCDOT, Ashley, and Speedway

filed motions for summary judgment in May-June 2017. (R. pp. 244-593). The Honorable Kristi Lea Harrington held a hearing on these motions on June 6, 2017, and granted summary judgment in an order received on June 26, 2017. The order cited both a lack of duty and evidence of proximate cause to support claims against Ashley and Speedway. (R. p. 13). The order cited the South Carolina Tort Claims Act ("SCTCA") as the basis for granting summary judgment in SCDOT's favor.

The South Carolina Court of Appeals heard oral arguments on May 27, 2020, and filed its opinion on July 6, 2022, affirming the circuit court orders.

ARGUMENT

1. The Court's duty analysis for Pilot, Speedway, and Ashley overlooks precedent on the obligation of landowners abutting public highways.

The Court held that Pilot, Speedway, and Ashley owed the Wrights no duty regarding the median placement, driveways plan, or in their failure to act after allegedly being on notice of dangerous highway conditions. To reach this conclusion, the Court relied on three main points: (1) SCDOT project manager Leland Colvin's testimony claiming the median selection was solely his decision and was not a product of negotiations with a Pilot/Speedway representative; (2) Pilot, Speedway, and Ashley could only owe a duty to the Wrights if they created an "artificial condition" on the highway; and (3) Even if Pilot, Speedway, and Ashley pursued a dangerous median selection or driveway configuration, they can face no liability because of SCDOT's statutory responsibility over highways. The Wrights respectfully request the Court reconsider each of these points as they stand at odds with precedent and other legal principles.

a. The Court erred in discounting the "negotiations" letter in favor of Colvin's contrary testimony.

The parties offer two very different views on how a flush median, rather than a raised median designed to prevent left turns, came to be on the stretch of Highway 17A bordering Pilot Travel Center. Respondents argue a flush median was ultimately selected by SCDOT alone as it always intended. There is evidence (e.g. Colvin's testimony) to support that assertion. The Wrights argue SCDOT Right of Way Manager Tommy Smoak "negotiated . . . removal" of the raised median in favor of a flush median that would make it easier for potential customers to patronize Pilot Travel Center. There is also substantial evidence to support that assertion including the August 2000 letter where these negotiations were documented (R. p. 675) and SCDOT witnesses' admission that Pilot/Speedway requested changes to the median plan. (R. p. 357 at 81, lines 10-20).

The Court credits Respondents' evidence on this point and largely discounts the "negotiations" letter offered by the Wright. Opinion at 25-26 (finding Pilot and Speedway owed no duty "despite these notations on the letter" and then immediately citing Colvin's testimony as "support[ing] the circuit court's granting of summary judgment"). The Court should reconsider its approach to these competing theories because it is not proper to weigh the evidence at this procedural stage. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing evidence").

This factual dispute is an inescapable reason why the Wrights' claims cannot be resolved at the summary judgment stage. The parties' dispute over Pilot, Speedway, and SCDOT's roles in the median's selection affects almost every legal doctrine the Court applies in its opinion. The Court relies on Skinner v. South Carolina Department of Transportation, 383 S.C. 520, 681 S.E.2d

871 (2009)[1], but the parties' median selection dispute will determine whether Pilot/Speedway are more like the "contractors" referenced in Skinner who owe a duty to motorists for highway alterations or more passive abutting landowners liable only if they create an "artificial condition" on the highway. 383 S.C. at 524-25, 681 S.E.2d at 873-74. Similarly, whether Pilot and Speedway "negotiated" away a raised median bears directly on the application of Restatement (Second) of Torts § 349, which the Court cited as an additional basis for affirming the circuit court's summary judgment order. (Order at 28-29); see also Restatement (Second) of Torts § 349 (stating that an abutting landowner has no duty to warn motorists of danger only when the hazard is "***not created by him***") (emphasis added).

In sum, a reasonable jury could choose to believe the negotiations letter over Colvin's testimony and conclude Pilot/Speedway's profit-motivated business concerns were the driving force for selecting a flush median over a safer raised median. If a jury reached that conclusion, Pilot/Speedway's duty is much broader than if they were merely business owners who happen to own property adjoining a dangerous highway. Resolving this core factual dispute at this procedural stage was improper.

b. Precedent establishes that an adjoining landowner may be liable for highway dangers it helped create.

The Court viewed Pilot, Speedway, and Ashley's potential duty narrowly, concluding that South Carolina law imposes a duty only when a landowner creates an "artificial condition" on the highway. Opinion at 26 (quoting Skinner, 383 S.C. at 523, 681 S.E.2d at 873). However, long-standing South Carolina precedent holds that the owner of property adjoining a highway may be liable for *any* highway danger the landowner helped create. Shaw v. City of Charleston, 351 S.C.

[1] Opinion at 25-27, 29.

32, 43, 567 S.E.2d 530, 535-36 (Ct. App. 2002) (quoting Epps v. U.S., 862 F. Supp. 1460, 1464 (D.S.C. 1994) ("The general rule appears to be that an abutting landowner or occupier normally does not have a duty of care . . . unless such a duty is imposed by legislation, the abutter *created an unsafe condition* on the sidewalk" or "the abutter has a special property interest in the sidewalk") (emphasis added).

Epps relied on the South Carolina Supreme Court which previously held that "a municipality and an abutting landowner or occupier may be joined as defendants in an action for injuries resulting from defects in a sidewalk or highway . . ." Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213, 216-17 (1961) (*overruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741, 744 (1985)). Ultimately, Epps found that, for an abutting landowner to be liable for a customer's fall on the sidewalk, the facts must show the abutting landowner help create the hazard or that the hazard was "legally traceable" to the landowner. 862 F. Supp. at 1467. This case satisfies the Epps standard because the Wrights presented evidence to show the median selection and driveway errors were traceable to SCDOT and Pilot/Speedway/Ashley.

Skinner is not at odds with this long-standing line of precedent. There, the Supreme Court generally limited an abutting landowner's duty to instances where it created an "artificial condition" on the highway because most abutting landowners neither "possess[] nor control[]" the highway. Skinner, 383 S.C. at 524, 681 S.E.2d at 873. Yet, when a private party does exercise "control" over the highway—e.g. construction contractors—the party owes a duty for defects in highway alterations. Id. at 524-25, 681 S.E.2d at 874. Should a jury find Pilot/Speedway were a driving force for the decision to place only a flush median on Highway 17A, then Pilot/Speedway exercised "control" over the process and may face liability for the hazardous condition they

created. By unduly narrowing the scope of Pilot/Speedway's potential duty, the Court failed to properly apply the precedent from Hollifield and Shaw as discussed in Epps.

c. Precedent establishes SCDOT's statutory responsibility for highways does not preclude liability for private entities.

To the extent the Court credits the negotiations letter at all, it still concludes Pilot/Speedway had no duty because SCDOT has exclusive statutory responsibility for state highways. Opinion at 27. The Court made the same point to conclude Pilot, Speedway, and Ashley owed no duty to act even if on notice of dangerous conditions on Highway 17A. Opinion at 29. However, precedent states that a government entity's statutory duty over public areas *does not* absolve private actors who create hazardous conditions in those areas.

The federal district court has addressed this issue directly. In Epps, the court first cited all the statutes imposing duties on municipalities to maintain public sidewalks/highways. 862 F. Supp. at 1463-64. Then, the court concluded that an adjoining landowner could still be liable for dangers in that public sidewalk. Id. at 1464 (finding state's statutory duty "does not, however, necessarily absolve defendant" property owner). Epps also cited the Fourth Circuit which held that "the fact that a duty is imposed upon public officials to maintain the safety of a street or highway does not necessarily absolve an abutting owner from duty." Chambers v. Whelen, 44 F.2d 340, 341 (4th Cir. 1930). Significantly, South Carolina is not alone in recognizing joint tortfeasors even when the state owes a statutorily-imposed duty. See Kraus v. Hy-Vee, Inc., 147 S.W.3d 907, 921 (Mo. App. 2004); Donavan v. Jones, 658 So.2d 755, 764 (La. App. 1995) ("an owner of property abutting a highway . . . may be liable for causing or contributing to a defective or dangerous condition in the area, despite the fact that a public authority is charged with maintaining the highway")).

The Court cites no authority for the proposition that SCDOT's statutory responsibility for highways prevents Pilot/Speedway from owing a duty for highway dangers. Precedent from South Carolina's federal district court and the Fourth Circuit are at odds with the Court's conclusion as are rulings in at least two other states. Accordingly, the Wrights respectfully request the Court reconsider its ruling and find Pilot, Speedway, and Ashley are not entitled to summary judgment on the duty element of the Wrights' claims.

2. By affirming summary judgment to SCDOT on its SCTCA affirmative defenses, the Court improperly interpreted or applied design immunity, discretionary immunity, and the concept of constructive notice.

The Court should reconsider its application of section 15-78-60(5), (15) to the facts of this case. By applying design immunity to SCDOT's decision to place a flush (rather than raised) median in front of Pilot Travel Center, the Court failed to heed South Carolina Supreme Court precedent on the interaction among section 15-78-60(15)'s general and specific provisions.[2] Moreover, viewed as a whole and in the light most favorable to the Wrights, the record presents multiple genuinely disputed questions of fact material to SCDOT's affirmative defenses. A reasonable jury could find SCDOT did not perform a "discretionary" act in eliminating the planned raised median or by approving a plan for driveways within the functional area of a busy intersection. As for SCDOT's failure to address the intersection's dangers before the Wrights' collision, the record shows SCDOT had at least constructive notice of the danger but failed to act. As this Court previously recognized, whether prior accidents at the site were sufficient to provide the requisite notice is "a quintessential matter for the jury."[3]

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[2] Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 467-68, 511 S.E.2d 355, 357 (1999).
[3] Wooten v. S.C. Dep't of Transp., 326 S.C. 516, 528, 485 S.E.2d 119, 125 (Ct. App. 1997) *aff'd as modified* 333 S.C. at 467-68, 511 S.E.2d at 357 (1999).

a. Section 15-78-60(15) does not afford SCDOT design immunity for the initial placement of a flush median.

The Court held SCDOT is entitled to "design immunity" for its placement of a flush median rather than a raised, non-transversable median on the section of Highway 17A in front of Pilot Travel Center. Opinion at 32. This holding failed to properly apply South Carolina Supreme Court precedent on the construction of section 15-78-60(15)'s multiple provisions. This section contains at least five different limited or full exceptions from SCTCA liability related to various devices used on roadways. One provision protects government entities from liability for "the design of highways and other public ways." Other of these provisions are arguably included within that broader design immunity provision but apply in more limited circumstances with more limited liability protection. For example, SCDOT is not liable for the absence or malfunction of a highway median (or similar device) unless SCDOT fails to correct a resulting hazard after actual or constructive notice. Similarly limited protection for SCDOT is afforded by the section's last sentence for highway defects caused by third parties. Most importantly, section 15-78-60(15)'s third sentence protects SCDOT for failures in the initial placement of a median but only if "the failure is the result of a discretionary act."

In Wooten, the South Carolina Supreme Court held that, when multiple section 15-78-60(15) provisions could be applied to the conduct in question, the most specific provision controls. 333 S.C. at 468, 511 S.E.2d at 357 (citing Atlas Food Sys. & Serv., Inc. v. Crane, 319 S.C. 556, 462 S.E.2d 858 (1995)). Thus, SCDOT's alleged failure in installing traffic lights in Wooten was governed by section 15-78-60's limited discretionary liability for initial placement decisions not the broader design immunity referenced later in the section. 333 S.C. at 468, 511 S.E.2d at 357. The Court was bound by Wooten to apply the same principle here. Rather than granting SCDOT unlimited design immunity for its failure to install a raised median across Highway 17A, the Court

should have recognized the disputed conduct related to SCDOT's alleged "failure . . . to initially place . . . median barriers" and evaluated whether SCDOT's evidence established as a matter of law its median placement decision was a "discretionary act." S.C. Code Ann. § 15-78-60(15).

SCDOT cannot meet its burden on that defense. Discretionary immunity only applies to actions taken after SCDOT weighs competing considerations and uses "acceptable professional standards appropriate to resolve the issue." Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000) (citing Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)). Taken in the light most favorable to the Wrights, the median selection decision was part of a negotiation between Pilot/Speedway's representative and a SCDOT manager. (R. p. 675). Pilot/Speedway wanted to dissuade SCDOT from installing the planned raised median not for safety reasons but to ease potential customers' access to their business. SCDOT acknowledges meetings with Pilot/Speedway's representative where this request was made. (R. p. 357 at 81, lines 10-20). Acceding to an abutting landowner's self-interested request to install a painted median instead of a raised median is not the use of "acceptable professional standards" for median placement. Even SCDOT admits it would be improper to allow a property owner's business concern to affect SCDOT's median placement decisions. (R. p. 348 at 48, lines 8-12).

Therefore, the Court should reconsider its application of design immunity as Wooten shows that is not the proper section 15-78-60(15) provision to apply here. Moreover, under the properly applied discretionary immunity provision, SCDOT has not met its burden to show its placement of a flush median was a "discretionary" act because the Wrights' evidence suggests SCDOT acted at Pilot/Speedway's urging rather than considering the acceptable professional standards for installing a safe median for motorists.

b. The Court misconstrued and misapplied the concept of "constructive notice" in granting SCDOT immunity for its failure to correct the hazard on Highway 17A.

While the Court correctly interpreted section 15-78-60(15) to allow liability for SCDOT's failure to correct a hazard after notice[4], the Court overlooked key evidence when holding there was no evidence in the record to suggest SCDOT was on notice of potential hazards at the site of the Wrights' collision. Opinion at 33. The Court reasoned SCDOT lacked notice because it did not in fact conduct an accident analysis for the key intersection until 2013, months after the Wrights were injured. Opinion at 33. While the belated accident analysis may show SCDOT lacked *actual* notice, the Court erred in finding this evidence established as a matter of law a lack of *constructive* notice.

Constructive notice is a legal inference and substitute for actual notice. Major v. City of Hartsville, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014) (citing Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998)). Constructive notice is what "a reasonable person should know." Staples v. Duell, 329 S.C. 503, 508, 642, 494 S.E.2d 639, 642 (Ct. App. 1997). By its very nature, constructive notice focuses not solely on the information of which the individual is aware but also on the individual's failure to pursue additional facts that he/she does not actually know. Strother v. Lexington Cnty. Recreation Comm'n, 332 S.C. 54, 63 n. 6 504 S.E.2d 117, 122 n. 6 (1998) (noting that, for constructive notice, a person is "presumed to have actual knowledge of the undisclosed facts"). In other words, constructive notice contains an element of reasonable care which imposes a duty of reasonably inquiry. Staples, 329 S.C. at 508, 494 S.E.2d at 642 (citing Hightower v. Greenville Cnty., 255 S.C. 192, 195, 177 S.E.2d 785, 786 (1970)). Government entities are charged with constructive notice of a roadway hazard when it

[4] Opinion at 33 (citing Giannini v. S.C. Dep't of Transp., 378 S.C. 573, 580, 664 S.E.2d 450, 454 (2008)).

has existed for so long that, "in the exercise of reasonable care the defect should have been discovered and remedied." Hightower, 255 S.C. at 196, 177 S.E.2d at 786-87.

Here, evidence in the record suggests SCDOT should be charged with constructive notice because it failed to use the information it knew in the years preceding the Wrights' injury to learn and react to the hazard evident on the key stretch of Highway 17A. The Court is simply incorrect to conclude the record contains "no evidence . . . to suggest SCDOT knew or should have known of a . . . potentially hazardous condition at the intersection prior to 2013." Opinion at 33. Dating all the way back to August 2000, SCDOT Right of Way Manager Tommy Smoak's notes on ingress and egress to the Pilot/Speedway property stated that "all radii" for several of the property's driveways were "inadequate for use." (R. p. 398 at 246, line 6 – 248, line 24). Leland Colvin, SCDOT's project manager, testified that he was unsure whether this inadequacy was ever addressed by SCDOT. (R. p. 399 at 249, lines 10-21).

Armed with actual knowledge that the planned driveways at the property were inadequate, SCDOT took no action to monitor the frequency and pattern of collisions at this intersection in the years that followed. A reasonable juror could conclude that analyzing traffic incidents at this location was the reasonable inquiry imposed by SCDOT's duty of reasonable care for maintaining the state's highways in light of what SCDOT knew about the driveways' inadequacies. Conducting this analysis would be especially reasonable since it was a core part of SCDOT's functions. Colvin testified that performing accident analyses is a normal part of SCDOT's operations (R. p. 398 at 245, lines 14-24) and that SCDOT has easy access to the South Carolina Department of Public Safety database depicting the location of traffic collisions. (R. p. 390 at 214, lines 8-11). Yet, Colvin could not recall a single accident analysis performed for this area from 2000 to 2012. (R. p. 390 at 215, line 15 – 216, line 3). Had SCDOT performed this analysis, it would have discovered

dozens of collisions near the entrance to Pilot/Speedway's property. (R. p. 391-92; 781-812). While SCDOT may quibble on whether these collisions were numerous or similar enough to trigger an accident analysis, "whether there was a history of accidents which put SCDOT on notice of a potentially dangerous situation is a quintessential matter for the jury." Wooten, 326 S.C. at 528, 485 S.E.2d at 125.

In sum, the record contains evidence to suggest SCDOT had constructive notice of a hazard on Highway 17A but failed to address the danger. Accordingly, SCDOT cannot establish its 15-78-60(15) affirmative defense as a matter of law and summary judgment should be denied.

c. The Court overlooked key evidence in granting SCDOT discretionary immunity for approving the encroachment permit.

Citing section 15-78-60(5), the Court held SCDOT was entitled to discretionary immunity for its decision to approve an encroachment permit for Pilot Travel Center's driveways. Opinion at 34-36. The Court should reconsider this ruling because it fails to account for evidence indicating SCDOT ignored mandatory highway construction standards and is, therefore, not entitled to summary judgment on its discretionary immunity defense.

As discussed above, discretionary immunity demands not only that SCDOT actually weighed its options before approving the proposed driveway plan but also that SCDOT utilized acceptable professional standards in making its decision. Pike, 343 S.C. at 230, 540 S.E.2d at 90-91. The Court cites two SCDOT employees' (Leland Colvin and Robert Clark) depositions to affirm summary judgment on discretionary immunity. Opinion at 34-36. Both admitted one or more of the disputed driveways were in the "functional area" of the adjacent intersection, a configuration disapproved by SCDOT's Access and Roadside Management Standards Manual ("ARMS Manual"). (R. p. 379 at 169, lines 15-22; 380 at 173, lines 11-16; 656 at 11, line 23 – 12, line 4) However, the Court still found SCDOT utilized acceptable professional standards in

approving the driveways because Colvin and Clark claimed (1) the ARMS Manual provisions are not mandatory; (2) SCDOT's engineering judgment includes considerations beyond the ARMS Manual when addressing encroachment permit applications. Opinion at 34-36.

While this is relevant testimony, it is not a full picture of the pertinent evidence for evaluating SCDOT's discretionary immunity defense. First, the ARMS Manual's text calls into question Colvin and Clark's claim that ARMS Manual provisions are optional. (R. pp. 716-17) ("Points of access in the vicinity of freeway or expressway ramps shall comply with the requirements" imposed by the ARMS Manual"). The phrase "shall comply" never connotes an optional provision or a principle that may be overcome by other considerations. Mandatory language like this is likely why the South Carolina Supreme Court chose not to use Colvin and Clark's description of "guidelines" to characterize ARMS Manual provisions. Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 523, 681 S.E.2d 871, 873 (2009). Instead, Skinner described the ARMS Manual's terms as "DOT regulations" that "regulate the construction of private roads which intersect with a public highway." Id. Whether the ARMS Manual provisions are mandatory or whether they are something SCDOT could, in its discretion, allow to be outweighed by other considerations is genuinely disputed. Accordingly, SCDOT should not have been granted summary judgment on its discretionary immunity defense.

Second, the Court erred in disregarding the Wrights' expert affidavits. Order at 36 n. 12. The Court noted that the experts' statements made specific reference to Pilot's errors. Id. While it is true that the experts reference Pilot's mistakes, their larger point is that the driveway design Pilot submitted and SCDOT approved was unsafe. This is well illustrated by a key provision of highway engineering expert Richard Balgowan's affidavit. (R. p. 692 ¶ 9). Balgowan's review of Pilot Travel Center concluded its driveways were "unsafe" because they are too close to the functional

area of an adjoining intersection. Id. Balgowan articulated the "proper" approach for driveways at this location and listed all of the industry safety standards that were disregarded by the current driveway locations:

- Federal Manual on Uniform Traffic Control Devices ("MUTCD");
- SCDOT's supplemental MUTCD (§ 2B.19);
- Institute of Traffic Engineers ("ITE") Intersection Design Guidelines Manual;
- ITE Travelled Way Design Guidelines (Ch. 9);
- ITE Toolbox on Intersection Design and Safety (Ch. 5-7);
- National Cooperative Highway Research Program ("NCHRP") Report 780 (Design Guidance for Intersection Auxiliary Lanes);
- NCHRP Report 279 (Intersection Channelization Design Guide);
- American Association of State Highway and Transportation Officials ("AASHTO"): A Policy on Geometric Design of Highways and Streets (Ch. 9);
- SCDOT Design Manual;
- ARMS Manual; and
- Federal Highway Administration's Access Management in the Vicinity of Intersections Manual.

Id. It is not fair to limit these criticisms to Pilot's submission of a proposed driveways plan when SCDOT's corporate designee testified that several of these resources are industry safety standards applicable to SCDOT's work. (R. p. 346 at 40, lines 4-16) (admitting ARMS Manual is an industry safety standard); (R. p. 346 at 40 line 17 – R. p. 347 at 41, line 4) (same for AASHTO); R. p. 347 at 41, lines 5-12) (same for MUTCD).

By overlooking this evidence (ARMS Manual text and Balgowan expert affidavit), the Court accepted Colvin and Clark's word when it should have recognized a genuine dispute of fact that precludes summary judgment. The Wrights urge the Court to consider the South Carolina Supreme Court's guidance in Pike. There, SCDOT argued it could prevail on discretionary immunity simply by providing "some evidence" that its disputed conduct was a discretionary act. 343 S.C. at 227, 540 S.E.2d at 88-89. The Supreme Court deemed that argument "wholly meritless" because it "flies in the face" of the fundamental notion that the party pressing an affirmative defense bears an affirmative burden to prove it just as much as any other party asserting

a legal claim. Id. at 231-32, 540 S.E.2d at 91 (holding that when SCDOT "asserts the affirmative defense of discretionary immunity under the [SCTCA], the burden of proof is on [SCDOT] and this burden is one of persuasion by a preponderance of the evidence"). Similarly, when SCDOT seeks summary judgment on its affirmative defense, its burden is to show the record contains no genuine dispute of material fact. Rule 56(c), SCRCP.

In Pike, these core legal principles meant SCDOT could not prevail simply by presenting its employees to state it made a discretionary decision when the plaintiff's expert and other evidence suggested SCDOT actually violated industry standards. 343 S.C. at 227-31, 540 S.E.2d at 89-91. The same principles apply here. There is competent evidence that disputes Colvin and Clark's claim that SCDOT used accepted professional standards regarding the Pilot Travel Center's driveways plan. That dispute means the circuit court erred in granting SCDOT summary judgment on its affirmative defense.

3. Respondents' tortious conduct proximately caused the Wrights' losses.

The Court declined to address proximate causation based on its resolution of the duty issue. Opinion at 29 n. 8 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)). As discussed above, Respondents each owed the Wrights a duty under these circumstances, and SCDOT was not entitled to summary judgment on its SCTCA defenses. Accordingly, the Court should reconsider its ruling and reach the merits of the Wrights' proximate cause argument. The record contains the required scintilla of evidence linking Respondents' conduct to the collision and the Wrights' injuries. See Appellant's Br. at 25-28; Reply Br. at 18-21. Thus, Respondents should not have been granted summary judgment based on the proximate cause issue.

CONCLUSION

For the reasons stated above, the Wrights respectfully request the Court grant this Petition for Rehearing.

Respectfully submitted,

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Rock Hill, South Carolina
July 21, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-001563

Cynthia Wright and Richard Wright, …….. Appellants

v.

South Carolina Department of, Transportation, Pilot Travel Centers, LLC, Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering and Consulting, Inc., and Munlake Contractors, Inc.

Of Whom

South Carolina Department of, Transportation, Pilot Travel Centers, LLC, Speedway, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering and Consulting, Inc., …… Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 21, 2022, he served Respondents' counsel with the Petition for Rehearing at the email addresses listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina's Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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C. Wright v. S.C. Dep't of Transp. et al. (Appellate Case No. 2017-001563)

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Thu 7/21/2022 9:58 AM

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1 attachments (177 KB)

C. Wright--Pet. for Rehearing FINAL PDF.pdf;

Counsel:

I am attaching a Petition for Rehearing that is being electronically filed today with the Court of Appeals. Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021, order (Order No. 2021-08-25-02), please consider this email as service for the Petition.

Thanks,

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