THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

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Appellate Case No. 2017-001563
Ct. App. Opinion No. 5921 (filed July 6, 2022)

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Cynthia Wright and Richard Wright, …………….. Petitioners,

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.

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Oct 21 2022
S.C. SUPREME COURT

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.

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**PETITION FOR WRIT OF CERTIORARI**

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## CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioners' counsel certifies that a Petition for Rehearing was made on July 21, 2022, and denied on September 23, 2022.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the owners of highway-adjacent property that use their profit-driven concerns to convince SCDOT to remove a planned traffic safety device may be liable with SCDOT for creating the resulting traffic hazards.

2. Whether a court may grant summary judgment on South Carolina Tort Claims Act design or discretionary immunity defenses despite evidence SCDOT was constructively aware the disputed intersection was dangerous and created traffic hazards in violation of mandatory professional standards.

3. Whether the Wrights' presented at least a scintilla of evidence to show Respondents' misconduct proximately caused their injuries.

## STATEMENT OF THE CASE

Petitioners Cynthia and Richard Wright filed and served an action against the South Carolina Department of Transportation ("SCDOT"), Pilot Travel Centers, LLC ("Pilot"), and C & A Unlimited, Inc. for negligence and loss of consortium in the Berkeley County Court of Common Pleas on March 28, 2014. (App. p. 63-76) The Complaint was amended May 1, 2014, and C & A Unlimited, Inc. was later dismissed by stipulation. (App. pp. 77-92). The Wrights filed and served a separate action against Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC, Ashley Land Surveying, Inc. f/k/a Ashley Engineering & Surveying, Inc./Ashley Engineering & Consulting, Inc. ("Ashley") and Munlake Contractors, Inc. for negligence and loss of consortium in the Dorchester County Court of Common Pleas on October 1, 2015. (App. pp. 96-111). This Complaint was amended on March 10, 2016, to substitute Respondent Speedway, LLC ("Speedway") as a party for Marathon Petroleum Company, LP f/k/a Marathon Ashland Petroleum, LLC. (App. pp. 112-127). Munlake Contractors, Inc. failed to answer the Complaint

and an order of default was entered against it. (App. p. 46). The actions were later consolidated in Berkeley County.

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. (App. pp. 209-26). 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. (App. p. 56). 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. (App. pp. 61-62). SCDOT, Ashley, and Speedway filed motions for summary judgment in May-June 2017. (App. pp. 289-644). 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. (App. p. 58). The order cited the South Carolina Tort Claims Act ("SCTCA") as the basis for granting summary judgment in SCDOT's favor. The Wrights filed and served a timely Notice of Appeal on July 19, 2017. The Court of Appeals heard oral arguments on May 27, 2020, and affirmed the circuit court's rulings in an opinion issued on July 6, 2022.

## **STATEMENT OF THE FACTS**

Cynthia and Richard Wright suffered severe injuries after being thrown from their motorcycle in a collision on Highway 17A in Summerville, South Carolina on October 6, 2012. (App. p. 119 ¶¶ 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. (App. p. 685, lines 2-3; p. 693, lines 18-19; p. 699 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. (App. p. 703 ¶¶ 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" application to SCDOT to facilitate the driveways' construction. (App. p. 704 ¶ 8; p. 710). Pilot and Ashley's application included three driveways to serve passenger vehicles and commercial trucks. In violation of its own rules, SCDOT approved the plan to construct one or more of these driveways in an area that was unreasonably close to an adjacent intersection. (App. p. 713 at 11, line 23 – p. 12, line 4; p. 726 at 169, lines 15-22; p. 727 at 173, lines 11-16). SCDOT also approved the plan despite the fact that the driveways were not the required distance from each other. (App. p. 714 at 30, lines 23-25).

Speedway also learned SCDOT had a plan in place to install a raised, non-transversable median across the center of Highway 17 and running nearly the full length of Pilot Travel Center. (App. p. 732). A raised 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. (App. p. 687, lines 6-7; p. 723 at 101, lines 9-25). Speedway worried the planned raised median could harm its business by making it harder for potential customers to make a left turn in to its parking lot. (App p. 690, lines 10-23). Accordingly, a Speedway representative 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. (App. p. 732). Handwritten notes authored by the Speedway representative ("Negotiations Letter") document "verification" from SCDOT Right of Way Manager Tommy Smoak of a "negotiated median removal" which meant "the unmountable median has been eliminated from the plan." (App. p. 732).

As the Wrights rode along Highway 17 on October 6, 2012, a vehicle driven by Daniel Sena attempted a left turn across the painted median to which SCDOT improperly acceded and into one of the driveways SCDOT should not have approved. (App. p. 119 ¶ 29; p. 734). Mr. Sena did not see the Wrights and struck their motorcycle during his turn. According to Mr. Sena, if a raised 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." (App. p. 701 at 119, lines 2-4).

## ARGUMENT

The highway conditions that caused the Wrights' collision were the product of Pilot, Speedway, and Ashley's self-interested business decisions as well as SCDOT's violation of mandatory industry standards. Taking the facts in the light most favorable to the Wrights, the fateful left turn that caused their injuries was only possible because Speedway and SCDOT negotiated a deal to remove a raised median planned for the center of the highway. SCDOT also approved Pilot/Ashley's request to install dangerous driveways in the "functional area" of the adjacent intersection. None of these decisions were consistent with highway safety standards and all were made while SCDOT was on notice of just how dangerous this intersection had become.

Yet, the circuit court concluded none of these parties could face liability for the Wrights' losses. The Court of Appeals' ruling affirming summary judgment merits review for several reasons. First, the Court of Appeals failed to follow this Court's precedent defining the circumstances in which the owner of highway-adjacent property may be liable for dangerous highway conditions. Wright v. S.C. Dep't of Transp., ___ S.C. ___, 877 S.E.2d 788, 791-94 (Ct. App. 2022). This Court has long held an adjoining landowner, along with the governmental entity responsible for the highway, has a duty to prevent harm from any highway hazard the landowner helped create. Second, by ruling only SCDOT could be liable for a highway hazard *even if* Pilot/Speedway helped create it, the Court of Appeals' ruling is directly at odds with this Court's long-standing rule on joint tortfeasors for highway dangers. Id. at 793.

Third, the Court of Appeals' misguided application of the SCTCA's immunity provisions warrants further review. SCDOT seeks the protection afforded by S.C. Code Ann. § 15-78-60(15), the longest and perhaps most muddled of the forty statutory exceptions to SCTCA liability. Judicial interpretation of subsection 15's seven sentences has produced considerable debate in South

Carolina's appellate courts, especially on the key issues of design immunity[1], discretionary immunity[2], and constructive notice[3]. Here, the Court of Appeals incorrectly applied absolute design immunity when a more specific subsection 15 provision applied to the initial placement of a median across Highway 17A. Wright, 877 S.E.2d at 796. The Court of Appeals also interpreted "constructive" notice far too narrowly, overlooking substantial evidence SCDOT should have known the left-turn danger this intersection presented. Id. at 796-97. Finally, the Court of Appeals' application of discretionary immunity under S.C. Code Ann. § 15-78-60(5) strayed from Supreme Court precedent by discounting or disregarding SCDOT's violation of its own mandatory standards and by accepting as definitive SCDOT's claim that it made a discretionary decision to approve the dangerous driveways when the Wrights' experts pointed to a host of accepted professional standards SCDOT ignored. Id. at 797-98.

In short, Highway 17A became dangerous when Pilot, Speedway, and Ashley convinced SCDOT to prioritize easy access to Pilot Travel Center over motorists' safety. South Carolina law does not permit these four entities to all evade liability for the near fatal travel collision their collaborative errors created. This Court should grant the Wright's petition and reverse the Court of Appeals' ruling to reassert the Court's rule on a landowner's duty and to maintain a clear line of precedent on the proper application of the SCTCA's immunity provisions.

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[1] Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (adopting different position than Court of Appeals on the interaction between section 15-78-60(15)'s design immunity and "initial placement" provisions).

[2] Giannini v. S.C. Dep't of Transp., 378 S.C. 573, 664 S.E.2d 450 (2008); Id. at 588, 664 S.E.2d at 458 (Beatty, J., concurring) (SCDOT's failure to correct hazard after notice is not subject to discretionary immunity); Id. at 590, 664 S.E.2d at 459 (Pleicones, J., dissenting) (discretionary immunity should apply to failure to correct hazard after notice).

[3] Major v. City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014) (reversing Court of Appeals and adopting a more expansive description of evidence proving constructive notice).

1. **The Court of Appeals' analysis of a landowner's duty for highway hazards conflicts with South Carolina Supreme Court precedent.**

Despite documentary evidence showing Speedway "negotiated" a planned raised median out of the plans for Highway 17A, the Court of Appeals ruled Speedway had no duty to address the hazard its conduct created and no liability for the harm it caused. Practically speaking, it appears the Court of Appeals may have adopted the circuit court's approach of simply rejecting this evidence in favor of SCDOT's alternative explanation for the median selection process. Wright, 877 S.E.2d at 792-93. To the extent it credited the Negotiations Letter at all, the Court of Appeals found it provided no indication Speedway exercised the "control" over median selection required to create a legal duty. Id. at 793. Alternatively, the Court of Appeals held, Speedway's alleged role in negotiating the planned raised median's elimination was irrelevant to the duty analysis because SCDOT has a statutory duty for highway maintenance. Id. All three propositions stand at odds with this Court's precedent.

a. **The Court of Appeals failed to credit the Wrights' key evidence when considering Pilot, Speedway, and Ashley's summary judgment motions.**

This case has a history of judicial skepticism over the implications of the Negotiations Letter. A governmental entity allowing a profit-motivated property owner to influence highway safety choices raises larger concerns about the entity's performance of its duty to protect the public. While any reasonable observer would certainly hope SCDOT always limits its highway safety decisions to objective safety considerations, the Negotiations Letter's plain language indicates that was not the case here. It was perhaps these concerns that led the circuit court to outright dismiss the Negotiations Letter (App. p. 52). The Court of Appeals opinion also refused to accept the Negotiations Letter's contents at face value. The opinion recounted the Negotiation Letter's contents but still concluded "the evidence in the record establishe[d]" median selection was

SCDOT's decision alone. Wright, 877 S.E.2d at 792. The Court of Appeals then went on to discuss in detail a SCDOT representative's (Leland Colvin) contrasting explanation for the planned raised median and the later selection of a flush median. Id. (concluding Mr. Colvin's testimony "supports the circuit court's granting of summary judgment").

By ruling the "evidence established" SCDOT was the sole decision maker, the Court of Appeals misapplied the legal standard for a summary judgment motion. Summary judgment is not the time for fact finding but only for determining the existence of genuine and material factual disputes. Rule 56(c), SCRCP. The Wrights acknowledge the parties offer two very different accounts for the median selection process, but it was not the lower courts' function to weigh this disputed evidence. Montgomery v. CSX Transp., Inc., 376 S.C. 37, 54, 656 S.E.2d 20, 29 (2008) (finding the parties' dispute over evidence in record "simply establishes that summary judgment is not appropriate"); 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").

Plus, the Negotiations Letter is competent evidence for a jury to consider. It plainly states changes were made to the intended median in front of Pilot Travel Center after a Speedway representative (Robert Greiwe) met with SCDOT's Right of Way Manager Tommy Smoak. (App. p. 732). Speedway has admitted in its briefing Mr. Greiwe was its agent. (App. p. 1096). Mr. Greiwe describes these interactions as a "negotiat[ion]," a term plainly intended to describe collaborative decision making. Black's Law Dictionary (11th ed. 2019) (defining "negotiate" as communication designed to "reach an understanding" or to "bring about buy discussion or bargaining"). The products of this negotiation are also stated in unambiguous terms. Through his discussions with Mr. Smoak, Mr. Greiwe garnered "approval" for a "painted median only." (App.

p. 732). Lest anyone think the painted median was SCDOT's plan all along, Mr. Greiwe reiterated that the negotiations cause the planned raised median to be "eliminated from the plan." Id. Moreover, the Negotiations Letter does not stand alone. Pilot's vice president of construction testified that any traffic device that made it difficult to access the Pilot Travel Center parking lot would have been bad for business because it would incentivize potential customers to patronize a competitor on the opposite side of Highway 17A. (App. p. 980, lines 10-23); see also (App. p. 724 at 113, lines 1-16) (SCDOT representative admitting the convenience store's owners would be against a raised median because it "restricted left turns"). SCDOT also admitted it was approached by Pilot Travel Center's owners for the express purpose of removing the plan for a raised median. (App. p. 407 at 80, line 16 – p. 408 at 81, line 20).

SCDOT's self-interested denial that this approach affected the median selection process can be presented to a jury, but it does not render a nullity the Negotiations Letter and supportive circumstantial evidence. In other words, Colvin's testimony does not eliminate a genuine factual dispute, it creates one, and the Court of Appeals erred by discounting the Negotiations Letter when considering the duty element of the Wrights' negligence claim against Speedway.

**b. The Court of Appeals overlooked South Carolina's established rule imposing a duty on landowners who create highway hazards.**

The Court of Appeals' discounting of the Negotiations Letter and its supporting evidence directly affected its ruling that Speedway owed the Wrights no legal duty. Wright, 2022 WL 244703, at * 3 (finding no duty because "neither Pilot nor Speedway possessed or controlled the highway"). The negotiations letter is evidence Speedway in fact exercised control over the median selected for the stretch of Highway 17A fronting Pilot Travel Center. In light of this evidence, the Court of Appeals should have applied South Carolina's long-standing duty creation rules to find Speedway owed a duty of reasonable care.

South Carolina's appellate courts have traditionally recognized three instances in which a neighboring landowner may be liable for hazardous conditions on a public way (e.g. sidewalk or highway). Shaw v. City of Charleston, 351 S.C. 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 landowner acquires a duty of reasonable care when the landowner (1) falls within a statutory provision creating a duty; (2) creates an unsafe condition; or (3) holds a property interest in the affected sidewalk/highway. Id. Epps is not a one-off district court order.[4] The rule it describes—especially its second component—is derived from this Court's long-standing precedent. Dating back to at least 1947, this Court has recognized the potential for adjoining landowner liability in instances where the landowner helped create a highway hazard. Epps, 862 F. Supp. at 1465 (citing Dunbar v. Charleston & W. Carolina Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947) (holding that "the real test is one of control" and the court should ask "did the defendant [landowner] have any control of the manner of construction and maintenance of this intersection")).

Charging an adjoining landowner with a duty to prevent harm from highway hazards the landowner helped create is both the "general rule" across jurisdictions and the rule of English common law from which South Carolina and other states often derive modern tort principles. Epps, 862 F. Supp. at 1464-65 (citing Stewart v. 104 Wallace Street, Inc., 432 A.2d 881, 885 (N.J. 1981)).[5] Taking all of this authority together, Epps concluded an adjoining landowner's duty arises

[4] The Court of Appeals also applied the Shaw/Epps rule in Connelly v. Winsor Custom Homes, LLC, No. 2019-UP-287, 2019 WL 3714967, at * 1 (S.C. Ct. App. Aug. 7, 2019) (affirming directed verdict to plaintiff on duty issue in light of the Shaw/Epps rule on hazardous sidewalk conditions "created by" general contractor for adjacent property).

[5] The control standard recognized in Shaw, Epps, and Dunbar is further supported by the Restatement and other secondary sources. Restatement (Second) of Torts § 349 (stating that an adjoining landowner has no duty to warn of dangerous highway conditions if they are "not created by him"); Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334 n. 8, 566 S.E.2d 536, 546 n. 8 (2002) (citing Restatement (Second) of Torts § 321 (imposing duty to take preventative action

in any instance "where it has created or maintained a hazard on the sidewalk [or highway], or the hazard is otherwise legally traceable to it." Epps, 862 F. Supp. at 1467 (citing Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 356 S.E.2d 123, 127 (Ct. App. 1987) and Hollifield v. Keller, 238 S.C. 584, 121 S.E.2d 213 (1961)).

The Court of Appeals failed to apply this established principle of South Carolina law. The Negotiations Letter and supporting evidence show Speedway exercised considerable control over the median selection process and a reasonable jury could easily conclude Speedway helped create the left-turn hazard that plagued this stretch of Highway 17A in the years leading to the Wrights' injuries. The Court of Appeals found Speedway owed no duty based on the court's failure to credit the Negotiations Letter and its misplaced reliance on one previous ruling. Wright, 2022 WL 2444703, at * 3-5 (citing Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009)). But, Skinner's very different facts limit any comparisons to what Speedway did here. Skinner affirmed summary judgment to owners of a stable and driveway whose only alleged wrongdoing was owning highway-adjacent property and hosting people who might use weighty horse trailers to access the property. 383 S.C. at 523, 681 S.E.2d at 873. When the plaintiff was injured in a collision allegedly caused by ruts on the highway's shoulder, this Court held there was no legal theory for imposing a duty on a passive adjoining landowner for a hazard it did not create. Id. at 525, 681 S.E.2d at 874. Thus, Skinner is a far cry from this case where the Wrights produced documentary evidence to show Speedway were directly involved in creating a hazard that caused their collision.

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when defendant "has created an unreasonable risk of causing physical harm to another")); 40 C.J.S. *Highways* § 254 (1991) (stating that a private landowner may be liable for a dangerous highway condition when the landowner has been "granted the right to construct or improve a public highway on proper authorization from the responsible public authority").

Moreover, while Skinner's facts are distinguishable, its reasoning is not inconsistent with the Shaw/Epps rule discussed above. Skinner rejected three duty theories. The first was based on alleged statutory duties not at issue here. Id. at 523, 681 S.E.2d at 873. Skinner's discussion of the latter two theories is consistent with the Shaw/Epps rule. The Court found common law imposes no duty on a defendant for highway hazards simply because the defendant owns property adjoining a highway. Id. at 524, 681 S.E.2d at 873. Yet, in so holding, Skinner recognized a duty would apply if the landowner created the hazard. Id. (citing Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997) (tying a property owner's duty to its control over the property). This is why, Skinner concluded, a highway contractor may be liable for dangerous highway conditions but a wholly passive adjoining landowner would not. 383 S.C. at 524, 681 S.E.2d at 874 (citing Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 605 S.E.2d 12 (2004)). Thus, even using the Skinner framework, Pilot/Speedway are charged with a duty arising out of their affirmative acts to remove the planned median which created a hazard on Highway 17A.

Similarly, Skinner rejected the hazard creation theory because the alleged hazard (ruts on the highway's shoulder) were "normal," "natural" and, therefore, not "created" by the defendant. 383 S.C. at 525, 681 S.E.2d at 874. Skinner did nothing to undermine the hazard creation theory of liability for adjoining landowners in cases like this where the hazard arose not from normal highway wear and tear but rather a collaborative decision between Speedway and SCDOT on which variety of median to install on the highway.[6]

[6] See Restatement (Second) of Torts § 363 cmt. b (when used to describe a landowner's duty to highway motorists, "artificial condition" includes any "structure erected upon land" as well as "changes in the surface by excavation and filling" while "natural conditions" are those for which "the condition of the land has not been changed by any act of a human being").

In sum, the Court of Appeals should have applied the Shaw/Epps rule and found Speedway owed the Wrights a duty of reasonable care because, taken in the light most favorable to the Wrights, the record indicates Speedway successfully negotiated with SCDOT for the removal of a planned raised median for the stretch of Highway 17A fronting Pilot Travel Center.

**c. The Court of Appeals overlooked this Court's precedent in finding SCDOT's statutory highway duties precluded liability for an adjoining property owner.**

The Court of Appeals' final ruling on the median selection process was to find Speedway could face no liability even if it was in fact responsible for the median selected for Highway 17A. Wright, 877 S.E.2d at 793. Citing SCDOT's statutory highway duties, the Court of Appeals held SCDOT is "exclusively responsible" for highway conditions even if a private entity participates in creating a highway hazard. Id. This holding also merits review because South Carolina's appellate courts and persuasive authority have expressly rejected it multiple times:

- "[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, 238 S.C. 584, 121 S.E.2d at 216-17 (*overruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741, 744 (1985)).

- The "[l]egal duty of municipality to maintain sidewalk does not absolve landowner with abutting property from [a] similar duty to traveling public." Shaw, 351 S.C. at 43, 567 S.E.2d at 535-36 (citing Epps and Miller, 329 S.C. at 315-16, 494 S.E.2d at 815-16).

- The town of Fort Mill's duty to maintain sidewalk bordering post office "does not . . . necessarily absolve [neighboring property owner] from any duty with respect to the sidewalk." Epps, 862 F. Supp. at 1464 (citing Chambers v. Whelen, 44 F.2d 340, 341 (4th Cir. 1930) ("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 with respect thereto").

These holdings are in line with rulings from other jurisdictions. See e.g. 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). Moreover, the SCTCA recognizes liability for collaborative errors by a governmental entity and

private party is not a one-or-the-other proposition. S.C. Code Ann. § 15-78-100(c) (discussing verdict form requirements when SCTCA suit alleges claims against private "joint tortfeasor"). The same principle applies to the Court of Appeals' ruling on the Wrights' claim against Pilot and Ashely (Wright, 877 S.E.2d at 793-94) for their pursuit of driveways they knew or should have known were in violation of numerous industry safety standards. (App. 749-50 ¶ 9). SCDOT and these private entities may be joint tortfeasors for the dangerous driveways. The Court should grant the Wrights' petition to correct the Court of Appeals' substantial departure from long-standing precedent.

**2. The Court of Appeals overlooked this Court's precedent on the proper construction and application of SCTCA immunity provisions.**

Section 15-78-60(15) contains immunity or liability limitation provisions for six different highway hazard scenarios.[7] Some of these provisions appear to overlap, and the parameters of others are unclear. That has led to a range of opinions among members of this Court on the scope and limits of design and discretionary immunity. Supra at 6 nn. 1-2. However, what this Court's precedents have established is that design immunity, limited by both time and event, was not the appropriate section 15-78-60(15) to apply to SCDOT's conduct in this case. Moreover, the Court of Appeals' discretionary immunity analysis (under S.C. Code Ann. § 15-78-60(5) and (15)) improperly deferred to SCDOT's position without crediting evidence showing the median and driveway errors violated numerous professional standards. In sum, the Court of Appeals' decision

[7] These include (1) the absence, condition, or malfunction of a traffic sign, signal, device, or median; (2) third-party removal of a traffic sign, signal, device, or median; (3) initial placement of a traffic sign, signal, device, or median; (4) "the design of highways and other public ways"; (5) losses during highway construction for which a government entity has an indemnity bond; and (6) a defect or condition in any highway caused by a third party.

merits review and reversal because it adds confusion to a complicated area of SCTCA interpretation by failing to properly apply this Court's previous rulings.

**a. The Court of Appeals incorrectly applied design immunity instead of section 15-78-60(15)'s more specific "initial placement" provision.**

The Wrights' multi-faceted claim against SCDOT began with the improper initial placement of a painted median across Highway 17A instead of the planned raised median. The Court of Appeals found SCDOT was entitled to design immunity for this conduct. Wright, 877 S.E.2d at 796. That ruling stands at odds with this Court's precedent.

While section 15-78-60(15) states that SCDOT is "not liable for the design of highways," it also includes more specific provisions for what otherwise might be considered "design" choices. For example, SCDOT's failure to initially place a median barrier is governed by a different provision within section 15-78-60(15) permitting liability unless SCDOT's choice to exclude a median was a discretionary act. Thus, a court applying section 15-78-60(15) must choose between absolute design immunity and the section's discretionary immunity for initial placement decisions. Since specific statutory provisions apply over conflicting general ones, this Court holds that discretionary immunity, not design immunity, applies to a claim based on SCDOT's initial failure to install a highway median. Wooten, 333 S.C. at 468, 511 S.E.2d at 357. The Court of Appeals overlooked Wooten, and its design immunity analysis should be reviewed and reversed to prevent confusion over the interaction of section 15-78-60(15)'s various provisions.[8]

[8] While the Court of Appeals did not consider SCDOT's median selection under a discretionary immunity standard, the record contains substantial evidence to show SCDOT's conduct was not a discretionary act. According to the ARMS Manual, other highway industry materials, and the Wrights' expert affidavits, failing to install a raised median on Highway 17A in front of Pilot Travel Center was a failure to utilize acceptable professional standards. (App. p. 1179-81). Moreover, as the Negotiations Letter indicates, SCDOT's agreement with Pilot/Speedway to remove the planned raised median is also a failure to use acceptable professional standards.

**b. The Court of Appeals failed to credit important evidence showing SCDOT's constructive notice that the intersection was hazardous.**

The Wrights' second median-related claim alleges SCDOT negligently failed to correct the intersection once on constructive notice of the left-turn hazard prior to the Wrights' collision. In this instance, the Court of Appeals considered the proper standard but diverged from precedent in discussing the evidence that can provide SCDOT "constructive" notice. The Court of Appeals concluded SCDOT lacked constructive notice, as a matter of law, because SCDOT did not conduct a safety analysis to evaluate the intersection's collision rate until a year after the Wrights were injured. Wright, 877 S.E.2d at 796. Focusing solely on the timing of the safety analysis, the Court of Appeals held the record contained "no evidence" to suggest "SCDOT had constructive notice of a hazardous condition." Id. This holding misconstrues the meaning of "constructive" notice and ignores precedent describing the wide swath of evidence that proves it.

It was an error for the Court of Appeals to find SCDOT lacked *constructive* notice of the hazard the key intersection presented because it had not *actually* evaluated the collision rate. 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 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, 332 S.C. at 63 n. 6, 504 S.E.2d at 122 n. 6 (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 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.

The Court of Appeals also broke from precedent by focusing so narrowly on the timing of the safety analysis. A variety of evidence can be used to show SCDOT had constructive notice. Just like the collision reports the Wrights presented here, this Court has previously recognized evidence of prior collisions is "clearly relevant on the issue of notice" even if SCDOT argues the circumstances of those collisions were different. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 232-34, 540 S.E.2d 87, 92-93 (2000). Expert testimony showing the roadway's conditions violated industry standards is also strong evidence SCDOT should have known the roadway was dangerous. Id. at 233, 540 S.E.2d at 92 (citing expert testimony showing SCDOT violation of the Manual on Uniform Traffic Control Devices ("MUTCD")); see also LeFont v. City of Myrtle Beach, 460 S.C. 534, 545, 846 S.E.2d 355, 360 (Ct. App. 2020) (noting expert testimony on defendant's violation of property maintenance code). Constructive notice may even be inferred from the length of time the hazard existed. Fickling v. City of Charleston, 372 S.C. 597, 609-10, 643 S.E.2d 110, 117 (Ct. App. 2007).

The Wrights presented substantial evidence to show SCDOT was on constructive notice here including (1) expert testimony of MUTCD and other professional standard violations in the median and driveways (App. p. 749); (2) notes from a SCDOT representative describing the Pilot/Speedway property's driveways as "inadequate for use" (App. p. 449 at 246, line 6 – 248, line 24); and (3) a database listing a large number of collisions in the area. (App. p. 442-43; 838-69). Accordingly, the Court of Appeals' opinion is incorrect on the facts in finding "no evidence" of constructive notice. More importantly, the Court of Appeals was also wrong as a matter of law

in granting summary judgment in light of this evidence. Major, 410 S.C. at 4, 763 S.E.2d at 350 (reversing Court of Appeals and finding jury question on constructive notice); see also 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) (holding that determination of whether prior accidents provided constructive notice was "a quintessential matter for the jury").

**c. The Court of Appeals failed to correctly apply the summary judgment standard to SCDOT's discretionary immunity defense.**

The Wrights also claim SCDOT negligently approved an encroachment permit for Pilot Travel Center that had driveways that were too close together and, crucially, within the "functional area" of the adjacent intersection. In fact, SCDOT's witnesses admit both allegations are true. (App. p. 714 at 30, lines 23-25; p. 713 at 11, line 23 – 12, line 4; p. 430 at 169, lines 15-22; 431 at 173, lines 11-16). Yet, the Court of Appeals still found "the evidence establishes" SCDOT was entitled to summary judgment based on the discretionary immunity granted by section 15-78-60(5). Wright, 877 S.E.2d at 798. This holding ignores the Wrights' evidence and fails to heed this Court's warning against diluting the summary judgment standard for SCTCA defenses.

Discretionary immunity requires SCDOT to prove its approval of Pilot/Ashley's encroachment permit was an act taken only after weighing competing considerations and using "acceptable professional standards." Pike, 343 S.C. at 230, 540 S.E.2d at 90. The Court of Appeals noted testimony from SCDOT representatives claiming their approval of the disputed driveways was a discretionary act. Wright, 877 S.E.2d at 797-98. However, the Wrights' evidence disputes this testimony. Pilot Travel Center's driveways violated the SCDOT Access and Roadside Management Standards' ("ARMS Manual") mandatory provisions.[9] (App. p. 772; p. 714 at 30,

[9] SCDOT's claim that the ARMS Manual provisions are optional is not supported by the text. (App. pp. 773-74) ("Points of access in the vicinity of freeway or expressway ramps shall comply

lines 23-25) (demanding 250 feet distance between driveways) (App. pp. 772-73) (driveways "should be located to avoid undue interference with or hazard to traffic on the highway and "as far from roadway intersections . . . as feasible and practical"). Also, the Wrights' highway engineering expert stated by affidavit that the driveway plan SCDOT approved violated rules imposed by more than ten different industry standards. (App. p. 749-50 ¶ 9).

In light of this evidentiary dispute, the Court of Appeals was required to deny summary judgment so that the issue may be resolved by a jury. As this Court has held, the standard for discretionary immunity is "inherently factual." Giannini, 378 S.C. at 581 n. 1, 664 S.E.2d at 454 n. 1 (citing Pike). This Court has also expressly rejected SCDOT's claim that it gets summary judgment simply by offering some evidence of a discretionary act. Pike, 343 S.C. at 231-32, 540 S.E.2d at 91. SCDOT bears the burden of persuasion on this matter and can claim summary judgment only by showing there is no dispute of fact as to whether they followed the applicable professional standards. SCDOT did not meet that burden here, and the Pike rule is threatened if the Court of Appeals' ruling stands.

**3. The Court of Appeals erred in refusing to consider proximate cause.**

The Court of Appeals' opinion declined to address the circuit court's finding of no proximate cause (on Speedway and Ashley's motions) based on its resolution of the duty issue. Wright, 877 S.E.2d at 795 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, South Carolina law recognizes a duty for each Respondent. Accordingly, the Court should review the Court of Appeals' ruling and reach the merits of the Wrights' proximate cause argument. The record contains the required scintilla of

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with the requirements" imposed by the ARMS Manual); see also Skinner, 383 S.C. at 523, 681 S.E.2d at 873 (describing ARMS Manual provisions as "DOT regulations" that "regulate the construction of private roads which intersect with a public highway").

evidence to show the collision causing the Wrights' injuries was the sort of harm Respondents should have anticipated could arise from their median selection and driveway errors and that the collision would not have happened but for these hazardous conditions. (App. pp. 1187-90).

## CONCLUSION

For the reasons stated above, the Wrights respectfully asks this Court to grant their petition for writ of certiorari and review the court of appeals' ruling.

Respectfully submitted,

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